

11/7/66

Memorandum 66-68

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

BACKGROUND

At the October meeting, the Commission was unable to take action on the various policy questions presented by this recommendation because only three or four members were present when the various questions were discussed. The Commission requested that we identify the major policy questions and the considerations pertinent to them so that they could be discussed at the November meeting when more members of the Commission were present.

GENERAL POLICY QUESTIONS

Constitutional Amendment

The State Bar Committee unanimously objects to the proposed constitutional amendment. In discussing this matter at the October meeting, the Commissioners present took the view that a constitutional amendment should not be submitted to the 1967 legislative session. They concluded that there was little chance of obtaining approval of such an amendment in 1967 and that perhaps the matter should be left to the Constitutional Revision Commission.

It was also concluded that the attention of the Commission should be directed to drafting appropriate statutory provisions dealing with possession prior to judgment and related problems with a view to possibly submitting recommended legislation on this subject to the 1967 session without a constitutional amendment. Members of the Commission present at the October meeting indicated that they wished to review Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902), and Heilbron v. Superior Court,

151 Cal. 271, 90 Pac. 706 (1907), before making a decision on whether to take the position that the recommended legislation would be constitutional under the existing constitutional provision. The opinion in the Steinhart case is attached as Exhibit III (green); the opinion in the Heilbron case is attached as Exhibit IV (buff). The staff believes that the Steinhart decision is based on the fact that the property owner was not entitled to draw down the deposit, not on the fact that the determination as to the amount of the deposit was not made by the jury. It is also noted that the two amendments to the Constitution to authorize immediate possession in right of way and reservoir cases were needed to authorize immediate possession without permitting the property owner to draw down the deposit. Hence, the existence of these two amendments does not necessarily lead to the inference that immediate possession cannot be extended to other cases without a constitutional amendment if the property owner is permitted to draw down the deposit before he is required to surrender possession of the property.

The staff recommends that the Commission not submit a constitutional amendment on this subject to the 1967 legislative session. We see no chance for legislative approval of such an amendment and, because of the strong objections of the State Bar Committee and others to the amendment, we doubt that it would be approved by the people even if the Legislature could be persuaded to submit it to the people for approval. At the same time, if a recommendation is made to the 1967 session, we believe it should include a discussion of the constitutional problem and include a recommended constitutional amendment. The recommendation should include a statement that the Commission has concluded that the right to possession can be extended

without a constitutional amendment and that the Commission does not recommend that a constitutional amendment on this subject be submitted at this time because the matter is one that should be considered by the Constitutional Revision Commission in connection with its overall revision of the Constitution.

We suggest that you read the Steinhart and Heilbron cases, together with the analysis of the problem in the research study, to see if you can support this conclusion.

Submission of legislation on this subject to 1967 Legislature

The four members of the Commission who were present when this matter was discussed at the October meeting were unable to reach a decision on whether legislation on this subject should be submitted to the 1967 legislative session.

It was pointed out that submission of legislation on this subject to the 1967 legislative session would present to the Legislature one controversial area of the entire topic and would permit the Legislature to decide the policy questions involved in this area before the entire comprehensive statute was drafted. The decisions made in the 1967 session could be taken into account in drafting the comprehensive statute. Having decisions on the immediate possession policy questions would be helpful in determining what approach to take on other related provisions. Even if the recommended legislation were not enacted by the Legislature, the experience would be helpful in determining what recommendation to submit in 1969.

On the other hand, it was pointed out by Mr. Huxtable (representing the State Bar Committee) and others that the decisions on the policy questions involved in immediate possession are dependent in part on what action is

taken on compensation. For example, immediate possession is less objectionable if moving expenses are allowed in all cases and if compensation is made for losses directly related to the shortness of the time allowed for the move from the property being taken. It was pointed out also that the general reaction to the recommended legislation on the part of the State Bar Committee was negative and that it is unlikely that it can be enacted if the State Bar objects. A recommendation covering all aspects of eminent domain--the comprehensive statute--would, on the other hand, present a balanced package, not just a package that would be regarded as detrimental to the property owners.

Two members present at the October meeting took the view that the Commission should attempt to draft legislation on this subject for the 1967 session. However, one of these members--Mr. Ball--took the view that he would approve such legislation only if substantial changes were made in the recommended legislation and we fear that such changes would result in legislation that would not be supported by public agencies. More important, changes of the nature suggested by Mr. Ball would require a substantial redrafting and reconsideration of the entire procedure in immediate possession cases and will delay completion of work on this aspect of the subject until a time that will not permit us to submit a recommendation to the 1967 session.

The staff has concluded that we should not attempt to prepare legislation on this subject for the 1967 session. Much as we would like to submit a recommendation in 1967, we believe that the general adverse reaction of the State Bar Committee requires that we make a careful reexamination of the entire proposal. Significant changes will no doubt be needed to devise legislation that would meet with the approval or minimize the objections of the State Bar Committee.

The staff has attempted to revise the proposed legislation to make the changes we believe are needed, but we do not believe that the Commission should approve a recommendation on this subject without substantial additional consideration by the Commission. Since we believe that this will require consideration at a number of meetings, we see no possibility of submitting a recommendation in 1967. In fact, even if a recommendation were approved at the November meeting, we doubt that it would be possible to have the printed pamphlet available before March 1, 1967. This would mean that the Legislature would have little time within which to give the recommendation the consideration it will require.

Accordingly, the staff recommends that the Commission continue to work on this aspect of the subject with a view to publishing a tentative recommendation and research study. You will recall that we followed this practice on the Evidence Code. We have already determined to follow this procedure on all other aspects of eminent domain. After we have published tentative recommendations and research studies on all aspects of the subject, we will then prepare the recommendation that will propose the enactment of the comprehensive statute.

PROPOSED CONSTITUTIONAL AMENDMENT

With respect to the proposed constitutional amendment, the State Bar Committee has suggested that it might be possible to amend Section 14 of Article I to specify the additional cases in which immediate possession would be available. In other words, the existing immediate possession "proviso" would be extended to include certain takings, such as those for school purposes, which would warrant immediate possession. The Commissioners

present at the last meeting generally took the view that this was not feasible and that we should adhere to our approach of bringing the entire matter into legislative competence insofar as practicable. For the last several meetings no significant suggestions for change in the form of the amendment have been made. The staff therefore recommends that the existing proposed amendment be retained whatever action the Commission may take as to a recommendation to the Legislature. Consideration should be given, however, to deleting from the proposed amendment any mention of takings for right of way or reservoir purposes.

AMENDMENTS

Code of Civil Procedure Section 1247 (page 16)

Subdivision (4) of this section (added in this proposal) has been rewritten in the interest of clarity. The subdivision merely restates case law and certain language contained in Code of Civil Procedure Section 1254 (repealed in this proposal). The subdivision is intended to state the relatively simple proposition that after the filing of a complaint in eminent domain, the condemnation court determines and enforces the right to possession as between condemnor and condemnee, and that other actions, such as unlawful detainer, are precluded. In the form shown, the subdivision is acceptable to the public agencies and others.

