

## Memorandum 66-33

Subject: Study 36(L) - Condemnation Law and Procedure (Possession Prior to Final Judgment)

Attached to this memorandum are two copies of the tentative recommendation on this subject. Please mark changes or suggestions on one copy and return it to the staff at the July meeting. The proposed legislation and constitutional amendment reflect previous actions of the Commission. The drafts and comments have been revised to include changes made at the June meeting. Some additional suggested changes have been made and are discussed below.

We plan to send the proposed legislation to the printer after the July meeting and to distribute the tentative recommendation for comments after the July meeting. We will request comments by September 1 and approve the pamphlet for publication at the October meeting. In response to a request from the Chairman of the State Bar Committee on Condemnation we have sent each member of the committee a copy of the attached recommendation so that the members of the committee may begin to think about the recommendation.

The tentative recommendation itself has not been considered by the Commission. It is in the general form of the recommendation made in 1961 on taking possession and passage of title with adaptations taking into account the legislation that was enacted in 1961.

The following matters should be noted:

The Constitutional Amendment

The draft itself has not been changed from that previously approved, except that the words "and use" have been deleted from the amendment, and also from the remainder of the statute as unnecessary and inarticulate. The Comment has been rewritten to state more fully and precisely the effects of the changes in the section.

Section 1268.01

In this section and throughout the draft, the term "compensation" has

been substituted for the more cumbersome "compensation for the property and any damage incident to its being taken."

Section 1268.02

The second sentence has been added to state explicitly the holding in the Deacon case that is cited in the comment. See the comment to Section 1270.04. The last sentence of this section has been changed to state more clearly the obvious intention of the sentence. The comment also has been rewritten.

Section 1268.03

The last sentence of this section has been added and the comment has been rewritten accordingly.

Section 1268.04

The words "prior to judgment" in the first sentence and the last sentence have been added to prevent an overlap with Section 1270.05.

Section 1268.07

The last sentence has been added to the comment to point out the rule stated in the cited case.

Section 1269.02

The comment to this section (which authorizes "immediate possession" for entities whose resolution of necessity is conclusive) has been rewritten to refer exhaustively to those entities and the appropriate statutory citations.

Section 1269.06

Subdivision (a) has been revised to permit the condemnor to take possession (after deposit) after the defendant vacates the property--even though the defendant does not send the written notice provided by Section 1249.1. In effect, the condemnor may, but need not, take possession in this

circumstance, for under Section 1249.1 the risk of loss does not shift until possession is actually taken. If the notice is given, however, the condemnor is forced, in effect, to take possession because the notice shifts the risk of loss under Section 1249.1.

Subdivision (b) has been added to state explicitly the rule that would probably be applied anyway under the rationale of the Gutierrez case cited in the comment. That case held that a deposit made after judgment--not intended as a deposit to obtain possession--could be withdrawn by the defendant just as if it were a deposit made to obtain possession after judgment. The defendant could file a receipt and waiver of all claims except the claim to greater compensation and preserve his right to a new trial or appeal on the issue of compensation. However, because of the waiver of all claims except to greater compensation, the withdrawal resulted in a surrender of the right of possession to the condemnor. Subdivision (b) expresses this rule as to pre-judgment deposits.

#### Section 1269.07

The reference to a new trial has been added in the interest of clarity. The portion of the comment following the first sentence is new.

#### Section 1270.01

The Gutierrez case, mentioned above in connection with Section 1269.06, points up a confusion that has existed between deposits made to obtain possession pursuant to Section 1954 and deposits made in satisfaction of the judgment under Section 1952. There is language in the cases indicating that the condemnee's withdrawal of a 1952 deposit waives his right of appeal and his right to a new trial, while withdrawal of a 1954 deposit does not. The Gutierrez case permitted the condemnee, by complying with the procedures

in 1954, to withdraw a deposit ostensibly made under 1952 and still preserve his right to a new trial on the issue of compensation. The Gutierrez case leaves the rule as to appeals somewhat in doubt.

In order to clarify the matter, the draft has been revised so that the post-judgment deposit procedure more closely parallels the pre-judgment deposit procedure. Under Section 1270.01, the post-judgment deposit is no longer tied to an application for an order for possession, although under Section 1270.02 it is a condition precedent to an order for possession. Section 1952 has been amended to eliminate any implication that there are two post-judgment deposit procedures. Under the revised draft, therefore, there is but a single post-judgment deposit procedure governed exclusively by the provisions of the chapter beginning with Section 1270.01.

#### Section 1270.02

The first sentence has been revised to refer to the ex parte application by the plaintiff inasmuch as reference to such application was deleted from Section 1270.01.

#### Section 1270.04

The first two lines have been revised by deleting a reference to an order for possession and substituting a reference to the deposit in order to conform to the revised version of Section 1270.01.

#### Section 1270.05

The words "to which he is entitled under the judgment" have been added in the interest of clarity.

#### Section 1270.06

Section 1270.06 is a new section that is necessary because the post-judgment deposit provisions are no longer tied to an order for possession. Section 1270.06 parallels Section 1269.06.

Section 1270.08

The reference to a new trial has been added in the interest of clarity. The portion of the comment following the first sentence is new.

Section 1270.09

Section 1270.09 has been simplified by referring to the identical provision in Section 1268.10 instead of restating the entire provision for depositing money in the state or county treasuries.

Section 1249

Subdivision (c) of this section has been placed in a more appropriate location as Section 1249.1(b).

Section 1249a

Subdivision (b), as it appeared in the last draft, permitted the condemnor to fix the date of valuation by depositing probable just compensation only if the deposit was made during the first six months following the commencement of the action. As a result, if the deposit were not made within the first six months, the condemnor was provided with no incentive to make any deposit thereafter because nothing it could do could prevent valuing the property as provided in the subsequent subdivisions. After that time, even though the condemnor deposited the money, took the property, and the defendant withdrew the deposit, the date of valuation would move forward if, for any reason not the fault of the defendant, the trial did not begin within one year from the commencement of the action. Thus, the condemnor could be forced to pay for property at values several years removed from the date that the property and the bulk of the compensation actually changed hands.

Subdivision (b) has been revised to provide the condemnor with a continuing incentive to make the deposit, for under the revised version the date of the deposit fixes the ultimate date for determining the date of

valuation. In a case that is tried three times (as Murata was), the failure of the condemnor to make the post-judgment deposit after the first judgment will not preclude it from making the deposit after the second judgment, thus making the money available to the defendant and stopping any inflation of the price of the property.

Section 1252

The amendment of Section 1252 is new and has been included to eliminate the bifurcated post-judgment deposit procedure that has heretofore existed.

Section 1255a

This section (which deals with abandonment) has been revised in accordance with the actions of the Commission at the June meeting, and the comment has been rewritten.

Section 1255b

The elimination of the dual post-judgment deposit procedure has eliminated the need for paragraph (5) of subdivision (c). As all post-judgment deposits are pursuant to Section 1270.01 et seq., paragraph (3) fully covers the ground formerly covered by paragraph (5) and the latter paragraph has been deleted.

Respectfully submitted,

Clarence B. Taylor  
Special Condemnation Counsel

OUTLINE

OF

RECOMMENDED LEGISLATION

TITLE 7.1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT

OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

	<u>Page</u>
CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT	27
1268.01. Order determining amount of probable just compensation	28
1268.02. Increase or decrease in amount of deposit	29
1268.03. Service of notice of deposit	30
1268.04. Application for withdrawal of deposit	31
1268.05. Withdrawal of deposit	32
1268.06. Security when amount in excess of original deposit is withdrawn	35
1268.07. Withdrawal waives all defenses except claim to greater compensation	37
1268.08. Repayment of amount of excess withdrawal	38
1268.09. Amount of deposit or withdrawal inadmissible in evidence	39
1268.10. Deposit in State Treasury unless otherwise required	40
CHAPTER 2. POSSESSION PRIOR TO JUDGMENT	41
1269.01. Possession by public entity for right of way or reservoir	41
1269.02. Possession where plaintiff's determination of necessity is conclusive	43
1269.03. Possession in other cases	52

	<u>page</u>
1269.04. Service of the order for possession	55
1269.05. Deposit and possession on motion of certain defendants	57
1269.06. Right of plaintiff to possession after vacation of property or withdrawal of deposit	59
1269.07. Taking possession does not waive right of appeal	60
 CHAPTER 3. DEPOSITS AND POSSESSION AFTER ENTRY OF JUDGMENT	 61
1270.01. Deposit after entry of judgment	61
1270.02. Order for possession	63
1270.03. Service of order	64
1270.04. Increase or decrease in amount of deposit	65
1270.05. Withdrawal of deposit	67
1270.06. Right of plaintiff to possession after vacation of property or withdrawal of deposit	69
1270.07. Repayment of amount of excess withdrawal	70
1270.08. Taking possession does not waive right of appeal	71
1270.09. Deposit in State Treasury unless otherwise required	72
 AMENDMENTS AND ADDED SECTIONS (CODE OF CIVIL PROCEDURE)	 73
C.C.P. § 1249. Market value standard	73
C.C.P. § 1249a. Date of valuation [added]	77
C.C.P. § 1249.1. Risk of loss	81
C.C.P. § 1252. Payment of Judgment	83
C.C.P. § 1253. Final order of condemnation	84
C.C.P. § 1255a. Abandonment	85
C.C.P. § 1255b. Interest	88
C.C.P. § 1257. New trial and appeal	92



ADDED SECTIONS (GOVERNMENT CODE)	<u>page</u>
ARTICLE 9. CONDEMNATION DEPOSITS FUND	94
16425. Condemnation Deposits Fund	94
16426. Investment of fund	95
16427. Apportionment and disbursement of fund	96
AMENDMENTS (GOVERNMENT CODE)	
Govt. Code § 38090. When right to compensation or damages accrues	97
Govt. Code § 38091. Improvements after service of summons not to be included in compensation	98
AMENDMENTS (STREETS AND HIGHWAYS CODE)	
S. & H. Code § 4203. Date of accrual of damages	99
S. & H. Code § 4204. Subsequent improvements; exclusion from damages	101
REPEALS	
C.C.P. § 1243.4. By whom and for what purposes immediate possession may be taken	102
C.C.P. § 1243.5. Order of immediate possession	103
C.C.P. § 1243.6. Deposit in State Treasury unless otherwise directed	106
C.C.P. § 1243.7. Withdrawal of deposit	107
C.C.P. § 1254. Possession after judgment or pending appeal	111
OPERATIVE DATE OF ACT	115
RECOMMENDED CONSTITUTIONAL AMENDMENT	116
Article I, Section 14	116

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

POSSESSION PRIOR TO FINAL JUDGMENT AND ASSOCIATED PROBLEMS IN EMINENT DOMAIN  
PROCEEDINGS

In 1965 the California Legislature directed the Law Revision Commission to study the question "whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings." This recommendation (one of a contemplated series) covers basic problems that inhere in the timing or sequence of steps in condemnation procedure from the governmental decision to acquire the property through final judgment in the eminent domain proceeding. Both legally and practically the most important problem in this sequence is the point at which the condemnor may take possession of the property. Closely related questions involve determination of (1) the date as of which the property is to be valued, (2) the time of payment to the property owner, (3) the dates when interest begins to accrue and ceases, and (4) the conditions under which the condemnor may abandon the proceeding.

In 1961, on recommendation of the Law Revision Commission, the Legislature enacted legislation that partially systematized the law on these questions.<sup>2</sup> The Commission has concluded that further improvements

<sup>1</sup> See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at E-1 (1961).

<sup>2</sup> See Cal. Stats. 1961, Ch. 1613, p. 3442, amending or adding CAL. CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a, and 1255b.

are needed and that the problems deserve legislative attention as a first step in the revision and recodification of the law of eminent domain.

#### Possession Prior to Judgment - Constitutional Revision

Section 14 of Article I of the California Constitution requires that the power of eminent domain be exercised through judicial proceedings and grants the right to a jury trial in such proceedings upon the issue of compensation. Under that section and the Code of Civil Procedure, a taking by eminent domain is an ordinary civil proceeding at both the trial and appellate levels. The only distinctive treatment given the eminent domain proceeding is a preferred setting on the trial calendar. Until the end of the proceeding the condemnor is not entitled to possession of the property, nor is the property owner entitled to compensation.

A limited exception to these rules was created by two amendments to Section 14 which provide for so-called "immediate possession" in takings by the state, cities, counties, and certain districts for rights of way or reservoir purposes. These amendments require that the condemning agency deposit a sum of money determined by the court to be adequate to secure eventual payment of the award. They do not require, however, that the amount deposited be paid or made available to the owner when possession of his property is taken or at any time prior to final judgment. Before 1957 no provision was made for withdrawal by the property owner of the required deposit. Furthermore, there were no provisions requiring notice to the property owner of the effective date of the order for possession, and the order for possession could be made effective when granted. These rules afforded at least the possibility of administrative abuse and gave

rise to the unanalyzed view that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible.

The Commission believes, however, that more general provisions for possession prior to judgment can be made to be of benefit to both condemnors and condemnees. To the public agencies a right to earlier possession facilitates an orderly and systematic program of property acquisition and project construction. An undue delay in acquiring even one essential parcel can prevent construction of a vitally needed public improvement and can complicate financial and contracting arrangements for the project. To avoid such a delay, the condemnor may be forced to pay the owner of that parcel more than fair value and more than the owners of similar property received.