Code of Civil Procedure Section 1249 (page 18)

Subdivision (b) of this section and the portions of the Comment have been rewritten as a result of the discussion at the last meeting. Previous drafts of this subdivision have attempted to deal with the problem in terms of increases or decreases in "market value" prior to the date of valuation. This draft, in keeping with the suggestion of the State Bar Committee, is calculated to achieve the same effect, but address the

problem in terms of factors to be considered in determining the "actual value" of the property, under subdivision (a) of the section, on the date of valuation.

Attached as Exhibit I (pink), for purposes of comparison, are Sections 601-604 of the Pennsylvania Eminent Domain Code. The significant language in Section 602 requires that market value be determined "immediately before the condemnation and as unaffected thereby." That entire section, however, merely states the general "before and after" approach to determining compensation. In contrast, Code of Civil Procedure Section 1248 requires separate determination of the value of property taken, severance damages, and benefits. However, indicating the factors to be considered in determining "actual value" under subdivision (a) of Code of Civil Procedure Section 1249 achieves the same effect as Section 602 insofar as this problem is concerned. It should be noticed, however, that notwithstanding Section 602, Section 604 of the Pennsylvania Code, also states the principle of disallowing changes in market value prior to the date of valuation "due to the general knowledge of the imminence of condemnation."

There are obvious problems in stating precisely the factors that are to be disallowed in determining "actual value" on the date of valuation. The statement of the four factors in this draft may overlap or be subject to improvement, but each of the subparagraphs is of some significance.

Attached as Exhibit II (yellow) is a succinct article from the Santa Clara Lawyer dealing with this problem. The essential points to the article are (1) that there is a significant, remediable problem in this area, and (2) that existing case law is confused and does make an unfair differentiation between cases of appreciation in value and cases of depreciation in value.

Code of Civil Procedure Section 1249a (page 22)

This section, which prescribes the date of valuation, has been revised to eliminate the six months compromise reflected in previous drafts. The reaction to that proposal by the State Bar Committee, the public agencies, and even the property owners was essentially negative. Under this draft, existing law is retained except that the condemnor can assure itself an early date of valuation by depositing probable just compensation. Similarly, the result of the Murata decision is reversed, unless the condemnor deposits the amount of the award following the first trial.

Code of Civil Procedure Section 1255a (page 33)

In subdivision (c) of this section, which deals with recovery of expenses upon abandonment of the proceeding, the language following the paragraph (2) has been rewritten. The public agencies object strongly to the allowance of any expenses, including attorney or appraisal fees, prior to the filing of the complaint. The Commissioners present at the last meeting took the view that such expenses should be recoverable if they are "actually and reasonably incurred as a result of the proceeding to take the property." Admittedly, the language leaves a measure of discretion to the court.

Chapter 1 (Sections 1268.01-1268.10)(Page 42)

This chapter dealing with the depositing of probable just compensation prior to judgment has been generally approved by most commentators. Unfortunately, the chapter doesn't accomplish much apart from its relationship to "immediate possession" (Chapter 2) and some sort of provision for the depositing of probable compensation at the option of the condemnee (Section 1269.05). The public agencies have indicated reservations about the liberalized bonding requirements, but the Commissioners present at the last meetings were not disposed to change the existing draft.

In section 1268.02 (page 46), a new third sentence has been added to permit the court to stay its redetermination of probable compensation pending its disposition of a motion for a new trial.

In Section 1268.05 (page 51) a minor technical change has been made in the last sentence to permit the court to stay its redetermination of probable compensation pending its disposition of a motion for a new trial.

Chapter 2 (Section 1269.01-1269.07)(page 58)

This chapter contains the de key provisions in the recommendation. The Commissioners will recall that previous drafts have reflected three distinct forms of immediate possession, as follows:

- (1) Existing practice in reservoir and right of way cases (Section 1269.01)
- (2) Ex parte procedure, with a motion to modify, in all cases in which the resolution to condemn is conclusive of any issue of "public necessity." (Section 1269.02)
- (3) Immediate possession in all other cases by noticed motion procedure (Section 1269.03).

This draft has been revised to limit Section 1269.01 to the agencies mentioned in the Constitution, to merge the second and third categories, and to provide noticed motion procedure for this category (Section 1269.02). A new Section 1269.03 dealing with appeals has been added. A possible alternative to either ex parte or noticed motion procedure that would probably be acceptable to property owners is outlined hereafter.

Alternative scheme for immediate possession

1. The condemnor, whether or not entitled to take immediate possession, is authorized to deposit the amount it believes to be the probable just compensation. Upon making such a deposit, the condemnor shall serve on each party having an interest in the property, a copy of the appraisal report upon which the deposit is based. Upon motion of the condemnor or any party having an interest in the property, the court shall determine the amount of probable just compensation and the condemnor shall thereupon deposit such additional amount, if any, as is required to bring the deposit into conformity with the court's determination.

2. After a deposit of probable just compensation has been made (the amount originally deposited or as determined by the court), the condemnor may apply on noticed motion for an order for immediate possession.

3. If immediate possession is sought for a right of way or for reservoir purposes, the court shall hear such motion within five days after service thereof, shall determine the amount of probable just compensation and fix the effective date of the order for possession, which date shall be not more than 30 days after the date that the notice of the motion for the order of immediate possession was served on the party in possession of the property and the court in exceptional circumstances may shorten the time to not less than three days after such service but not in any event before the hearing of the motion.

4. If immediate possession is sought for some other purpose, the court upon such motion shall determine the amount of probable just compensation and fix the effective date of the order for possession, such date shall not be earlier than 30 days after the date that the notice of

the motion for the order of immediate possession is served on the party in possession of the property. In determining the effective date of the order for possession, the court shall weigh the hardship to the condemnor and condemnee.

5. Security is required for any amount withdrawn that exceeds the amount originally deposited by the condemnor.

Policy questions

The principal decisions that must be made with respect to the chapter are (a) the extent, if any, to which the existing authorization for immediate possession is to be broadened, and (b) the procedure to be provided (1) for cases in which such possession is now authorized and (2) for such additional cases as may be brought within the authorization. The Commission heretofore has taken the position that early possession should be available in all cases except for the rather unusual instances of so-called "private condemnation." The Commission has also generally favored ex parte procedure with liberal provisions for modification at the behest of the property owner. The State Bar Committee opposes any extension of the area of immediate possession and particularly opposes ex parte procedure. Mr. Ball indicated at the last meeting that he favored the extension of immediate possession, but only if the property owner is assured notice and a right to be heard before the order for possession is made. The public agencies, of course, are adamantly opposed to any substantial changes in procedure in those cases in which immediate possession is now available.

This draft is suggested by the staff simply as an alternative and as a compromise. Another possibility would be to work out a scheme in which the property owner and his counsel, if any, are notified of the application

for an order for possession. On his demand, he would be given an opportunity to be heard on the questions of the right to take, the amount of the deposit, and the date of possession.

Public agencies generally take the position that the allowance of any discretion to the condemnation court vitiates the benefit of immediate possession by eliminating any certainty as to the date on which the property will be available. It seems probable that they would be successful in resisting any change in existing practice in right of way and reservoir cases. On the other hand, property owners probably can object successfully to ex parte procedure in the area to which provisions for immediate possession are extended. The staff, therefore, recommends the compromise reflected in the draft.

Section 1269.05 (page 73)

Subdivision (a) of this section has been changed to deal with the problem of the small dwelling on the large plot of land. The effect of the change is to require deposit of the value of the dwelling and of "so much of the land . . . as may be required for its convenient use and occupation." This standard is taken from the mechanic's lien law.

Previous drafts of this section have entitled the condemnor to an order for possession effective 30 days after its making the deposit of probable just compensation. The State Bar Committee objected strenuously to that feature of the section. The objection was that, faced with a loss of possession within 30 days, no property owner would make the motion authorized by the section. This draft attempts to deal with the problem by providing, in effect, that the making of the deposit does not entitle the condemnor to possession. Under Section 1269.06 (page 75), however, the condemnor is

entitled to possession if the property owner withdraws the deposit.
As no interest accrues on the amount deposited after the deposit, the homeowner would have no undue incentive to leave the amount on deposit. And, of course, most condemnors could invoke the immediate possession procedures of Sections 1269.01 or 1269.02.

All public agencies are strenuously opposed to this section or to any provision requiring a deposit of probable compensation at the behest of the property owner. The Commission as present at the last meeting, however, were disposed to retain this section if the two problems mentioned above can be overcome.

Respectfully submitted,

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ARTICLE VI

Just Compensation and Measure of Damages

Section 601. Just Compensation.—The condemnee shall be entitled to just compensation for the taking, injury or destruction of his property, determined as set forth in this article.

Comment:

This section is derived from the Pennsylvania Constitution, Article I, §10, and Article XVI, §8, and indicates that just compensation is defined and is to be determined as set forth in this article.

Section 602. Measure of Damages.—Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after such condemnation and as affected thereby, and such other damages as are provided in this article.

In case of the condemnation of property in connection with any urban development or redevelopment project, which property is damaged by subsidence due to failure of surface support

resulting from the existence of mine tunnels or passageways under the said property, or by reason of fires occurring in said mine tunnels or passageways or of burning coal refuse banks the damage resulting from such subsidence or underground fires or burning coal refuse banks shall be excluded in determining the fair market value of the condemnee's entire property interest therein immediately before the condemnation.

Comment:

This section sets forth what damages the condemnee is entitled to when his property is condemned. The first paragraph of this section codifies existing case law by adopting the "before and after rule," which is firmly entrenched in the law, *Brown v. Commonwealth*, 399 Pa. 156 (1960), and adds other items of damages as provided in Sections 608, 609, 610, 611, 612, 613 and 614.

Section 603. Fair Market Value.—Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

- (1) The present use of the property and its value for such use.
- (2) The highest and best reasonably available use of the property and its value for such use.
- (3) The machinery, equipment and fixtures forming part of the real estate taken.
- (4) Other factors as to which evidence may be offered as provided by Article VII.

Comment:

This section is intended to enlarge the traditional definition of fair market value to conform to modern appraisal theory and practice, which differentiates between market price, which is the price actually paid for a property under conditions existing at a certain date regardless of pressures, motives or intelligence, and market value, which is what a property is actually worth, a theoretical figure which assumes a market among logical buyers under ideal conditions.

This section contemplates first a "willing" seller and buyer. This means that neither is under abnormal pressure or compulsion, and both have a reasonable time within which to act.

Secondly, it contemplates an "informed" seller and buyer, which means that both are in possession of all the facts necessary to make an intelligent judgment.

Clause (1) will permit consideration of any special value the property may have for its existing use, including improvements uniquely related to that use and, in conjunction with the provisions of Section 705(2)(iv), will provide for proper valuation of special use properties, such as churches, which have no normal market, because it presupposes a buyer who would purchase it for its existing use.

Clause (2) permits the traditional consideration of the property's value for the highest and best use to which it is adapted and capable of being used, provided such use is reasonably available. If it is claimed that the property is more valuable for a use other than its existing use, it should be shown that such use is reasonably available after considering the existing improvements, the demand in the market, the supply of competitive property for such use, the zoning and all other reasonably pertinent factors. Existing zoning would ordinarily be controlling, but evidence may be given of a sufficient probability of a change in zoning as to be reflected in market prices of similarly zoned properties. See *Snyder v. Commonwealth*, 412 Pa. 15 (1963).

Clause (3) is in accord with existing law since it assumes that the machinery, equipment and fixtures are part of the real property taken. See *Diamond Mills Emory Co. v. Philadelphia*, 8 Dist. R. 30 (1898), and also *Philadelphia & Reading Railroad Co. v. Gatz*, 113 Pa. 214 (1886).

Clause (4) was included in order to make it clear that in ascertaining fair market value, all matters which may properly be introduced into evidence as provided in Article VII of this act may be considered.

It is not intended by this section to repeal statutes providing for the consideration of additional factors or criteria. See, for example, *Second Class County Port Authority Act, 1956*, April 6, P. L. (1955) 1414, as amended (55 P. S. §551 et seq.).

Section 604. Effect of Imminence of Condemnation.—Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

Comment:

This section is new. Although it has no counterpart in existing law, the language of this section is based on the language in *Olsen & Fruek, Inc. v. Commonwealth*, 399 Pa. 266 (1960), at page 272, where the court used the phrase "general knowledge of the imminence of . . . condemnation. . . ." In many cases, condemnees suffer an economic loss because of an announcement of the proposed condemnation by the condemnor prior to the actual condemnation. Where such announcement is made and publicized, which may be several years before the actual condemnation, the tenants of the condemnee move out or fail to renew their leases and new tenants cannot be obtained because of the proposed condemnation. Under these condi-

tions, the property which is to be condemned is economically deteriorated through no fault of the owner-condemnee, and as a consequence, at the time of actual condemnation, the amount of damages may be affected to the detriment of the innocent condemnee because of lack of tenants or because the condemnee was forced to rent at lower rentals for short terms. This section permits the condemnee to show these economic circumstances in order to prove what his damages actually are at the date of taking. On the other hand, in many cases an announcement of the proposed condemnation causes an inflation of property values and as a result the condemnor may have to pay more for the condemned property. The condemnor may show this increase in the value of the condemned property. Any decline or increase in the fair market value caused by the general knowledge of the imminence of the condemnation is to be disregarded.

Physical deterioration of the property which may occur because of the imminence of the condemnation is also to be disregarded in determining fair market value if the condemnee has acted reasonably in maintaining and protecting his property.

EXHIBIT II

CONSEQUENCE OF ANTICIPATED
EMINENT DOMAIN PROCEED-
INGS—IS LOSS OF VALUE
A FACTOR?†

William Anderson*

As a practical matter, months and years usually elapse between the time when preliminary plans for a particular project are announced by a public agency and the time when the summons initiating an action for condemnation of land required for the project issues. During the intervening period, the inhabitants of the affected area are usually aware of the nature and extent of the project and if it is of a kind that would be injurious to the area, the fact of its imminence hangs, as one writer has said, "... like the sword of Damocles over the heads of the landowners. . . ." This circumstance cannot fail to diminish the value of their land. When the public agency subsequently attempts to condemn the land required for the project, should it receive the advantage of such a depreciation in value, or should the extent of such depreciation be determined in order that it may be restored to the landowner? During 1963, the District Court of Appeals considered this question on two occasions within the space of six months and reached disparate conclusions.