From the condemnee's standpoint, if reasonable notice is given and if prompt receipt of the probable value of the property is assured, possession prior to judgment frequently will be advantageous. Upon filing of the condemnation proceeding, the land owner loses many of the valuable incidents of ownership. He is precluded from selling or financing the property and is deprived of any further increase in the value of the property. As a practical matter, the property owner must find and purchase another property prior to termination of the litigation. He must also defray the expenses of litigation. It is possible that because of these difficulties he will be forced to settle for an amount less than he would have received eventually in the condemnation proceeding. In contrast, the taking of possession and payment of estimated compensation prior to judgment permits the condemnee to meet these expenses while proceeding with the trial on the issue of compensation. Even if the condemnee has no

urgent need for prompt payment, he may withdraw the deposit and invest in other property or he may leave the amount on deposit and receive interest throughout the proceeding.

The practical necessity of determining the right of the condemnor to take the property by eminent domain before any exchange of possession and compensation does not preclude broadening the provisions for deposit and possession prior to judgment. Notwithstanding the important roles the limiting doctrines of "public use" and "public necessity" played in condemnation cases in the 19<sup>th</sup> century, the only substantial question for judicial decision in virtually all contemporary condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is for the court, not the jury, to decide, procedures may be readily fashioned that will permit the expeditious determination of the question in the few cases where it may arise.

In its general application, Section 14 forbids the "taking" of property "without just compensation having first been made to, or paid into court for, the owner." In reliance upon this provision, the Supreme Court of California invalidated certain legislation enacted in 1897 that authorized the taking of "immediate possession" in any condemnation case.<sup>3</sup> That decision has been considered by some as a bar to any legislative extension of the right of a condemnor to take possession prior to judgment. The 1897 legislation, however, required only the posting of security by bond and did not provide for any payment to the owner of the property. The decision invalidating that legislation was based upon the logical

---

<sup>3</sup> Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902)

ground that, even if money is deposited, it is not deposited "for the owner" unless it is available to him. The provisions of the Constitution that now authorize immediate possession without payment to the owner "having first been made" were adopted to overcome this decision of the Supreme Court.

The policy underlying that decision and the original and fundamental provisions of Section 14 are sound. Possession of property should not be taken from the owner unless he has the right to be paid concurrently. It is possible that the Supreme Court of California would sustain broader statutory provisions for possession prior to judgment if they adequately implement the property owner's right to concurrent payment. But in view of the tangled evolution of this section and the unfathomable import of its language, the Commission believes that a clarifying amendment should be submitted to the voters. Not the least of the benefits to be derived from the amendment would be the restoration of clarity and precision to the only section of the California Constitution dealing directly with eminent domain. Moreover, such amendment would restore to the Constitution the right of a property owner to compensation at the time his property is taken for any purpose.

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

1. An explicit provision should be added guaranteeing the owner the right, in all cases, to be compensated promptly whenever possession or use of his property is taken.

2. The existing authorization for possession prior to judgment in right of way and reservoir cases should be retained, but should be subjected to the requirement of prompt compensation. The

authorization in such cases also should be extended to all governmental entities and agencies having the right to take for right of way or reservoir purposes. The existing list of entities has resulted from amendments adding one entity or another at various times, and no substantive distinction between the public entities listed and not listed can be drawn.

3. The Legislature should be authorized to specify the other purposes for which, and entities by which, possession may be taken prior to judgment. The authorization should include the power to classify entities and classes of takings for this purpose. Subject to the basic constitutional guarantees, the Legislature also should be authorized to establish and change procedure for such cases.

4. The uncertain and partially obsolete language of Section 14 should be clarified, and partially deleted, as follows:

(a) The phrase, "which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law" should be clarified to make the latter two phrases refer to the total process for ascertainment of compensation, rather than merely to waiver of jury.

(b) The elongated proviso to the first sentence, dealing with "immediate possession," should be eliminated and superseded by clear provisions (1) authorizing possession prior to judgment in right of way and reservoir cases, (2) authorizing possession in such other cases as are prescribed by statute, and (3) requiring prompt compensation to the the property owner in all cases.

(c) The second portion of the first sentence, prohibiting "appropriation" of property "until full compensation therefor be first made in

money or ascertained and paid into court for the owner" should be eliminated as surplusage.

(d) The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be eliminated. By its terms the phrase applies only to "corporations other than municipal" and, oddly, only to takings for right of way or reservoir purposes. Insofar as the language undertakes to make any distinction in the offsetting of benefits, other than distinguishing between "special" benefits (which may be offset in all cases) and "general" benefits (which may not be offset in any case), the language has been held inoperative because it conflicts with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.<sup>4</sup> The complex question of the offsetting of benefits in cases of partial takings should be left to treatment by the Legislature in keeping with more fundamental guarantees of the Constitution.

(e) The last sentence of the section, which provides, in effect, that property may be taken for certain logging and lumbering railroads, and that such taking constitutes the taker a common carrier, should be deleted. Takings for such purposes are authorized by existing legislation, and the statement that the taker becomes a common carrier is merely an application of a broader proposition that attaches certain consequences to any exercise of the power of eminent domain.

---

<sup>4</sup> Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902).



### Possession Prior to Judgment - Implementing Legislation

To implement Section 14, as thus amended, legislation should be enacted that substantially expands the list of condemnors entitled to take possession of property prior to judgment. Such legislation should classify condemnors in accordance with the nature of the litigable issues that may be raised in the condemnation proceeding and specify procedures applicable to each class of condemning agency that will fully protect the rights of persons whose property is being taken.

The Commission recommends the enactment of the following provisions:

1. The procedure now followed in cases where property is taken prior to judgment for right of way or reservoir purposes should be retained in such cases, except that the period of notice to the property owner should be extended. Prior to 1957, there was no requirement that the property owner be notified. In 1957, a requirement of three days' notice was enacted. In 1961, on recommendation of the Law Revision Commission, this period was extended to 20 days. The Commission now recommends that this period be extended to 30 days. The change will facilitate the disbursement to the property owner of the required deposit prior to the time that the owner is required to relinquish possession of the property and will thus reduce the possibility of serious inconvenience to the property owner.

2. The statutes of California now provide that the governing body of many condemning agencies may adopt a resolution or ordinance before the commencement of the condemnation proceeding that is "conclusive evidence" of (1) the public necessity for the public improvement, (2) the necessity for taking the property for the improvement, and (3) the planning and location of the improvement in the manner most compatible with the

greatest public good and the least private injury. Because of the resulting inevitability of the taking, such agencies should be authorized to take possession of property prior to judgment in accordance with a procedure that will fully protect the rights of property owners.

In such cases, the order for possession should be issued ex parte upon application of the plaintiff, but should not be effective to transfer the right of possession until at least 30 days after notice to the property owner. Within the 30-day period after notice, the property owner should be entitled to obtain a stay of the order if the hardship to him of losing possession outweighs the need of the plaintiff-condemnor to avoid delay. Also within the 30-day period after notice, the property owner should have the right to obtain a vacation of the order for possession if he shows that the plaintiff is not entitled to take the property by eminent domain or that the taking is not actually authorized by a conclusive resolution or ordinance.

3. In most other condemnation actions, the plaintiff should be entitled to obtain possession prior to judgment if, upon regularly noticed motion, the court determines that the plaintiff is entitled to take the property, the plaintiff has a need for early possession, and that the plaintiff's need for such early possession outweighs any hardship to the owner or occupant of the property. But to avoid extending the right to possession prior to judgment to the exceptional cases of so-called "private" condemnation, the right to obtain possession upon noticed motion should be limited to public entities, public utilities, common carriers, and public service corporations. And, in the case of public utilities, common carriers, and public service corporations, the procedure should

be available only when the need for the proposed improvement or project is evidenced by a certificate of public convenience and necessity obtained from the Public Utilities Commission.

Deposit by Condemnor

Existing law provides for the deposit of probable just compensation only in connection with an application for an order of possession prior to judgment. The deposit procedure itself, however, can serve a valuable role in condemnation proceedings. It is the right of the defendant to withdraw the deposit prior to judgment that enables him to finance the acquisition of property to replace that being taken in the condemnation action. In many cases, it is the deposit that enables the defendant to defray the expenses of the condemnation litigation. These advantages would accrue to the condemnee from the deposit even though the condemnor is not entitled to or does not seek possession prior to judgment.

From the condemnor's viewpoint also, the deposit procedure can be of value. Because the defendant by withdrawing the deposit waives all defenses except his claim to greater compensation, the defendant's withdrawal of the deposit confirms the plaintiff's right to take the property.<sup>5</sup> Thus, even in cases where the condemnor is not entitled to take possession of the property prior to judgment, the deposit and withdrawal procedure provides a method by which the parties can effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to fully litigate the compensation issue.

Accordingly, the Commission recommends the enactment of legislation

---

<sup>5</sup> See *People v. Gutierrez*, 207 Cal. App.2d 529, 24 Cal. Rptr. 441 (1962).

authorizing any condemnor, without seeking possession prior to judgment, to deposit for the condemnee an amount determined by the court to be the probable just compensation that will be awarded to the defendant in the action. The Commission further recommends:

1. The existing procedure for determining the amount of the probable just compensation should be retained. The existing system for withdrawing the deposit, however, should be streamlined to eliminate, insofar as possible, obstacles to withdrawal. Any justifiable fear that the amount withdrawn will exceed the eventual award, or that the deposit will be withdrawn by a person other than the one entitled to it, can be obviated by requiring the filing of a bond or other undertaking.

2. Existing law requires the condemnor to pay the cost of bond premiums for such purposes if the need for the bond arises from the condemnee's efforts to withdraw an amount greater than that originally deposited. No provision for such payment is made if the bond is required because of competing claims among defendants to the amount originally deposited. These claims usually result from the need to allocate the award among owners of separate interests in the property, and the necessity for such allocation arises from the condemnation proceeding itself. The Commission therefore recommends adoption of a requirement that the condemnor pay bond premiums in such instances unless the need for the bond arises primarily from an issue as to title between defendants.

3. Under existing practice no withdrawal is permitted unless personal service of the application to withdraw is made upon all parties. This requirement should be simplified by permitting service by mail upon the other parties and their attorneys, if any, in all cases in which the

party has appeared in the proceedings or has been served with the complaint and summons. Further, the existing absolute prohibition of withdrawal for lack of personal service should be eliminated. Quite often "defendants" named in eminent domain proceedings can easily be shown to have no compensable interest in the property. In such cases, withdrawal should be permitted upon the furnishing of adequate security. Further, the requirement of an undertaking for withdrawal should be left to the sound discretion of the court, rather than being required as a matter of course upon the appearance of any possible conflict, however technical, in claims to the eventual award.

4. Because the condemnee is entitled to receive substantial compensation when the deposit is made--the amount determined by the court to be the probable compensation that eventually will be awarded to the condemnee--the date of valuation should be fixed by the deposit. See below at pages 16-18.

5. After a deposit is made, the condemnor should acquire the right to the possession of the property when the defendants entitled to possession of the property either notify the condemnor that the property has been vacated or withdraw the deposit.

#### Deposit on Demand of the Defendant

The Commission has considered provisions recently enacted in other states that permit the condemnee to demand and receive probable compensation at the beginning of the proceedings or soon thereafter. Under these provisions, the condemnor is given the right to possession upon complying with the demand of the condemnee. Although the objective has merit, integration of such a requirement into California condemnation

procedure does not appear feasible. Such provisions eliminate, in effect, any privilege of the condemnor to abandon the proceedings. More importantly, in California there are instances in which the public funds for eventual acquisition of the property are not available at the outset of the proceeding. Improvement, revenue, or general obligation bonds may have to be sold. And, as a practical matter in certain cases, it is necessary for the value of the property to be determined before the amount of the bond issue can be established.

Nonetheless, the Commission believes that a greater incentive should be provided for the condemnor's depositing probable just compensation in certain cases. As it is not feasible to require such deposit, on penalty of dismissal of the proceeding, an appropriate sanction would be imposition of interest on the amount of the eventual award from the date that the deposit should have been made. As the position of the home owner after commencement of the eminent domain proceedings is particularly onerous, the Commission recommends enactment of such a provision limited in application to cases in which the property being taken is a residential property having not more than two dwelling units and the defendant is a resident of one of the units.

#### Possession After Entry of Judgment

California law distinguishes sharply between the taking of possession before entry of the "interlocutory judgment" of condemnation, and the taking of possession after that event. Since enactment of the Code of Civil Procedure in 1872, Section 1254 has permitted any condemnor to obtain possession following entry of judgment by depositing for the defendant the amount of the award and also depositing an additional sum to secure payment of any additional amount that may be recovered in the

proceeding. The procedure is available even though the award is attacked by either party by motions in the trial court or by appeal. Neither party forfeits the right to further redress in the proceeding by possession being taken and the deposit being withdrawn, except that withdrawal of the deposit waives the condemnee's right to further contend that the property may not be taken by eminent domain. Unlike provisions for possession prior to judgment, this authorization for possession after judgment does not raise constitutional problems.<sup>6</sup>

Even though the judgment may be reversed or set aside, provisions for possession after entry of judgment are properly distinguished from similar provisions for possession prior to judgment. The judgment determines the condemnor's right to take the property, the trial court's assessment of compensation, and the allocation of the award among defendants. As motions in the trial court, appeals, and possibly new trials may consume a period of years, the procedure is beneficial to both parties. From the condemnee's standpoint, the period during which he is effectively precluded from renting, selling, or improving the property is reduced, and he may withdraw the deposit and carry out his plans for the future. To the condemnor, the procedure is virtually essential to prevent the public improvement from being delayed for a protracted period or even having to be abandoned.

---

6

Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907).

The Commission recommends retention of the procedure and re-statement of the authorizing provisions with the following changes:

1. The statutory provisions should be redrawn to clearly distinguish between the procedures for, and consequences of, possession and deposits before entry of judgment, and possession and deposits after entry of judgment.