In *City of Oakland v. Partridge*² (decided by Division 2 of the Second District on March 20, 1963), the court, referring to two earlier cases,³ held inadmissible evidence that the prospect of a freeway had "blighted" the property in question and reduced its income potential.⁴ To admit such evidence, the court said, would be to indulge in "unfathomable speculation."⁵ In *People v. Lillard*⁶ (decided by the Third District on August 15, 1963) counsel for the condemnee had asked a State right-of-way agent on cross-examination if the State had not been threatening to close various access

† The views expressed herein are those of the author and do not necessarily reflect those of the City of Mountain View, California.

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¹ 4 NICHOLS, *Law of Eminent Domain* § 12.3151 (Rev. 3d ed. 1962).

² 214 Cal. App. 2d 196, 29 Cal. Rptr. 388 (1963).

³ *People v. Lucas*, 155 Cal. App. 2d 1, 317 P.2d 104 (1957); *Atchison, T. & S.F.R.R. v. Southern Pac. Co.*, 13 Cal. App. 2d 505, 57 P.2d 575 (1936).

⁴ 214 Cal. App. 2d at 202-03, 29 Cal. Rptr. at 392.

⁵ 214 Cal. App. 2d at 203, 29 Cal. Rptr. at 392.

⁶ 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (1964).

openings and take portions of the property in question during the previous 10 years. The lower court sustained an objection to the question⁷ and the court affirmed the ruling, but indicated, referring to a recent case,⁸ that if there had been some evidence of threatened condemnation or of a depression in the market value "... (p)roperly framed and with a foundation-laid inquiry, cross-examination of an adverse witness on this subject would have been proper."⁹

Section 1249 of the *California Code of Civil Procedure* provides that the measure of compensation for property taken in eminent domain proceedings is to be the "actual value" of the property at the time of the issuance of the summons, except that if the case is not tried within one year of the commencement of the action and the delay was not caused by the condemnee, the measure of damages shall be the "actual value" of the property at the time of the trial.¹⁰ It is well settled in California and elsewhere that "actual value" is ordinarily measured by "market value,"¹¹ and that "market value," in turn, is estimated with reference to the uses to which the property is adapted.¹² The burden of proof of market value in California and most other jurisdictions is on the condemnee.¹³ Thus the issue raised by the *Partridge* and *Lillard* cases, cast in terms of applicable law, is: If an announcement of projected eminent domain proceedings abridges the uses to which the subsequently condemned land is adapted, may the condemnee introduce evidence of this abridgment, so that it may be excluded as a factor in the determina-

⁷ 219 Cal. App. 2d at 377, 33 Cal. Rptr. at 194.

⁸ *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959).

⁹ 219 Cal. App. 2d at 377, 33 Cal. Rptr. at 194.

¹⁰ CAL. CODE CIV. PROC. § 1249 provides in part:

For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken and the basis of damages to property not actually taken but injuriously affected, in all cases where damages are allowed as provided in section one thousand two hundred forty-eight; provided, that in any case in which the issue is not tried within one year after the date of commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have occurred at the date of the trial.

¹¹ See, e.g., *People v. LaMacchia*, 41 Cal. 2d 738, 751, 264 P.2d 15, 24 (1953); *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 68, 20 Pac. 372, 375 (1888); *United States v. Petty Motor Co.*, 327 U.S. 372, 379 (1945). See cases cited 4 NICHOLS, *op. cit. supra* note 1, § 12.1 n.12.

¹² See, e.g., *People v. LaMacchia*, 40 Cal. 2d 738, 751, 264 P.2d 15, 24 (1956); *People v. Ocean Shore R.R.*, 32 Cal. 2d 406, 425, 196 P.2d 570 (1948); *Olsen v. United States*, 292 U.S. 243, 255 (1934). See cases cited 4 NICHOLS, *op. cit. supra* note 1, § 12.314 n.1.

¹³ See, e.g., *San Francisco v. Tilman Estate Co.*, 205 Cal. 651, 653-54, 272 Pac. 585, 586 (1928); *People v. Thomas*, 108 Cal. App. 2d 832, 840, 239 P.2d 914, 920 (1952). See cases cited 4 NICHOLS, *op. cit. supra* note 1, § 18.5 n.1.

tion of market value?¹⁴ *Partridge* has held that he may not, while *Lillard* has indicated, arguably, that he may.

PRECEDENT

The Partridge Case

Because *Partridge* relied, without comment, on two earlier California cases, any discussion of its holding becomes, for all practical purposes, a discussion of the cases which preceded it. A review of precedent may, therefore, serve as a convenient point of departure for the present discussion.

The cases referred to by the court in *Partridge, Atchison, T. & S.F.R.R. v. Southern Pac.*¹⁵ and *People v. Lucas*,¹⁶ appear to have been the only California cases, apart from *Partridge* and *Lillard*, to have considered the present problem. In *Atchison*, which was the earlier of the two, the District Court of Appeals, held that testimony relevant to a depreciation in value resulting from anticipation of eminent domain proceedings was inadmissible. The court did not refer to any authority in support of the precise proposition but

¹⁴ This problem is to be distinguished at the outset from the entirely different problem arising where decline in value results from a protracted delay in instituting condemnation proceedings subsequent to the formulation of the original plans. A loss resulting from such a delay will give rise to a personal cause of action sounding in Tort, but is not an element to be considered in the determination of market value. For an extensive discussion of this distinction see *Gottelman Brewing Co. v. City of Milwaukee*, 245 Wis. 9, 13 N.W.2d 541, 542-46 (1944) and cases cited therein. *But see* *United States v. Certain Lands in Town of Highlands*, 47 F. Supp. 934 (S.D.N.Y. 1942), discussed *infra*, in text accompanying note 24, where the court apparently fails to recognize the distinction. Another distinguishable, but deceptively similar problem, is that which arises where it is contended that a depreciation in value of the land resulted from the fact that a pending eminent domain action rendered the property unsaleable. It is abundantly clear that depreciation of this character will be disallowed, since the notion of saleability is implicit in the definition of market value. See discussion *infra* in text accompanying note 41, *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959). See generally 4 *NICHOLS*, *op. cit. supra* note 1, § 12.2 n.1.

¹⁵ 13 Cal. App. 2d 505, 57 P.2d 575 (1936), quoted in 1 *ORGZL, Valuation Under Eminent Domain Proceedings* § 105 (2d ed. 1953). The court affirmed the trial court's refusal to permit examination of witnesses on the question of the depreciation in value of land as a result of the commissioner's order authorizing the condemnation on the ground that, to do so, would permit indulgence in "unfathomable speculation."

¹⁶ 155 Cal. App. 2d 1, 317 P.2d 104 (1957). On cross-examination, the condemnees asked an expert witness of the condemnor if he knew that the State Highway Commission, prior to the initiation of the action, had designated alternate routes for the freeway in question, one of which would require the taking of the condemnees' land. The witness answered that he had read about it. The condemnees then asked the witness whether the possibility that the route selected might be one requiring the condemnees' property would affect the development of the land on both sides of the street upon which the condemnees' property was located. The court upheld a ruling of the trial court sustaining an objection to this question.

relied, instead, on the California Supreme Court case of *San Diego Land & Town Co. v. Neale*.¹⁷

Neale is one of a series of California decisions dealing with the approximate converse of the present problem; i.e., the anticipated eminent domain proceedings had resulted or would result¹⁸ in an appreciation in the value of the land. The California courts have uniformly held that this appreciation *may not be considered* as a factor in the calculation of market value.¹⁹

In referring to *Neale*, the court in *Atchison* said:

... [T]he case of *San Diego Land & Town Co. v. Neale* . . . expressly holds, ". . . it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." *If the benefits may not be considered, why consider the detriment?* A value so derived is too remote and speculative.²⁰

From this statement it seems patent that the court concluded that logical consistency required that evidence of depreciation resulting from anticipation of eminent domain proceedings should be excluded in the determination of market value since evidence of appreciation is excluded in the converse situation.²¹ This is justified on the ground that the detriment should not be "considered" if the benefit is not. But, by refusing to admit evidence of depreciation in value resulting from anticipation of eminent domain proceedings, the *Atchison* case, in effect, permitted it to be "considered" as an element in the determination of market value. At the time of issuance of the summons or commencement of the trial, the value of the land would of course, have been diminished to the extent of such depreciation. Unless the condemnee can introduce evidence of this depreciation its amount cannot be determined and added to the value of the property. If the amount of such depreciation is not added to the value of the property, in light of the fact that the burden of proof of the value of the land is on the condemnee, it

¹⁷ 78 Cal. 63, 20 Pac. 372 (1888).

¹⁸ See the text *infra* for a discussion of the difference in the rationales of the courts where it is contended that appreciation has taken place and where it is contended that appreciation will take place in the future and the significance of this difference as it reflects on the reasoning of the *Partridge* case.

¹⁹ *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372 (1888); *City of Pasadena v. Union Trust Co.*, 138 Cal. App. 21, 31 P.2d 463 (1934); *City of Stockton v. Vote*, 76 Cal. App. 369, 244 Pac. 609 (1926); *cf. Los Angeles County v. Hoe*, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

²⁰ *Atchison, T. & S.F.R.R. v. Southern Pac. Co.*, 13 Cal. App. 2d 503, 518, 57 P.2d 375, 581 (1936). (Emphasis added.)

²¹ At 17 Cal. Jur. 2d 652 (1954) the same conclusion is implicit in the writer's statement that ". . . the condemnation project or improvement as such is not a factor to be considered in determining the market value of the land. . . ."

cannot be effectively disallowed as an element in the determination of market value. By contrast, the court need only exclude testimony with respect to appreciation in the value of land as a consequence of anticipated eminent domain proceedings in order to disallow such appreciation as an element in the determination of market value.

If *Atchison* is consistent with *Neale* at all, it is so only in the limited sense that both cases deny the admission of evidence of a change in property values as a result of anticipation of eminent domain. This apparent consistency results in a more fundamental inconsistency in that *Atchison* permits the change in property values to operate as a factor in valuation, whereas *Neale* does not. The courts in other jurisdictions which have dealt with the problem have concluded that disallowance of depreciation in value is the logical converse of disallowance of appreciation.²²

It is submitted that the *Atchison* case is based on an incorrect interpretation of the holding of the Supreme Court in *Neale* and that it is, in reality, contrary to that holding. The *Lucas* case,²³ unhappily, relied on *Atchison* as well as the Federal case of *United States v. Certain Lands in Town of Highlands*.²⁴ *Town of Highlands* involved damages arising from a delay in prosecution of eminent domain proceedings rather than from depreciation resulting from their anticipation.²⁵ This is a fundamentally different issue and the

²² In *St. Louis v. MacAdras*, 257 Mo. 448, 166 S.W. 307, 310 (1914) the court said, "If, when property is taken *in toto*, as here, it be the rule that the owner can have considered, as an element of his damages, the enhanced value of the property occasioned by a partial construction of the railroad, . . . then the converse of the proposition should likewise be true; . . . if a partial construction of the contemplated road and its incidents, above named, had depreciated the property sought to be taken, then the railroad should have the benefit of such depreciation, when it actually came to the taking of the property. No court would stand for this latter rule, and yet it is the very converse of the one sought to be enforced here. The proper rule, when the whole property is being taken, is not to allow the jury to consider either enhancements or depreciations brought about by the construction of the improvement for which the property is being taken." And in *Brainerd v. State*, 74 Misc. 100, 131 N.Y. Supp. 221 (1911) it was said that, "Because the state contemplates constructing an improvement it should not be made to pay for the enhancement in the value of property that follows the announcement or construction of the improvement where it benefits property specially, nor should claimants be made to suffer the damages resulting therefrom where it produces depreciation in the value of property." In *Conner v. Metropolitan Dist. Water Supply Comm.*, 314 Mass. 33, 49 N.E. 593, 596 (1943), the court cites cases disallowing appreciation resulting from anticipated eminent domain in support of its conclusion that depreciation would be similarly disallowed, see 4 *NICHOLS*, *op. cit. supra* note 1, § 12.3151(1) n.20, where "appreciation" cases and "depreciation" cases are cited for the proposition that ". . . in valuing the land the effect of the proposed improvement upon the neighborhood is to be ignored."

²³ *People v. Lucas*, 155 Cal. App. 2d 1, 6-7, 317 P.2d 104, 107 (1957).

²⁴ 47 F. Supp. 934 (S.D.N.Y. 1942).

²⁵ The court in the *Highlands* case said, ". . . the long lapse between time when Congress first publicly evinced an interest in this tract . . . and the com-

cases seem clearly distinguishable on their facts.²⁶ While *Lucas* indicated, in random fashion, a variety of reasons for upholding the lower court's ruling²⁷ it adds little to the *Atchison* case.

It thus appears that the *Partridge* case finds no real support in California precedent and it becomes necessary to refer to other jurisdictions in an effort to find support for it. It has previously been suggested that cases wherein the condemnee is claiming that damages resulted from the condemnor's protracted delay in instituting eminent domain proceedings are distinguishable.²⁸ One other factual situation which has arisen in other jurisdictions is that wherein the condemnee claims that the time of the preliminary announcement should be regarded as the time of taking for the purpose of awarding interest on the damages. This claim has been consistently denied,²⁹ but here, again, the facts are clearly distinguishable. The condemnee in *Partridge* and *Lillard* did not seek to have the day of the preliminary announcement designated the day of the taking,³⁰ but rather that, at the time of the subsequent taking, the depreciation resulting from the preliminary announcement should be disallowed.

When these two factually dissimilar type of cases have been distinguished, the remainder of authority in other jurisdictions is

mentement of these proceedings, may have thwarted the efforts of the claimant fully to subdivide the tract. . . ." 47 F. Supp. at 937. However see 1 ORCEL, *op. cit.* *supra* note 15 § 105 where the *Highlands* case is apparently regarded as authority for the inclusion of depreciation resulting from anticipation of eminent domain proceedings as a factor in market value.