2. The court should not be required in every case to determine an additional amount to be deposited as security for any further compensation, costs, or interest that may be recovered in the proceeding. A procedure exists for the increase or decrease of the amount deposited on motion of either party. This procedure should be adapted to permit a defendant to make a motion to compel deposit of an additional amount as security for the payment of additional compensation, costs, or interest if he deems such action necessary.

3. Existing law should be clarified to permit the condemnee, after entry of judgment, to withdraw a deposit made prior to judgment under the simpler provisions for withdrawal of a deposit made after entry of judgment. However, the trial court should be authorized to require, in its discretion and upon objection to withdrawal by any other party, that an undertaking be filed by the withdrawing party.

4. One uniform procedure should be provided for making deposits after entry of judgment and for the withdrawal of such deposits.



### Date of Valuation

Since 1872 the date of summons has been fixed as the date of valuation in eminent domain proceedings. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not tried within one year from its commencement, and the delay is not caused by the defendant, the date of valuation is the date of trial. Under existing law, neither the taking of possession by the condemnor, nor the depositing of probable just compensation, has any bearing in determining the date of valuation. In cases in which the issue of compensation is once tried, and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the date of the original trial.

Fixing the date of valuation as of the date of summons is supported by the analogy to other civil actions. In such actions, for many purposes, conditions are considered to remain static as of the commencement of the action. In eminent domain proceedings, however, commencement of the proceedings is not logically relevant to ascertaining the date as of which the level of the general market, and the value of the particular property in that market, should be considered. Unless the condemnor deposits probable just compensation and takes possession of the property, the property owner is left in possession and control of the property, however hampered he may be in dealing with it. In a rising market he cannot replace the property taken with the award eventually received.

In approximately half of the United States and in federal practice property is taken at the beginning of the eminent domain proceeding and the proceeding continues for the purpose of determining the amount of compensation.

In these jurisdictions the usual practice is to fix the date of valuation as of the date of the preliminary taking and to provide interest on the award from the date of that taking. In those states in which the power of eminent domain is exercised exclusively through judicial proceedings, the majority rule is to fix the date of valuation as of the date of trial.

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Although the simplicity of such a rule is desirable, it is not altogether fair to condemnors and provides an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation.

As a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial will begin. Appraisals and appraisal testimony must be directed to market value as of a specific date.

The Commission therefore recommends enactment of the following rules for determining the date of valuation:

1. The condemnor should be permitted to establish the date of valuation by depositing the amount of probable just compensation for withdrawal by the property owner. If it does so, the date of valuation should be the date of deposit unless an earlier date is fixed by the rules stated below. A date of valuation thus established should not be subject to change by any subsequent eventuality in the proceeding.

2. In other cases, a compromise should be made between California's two existing rules, and the date of valuation fixed as the date six months from the filing of the complaint.

3. The provision making the date of valuation the date of trial if, without fault of the defendant, the case is not tried within one year, should be retained.

4. In cases of new trials, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a reasonably brief period after the entry of judgment in the original trial.

5. As a technical matter, provisions respecting the date of valuation should be changed to compute that date from the filing of the complaint rather than the issuance of summons. Under early law, the issuance of summons was deemed to mark inception of the court's jurisdiction over the property. As that rule no longer prevails, the date of filing of the complaint is a more appropriate date.

6. The Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) and the Park and Playground Act of 1909 (Government Code Sections 38000-38213) specify dates of valuation that differ from the dates specified by the Code of Civil Procedure. As there appears to be no justification for the discrepancy between these provisions and the rules generally applicable, these acts should be amended to conform them to the provisions of the Code of Civil Procedure.

#### Decreases in Value Prior to the Date of Valuation

It is generally recognized that announcement or undertaking of public improvements or projects may cause particular property to fluctuate in value before commencement of any eminent domain proceeding respecting the property. This problem of increase or decrease in market value prior to the date of valuation is not dealt with in California statutory law. Case law establishes, however, that any increase in the value of the property directly resulting from the improvement itself is to be ascertained and deducted in arriving at the compensation to be made for a given property. Decisions as to the

treatment of any decrease in value are uncertain. Notwithstanding the rule as to increases in value, demands by property owners that alleged decreases in value be ascertained and added to the value at the date of valuation usually have been denied. The reason most commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation." The injustice to the property owner is clear, however, if the proposed improvement has actually depreciated the value of the property prior to the date of valuation. The equitable rule would be that "market value" of the property on the date of valuation is to be appraised irrespective of any effect produced by the public project. The diminution in value, if any, can be shown by expert testimony and by direct evidence as to the general conditions of the property. Determination of "market value" itself involves elements and considerations that can be characterized as "speculative." The Commission therefore recommends enactment of a provision requiring the taking into account of any such changes in value and providing a uniform rule for both increases and decreases.

#### Interest Problems

By analogy to other civil actions, interest in eminent domain proceedings runs from entry of judgment to the time of payment of the award. If possession is taken prior to judgment, interest begins on the date upon which the condemnor is authorized to take possession. The latter rule is constitutionally required as the owner must be compensated for the use of his property prior to receipt of the award. The courts have held that interest on the eventual award at the legal rate of seven percent is an adequate way to compute ~~the~~ amount of this element of compensation.

Interest ceases when the full amount of the award, together with the amount of interest then accrued, is paid into court for the defendant. The same rule applies if the deposit is made to obtain possession under the provisions for taking possession after entry of judgment. As to any amount deposited to obtain possession prior to judgment, however, interest does not cease until and unless the amount is withdrawn.

Ideally, procedure in eminent domain cases would be such that interest ceases upon an amount deposited by the condemnor, whether the amount is or is not withdrawn by the property owner. Fairness does not require that the property owner be given an option to withdraw the deposit or to leave the amount on deposit and draw interest at seven percent. Even though the condemnor may place the amount deposited in the state Condemnation Deposits Fund in the State Treasury and partially recoup the amount of such interest, the income from that fund does not approach the seven percent rate that must be paid on the award in the eminent domain proceeding. Denial of interest is appropriate, however, only if the amount deposited may be withdrawn promptly and easily. Although the provisions for withdrawal of a deposit made prior to judgment can be and should be streamlined, there appears to be no way to overcome the obstacle presented by the possible existence of separate interests in the property. On trial of the issue of compensation, the condemnor is entitled to have the property valued as a whole, irrespective of the existence of separate interests. The total award is segregated only after its total amount has been determined. Also, deposits prior to judgment are made in the aggregate and are not segregated among severable interests in the property. These privileges are regarded as pivotal by condemnors. Hence, there is little justification for tolling interest at the time of

the deposit as the condemnee may no longer have possession and yet be faced with serious obstacles in withdrawing the deposit.

Accordingly, the Commission recommends retention of existing policy on payment of interest. Various relatively minor and clarifying changes should be made, however.

Under existing law, interest does not cease upon an amount deposited prior to judgment even upon entry of judgment. As the justification for the rule requiring payment of interest on amounts deposited prior to judgment is that difficulties may be encountered in withdrawing the amount deposited, and as such difficulties are obviated on the entry of judgment, the Commission recommends that interest on amounts deposited prior to judgment be made to cease upon the entry of judgment. After entry of judgment, it is a matter of little consequence whether the deposit was made before or after judgment.

Subdivision (b) of Code of Civil Procedure Section 1255b provides that if the defendant "continues in actual possession of or receives rents, issues, and profits from the property" after interest begins to accrue, the "value of such possession and of such rents, issues, and profits" are to be offset against the interest. The section should be amended, in the interest of clarity, to provide that it is the value of possession and the net amount of rents or other income that are to be offset.

Before 1959 case law permitted the defendant to show that fair compensation for possession being taken prior to judgment differed from the seven percent interest allowed on the award from the date of taking possession to the date of payment. Legislation of 1959 provided, in the interest of simplicity, that such damages should be computed in all cases as seven percent upon the award. In 1961, the provisions on interest were amended to permit the value

of the condemnee's use and occupancy to be set off against the accruing interest. Since 1961 it has been uncertain whether interest, and the offset against interest, are to be determined by the court or by the jury. Apart from the tendency of such issues to confuse the jury, determination by jury requires each of the parties to present evidence inconsistent with the position taken upon trial of the main issue of compensation. For example, if a capitalization-of-income approach is taken to value, the property owner seeks to show a maximum value of such income. However, in attempting to show a minimum offset of rentals against interest, he must show a minimum rental value. The Commission therefore recommends that Section 1255b be clarified to provide that the court shall determine the amount of the interest in all cases, including interest constitutionally required as compensation for possession prior to payment. The section also should provide that the amount of any offset against interest should be determined by the court, and that evidence on that issue should be presented to the court, rather than to the jury.

#### Abandonment of the Proceeding

A California condemnor may abandon the proceeding at any time after the filing of the complaint and before expiration of 30 days from final judgment. The law does not distinguish, in express terms, between abandonment in cases in which the condemnor has or has not taken possession prior to judgment. In the great majority of states, abandonment is precluded after the taking, damaging, or use of the property by the condemnor. As a result of the Law Revision Commission's recommendations, the Legislature in 1961 enacted the equitable principle that abandonment without the consent of the condemnee will be denied if the court determines that the condemnee has changed

his position in justifiable reliance upon the proceedings and cannot be restored to substantially the same position as if the proceeding had not been begun.

This equitable rule applies whether or not the plaintiff has taken possession prior to judgment, but it would appear that in most instances in which the property owner has withdrawn the deposit and relinquished possession of the property he would be entitled to invoke the rule.

The Commission does not believe, therefore, that it is necessary to change the basic rule governing abandonment, even in connection with enactment of more widespread provisions for the taking of possession prior to judgment. There are, however, two changes that should be made in the consequences of abandonment. Existing law permits recovery by the defendant of his costs and necessary expenses upon abandonment. The general purpose of this provision is to compensate the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry the eminent domain proceeding through to its conclusion. Decisions have held that reasonable attorney's fees, actually incurred, may be recovered without regard to the period in which the legal services are rendered. For example, they may be recovered for services rendered before the proceeding is filed. Other expenses, including appraisal fees, may not be recovered if the proceeding is discontinued 40 or more days before the date set for pretrial. As this distinction is not founded on any substantive difference, the Commission recommends that existing law be amended to provide a uniform rule governing attorney's and appraiser's fees and that both be made recoverable if reasonable in amount and actually incurred. Recovery of these fees, and all other expenses necessarily incurred in the proceeding, should be permitted without regard to the date that the proceeding is dismissed.



## Recodification and Miscellaneous Changes

Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure, which deals with eminent domain, has been amended many times since its enactment in 1872. Certain sections have grown to several pages in length. Also, the allocation of provisions between that title and parts of other codes dealing with particular condemnors, condemnations for particular purposes, and related matters can be improved. For example, the detailed provisions respecting the Condemnation Deposits Fund should be removed from Title 7 and added to the part of the Government Code that deals with deposits in the State Treasury. Provisions for deposit and withdrawal of just compensation and possession prior to the termination of the proceeding should be organized in a new title of the Code of Civil Procedure consisting of three chapters dealing, respectively, with the deposit and withdrawal of probable just compensation, possession before entry of judgment, and possession after entry of judgment.

In connection with the recodification of the provisions of Title 7 that deal with possession prior to final judgment and related matters, there are numerous changes that should be made in existing statutory language. Some of these changes reflect appellate decisions construing existing provisions. Other changes are made appropriate by the simplicity achieved through reorganization and restatement of existing provisions. The reasons for, and effects of, all of these changes are indicated in the comments to the particular sections of the legislation recommended by the Commission.

---

The Commission's recommendations would be effectuated by enactment of the following measures:<sup>7</sup>

---

<sup>7</sup> Matter in italics would be added to the present law; matter in "strikeout" type would be omitted from the present law.

RECOMMENDED LEGISLATION

An act to amend Sections 1249, 1249.1, 1252, 1253, 1255a, 1255b, and 1257 of, to add Title 7.1 (commencing with Section 1268.01) to Part 3 of, to add Section 1249a to, and to repeal Sections 1243.4, 1243.5, 1243.6, 1243.7, and 1254 of, the Code of Civil Procedure and to amend Sections 38090 and 38091 of, and to add Article 9 (commencing with Section 16425) to Chapter 2 of Part 2 of Division 4 of Title 2 of, the Government Code and to amend Sections 4203 and 4204 of the Streets and Highways Code, relating to eminent domain.

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

SECTION 1. Title 7.1 (commencing with Section 1268.01) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 7.1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT;  
OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

Note. A Title 7.1 (commencing with Section 1268), relating to evidence in eminent domain and inverse condemnation proceedings, was added to Part 3 of the Code of Civil Procedure by Section 1 of Chapter 1151 of the Statutes of 1965, but Section 7 of Chapter 1151 repeals that title on the operative date of the Evidence Code (January 1, 1967). The content of the repealed title is superseded by Sections 810-822 of the Evidence Code.

CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO  
JUDGMENT

Comment. This chapter supersedes Code of Civil Procedure Sections 1243.6 and 1243.7 and those portions of Section 1243.5 that relate to the deposit and withdrawal of probable just compensation. Under this chapter, the condemnor may deposit an amount determined by the court to be the probable just compensation which will be made for the taking of the property (including any damage incident to the taking) at any time after filing the complaint and prior to the entry of judgment. The deposit may be made whether or not possession of the property is to be taken prior to judgment. This deposit serves several purposes: First, it is a condition to obtaining an order for possession prior to judgment. See Sections 1269.01(b), 1269.02(b), 1269.03(d)(3), 1269.05(b). Second, in some cases, it fixes the date of valuation. See Section 1249a. Third, it permits the condemnee to shift the risk of loss to the condemnor by giving the condemnor written notice that he has vacated the property. See Section 1249.1(d).

The deposit to be made after entry of judgment is not governed by Chapter 1, but is covered by Chapter 3 (commencing with Section 1270.01).