²⁶ See discussion in note 14, *supra*. The court in the *Highlands* case seemed unaware of the remedy discussed in the case of *Gottelman Brewing Co. v. City of Milwaukee*, 245 Wis. 9, 13 N.W.2d 541, 542-46 (1944).

²⁷ Four conceivable bases for the affirmation of the lower court ruling were stated during the course of the *Lucas* opinion:

1. That the trial court has wide discretion regarding the scope of cross-examination so that the test on appellate review is not whether a specific question should have been allowed but whether the scope, generally, has been sufficiently broad, and in this instance, it was;
2. That the question was irrelevant in that it had no bearing on market value but only on "development";
3. That the question was inadmissible in that it assumed facts not in evidence;
4. That the question was inadmissible in that to allow evidence of the depreciation of market value would result in an indulgence in speculation.

In support of the fourth basis the court merely refers to the *Atchison* and *Highlands* cases without the formality of an independently reasoned conclusion. The third basis was merely referred to without comment as one of the objections "to the question in the trial court." 155 Cal. App. 2d at 6-7, 317 P.2d at 107. However, it assumes new significance in light of the holdings in the *Lillard* case discussed *infra*, in text accompanying note 60.

²⁸ See note 14 *supra*.

²⁹ See, e.g., *Danforth v. United States*, 308 U.S. 271, 283-85 (1939).

³⁰ Such a contention would be precluded, in any event, by the clear wording of section 1249 of the Code of Civil Procedure, see note 5 *supra*.

apparently uniform in disallowing depreciation resulting from anticipated eminent domain proceedings in determining the value of the property condemned.³¹ This is the rule whether the preliminary designation specifically included the property ultimately taken, included it in the alternative, or merely referred to the neighborhood in general terms.³² Thus, it would seem that the holding in *Partridge* finds no real support in precedent.

The Lillard Case

The court in the *Lillard* case, in its discussion of the present problem, begins by conceding, curiously, that:

... there appears to be a conflict of authority on whether "market value" is still the yardstick of just compensation when it is established that a depressed market for the property is created by a proposed condemnation.³³

As authority for this proposition, the court cites Orgel's treatise on valuation in eminent domain.³⁴

In the first place, it is at least arguable that the reasoning of the courts, in those cases where depreciation in value has occurred as a consequence of a proposed condemnation, may be more appropriately understood as a refinement of the market value concept than a departure from it.³⁵ Further, a perusal of Orgel's text³⁶ reveals that the very cases on which the author relies to establish this

³¹ See, e.g., *Lower Nueces River Dist. v. Collins*, 357 S.W.2d 449, (Tex. Ct. App., 1962); *State Dept. Highway v. Clarke*, 135 So. 2d 329, (La. App. 1961); *Hermann v. North Pa. R.R.*, 270 Pa. 551, 113 Atl. 828 (1921); *Brainerd v. State*, 74 Misc. Rep. 100, 131 N.Y. Supp. 221 (1911); cf. *State Road Dept. v. Chicone*, 148 So. 2d 532 (Fla. 1962). The case of *Lower Nueces River Dist. v. Collins*, *supra*, is particularly interesting if only because it illustrates the *reductio ad absurdum* of the *Partridge* rule. The land in that case, consisted of three islands which were to be immersed by virtue of the proposed project. In light of the imminence of the project they were worthless and under the rule of the *Partridge* case the condemnnee would not have been entitled to any compensation.

³² In the converse situation, where appreciation in value has occurred, some courts apparently distinguish between specific and general designation; disallowing appreciation in the former and allowing it in the latter. See, *United States v. Miller*, 317 U.S. 369, 376-79 (1942). See generally, 4 NICHOLES, *op. cit. supra* note 15, §§ 100-103. The courts have refused to make this distinction where depreciation has resulted, however, apparently because of the danger manifest in a rule which would permit the condemnor to lower market values by announcing his intention to erect an offensive structure in the general neighborhood of the land subsequently to be condemned. See *State v. Burnett*, 24 N.J. 280, 131 A.2d 765 (1957), *Brainerd v. State*, 74 Misc. Rep. 100, 131 N.Y. Supp. 221 (1911).

³³ 219 Cal. App. 2d 368, 377, 33 Cal. Rptr. 189, 194 (1963).

³⁴ 1 ORGEL, *op. cit. supra* note 15, § 105.

³⁵ The courts seem to say, in effect, that the value of the land shall be its market value with respect to those uses to which it would be adapted but for the proposed project. See cases cited in note 31, *supra*.

³⁶ 1 ORGEL, *op. cit. supra* note 15, §§ 105-06.

"conflict of authority" are none other than *Atchison* and *United States v. Certain Lands in Town of Highlands*.³⁷ It has been previously suggested that the latter is distinguishable³⁸ and the former incorrectly decided.³⁹

Having conceded this "split of authority" however, the court, in the *Lillard* case goes on to observe that:

... at least one California case has said that the trial court could have, within the limitations of sound legal and equitable principles, advised the jury that they should treat the property as having the value that it would have had, had no preliminary action been taken by the board toward the acquisition of the property.⁴⁰

This case is *Buena Park School Dist. v. Metrim Corp.*⁴¹ It should be noted at the outset that *Buena Park* is distinguishable from both *Partridge* and *Lillard*. The condemnee, in *Buena Park*, did not contend that depreciation had resulted from the anticipation of eminent domain proceedings. Rather, the condemnor contended that evidence concerning the value of the land in question for subdivision purposes should not have been received because, in light of the pending condemnation action, the land had become unsaleable for those purposes.⁴² The court held such evidence admissible stating, in effect, that the notion of saleability is implicit in the definition of market value.⁴³ Although thus distinguishable, the broad dictum of *Buena Park* served as a useful predicate for the *Lillard* case and, when it is considered in conjunction with the cases decided in other jurisdictions,⁴⁴ it seems clear that the *Lillard* case finds significant support in precedent.

RATIONALE

Just Compensation

Any attempt to rationalize the *Partridge* and *Lillard* cases must begin with a consideration of the constitutionality of the holding of the *Partridge* case. A rule which would permit the condemnor to depress the value of property by the announcement of a plan to erect an offensive structure and then acquire the property at a reduced value would seem to violate the "Just Compensation" provision of

³⁷ 47 F. Supp. 934 (S.D.N.Y. 1942).

³⁸ See note 14 *supra*.

³⁹ See text accompanying note 15 *supra*.

⁴⁰ 219 Cal. App. 2d 368, 377, 33 Cal. Rptr. 189, 194 (1963).

⁴¹ 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959).

⁴² *Id.* at 258, 1 Cal. Rptr. at 253. Because the condemnation action had been filed, the county recorder would not accept the final subdivision map.

⁴³ *Id.* at 258-59, 1 Cal. Rptr. at 255.

⁴⁴ See cases cited in note 31 *supra*.

the eminent domain section of the California Constitution.⁴⁵ The court, in *Partridge*, as well as in *Atchison* and *Lucas*, however, seemed unaware of this possibility.

Significantly, when it was contended before the Massachusetts Supreme Court⁴⁶ that a statute requiring damages to be fixed at the value of the property "before the taking" violated the Massachusetts "Just Compensation" provision⁴⁷ because it permitted the inclusion of depreciation resulting from anticipation of the proposed improvement in the determination of market value, the court interpreted "before the taking" to mean "damages shall be based upon the value of the land unaffected by the improvements" to obviate the constitutional objection. Implicit in the court's ruling is its recognition of the fact that if the statute were interpreted to permit such depreciation to operate as an element in the determination of market value, it would have been unconstitutional.⁴⁸

Why did the court in *Partridge* fail to anticipate this problem? Perhaps because it relied on the *Atchison* case and the court in *Atchison*, felt that depreciation, in this context, could be disallowed by the process of excluding such evidence when, in fact, the exclusion of such evidence resulted in the inclusion of such depreciation as an element of market value. In all events this constitutional problem poses a serious objection to the *Partridge* holding.

"Unfathomable Speculation"

The court, in *Partridge*, quoting from *Atchison* indicated that, to admit evidence of depreciation in value of land as a consequence of anticipated eminent domain would be to indulge in "unfathomable speculation."⁴⁹ The apparent theory is that a decline in market value subsequent to the preliminary announcement can result from the interaction of many factors and that it is impossible to isolate the anticipation of eminent domain as one of these and assign a portion of the decline to it.⁵⁰

⁴⁵ CALIF. CONST. art. 1 § 14 provides, in part, "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. . . ."

⁴⁶ *Conner v. Metropolitan Dist. Water Supply Comm.*, 314 Mass. 33, 49 N.E.2d 593, 596 (1943).

⁴⁷ MASS. CONST. Pt. 1, art. 10, § 11.

⁴⁸ See also *Herman v. North Pa. R.R. Co.*, 270 Pa. 551, 113 Atl. 828, 829 (1921), where the concern of the court over "illegal compensation . . . feebly disguised" suggests that it is anticipating a constitutional problem.

⁴⁹ 214 Cal. App. 2d 196, 203, 29 Cal. Rptr. 388, 392 (1963). This same language from the *Atchison* case was quoted by the court in *People v. Lucas*, 155 Cal. 2d 1, 6, 317 P.2d 104, 107.

⁵⁰ It is interesting, in this context, to note that in the *Atchison* case, the announcement of the project occurred prior to and the initiation of the action sub-

In the converse situation, where appreciation has resulted from the anticipation of eminent domain, the California courts have had little difficulty in determining what portion of the appreciation is attributable to the anticipation of eminent domain for the purpose of excluding such evidence. They circumvent the objection of "unfathomable speculation" by the expedient of stating the portion of appreciation attributable to the anticipation in terms of the increased uses to which the land becomes adapted as a consequence of the condemnation plans.⁵¹

To illustrate the above, the *City of Pasadena v. Union Trust Co.*,⁵² the highest use to which land was adapted in the hands of the condemnee was as a cabin site. The condemnor proposed to use the land, in conjunction with other land previously acquired, for a reservoir, and the condemnee sought to have the market value estimated with reference to the higher use of the land as a reservoir site, even though it would not have been practicable for him to acquire the additional land necessary to put the land to this use. It was held that the damages were to be measured in terms of the current market value of land in that vicinity adapted for use as a cabin site. By first excluding evidence of the increase in available uses resulting from anticipation of eminent domain and then determining the value of the land for the uses to which it was adapted in the hands of the condemnee in terms of current market value, the court effectively isolated appreciation resulting from anticipation of eminent domain as a factor. Additionally the court precluded the disallowance of appreciation resulting from other elements reflected in general economic conditions since these elements are, of necessity, reflected in the current market value of land for whatever use.

It would seem logical that this valuation process should apply inversely to the facts of the *Partridge* case and that the damages should be assessed in terms of the current market value of land for uses to which it was adapted in the hands of the condemnee without reference to the abridgment of those uses resulting from the anticipation of eminent domain proceedings. The courts in other jurisdictions have applied this formula in effect, if not in terms.⁵³

sequent to the great depression of 1929, a circumstance which may instinctively have prompted the court's conclusion in this regard.

⁵¹ *City of Pasadena v. Union Trust Co.*, 138 Cal. App. 2d 463 (1934); *City of Stockton v. Vote*, 76 Cal. App. 369, 244 Pac. 609 (1926); *Cf. Los Angeles County v. Hoe*, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

⁵² 138 Cal. App. 2d 463 (1934).

⁵³ See, e.g., *Brainerd v. State*, 74 Misc. 100, 131 N.Y. Supp. 221, 226 (1911), where the court says, ". . . the claimants are entitled to have their premises valued before the appropriation by reference to the condition in which they were at that time with the use of the dock and the old canal. . . ." In *Hermann v. North Pa. R.R.*

On the facts of *Partridge*, it is obvious that the condemnees could not have their land valued with reference to its use as a highway site since it was not adapted to that use prior to the announcement of the condemnation plans. Conversely, it would seem that they should have been permitted to offer evidence tending to show that, prior to the announcement of the condemnation plans, their land was adapted to certain long term uses which the character of the proposed project rendered unfeasible.⁵⁴

The question remains: Why did the court in the *Partridge* case and the *Atchison* case fail to apply inversely the proof formula used in the "appreciation" cases? Obviously, *Partridge* did not apply this formula because *Atchison*, upon which it relied, did not. *Atchison* did not apply the formula because, it is submitted, the court erroneously interpreted the *Neale* case on which it relied.

The *Neale* case dealt with two fundamentally different questions. The first of these was whether the anticipated eminent domain proceedings had resulted in an appreciation in value.⁵⁵ The court answered in the negative saying that there had been no increase in uses to which the land was adopted as a consequence of the anticipated proceedings but clearly indicated that, if there had been an increase in prospective uses, evidence thereof would be inadmissible. The court considered such evidence inadmissible not because it would be speculative,⁵⁶ but because the consequence of the admission would be to require the condemnor to pay for the appreciation in value attributable to his announcement of the projected improvement.⁵⁷

The second problem dealt with in *Neale* was whether the erection of the proposed improvement would result in a future appreciation in the value of the land.⁵⁸ The court refused to admit

Co., 270 Pa. 551, 113 Atl. 828, 829 (1921) the court states, "When the appropriation takes place this 'impairment of value' from these preliminary steps becomes merged, as it were, in the damages then payable; the matter being worked out practically in assessing the damages by simply ignoring the detrimental effect of the plotting and treating the property as though there had been no harmful results."

⁵⁴ In the *Partridge* case there was some indication that, in light of the anticipated proceedings, the property had become unsuitable for use with respect to business rentals. 214 Cal. App. 2d 196, 202-03, 29 Cal. Rptr. 388, 392 (1963).

⁵⁵ 78 Cal. 63, 20 Pac. 372 (1888).

⁵⁶ The court says, generally, that permitting proof of the prospective use in question was not ". . . sanctioning a remote or speculative value. It was merely taking the present value for the prospective purposes." *Id.* at 71, 20 Pac. 372, 376.