1268.01. Order determining amount of probable just compensation

1268.01. (a) In any proceeding in eminent domain, the plaintiff may, at any time after filing the complaint and prior to entry of judgment, apply ex parte to the court for an order determining the probable just compensation which will be made for the taking of any parcel of property included in the complaint. Upon such application the court shall make and enter its order determining the amount of such probable just compensation.

(b) At any time after the making of the order and prior to entry of judgment, the plaintiff may deposit the amount specified in the order. Such deposit may be made whether or not the plaintiff applies for, or is authorized by law to apply for, an order for possession.

Comment. This section restates the substance of Code of Civil Procedure Section 1243.5(a). In contrast with that section, however, the application and deposit may be made without regard to an order for possession. See the initial Comment to this chapter.

The words "any parcel of property included in the complaint" have been used to make clear that a deposit may be made for one parcel only even though, under Code of Civil Procedure Section 1244, several parcels may be included in the one complaint.

"Compensation," within the meaning of this section and this chapter, includes any damages incident to the taking as well as the value of the property taken. "Probable just compensation" has the same meaning as the phrase "just compensation for such taking and any damage incident thereto" in Section 14 of Article I of the California Constitution.

1268.02. Increase or decrease in amount of deposit

1268.02. At any time after the court has made an order determining the amount of probable just compensation, the court may, upon motion of any party, redetermine the amount. If the court redetermines the amount after entry of judgment, it shall redetermine the amount to be the amount of the judgment. If the plaintiff has deposited the amount of probable just compensation previously determined and the court, on redetermination, determines that such amount is larger than previously determined, the court shall order the amount previously deposited to be increased accordingly. After any amount deposited pursuant to this chapter has been withdrawn by a defendant, the court may not redetermine probable just compensation to be less than the total amount already withdrawn.

Comment. This section restates the substance of Code of Civil Procedure Section 1243.5(d) except that reference to the order for possession is eliminated. Section 14 of Article I of the California Constitution provides for modification of the amount originally deposited to obtain possession. As to the duty of the plaintiff and the powers of the court to maintain the deposit in an adequate amount, see G. H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934); Marblehead Land Co. v. Superior Court, 60 Cal. App. 644, 213 Pac. 718 (1923).

Section 1268.08 provides for recovery of any excessive withdrawal after final determination of amounts in the eminent domain proceeding. No provision is made for recovery, prior to such final determination, of any amount withdrawn.

1268.03. Service of notice of deposit

1268.03. If the plaintiff deposits the amount determined by the court, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding who have an interest in the property for which the deposit was made. Service of such notice shall be made in the manner provided in Section 1269.04 for service of an order for possession. Service of an order for possession that recites the amount deposited pursuant to this chapter is sufficient compliance with the requirement of this section.

Comment. This section is new. It requires that notice of the deposit be given in all cases to facilitate withdrawal of the funds by the defendants.

Sections 1269.01 and 1269.02 require that information respecting the deposit be recited in any order for possession under one of those sections. Section 1268.03 dispenses with separate notice of the deposit if such an order is obtained and served.

1268.04. Application for withdrawal of deposit

1268.04. At any time prior to judgment, after the plaintiff has deposited the amount determined by the court, any defendant who has an interest in the property for which the deposit was made may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff. Application for withdrawal after entry of judgment shall be made under the provisions of Section 1270.05.

Comment. This section restates existing law. It is derived from Code of Civil Procedure Section 1243.7(a) and (c).



1268.05. Withdrawal of deposit

1268.05. (a) Subject to subdivisions (c) and (d) of this section, the court shall order the amount requested in the application, or such portion of that amount as the applicant may be entitled to receive, to be paid to the applicant. No withdrawal may be ordered until 20 days after service of a copy of the application on the plaintiff, or until the time for all objections has expired, whichever is later.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on the grounds:

(1) That other parties to the proceeding are known or believed to have interests in the property; or

(2) That an undertaking should be filed by the applicant as provided in subdivision (e) of this section or in Section 1268.06, or that the amount of such an undertaking or the sureties thereon are insufficient.

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. Such notice shall be served in the manner provided in subdivision (c) of Section 1269.04 for service of an order for possession. The plaintiff shall report to the court (1) the names of parties served and the dates of service, and (2) the names and last known addresses

of parties who have neither appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in subdivision (c) of Section 1269.04 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served, but if such liability is enforced the plaintiff shall be subrogated to the rights of such parties under Section 1268.08.

(d) If any party objects to the withdrawal, or if the plaintiff so requests, the court shall determine, upon hearing, the amounts to be withdrawn, if any, and by whom.

(e) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. If the undertaking is executed by two or more sufficient sureties approved by the court, the amount shall not exceed double such portion.

(f) Unless the undertaking is required primarily because of an issue as to title between the applicant and another party or person, if the undertaking is executed by an admitted surety insurer the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed two percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. This section is based on Code of Civil Procedure Section 1243.7(a), (c), (d), (e), and (f). Unlike the section on which it is based, this section does not forbid withdrawal of any portion of the deposit if notice of the application cannot be personally served upon all parties. The section permits the court to exercise its discretion as to withdrawal in such cases and as to the requirement of an undertaking.

Nothing in this section precludes withdrawal of the deposit upon stipulation of all parties having an interest in the property for which the deposit was made.

Subdivision (f) has been added to permit recovery of the bond premium as costs in the proceeding unless the necessity for the undertaking arises primarily from an issue of title. For use of the same distinction in assessing the costs of apportionment proceedings. See Code of Civil Procedure Section 1246.1; People v. Nogarr, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

1268.06. Security when amount in excess of original deposit is withdrawn

1268.06. (a) If the amount originally deposited is increased pursuant to Section 1268.02 and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, shall file an undertaking. The undertaking shall be in favor of the plaintiff and shall secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. If the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. If executed by two or more sufficient sureties approved by the court, the undertaking shall be in double such amount.

(b) If there are two or more applicants, the applicants, in lieu of filing separate undertakings, may jointly file a single undertaking in the amount required by subdivision (a).

(c) The plaintiff may consent to an undertaking that is less than the amount required under this section.

(d) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking may recover the premium paid for the undertaking, but not to exceed two percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. This section is the same in substance as subdivision (b)

§ 1268.06

of Code of Civil Procedure Section 1243.7. Withdrawal by one or more defendants of an amount in excess of the original deposit is possible if the deposit has been increased as provided for by Section 1268.02.

1268.07. Withdrawal waives all defenses except claim to greater compensation

1268.07. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

Comment. This section restates the substance of subdivision (g) of Code of Civil Procedure Section 1243.7. Withdrawal of the deposit not only waives claims and defenses, it also results in a surrender of the right to possession. See Section 1269.06. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

1268.08. Repayment of amount of excess withdrawal

1268.08. Any amount withdrawn by a party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled to such amount, together with legal interest from the date of its withdrawal. The court in which the eminent domain proceeding is pending shall enter judgment accordingly. If the judgment is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for such amount and interest.

Comment. This section restates the substance of subdivision (h) of Code of Civil Procedure Section 1243.7.

1268.09. Amount of deposit or withdrawal inadmissible in evidence

1268.09. Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall be given in evidence or referred to in the trial of the issue of compensation.

Comment. This section restates the substance of subdivision (e) of Code of Civil Procedure Section 1243.5.



1268.10. Deposit in State Treasury unless otherwise required

1268.10. (a) When money is deposited as provided in this chapter, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the 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 Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article.

(b) As between the parties to the proceeding, money deposited pursuant to this chapter shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Comment. Subdivision (a) of this section is the same in substance as Code of Civil Procedure Section 1243.6. Subdivision (b) is based on the first two sentences of subdivision (h) of Code of Civil Procedure Section 1254.

CHAPTER 2. POSSESSION PRIOR TO JUDGMENT

1269.01. Possession by public entity for right of way or reservoir

1269.01. (a) In any proceeding in eminent domain brought by the state or a county, city, district, or other public entity to acquire (1) any right of way or (2) lands to be used for reservoir purposes, the plaintiff may take possession of the property or property interest in accordance with this section.

(b) At any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession. The court shall authorize the plaintiff to take possession of the property if the court determines that:

(1) The plaintiff is entitled to take the property by eminent domain; and

(2) The plaintiff has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

(1) Recite that it has been made under this section and Article I, Section 14 of the Constitution of California.

(2) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.

(3) State the purpose of the condemnation.

(4) State the amount deposited as probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(5) State the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the earliest date on which the

plaintiff would be entitled to take possession of the property if service were made under Section 1269.04 on the day the order is made.

Comment. This chapter provides for orders for possession prior to entry of judgment, and supersedes Code of Civil Procedure Sections 1243.4 and 1243.5. Orders for possession subsequent to judgment are governed by Chapter 3 (commencing with Section 1270.1). Subdivision (a) of this section restates the substance of Code of Civil Procedure Section 1243.4. The words "the State or a county, city, district, or other public entity" have been substituted for the words "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 new language encompasses all proceedings by governmental entities, agencies, or officers to acquire rights of way or lands for reservoir purposes, whether the interest to be acquired is a fee, easement, or other interest.

Subdivision (b) restates the substance of subdivision (a) and a portion of subdivision (b) of Code of Civil Procedure Section 1243.5. The ex parte procedure for obtaining the order for possession is a continuation of existing law.

Subdivision (c) is the same in substance as Code of Civil Procedure Section 1243.5(b), except that the requirement that the order recite its authority has been added. The requirement is intended to avoid confusion with similar orders obtained under Section 1269.02.

With respect to the appellate relief available as to orders for possession, see the Comment to Section 1269.02.

1269.02. Possession where plaintiff's determination of necessity is conclusive

1269.02. (a) In any proceeding in eminent domain in which a resolution, ordinance, or declaration is made conclusive evidence of the public necessity for taking the property (whether by subdivision (2) of Code of Civil Procedure Section 1241 or by a statute applicable to the particular agency, entity, or officer), the plaintiff may take possession of the property or property interest in accordance with this section.

(b) At any time after filing of the complaint and prior to the entry of judgment, the plaintiff may apply ex parte to the court for an order for possession. The court shall authorize the plaintiff to take possession of the property if the court determines that:

(1) The plaintiff is entitled to take the property by eminent domain;

(2) The taking is provided for by a resolution, ordinance, or declaration that is conclusive evidence of the public necessity for such taking; and

(3) The plaintiff has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

(1) Recite that it has been made under this section and refer to the resolution, ordinance, or declaration authorizing the taking.

(2) Describe the property and the estate or interest to be acquired, which description may be made by reference to the complaint.

(3) State the purpose of the condemnation.

(4) State the amount deposited in accordance with Chapter 1 (commencing with Section 1268.01).

(5) State the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under Section 1269.04 on the day the order is made.

(d) At any time within 20 days after being served with an order obtained pursuant to this section any owner or occupant of the property may, by motion, apply to the court for a stay or vacation of the order. On such motion the court shall:

(1) Stay the effect of the order if the court determines that the hardship to the owner or occupant of having possession taken clearly outweighs any need of the plaintiff for earlier possession. Such stay shall be for a reasonable time, but shall not exceed 90 days from the date for possession specified in the original order.

(2) Vacate the order if the court determines that the plaintiff is not entitled to take the property by eminent domain or that the taking is not provided for by a resolution, ordinance, or declaration that is conclusive evidence of the public necessity for the taking.

Comment. This section is new.

Subdivision (a). Section 1269.01 provides for possession prior to judgment if the taking is for right of way or reservoir purposes. Section 1269.02 provides for possession prior to judgment--whatever the

STATE OF CALIFORNIA

STATUTE

AGENCY

University of California	EDUC. CODE § 23152
State Pub. Works Bd.	GOVT. CODE § 15855
State Housing Comm'n	HEALTH & SAF. CODE § 34878
State Lands Comm'n	PUB. RES. CODE § 6808
State Hwy. Comm'n	STS. & HWYS. CODE § 103
Cal. Toll Bridge Auth.	STS. & HWYS. CODE § 30404
Dep't of Water Resources	WATER CODE § 251
Dep't of Water Resources (Central Valley Project)	WATER CODE § 11582
( State Reclam. Bd.	WATER CODE § 8595

LOCAL PUBLIC ENTITIES

ENTITY

County	CODE CIV. PROC. § 1241(2)
	STS. & HWYS. CODE § 4189 (Street Opening Act of 1903)
	STS. & HWYS. CODE § 6121 (Improvement Act of 1911)
	STS. & HWYS. CODE § 11400 (Pedestrian Mall Law of 1960)
City	CODE CIV. PROC. § 1241(2)
	GOVT. CODE § 38081 (Park and Playground Act of 1909)
	STS. & HWYS. CODE § 4189 (Street Opening Act of 1903)
	STS. & HWYS. CODE § 6121 (Improvement Act of 1911)
	STS. & HWYS. CODE § 11400 (Pedestrian Mall Law of 1960)

LOCAL PUBLIC ENTITIES (continued)

ENTITY	STATUTE
City	STS. & HWYS. CODE §§ 31590, 31592 (Acquisitions for parking districts).
	WATER CODE § 71694 (Municipal Water District Law of 1911)
	WATER CODE APP. § 20-12(7) (Municipal Water District Act of 1911)

OTHER PUBLIC ENTITIES

County Sanitation Dist.	CODE CIV. PROC. § 1241(2)
Irrigation Dist.	CODE CIV. PROC. § 1241(2)
Public Utility Dist.	CODE CIV. PROC. § 1241(2); PUB. UTIL. CODE § 16404
Rapid Transit Dist.	CODE CIV. PROC. § 1241(2)
Sanitary Dist.	CODE CIV. PROC. § 1241(2)
School Dist.	CODE CIV. PROC. § 1241(2)
Transit Dist.	CODE CIV. PROC. § 1241(2)
Water Dist.	CODE CIV. PROC. § 1241(2)
Harbor Improvement Dist.	HARB. & NAV. CODE § 5900.4
Harbor Dist.	HARB. & NAV. CODE § 6076
Port Dist.	HARB. & NAV. CODE § 6296
Recreational Harbor Dist.	HARB. & NAV. CODE §§ 6590, 6593, 6598 (repealed)
River Port Dist.	HARB. & NAV. CODE § 6896
Small Craft Harbor Dist.	HARB. & NAV. CODE § 7147
San Diego Unified Port Dist.	HARB. & NAV. CODE APP. § 27
Joint Muni. Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5740.01, 5740.06 (repealed)
Regional Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5991, 5998 (repealed)

OTHER PUBLIC ENTITIES (continued)

ENTITY	STATUTE
Regional Park Dist.	PUB. RES. CODE § 5542
Regional Shoreline Park and Recreation Dist.	PUB. RES. CODE § 5722 (repealed)
Municipal Utility Dist.	PUB. UTIL. CODE § 12703
Transit Dist. (Alameda or Contra Costa Counties)	PUB. UTIL. CODE § 25703
S.F. Bay Area Rapid Transit Dist.	PUB. UTIL. CODE § 28954
Orange County Transit Dist.	PUB. UTIL. CODE § 40162
Stockton Metropolitan Transit Dist.	PUB. UTIL. CODE § 50162
Marin County Transit Dist.	PUB. UTIL. CODE § 70162
Los Angeles Metropolitan Auth.	PUB. UTIL. CODE APP. 1, § 4.7
Fresno Metropolitan Transit Auth.	PUB. UTIL. CODE APP. 2, § 6.3
West Bay Rapid Transit Auth.	PUB. UTIL. CODE APP. 3, § 6.6
Joint Highway Dist.	STS. & HWYS. CODE § 25052
Bridge & Highway Dist.	STS. & HWYS. CODE § 27166
Parking Dist.	STS. & HWYS. CODE § 35401.5
Water Replenishment Dist.	WATER CODE § 60230(8)
American River Flood Control Dist.	WATER CODE APP. § 37-23
Antelope Valley-East Kern Water Agency	WATER CODE APP. § 98-61(7)
Crestline-Lake Arrowhead Water Agency	WATER CODE APP. § 104-11(9)
Desert Water Agency	WATER CODE APP. § 100-15(9)
Donner Summit Public Utility Dist.	WATER CODE APP. § 58-3
Lassen-Modoc County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 92-3(f)



OTHER PUBLIC ENTITIES (continued)

ENTITY	STATUTE
Mendocino County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 54-3(f)
Metropolitan Water Dist.	WATER CODE APP. § 35-4(5)
Morrison Creek Flood Cont. Dist.	WATER CODE APP. § 71-3(f) (repealed)
Olivehurst Public Utility Dist.	WATER CODE APP. § 56-3
Orange County Water Dist.	WATER CODE APP. ' § 40-2(8)
Plumas County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 88-3(f)
San Geronio Pass Water Agency	WATER CODE APP. § 101-15(9)
San Mateo County Flood Cont. Dist.	WATER CODE APP. § 87-3(8)
Santa Cruz County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 77-24
Sierra County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 91-3(f)
Siskiyou County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 89-3(f)
Sonoma County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 53-3(f)
Tehama County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 82-3(f)
Upper Santa Clara Valley Water Agency	WATER CODE APP. § 103-15(7)
Vallejo Sanitation & Flood Cont. Dist.	WATER CODE APP. § 67-23
Yolo County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 65-3(f)
Bethel Island Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 22, § 80, p. 333, CAL. GEN. LAWS ANN. Act 5239e (Deering Supp. 1965)
Embarcadero Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 81, § 81, p. 447, CAL. GEN. LAWS ANN. Act 5239c (Deering Supp. 1965)

OTHER PUBLIC ENTITIES (Continued)

ENTITY	STATUTE
Estro Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 82, § 81, p. 464, CAL. GEN. LAWS ANN. Act 5239d (Deering Supp..1965)
Fairfield-Suisun Sewer Dist.	Cal. Stats. 1951, Ch. 303, § 44 p. 555, CAL. GEN. LAWS ANN. Act 7551a (Deering Supp. 1965)
Guadalupe Valley Municipal Improvement Dist.	Cal. Stats. 1959, Ch. 2037, § 80, p. 4710, CAL. GEN. LAWS ANN. Act 5239b (Deering Supp. 1965)
Montalvo Municipal Improvement Dist.	Cal. Stats. 1955, Ch. 549, § 45, p. 1018, CAL. GEN. LAWS ANN. Act 5239a (Deering Supp. 1965)
Mt. San Jacinto Winter Park Auth.	Cal. Stats. 1945, Ch. 1040, § 4.9, p. 2013, CAL. GEN. LAWS ANN. Act 6385 (Deering Supp. 1965)
Solvang Municipal Improvement Dist.	Cal. Stats. 1951, Ch. 1635, § 45, p. 3680, CAL. GEN. LAWS ANN. Act 5239 (Deering Supp. 1965)

The procedure will also be available to other entities or agencies whose resolution or ordinance is made conclusive evidence of the public necessity for taking the property.

Subdivisions (b) and (c). These subdivisions are patterned after Code of Civil Procedure Section 1243.5(a) and (b).

Subdivision (d). This subdivision provides a new procedure, applicable only to orders obtained under this section, whereby the property owner may contest the granting of the order for possession. For the source of this provision, see Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, B-7, B-14 (1961).

An appeal may not be taken from an order authorizing or denying possession prior to entry of judgment. Mandamus or prohibition are the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, the order for possession following entry of judgment is an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). These rules have not been changed in connection with this section, or with Sections 1269.01 and 1269.03. Existing writ practice, rather than appeals, is continued as to orders made under subdivision (d) of this section and under Section 1269.03.

1269.03. Possession in other cases

1269.03. (a) In any proceeding in eminent domain brought by or on behalf of any public entity, public utility, common carrier, or public service corporation to acquire any property or property interest, the plaintiff may obtain an order for possession of the property or property interest in accordance with this section.

(b) At any time after filing the complaint and prior to the entry of judgment, the plaintiff may, upon motion, apply to the court for an order for possession. The notice of motion shall be served in the same manner as an order for possession is served under Section 1269.04.

(c) On hearing of the motion, the court shall consider all relevant evidence, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan, and shall make an order that authorizes the plaintiff to take possession of the property if the court determines that:

(1) The plaintiff is entitled to take the property by eminent domain;

(2) The need of the plaintiff for possession of the property outweighs any hardship the owner or occupant of the property will suffer if possession is taken; and

(3) The plaintiff has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01); and

(4) If the plaintiff is not a public entity and is a public utility, common carrier, or public service corporation, the public

necessity of the proposed improvement is evidenced or supported by a certificate of public convenience and necessity obtained from the Public Utilities Commission in accordance with the provisions of the Public Utilities Code.

(d) The date after which the plaintiff is authorized to take possession of the property shall not be less than 30 days after the making of the order and may be any later date specified by the plaintiff.

Comment. This section is new.

Subdivision (a). This section provides a procedure for obtaining possession prior to judgment in cases in which such possession might not be obtainable under Sections 1269.01 or 1269.02. The words "the State or a county, city, district, or other public entity" include all governmental entities. The words "public utility, common carrier, or public service corporation" include business entities subjected to public regulation by provisions of the Public Utilities Code and court decisions.

Subdivisions (b) and (c). Subdivisions (b) and (c) are patterned after provisions in other states which provide for obtaining possession prior to judgment by noticed motion procedure and which require the plaintiff to show a need for such possession. See, e.g., ILL. REV. STAT. 1957, Ch. 47, § 2.1; Dept. of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958). These subdivisions provide for determination of the motion in keeping with motion practice generally. Paragraph (4) of subdivision (c) limits application of the section to those cases in which the Public Utilities Commission has issued its certificate of public convenience and necessity applicable to the proposed project or

improvement. See Public Utilities Code Section 1000; San Diego Gas & Electric Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

Subdivision (d). This subdivision is based on Code of Civil Procedure Section 1243.5(b)(4). As the order is obtained by regularly noticed motion, however, the period specified is computed from the date of the order, rather than the date of its service.

With respect to the appellate relief available as to orders for possession, see the Comment to Section 1269.02.

1269.04. Service of the order for possession

1269.04. (a) As used in this section, "record owner" means both (1) the person in whom the legal title to the fee appears to be vested by duly recorded deeds or other instruments and (2) the person, if any, who has an interest in the property under a duly recorded lease or agreement of purchase.

(b) At least 30 days prior to the time possession is taken pursuant to an order for possession obtained pursuant to this chapter, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any. If the order was obtained under Section 1269.01, the court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

(c) Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or been served with a copy of the summons and complaint. If the person has appeared or been served with the summons and complaint, service of the order for possession may be made by mail upon such person and his attorney of record, if any.

(d) If a person required to be personally served resides out of the State, or has departed from the State or cannot with due diligence be found within the State, the plaintiff may, in lieu of such personal service, send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal

service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not be made.

(e) The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

(f) A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. This section is the same in substance as Code of Civil Procedure Section 1243.5(c), except the period of notice has been increased from 20 to 30 days. Subdivision (f) is a clarification of a sentence in the first paragraph of Section 1243.5(c). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post-office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address.



1269.05. Deposit and possession on motion of certain defendants

1269.05. (a) If the property to be taken is a dwelling containing not more than two residential units and one of the units is occupied as his residence by a defendant, and if the plaintiff has not deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), such defendant may, by motion, apply to the court at any time prior to judgment for an order determining the amount of such compensation. The motion shall be heard and determined in the same manner as a motion made to modify an existing deposit under Section 1268.02.

(b) The court shall enter its order determining the probable just compensation and authorizing the plaintiff to take possession of the property 30 days after the date the plaintiff deposits the determined amount in accordance with Chapter 1 (commencing with Section 1268.01). If the deposit is not made within 20 days after the date of the order, the compensation awarded in the proceeding to the moving party shall draw legal interest from the twenty-first day after the date of the order.

(c) If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on abandonment. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the moving party, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of probable just

compensation as determined on the motion. The moving party shall be entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(c) The filing of a motion pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the amount determined to be probable just compensation, of all claims and defenses in favor of the moving party except his claim for greater compensation.

Comment. This section is new. Except as provided in this section, the depositing of probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the taking of possession pursuant to this chapter is optional with the plaintiff. If a deposit is not made and possession is not taken, a defendant is not entitled to be paid until 30 days after final judgment. Code of Civil Procedure Sections 1251 and 1268. If bonds must be issued and sold to pay the award, payment need not be made until one year after final judgment. Code of Civil Procedure Section 1251. Section 1269.05 is intended to make available to certain defendants a procedure by which probable just compensation may be ascertained within a brief period after commencement of the eminent domain proceeding. Although the plaintiff is not required to deposit the amount determined, if it does not, interest on the eventual award begins to accrue. If an award is not eventually made by the court or jury, the interest is computed on the amount determined by the court to be probable just compensation. This section apart, interest would not begin to accrue until entry of judgment. See Code of Civil Procedure Section 1255d(a)(1).

1269.06. Right of plaintiff to possession after vacation of property or withdrawal of deposit

1269.06. If the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01), the plaintiff may take possession of the property at any time after each of the defendants entitled to possession:

- (a) Vacates the property; or
- (b) Withdraws any portion of the deposit to which he is entitled.

Comment. This section is new. Chapter 1 (commencing with Section 1268.01) permits the plaintiff to deposit probable just compensation whether or not it obtains an order for possession. Code of Civil Procedure Section 1249.1 provides, in effect, that the risk of loss with respect to the property passes from the defendants to the plaintiff when the plaintiff takes possession or when, after the depositing of probable just compensation, all defendants entitled to possession notify the plaintiff in writing of the vacation of the property. To permit the plaintiff to protect his interests in the property, this section authorizes the taking of possession when the property is vacated whether or not an order for possession has been sought or obtained.

Subdivision (b) makes applicable to the withdrawal of the deposit prior to judgment the analogous rule that applies when a deposit made after judgment is withdrawn, Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962),

§ 1269.07

1269.07. Taking possession does not waive right of appeal

1269.07. The plaintiff does not abandon or waive the right to appeal from the judgment in the proceeding or request a new trial by taking possession of the property pursuant to this chapter.

Comment. This section is the same in substance as Code of Civil Procedure Section 1243.5(f). The language has been changed to preclude implied waiver of appeal or right to new trial by taking possession pursuant to any order obtained under this chapter, including orders under Sections 1269.01, 1269.02, 1269.03, and 1269.05. Under Section 1268.07, the defendant also retains his right to appeal or request a new trial upon the issue of compensation even though he withdraws the deposit made by the plaintiff. However, such withdrawal does waive all claims and defenses other than the claim to compensation.

CHAPTER 3. DEPOSITS AND POSSESSION AFTER ENTRY OF JUDGMENT

1270.01 Deposit after entry of judgment

1270.01. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, deposit for the defendants the amount of the judgment together with the interest then due thereon.

(b) Upon making the deposit, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding determined by the judgment to have an interest in the money deposited thereon. Service of the notice shall be made in the manner provided in Section 1270.03 for the service of an order for possession. Service of an order for possession under Section 1270.03 is sufficient compliance with this subdivision.

Comment. This chapter relates to deposits that may be made and orders for possession that may be obtained after entry of the "interlocutory judgment" in condemnation. The chapter supersedes Code of Civil Procedure Section 1254 and eliminates whatever distinction there may have been between deposits made under Section 1252 and Section 1254. Under this chapter, there is but one uniform post-judgment deposit procedure. As to the distinction between the "judgment" and the "final judgment" in eminent domain proceedings, see Code of Civil Procedure Section 1264.7 and Bellflower City School Dist. v. Skaggs, 52 Cal.2d 278, 339 P.2d 848 (1959).

Subdivision (a) is similar to subdivision (a) of Code of Civil Procedure Section 1254. However, the deposit required here is merely the amount of the judgment and accrued interest. The provision for an additional sum to secure payment of further compensation and costs is contained in Section 1270.04. In addition, the deposit may be made under this section without

regard to an order for possession. This section, thus, encompasses the deposit procedures of both Sections 1252 and 1254.

Subdivision (b) is new. It requires a notice of the deposit to be sent just as Section 1268.03 requires notice of the pre-judgment deposit to be sent to the parties interested therein. Under Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

1270.02. Order for possession

1270.02. If the judgment determines that the plaintiff is entitled to take the property and the plaintiff has made the deposit provided in Section 1270.01, the court upon ex parte application of the plaintiff shall authorize the plaintiff to take possession of the property pending final conclusion of the litigation. If necessary, the court also shall stay any actions or proceedings against the plaintiff arising from such possession. The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be 10 days after the date the order is made.

Comment. This section restates the substance of subdivision (b) of Code of Civil Procedure Section 1254.

1270.03. Service of order

1270.03. At least 10 days prior to the date possession is to be taken, the plaintiff shall serve a copy of the order for possession upon the defendants and their attorneys, either personally or by mail. A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. This section is the same in substance as subdivision (c) of Code of Civil Procedure, Section 1254. With respect to the last sentence, see the Comment to Section 1269.04.



1270.04. Increase or decrease in amount of deposit

1270.04. At any time after the plaintiff has made a deposit upon the judgment pursuant to this chapter, the court may, upon motion of any defendant, order the plaintiff to deposit such additional amount as the court determines to be necessary to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. After the making of such an order, the court may, on motion of any party, order an increase or a decrease in such additional amount.

Comment. This section supersedes subdivision (d) of Code of Civil Procedure Section 1254. For the parallel provision permitting increase or decrease in a deposit made prior to entry of judgment, see Section 1268.02.

Decisions under Section 14 of Article I of the California Constitution and Code of Civil Procedure Section 1254 have held that, where the plaintiff has taken possession prior to judgment, and judgment is entered for an amount in excess of the amount deposited, the defendant is entitled to have the deposit increased to the amount of the judgment. See, G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934). That rule is continued in existence, but the motion to obtain the increase is appropriately made under Section 1268.02, rather than under this section.

The additional amount referred to in this section is the amount determined by the court to be necessary, in addition to the amount of the judgment, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. See People v. Loop, 161 Cal. App.2d 466,

326 P.2d 902 (1958); City of Los Angeles v. Oliver, 110 Cal. App. 248, 294 Pac. 760 (1930). Deposit of the amount of the judgment itself is required by Sections 1270.01 and 1270.02.

Code of Civil Procedure Section 1254 was construed to make the amount, if any, to be deposited in addition to the judgment to be discretionary with the trial court. Orange County Water Dist. v. Bennett, 156 Cal. App.2d 745, 320 P.2d 536 (1958). This construction is continued under this section.

1270.05. Withdrawal of deposit

1270.05. (a) Any defendant for whom an amount has been deposited upon the judgment, or any defendant determined by the judgment to be entitled to an amount deposited prior to entry of judgment, is entitled to demand and receive the amount to which he is entitled under the judgment upon obtaining an order from the court. Upon application by such defendant, the court shall order that such money be paid to him upon his filing (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

(b) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to file an undertaking in the manner and upon the conditions specified in Sections 1268.05 and 1268.06 for withdrawal of a deposit made prior to entry of judgment.

Comment. This section is based on subdivision (f) of Code of Civil Procedure Section 1254. For the parallel provisions for withdrawal of a deposit made prior to judgment, see Sections 1268.05 and 1268.06.

Decisions under Section 14 of Article I of the California Constitution and Code of Civil Procedure Section 1254 held that, where a deposit was made to obtain possession prior to judgment, the defendant was nonetheless entitled to proceed under the provisions of this section after the entry of judgment. People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961); see also People v. Neider, 55 Cal.2d 832, 361 P.2d 916 (1961);

compare G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934) (practice before any provision existed for withdrawal of a deposit made before judgment). The language of this section has been changed to incorporate this construction. The section also has been changed to permit the court to require security as a condition to withdrawal in appropriate cases.

Code of Civil Procedure Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment, whether or not the plaintiff applied for or obtained an order for possession. People v. Guiterrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). That construction is continued in effect. Inferentially, Section 1254 permitted withdrawal only of the amount deposited upon the judgment and not the additional amount, if any, deposited as security. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958). That construction also is continued in effect.

1270.07 Repayment of amount of excess withdrawal

1270.07. When money is withdrawn pursuant to this chapter, any amount withdrawn by a person in excess of the amount to which he is entitled as finally determined in the proceeding shall be paid without interest to the plaintiff or other party entitled thereto, and the court shall enter judgment accordingly.

Comment. This section is the same in substance as subdivision (g) of Code of Civil Procedure Section 1254.

1270.08. Taking possession does not waive right of appeal

1270.08. The plaintiff does not abandon or waive the right to appeal from the judgment or request a new trial by depositing the amount of the judgment or taking possession pursuant to this chapter.

Comment. This section is the same in substance as subdivision (e) of Code of Civil Procedure Section 1254. Under the provisions of Section 1270.05, the defendant may also retain his right to appeal or request a new trial upon the issue of compensation only even though he withdraws the deposit. This may be accomplished by filing a receipt and waiver of all claims and defenses except the claim to greater compensation. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

§ 1270.09

1270.09. Deposit in State Treasury unless otherwise required

1270.9. Money deposited as provided in this chapter shall be deposited in accordance with Section 1268.10 and the provisions of that section are applicable to the money so deposited.

Comment. This section, which incorporates by reference Section 1268.10, supersedes the first three sentences of subdivision (h) of Code of Civil Procedure Section 1254.

SEC. 2. Section 1249 of the Code of Civil Procedure is amended to read:

1249. (a) Except as provided in subdivision (b), for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value of the property on the date of valuation determined under Section 1249a 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 under 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. 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.

(b) For the purpose of assessing compensation and damages, any increase or decrease in market value prior to the date of valuation that is substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken shall be disregarded.

Comment. This section states the measure of compensation for proceedings in eminent domain. The provisions relating to dates of valuation formerly contained in this section are superseded by Section



§ 1249

1249a. The provision on improvements subsequent to the service of summons is superseded by subdivision (b) of Section 1249.1.

Decisions construing Code of Civil Procedure Section 1249 held that its provisions governing the date of valuation and the making of subsequent improvements do not apply in proceedings for the taking of property already devoted to a public use ("property of a public utility" within the meaning of Section 23a of Article III of the California Constitution). Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963); Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 Pac. 469 (1918). This construction is continued under this section and Sections 1249a and 1249.1(b).

Subdivision (a). In restating the "actual value" measure of compensation, this subdivision retains the language employed since adoption of the Code of Civil Procedure in 1872. The term "actual value" and the word "value" in Section 1248(a) are equivalent, and both refer to "market value." See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899).

The phrase "date of valuation" has been substituted for language concerning accrual of the right to compensation and damages in the interest of clarity. No change is made in existing rules as to persons entitled to participate in the award of compensation or damages (see People v. City of Los Angeles, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944)). Further, no change is made in the effect of a lis pendens (see Lansburgh v. Market St. Ry.,

98 Cal. App.2d 426, 220 P.2d 423 (1950) or in the rule that, as against intervening rights of persons having actual or constructive notice of the proceeding, the title of the plaintiff relates back to the commencement of the proceeding (see East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240, 278 Pac. 476 (1929)).

Subdivision (b). This subdivision is new. The problems to which it relates have not heretofore been dealt with in California statutory law or constitutional provisions. Subdivision (b) requires that the property be valued at the "market value" it would have had if there were no enhancement or diminution in value that was substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken.

In San Diego Land and Town Company v. Neale, 78 Cal. 63, 20 Pac. 372 (1888), and subsequent decisions, the courts have held that any increase in the value of the property to be taken that results directly from the proposed public improvement is to be deducted in arriving at "market value." See U.S. v. Miller, 317 U.S. 369 (1943); City of San Diego v. Boggeln, 164 Cal. App.2d 1, 330, P.2d 74 (1958); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). This subdivision is intended to codify the results of these and similar decisions.

Notwithstanding the rule as to enhancement in value, the California decisions are uncertain respecting any decrease in value due to popular knowledge of the pendency of the public project. Several decisions seem to indicate that the rules respecting enhancement and diminution are not parallel, and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge

of the pendency of the public project. See City of Oakland v. Partridge, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); People v. Lucas, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and Atchison, Topeka and Santa Fe Railroad Co. v. Southern Pacific, 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary are Redevelopment Agency of the City of Santa Monica v. Zwerman, 240 A.C.A. 70 (1966); People v. Lillard, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963); Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959); and County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). Subdivision (b) is intended to make the rules respecting appreciation and depreciation parallel. Thus, any decrease in value (prior to the date of valuation) that is substantially due to the general knowledge of the public improvement is to be added in arriving at "market value."

See generally 4 NICHOLS, EMINENT DOMAIN § 12 at 3151 (3d ed. 1963); I ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 105 (2d ed. 1953); Anderson, Consequence of Anticipated Eminent Domain Proceedings - Is Loss of Value a Factor, 5 SANTA CLARA LAWYER 35 (1964); Annotation, Depreciation in Value, From the Project for Which Land is Condemned, as a Factor in Fixing Compensation, 5 A.L.R.3d 901 (1966). For analogous provisions in other jurisdictions, see Section 604, Pennsylvania Eminent Domain Code (Act of June 22, 1964, P.L. 84 ); Md. Stat. 1962, Ch. 52, § 6. For proposed federal legislation to the same effect, see Sections 102(a)(b)(1)(A) and 112(c)(2) of the "Fair Compensation Act of 1965" as that act would have been adopted by Senate Bill 1201, 89th Cong. (1st Sess.).

The method of proving value, including a statement of the matters upon which an expert opinion of market value may be based, is set forth in Article 2 (commencing with Section 810) of Division 7 of the Evidence Code.

§ 1249a

SEC. 3. Section 1249a is added to the Code of Civil Procedure immediately following Section 1248, to read:

1249a. (a) The date of valuation shall be determined as provided in this section.

(b) Unless an earlier date of valuation is applicable under subdivision (c), (d), or (g), the date of valuation is the date on which the plaintiff makes a deposit in accordance with Chapter 1 (commencing with Section 1263.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1. In all cases in which this subdivision does not determine the date of valuation, the date of valuation is determined under subdivisions (c), (d), (e), (f), and (g).

(c) If the issue of compensation is brought to trial within six months from the filing of the complaint, the date of valuation is the date of trial.

(d) If the issue of compensation is not brought to trial within six months from the filing of the complaint but is brought to trial within one year from such date, the date of valuation is the date six months after the filing of the complaint.

(e) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is not caused by the defendant, the date of valuation is the date of trial.

(f) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is caused by the defendant, the date of valuation is the date six months after the filing of the complaint.

(g) In any case in which there is a new trial, the date of valuation is the date of such new trial, except that the date of

§ 1249a

valuation in the new trial shall be the same date as in the previous trial if:

(1) The plaintiff has deposited the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1; or

(2) The plaintiff has, within 30 days after the entry of judgment, deposited the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1.

Comment. This section states exhaustively the methods for determining the date of valuation in eminent domain proceedings. The section supersedes those portions of Code of Civil Procedure Section 1249 that formerly specified dates of valuation. Since enactment of the Evidence Code, value may be evidenced by transactions made within a reasonable time before or after the date of valuation. See Evidence Code Sections 815-818.

Subdivision (b). This subdivision permits the plaintiff, by depositing probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the amount of the judgment pursuant to Chapter 3 (commencing with Section 1270.01) of Title 7.1 of the Code of Civil Procedure, to fix the date of valuation as of a date no later than the date of the deposit. The date of valuation may be earlier than the date of the deposit, and subsequent events may cause an earlier date of valuation to shift to the date of deposit. But the date of valuation cannot be shifted to a later date by any of the circumstances mentioned in the following subdivisions. The rule under former Section 1249 was to the contrary; neither the depositing of probable just compensation nor the taking of possession had any bearing on the date of valuation. See City of Los Angeles v. Tower, 90 Cal. App.2d 869, 204 P.2d 395 (1949).

Subdivisions (c)-(f). Subdivisions (c) through (f) provide alternative dates of valuation for cases in which probable just compensation is not deposited. With respect to the phrase, "six months from the filing of the complaint," Code of Civil Procedure Section 17(4) provides that, "The word 'month' means a calendar month, unless otherwise expressed." For the method of resolving any difficulty arising from months having an unequal number of days, see Messner v. Superior Court, 101 Cal. App. 172, 281 Pac. 503 (1929); Church Mfg. Co. v. Superior Court, 79 Cal. App. 637, 250 Pac. 705 (1926); Barbee v. Young, 79 Cal. App. 119, 249 Pac. 15 (1926).

The date of the filing of the complaint, rather than the date of the issuance of summons, is used in determining the date of valuation. Code of Civil Procedure Section 1243 requires that all proceedings in eminent domain "be commenced by filing a complaint and issuing a summons." Ordinarily the dates are the same, but this is not always the case. See Harrington v. Superior Court, 194 Cal. 185, 228 Pac. 15 (1924). As the issuance of summons is no longer essential to establish the court's jurisdiction over the property (see Harrington v. Superior Court, supra, and Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964)), the date of the filing of the complaint is a more appropriate date.

Subdivision (c) fixes the date of valuation for the relatively infrequent cases in which the trial is had within six months from the filing of the complaint.

Subdivision (d) establishes the principal date of valuation for cases in which the date of valuation has not been established by deposit of probable just compensation in accordance with subdivision (b). The date specified is new to California practice and supersedes the former basic date of valuation (date of issuance of the summons) and the alternate date (date of trial if the issue of compensation is not tried within one year).

Subdivision (e) continues in effect the proviso formerly contained in Section 1249.

Subdivision (f) retains the date specified in subdivision (d) as the date of valuation in any case in which the delay in reaching trial is caused by the defendant. This retains the effect of the proviso formerly contained in Section 1249.

Subdivision (g). Under the language of former Section 1249, questions arose whether the original date of valuation or the date of the new trial should be employed in new trials in eminent domain proceedings. The Supreme Court of California ultimately held that the date of the first trial, rather than the date of the new trial, should be used. See People v. Murata, 55 Cal.2d 1, 357 P.2d 833 (1960). This subdivision reverses the result obtained by that decision unless the date of valuation has been established by the deposit of probable just compensation or the plaintiff deposits the amount of the judgment in accordance with Code of Civil Procedure Section 1270.01. The subdivision applies whether the new trial is granted by the trial court or by an appellate court. However, if a mistrial is declared, further proceedings are not considered a "new trial," and the date of valuation is determined under subdivisions (b) through (f), rather than under this subdivision. Under subdivision (g), the date of valuation is the date of valuation used in the previous trial if the amount of the judgment is deposited within 30 days after entry of judgment. If the amount of the judgment is deposited thereafter, the date of valuation is the date of deposit under subdivision (b).

§ 1249.1

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

1249.1. (a) All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times:

(a) (1) The time title to the property is taken by the plaintiff.

(b) (2) The time the possession of the property is taken by the plaintiff.

(c) (3) The time the defendant moves from the property in compliance with an order of possession.

(4) In any case where the plaintiff has previously deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1, the time all of the defendants entitled to possession notify the plaintiff in writing of the vacation of the property.

(b) 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.

Comment. Section 1249.1 was added in 1961 to specify the times at which the risk of loss of improvements passes to the plaintiff and the times at which improvements upon the property are considered in determining value. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-8, B-53 to B-55 (1961); Redevelopment Agency v.



§ 1249.1

Maxwell, 193 Cal. App.2d 414, 14 Cal. Rptr. 170 (1961). The plaintiff may deposit probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) whether or not possession of the property is taken prior to judgment. See Section 1269.06. As the defendant's vacation of the property after the making of deposit is substantially equivalent to his moving from the property in compliance with an order for possession, such vacation, with notice to the condemnor, is given the same effect under this section.

Subdivision (b) restates and supersedes a provision of Section 1249.

SEC. 5. Section 1252 of the Code of Civil Procedure is amended to read:

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited ~~in court for the defendants, and be distributed to those--entitled thereto~~ as provided in Chapter 3 (commencing with Section 1270.01) of Title 7,1 and withdrawn by those entitled thereto in accordance with that chapter. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Comment. Section 1952 is amended in order to eliminate any distinction between the kinds of deposits that may be made after entry of judgment. Statements have appeared in cases indicating that the defendant's withdrawal of a deposit made under Section 1952 waives the defendant's right of appeal while withdrawal of a deposit made under Section 1954 does not. See People v. Neider, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961); People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962), has cast doubt on the validity of such statements by holding that a defendant may withdraw a deposit made under Section 1952 without waiving his right to a new trial on the issue of compensation by filing the receipt and waiver of claims and defenses, except the claim for compensation, provided in Section 1954 (recodified in Section 1270.05).

The amendment of Section 1952 and enactment of Sections 1270.01-1270.09 will make it clear that withdrawal of any deposit does not result in a waiver of appeal or a right to new trial on the issue of compensation if that issue is preserved in accordance with Section 1270.05.

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

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned, the estate or interest acquired therein, the purposes of such condemnation, and if possession is taken pursuant to ~~Section--1243.5-or-1254~~ Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1 prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

Comment. This section is amended to change the references to the appropriate statutory provisions.

SEC. 7. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 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 proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants ~~their costs and disbursements~~ which Recoverable costs and disbursements shall include (1) all necessary expenses incurred in preparing for trial and during trial, and (2) reasonable attorney and appraisal fees actually incurred, whether such fees were incurred for services rendered before or after the proceeding was commenced. 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 the plaintiff, the defendants, and each of them, may file a cost bill must be filed within 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 action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action .~~

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

Comment. The purpose and effect of subdivision (c) is to recompense the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry an eminent domain proceeding through to conclusion. Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965); Oak Grove School Dist. v. City Title Ins. Co., 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963); Kern County v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). Under prior law, reasonable

§ 1255a

attorney's fees actually incurred were recoverable irrespective of the time when the legal services were rendered. Decoto School Dist. v. M. & S. Tile Co., 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964). This construction is continued and extended to include appraisal fees. Under prior law, all other necessary expenses in preparing for trial and during trial were subject to a proviso precluding their recovery if the action was dismissed 40 days or more prior to pre-trial or trial. La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962). This subdivision provides that such expenses may be recovered without regard to the date that the proceeding was abandoned or dismissed.

§ 1255b

SEC. 8. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. (a) The compensation and damages awarded in an eminent domain proceeding shall draw lawful interest from the earliest of the following dates:

(1) The date of the entry of judgment.

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

(3) The date after which the plaintiff may take possession of the property as stated in an order ~~authorizing--the-plaintiff-to-take~~ for possession or as authorized by Section 1269.06 .

(4) If the amount determined to be probable just compensation on motion of a defendant made under Section 1269.05 is not deposited before such date, the twenty-first day following the date of the order determining such amount.

(b) If  , after the date that interest begins to accrue  , the defendant continues in actual possession of ~~or-receives-rents,-issues~~ and-profits-from the property or receives rents or other income therefrom attributable to the period after interest begins to accrue  , the value of such possession and the net amount of such rents or other income  , ~~issues-and-profits~~ shall be offset against the interest ~~that-accrues~~ during-the-period-the-defendant-continues-in-actual-possession-or ~~receives-such-rents,-issues-and-profits~~ . This subdivision shall not apply to interest accrued under Section 1269.05.

(c) Interest, including interest accrued due to possession or damaging of the property by the plaintiff prior to the final order in condemnation, and any offset against interest as provided in subdivision (b), shall be assessed by the court rather than by jury.

(e) (d) The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:

(1) As to any amount deposited pursuant to Chapter 1 (commencing with Section 1243.5 1268.01) of Title 7.1, the date that such amount is withdrawn by the person entitled thereto, or if not withdrawn, on the date that judgment is entered.

(2) As to any amount deposited pursuant to Section 1269.05, the date of such deposit.

(2) (3) As to any amount paid-into-court deposited pursuant to Chapter 3 (commencing with Section 1254 1270.01) of Title 7.1, the date of such payment deposit.

(3) (4) As to any amount paid to the person entitled thereto, the date of such payment.

~~(4) -- If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment.~~

Comment. In subdivision (a), paragraphs (2) and (3) are modified, without substantive change, to conform to usage throughout Title 7.1 (commencing with Section 1268.01). Paragraph (4) is added to reflect the effect of Section 1269.05.

Subdivision (b) is changed to clarify existing language. Under the subdivision, the plaintiff is entitled to offset against interest (1) the



value of possession and (2) the net amount of rents or other income received, if such rents or income are attributable to the period after the date interest begins to accrue. The last sentence of the subdivision is added to conform to Section 1269.05.

Subdivision (c) is added to clarify existing law and to specify that the court, rather than the jury, assesses interest, including interest constitutionally required as compensation for possession or damaging of property prior to conclusion of the eminent domain proceeding. The subdivision also clarifies existing law to specify that the amount of the offset against interest provided by subdivision (b) is assessed by the court and to provide, in effect, that any evidence on that issue is to be heard by the court, rather than the jury.

Subdivision (d) is changed to make paragraphs (1) and (3) refer to the appropriate statutory provisions. Paragraph (1) is also changed to terminate interest, on entry of judgment, upon an amount deposited pursuant to Chapter 1 (commencing with Section 1268.01) of Title 7.1. After entry of judgment, such a deposit may be withdrawn pursuant to Section 1270.05. See the Comment to that section. Judicial decisions are uncertain as to the time interest ceases on a deposit made prior to entry of judgment if the amount is not withdrawn. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958); compare People v. Neider, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961). Under this paragraph, interest on the amount on deposit terminates on entry of judgment even though the amount is less than the award. If the amount on deposit is less than the amount of the award, the deposit must be increased, on motion of the defendant, under Section 1268.02. See Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934). Paragraph (2) has been

§ 1255b

added to conform to Section 1269.05, which permits certain defendants to obtain an order determining probable just compensation.

Paragraph (5) has been eliminated as unnecessary. All post-judgment deposits are made under Chapter 3 (commencing with Section 1270.01) of Title 7.1 and, hence, are covered by paragraph (3). Paragraph (5) referred to the practice of payment into court pursuant to Section 1952, which practice is terminated by the amendment of Section 1952.

SEC. 9.. Section 1257 of the Code of Civil Procedure is amended to read:

1257. (a) The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title ;-provided,-that-upon-the-payment-of-the-sum-of-money assessed,-and-upon-the-execution-of-the-bond-to-build-the-fences and-cattle-guards,-as-provided-in-section-twelve-hundred-and-fifty-one,-the-plaintiff-shall-be-entitled-to-enter-into,-improve,-and-hold-possession-of-the-property-sought-to-be-condemned-(if-not-already-in-possession)-as-provided-in-section-twelve-hundred-and-fifty-four,-and-devote-the-same-to-the-public-use-in-question;-and-no-motion-for-new-trial-or-appeal-shall,-after-such-payment-and-filing-of-such-bond-as-aforesaid,-in-any-manner-retard-the-contemplated improvement.--Any-money-which--shall-have-been-deposited,-as-provided-in-section-twelve-hundred-and-fifty-four,-may-be-applied-to-the-payment-of-the-money-assessed,-and-the-remainder,-if-any-there-be,-shall-be-returned-to-the-plaintiff .

(b) 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.

Comment. The proviso to this section was added in 1877 in connection with related changes to Code of Civil Procedure Section 1254, which deals with possession after entry of judgment. See Code Am. 1877-78, Ch. 651, p. 109, §§ 1-2. Several subsequent changes to Section 1254 have deprived the proviso of any effect. See Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941). The general provision as to fences and cattle-guards remains in Code of Civil Procedure Section 1251.

Subdivision (b) is the same as and supersedes subdivision (k) of Code of Civil Procedure Section 1254. With respect to the construction and constitutionality of the provision, see Los Angeles, P. & G. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859 (1894).

§ 16425

SEC. 10. Article 9 (commencing with Section 16425) is added to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, to read:

ARTICLE 9. CONDEMNATION DEPOSITS FUND

16425. Condemnation Deposits Fund

16425. The Condemnation Deposits Fund in the State Treasury is continued in existence. The fund consists of all money deposited in the State Treasury under Title 7.1 (commencing with Section 1268.01) of Part 3 of the Code of Civil Procedure and all interest earned or other increment derived from its investment. The State Treasurer shall receive all such moneys, duly receipt for, and safely keep the same in the fund, and for such duty he is liable upon his official bond.

Comment. Sections 16425-16427 restate the substance of a portion of subdivision (h) and all of subdivisions (i) and (j) of Section 1254 of the Code of Civil Procedure.

16426. Investment of fund

16426. (a) Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430 of the Government Code or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2 of the Government Code.

(b) 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 State Treasurer shall invest or make deposits in bank accounts in accordance with the designations. For the purposes of this subdivision, 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.

Comment. See the Comment to Section 16425.

16427. Apportionment and disbursement of fund

16427. Interest earned and other increment derived from investments or deposits made pursuant to this article, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the State Treasurer in taking and making delivery of bonds or other securities under this article, 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.

Comment. See the Comment to Section 16425.

§ 38090

SEC. 11. Section 38090 of the Government Code is amended to read:

~~38090. The right to compensation or damages accrues at the date of the order appointing referees or the order setting the cause for trial. The actual value of the property at that date is the measure of compensation for property actually taken and the basis of damages to property not taken but injuriously affected.~~ date of valuation in proceedings under this article shall be determined in accordance with Section 1249a of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this article, the date of the filing of their report with the court shall be deemed the date of trial for the purpose of determining the date of valuation.

Comment. This section of the Park and Playground Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). It has not been amended previously to conform to the various changes that have been made over the years in the Code of Civil Procedure. The section is amended to conform, as near as may be, to the Code of Civil Procedure. See new Code of Civil Procedure Section 1249a.



§ 38091

SEC. 12. Section 38091 of the Government Code is amended to read:

38091. Improvements placed upon the property after ~~publication of the notice of passage of the ordinance of intention~~ the service of summons shall not be included in the assessment of compensation or damages.

Comment. This section of the Parks and Playgrounds Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). With respect to the construction of this section and related sections, see City of Los Angeles v. Glassell, 203 Cal. 44, 262 Pac. 1084 (1928). The section is amended to conform to Code of Civil Procedure Section 1249.1 which provides that improvements placed upon the property after the service of summons shall not be included in the assessment of compensation of damages.

§ 4203

SEC. 13. Section 4203 of the Streets and Highways Code is amended to read:

~~4203. For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons, and the actual value at that date shall be the measure of compensation for all property to be actually taken, and also the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed by the provisions of this part. -- If, however, a motion to set the action for trial is not made within one year after the date of the issuance of the summons in the action, the right to compensation and damages shall be deemed to have accrued at the date of the hearing of the motion to set the action for trial, and the actual value at that date shall be the measure of compensation and the basis of damages.~~

The date of valuation in proceedings under Chapters 7 through 10 of this part shall be determined in accordance with Section 1249 a of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this chapter, the date of the filing of their report with the court shall be deemed the date of trial for the purpose of determining the date of valuation.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) derives from an enactment of 1909 (Stats. 1909, Ch. 684, p. 1038, § 5). The section is intended to accord, as near as may be, with provisions of Code of Civil Procedure Section 1249a that

§ 4203

specify the date of valuation for condemnation proceedings generally. See City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929); City of Los Angeles v. Morris, 74 Cal. App. 473, 241 Pac. 409 (1925). The section is amended to accord with Code of Civil Procedure Section 1249a.

SEC. 14. Section 4204 of the Streets and Highways Code is amended to read:

4204. No improvements placed upon the property ~~proposed to be taken~~, subsequent to the ~~date at which the right to compensation and damages has accrued~~, service of summons shall be included in the assessment of compensation or damages.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) is amended to conform to Code of Civil Procedure Section 1249.1 which provides that improvements placed upon the property after the service of summons shall not be included in the assessment of compensation or damages.

SEC. 1243.4 Section 1243.4 of the Code of Civil Procedure  
is repealed.

~~§1243.4. 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 plaintiff 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, in the manner and subject to the conditions prescribed by law.~~

} all in  
strikeout  
type

Comment. Section 1243.4 is superseded by Code of Civil Procedure Sections 1269.01, 1269.02, and 1269.03.

SEC. 16. Section 1243.5 of the Code of Civil Procedure is repealed.

~~§1243.5. Proceedings Where~~  
~~Proceedings to Take~~ (a) In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(c) At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been

all in strike-out  
type

served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot with due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

all in strike-out  
type

Comment. Section 1243.5 is superseded by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01) of Title 7.1 of Part 3 of the Code of Civil Procedure. The provisions relating to the deposit are superseded by provisions contained in Chapter 1; the provisions relating to an order for possession prior to judgment are superseded by provisions contained in Chapter 2.

The disposition of the various provisions of Section 1243.5 is indicated below:

<u>Section 1243.5</u>	<u>Recommended Legislation</u>
Subdivision (a) -----	1268.01, 1269.01, 1269.02, 1269.03
Subdivision (b) -----	1269.01, 1269.02, 1269.03
Subdivision (c) -----	1269.04
Subdivision (d) -----	1268.02
Subdivision (e) -----	1268.09
Subdivision (f) -----	1269.07



SEC. 17. Section 1243.6 of the Code of Civil Procedure is repealed.

~~§ 1243.6. Deposit in State Treasury.~~  
~~When money is required to be deposited as provided by Section 1243.5, 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.~~

} all in strikes-out  
type

Comment. Section 1243.6 is superseded by Section 1268.10 of the

Code of Civil Procedure.

is repealed.

2

~~1243.7. Withdrawal of money deposited.~~  
 (a) At any time after money has been deposited ~~as provided in Section 1243.5~~, the party whose property or interest in property is being taken ~~may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his property or property interest. Under such application, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this section, to be paid to such applicant from the money deposited in connection with such property or property interest.~~

(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

If the undertaking required by this subdivision is executed by an admitted surety

all in strike-out type

insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.

If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

(c) The 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 20 days after such service of the application, or until the time for all objections has expired, whichever is later.

(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed or that the amount of, or the sureties upon, such an undertaking are insufficient.

(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground 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 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 such 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 the 20-day period, said amount shall not be withdrawn until the applicant causes such personal service to be made.

(f) 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

all in strike-out type

parties and shall determine the amounts to be withdrawn, if any, and by whom [REDACTED]. If the court determines that a party is entitled to withdraw any portion of a deposit which another party claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereon, 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.

(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law [REDACTED] of all defenses in favor of the persons receiving such payment except [REDACTED] his claim for greater compensation. Any amount so paid to any party shall be credited upon [REDACTED] the judgment [REDACTED] in the eminent domain proceeding.

(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the [REDACTED] eminent domain proceeding shall be [REDACTED] paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the [REDACTED] eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within [REDACTED] after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon. [REDACTED]

all in strike-out type

Comment. This section is superseded by Chapter 1 (commencing with Section 1268.01) of Title 7.1 of Part 3 of the Code of Civil Procedure.

§ 1243.7

The disposition of the various provisions of Section 1243.7 is indicated below.

<u>Section 1243.7</u>	<u>Recommended Legislation</u>
Subdivision (a) -----	1268.04, 1268.05
Subdivision (b) -----	1268.06
Subdivision (c) -----	1268.04, 1268.05
Subdivision (d) -----	1268.05
Subdivision (e) -----	1268.05
Subdivision (f) -----	1268.05
Subdivision (g) -----	1268.07
Subdivision (h) -----	1268.08

SEC. 13. Section 1254 of the Code of Civil Procedure is repealed.

9  
~~1254. Proceedings in eminent domain~~

(a) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of 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 the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

(b) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into

court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

(c) At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.

(d) At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this section, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this section.

(e) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court 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.

all in strike-out type

(f) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court.

The court, or a judge thereof, upon application by such defendant, shall 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 is 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.

(g) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid without interest to the party entitled thereto, and the court in which the eminent

domain proceeding is pending shall enter judgment therefor against such party.

(h) 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

all in strike-out  
type

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~~ 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 ~~the~~ Section 16430, ~~the~~ Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) 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 designation.

(i) 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.

(j) 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~~ the money ~~so~~ deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(k) 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.

all in strikes-out  
type



Comment. The disposition of the provisions of Section 1954 is indicated below.

<u>Section 1254</u>	<u>Recommended Legislation</u>
Subdivision (a) -----	1270.01
Subdivision (b) -----	1270.02
Subdivision (c) -----	1270.03
Subdivision (d) -----	1270.04
Subdivision (e) -----	1270.08
Subdivision (f) -----	1270.05
Subdivision (g) -----	1270.07
Subdivision (h) -----	1270.09, Government Code §§ 16425-16427
Subdivisions (i) and (j) -----	Government Code §§ 16425-16427
Subdivision (k) -----	1257(b)

SEC. 20. This act shall become operative only if Senate Constitutional Amendment No. \_\_\_\_ of the 1967 Regular Session of the Legislature is approved by the vote of the electors, and in such case this act shall become operative on January 1, 1969.

Comment. There is some doubt whether the right to take possession of property prior to judgment can be extended to condemnors and for purposes not listed in Section 14, Article I, of the California Constitution. See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902); compare Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 Pac. 218 (1892); Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907). The Constitutional Amendment referred to in this section would make it clear that the Legislature may by statute extend this right to additional entities and for additional purposes. The recommended legislation would become effective only if the Constitutional Amendment is adopted by the voters.

RECOMMENDED 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 1967 Regular Session  
commencing on the \_\_\_ day of January, 1967, 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. (a) Except as provided in subdivisions (b), (c),  
and (d) of this section:

(1) 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.

(2) Subject to the provisions of Section 23a of Article XII,  
just compensation shall be assessed in a court of record as in other  
civil cases and, unless a jury is waived, shall be determined by a  
jury.

(b) Subject to subdivision (d) of this section, in a proceeding  
in eminent domain brought by the state or a county, city, district,  
or other public entity to acquire any property, whether a fee or other  
interest be sought, the plaintiff may take possession of the

property or property interest following commencement of the proceeding and prior to the final judgment if the property or property interest being acquired is (1) any right of way, or (2) lands to be used for reservoir purposes.

(c) Subject to subdivision (d) of this section, with respect to any cases not covered by subdivision (b) of this section, the Legislature may specify and classify the entities or persons by which, the public purposes for which, and the manner in and the time at which, possession of any property or property interest may be taken following commencement of the eminent domain proceeding and prior to final judgment.

(d) Before possession of any property or property interest is taken in an eminent domain proceeding, just compensation shall be made to the owner or the plaintiff shall deposit such amount of money as the court determines to be the probable just compensation to be made for the property or property interest and any damage incident to the taking. The money so deposited shall be available immediately to the person or persons the court determines to be entitled thereto and may be withdrawn in accordance with such procedure and upon such security as the Legislature may prescribe. ; -and-no-right-of-way-or lands-to-be-used-for-reservoir-purposes-shall-be-appropriated-to-the use-of-any-corporation,-except-a-municipal-corporation-or-a-county or-the-State-or-metropolitan-water-district,-municipal-utility-district, municipal-water-district,-drainage,-irrigation,-levee,-reclamation-or water-conservation-district,-or-similar-public-corporation-until-full compensation-therefor-be-first-made-in-money-or-ascertained-and-paid into-court-for-the-owner,-irrespective-of-any-benefits-from-any-improvement-proposed-by-such-corporation,-which-compensation-shall-be-ascertained

by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right-of-way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.

The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

Comment. The effect of this amendment is as follows:

Subdivision (a). The amendment makes no change in existing constitutional law respecting "public use," "just compensation," "inverse condemnation proceedings," "date of valuation," or the general requirement that property not be taken or damaged until compensation is made to or paid into court for the owner. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), and City and County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955)(public use); Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940), and Sacramento etc. R.R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909)(just compensation); Bauer v. Ventura County, 45 Cal.2d 276, 289 P.2d 1 (1955), and Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505 (1942)(inverse condemnation proceedings); Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907), and McCauley v. Weller, 12 Cal. 500 (1859)(pre-payment or deposit). Section 14 has been held not to prescribe the date of valuation for property taken by eminent domain proceedings, nor to restrict the Legislature in fixing such date at any point of the proceedings. See City of Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526 (1927); Tehama County v. Brian, 68 Cal. 57, 8 Pac. 673 (1885); City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929). This is so even in those cases in which the condemnor takes possession of the property prior to judgment. See City of Los Angeles v. Tower, 90 Cal. App.2d 869, 204 P.2d 395 (1949). This amendment makes no change in these principles.

The second paragraph of this subdivision states the established judicial construction of the deleted language requiring that "compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." See City of Los Angeles

v. Zeller, 176 Cal. 194, 167 Pac. 849 (1917). With respect to the requirement that the power of eminent domain be exercised through judicial proceedings, see Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750 (1911); and Weber v. Board of Suprs. Santa Clara Co., 59 Cal. 265 (1881). Regarding the assurance of trial by jury in condemnation and inverse condemnation proceedings, see Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (1915), and Highland Realty Co. v. San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956).

The purpose of making the second paragraph "subject to the provisions of Section 23a of Article XIII" is to prevent any implication that Section 23a is superseded by the readoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made in takings of public utility property. Section 23a is limited in application to property that is already devoted to a public use. See S.H. Chase Lumber Co. v. R.R. Commission, 212 Cal. 691, 300 Pac. 12 (1931). The procedure for determining just compensation adopted pursuant to Section 23a (see Public Utilities Code Sections 1401-1421) is not exclusive and is an alternative to proceedings under Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. Further, in cases in which compensation is determined by the Public Utilities Commission, the procedures of the Code of Civil Procedure other than those for assessing compensation are available to the parties. See Citizen's Utilities Co. v. Superior Court, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963). This amendment makes no change in these rules.

Subdivision (b). This subdivision restates the existing authorization for the taking of immediate possession in right-of-way and reservoir cases, except that the subdivision has been extended to include all governmental entities and agencies. The former language included most, but not all, public entities, and created serious questions whether or not particular entities were included. See Central Contra Costa etc. Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950).

Subdivision (c). This subdivision is new, and clarifies the power of the Legislature to determine which public entities should have the right to immediate possession and the public purposes for which the right may be exercised. Essentially, the subdivision removes any doubt whether the Legislature may authorize immediate possession in any cases other than those provided for by the amendments of 1918 (rights-of-way) and 1934 (reservoirs). See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, at B-1 (1961).

Subdivision (d). This subdivision makes explicit the requirement that, before possession or use of property is taken, there be a deposit of the probable amount of compensation that eventually will be awarded in the proceeding. The subdivision also adds a requirement, not heretofore imposed by this section, that the funds be available to the property owner, rather than merely be posted as security. The subdivision thus accords with decisions of the California Supreme Court holding that, before property is taken, compensation must be paid into court for the owner. See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). The subdivision contemplates that the amount to be deposited be determined by the court, rather than by jury, and upon ex parte or other procedure provided by legislation.



Language deleted. In deleting the second portion of the first sentence of this section, this amendment eliminates language prohibiting "appropriation" of property in certain cases, "until full compensation therefor be first made in money or ascertained and paid into court for the owner." This language adds nothing to the meaning of subdivision (a)(1). See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by new subdivision (d).

Also deleted is the language requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This requirement respecting the offsetting benefits has been held inoperative because of its conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902); People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 (1939). In deleting the language, this amendment clarifies the power of the Legislature to deal with the offsetting of benefits in eminent domain proceedings. The subject is now governed by Section 1248 of the Code of Civil Procedure.

The proviso to the first sentence of this section, and the next following sentence, dealing with immediate possession, are superseded by subdivisions (b), (c), and (d).

In deleting the last sentence of this section, this amendment eliminates the provision that, in effect, property may be taken by eminent domain for certain logging or lumbering railroads, and that such taking constitutes the taker a common carrier. This provision, added in 1911, has never been construed or applied by the California appellate courts. Takings for the purposes mentioned in the sentence are authorized by Section 1238 of the Code of Civil Procedure and Section 1001 of the Civil Code. The portion

of the sentence making the taker a common carrier is merely an instance of a broader proposition inherent in the nature of the power of eminent domain.

See Traber v. Railroad Commission, 183 Cal. 304, 191 Pac. 366 (1920);

Western Canal Co. v. Railroad Commission, 216 Cal. 639, 15 P.2d 853 (1932).

Deletion of the sentence clarifies, rather than changes, existing law.