⁵⁷ The case of *City of Pasadena v. Union Trust Co.*, 138 Cal. App. 21, 31 P.2d 463 (1934) previously referred to (see note 15, *supra*) as an illustration of the disallowance of appreciation by exclusion of evidence of increased uses, relies on the case of *Stockton v. Vote*, 76 Cal. App. 369, 244 Pac. 609 (1926) which in turn relies extensively on this portion of the *Neale* opinion.

⁵⁸ 78 Cal. 63, 73-76, 20 Pac. 372, 377-78 (1888).

evidence tending to show that a general increase in land values would result from the completion and operation of the improvement on the grounds that it was "remote and speculative."

The problem which arose in *Atchison* is clearly the converse of the first problem considered in *Neale*; i.e., whether the anticipated eminent domain proceedings had resulted in a depreciation in value. If the court had analogized from the first portion of *Neale*, it would have concluded that evidence of a decrease in prospective uses should be admitted, since it is neither remote nor speculative. This would prevent the condemnor from taking advantage of the depreciation in value attributable to his announcement of the projected improvement. The court, however, analogized instead, from the second portion of the *Neale* opinion dealing with evidence of appreciation which would occur in the future as a result of the erection of the improvement to conclude that evidence of depreciation which had occurred in the past as a result of the anticipation of eminent domain proceedings was inadmissible because it was "speculative."³⁹

It thus appears that the reasoning of *Atchison* was incorrect in this regard and that to admit evidence of depreciation in value as a consequence of anticipated eminent domain proceedings would not require indulgence in "unfathomable speculation," but merely the application of a fairly simple rule of thumb.

A Proper Foundation

It has been suggested that the holding of *Partridge* is constitutionally suspect and that the argument that to admit evidence of depreciation in value attributable to anticipated eminent domain proceedings would be to indulge in "unfathomable speculation" is of dubious merit. It follows, therefore, that the rule of *Lillard* rather than that of *Partridge* is the more reasonable.

The *Lillard* case did not involve an attempt by the condemnee to introduce evidence of a depreciation in value in his own behalf. Rather, counsel for the condemnee had attempted to elicit such information from a witness on cross-examination.⁴⁰ The conclusion of

³⁹ This fact is apparent from the face of both the *Neale* and the *Atchison* cases, for the court in the latter quotes a portion of the former and states, ". . . It seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element in the value of the land." *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 75, 20 Pac. 372, 377 (1883) quoted in *Atchison T. & S.F.R.R. v. Southern Pac. Co.*, 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (1936). The court in *Atchison* is apparently overlooking the fact that it is dealing not with "benefit arising from the proposed improvement" but rather with appreciation resulting from anticipation of condemnation for the erection of the proposed improvement.

⁴⁰ 219 Cal. App. 2d 368, 376-77, 33 Cal. Rptr. 189, 194-95 (1963).

the court that such evidence would be admissible on direct examination seems implicit in the court's ruling that the question would not have been objectionable had a proper foundation been laid since the business of laying the foundation would presumably have involved an offer of evidence or of proof.⁶¹

Thus the *Lillard* case seems to have pointed the way to the admission of evidence of this character in future cases.

CONCLUSION

As land becomes more scarce, as land values continue to rise and as condemning agencies move ever further afield in quest of land necessary for their projects, the possibility of depreciation in the value of land resulting from anticipation of eminent domain proceedings becomes greater. It has been suggested that, as between the *Partridge* case, which held evidence of such depreciation inadmissible, the *Lillard* case, which indicated that such evidence was admissible, the latter represented the better rule.

Perhaps in the near future a California court will have occasion to consider these cases together and to overrule or disapprove *Partridge*. Until that time, the *Partridge* case, along with the cases upon which it relied, will remain as a skeleton in the already well populated closet of California precedent.

⁶¹ Because witnesses for the condemnor may not always be able to testify with respect to the effect of the proposed project or to a depression in values attributable to it, it may be difficult for counsel for the condemnee to lay the appropriate foundation on cross-examination and he may wish to ask leave of court, either to call his own witnesses out of order for this purpose, or to recall the condemnor's witness for further cross-examination at the conclusion of his own case.

RECOMMENDED LEGISLATION

An act to amend Sections 1247, 1249, 1249.1, 1252, 1253, 1255a, 1255b, and 1257 of, to add Title 7.1 (commencing with Section 1368.01) 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. 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.

s/o
reservoir

Comment. Section 1243.4 is superseded by Code of Civil

Procedure Sections 1269.01 and 1269.02.

SEC. 2. Section 1243.5 of the Code of Civil Procedure is repealed.

1242.5. (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 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 after 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 1213.7.

(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.

§ 1243.5

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:

Section 1243.5

Recommended Legislation

(Code of Civil Procedure)

Subdivision (a) -----	1268.01, 1269.01, 1269.02
Subdivision (b) -----	1269.01, 1269.02
Subdivision (c) -----	1269.04
Subdivision (d) -----	1268.02
Subdivision (e) -----	1268.09
Subdivision (f) -----	1269.07

Sec. 3. Section 1243.6 of the Code of Civil Procedure is repealed.

1243.6. 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.

Comment. Section 1243.6 is superseded by Section 1268.10 of the Code of Civil Procedure.

Sec. 4. Section 1243.7 of the Code of Civil Procedure is repealed.

1243.7. (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. Upon 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 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.

(c) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 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 money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If the persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another person 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 thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the person receiving such payment except his claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment 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 eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days 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.

Comment. Section 1243.7 is superseded by Chapter 1 (commencing with Section 1268.01) of Title 7.1 of Part 3 of the Code of Civil Procedure. The disposition of the various provisions of Section 1243.7 is indicated below.

<u>Section 1243.7</u>	<u>Recommended Legislation</u> (Code of Civil Procedure)
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. 5. Section 1247 of the Code of Civil Procedure is amended to read:

1247. The court shall have power:

1.

(1) To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in subdivision (6) of Section 1240;

2.

(2) To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

3.

(3) To determine the respective rights of different parties seeking condemnation of the same property;

(4) To determine the right to possession of the property as between the plaintiff and the defendants, in accordance with Title 7.1 (commencing with Section 1268.01), to enforce its orders for possession by appropriate process, and to stay any actions or proceedings against the plaintiff arising from possession of the property.

all
italics

Comment. Subdivision (4) is added to Section 1247 to codify judicial decisions which hold that the court in which the eminent domain proceeding is pending has the power to control possession of the property to be taken and to enforce its orders made in this connection. See Marblehead Land Co. v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921); Montgomery v. Tutt, 11 Cal. 190 (1858); Sullivan v. Superior Court, 185 Cal. 133, 195 Pac. 161 (1921); Rafferty v. Kirkpatrick, 29 Cal. App.2d 503, 86 P.2d 147 (1938)(placing the plaintiff in possession); Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790 (1888); In re Bryan, 65 Cal. 375, 4 Pac. 304 (1884) (preventing the plaintiff from taking possession or restoring the defendant to possession). The phrase which empowers the court to stay actions or proceedings against the plaintiff is derived from a sentence formerly found in Code of Civil Procedure Section 1254: In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see the cited decisions), orders for possession contemplated by the subdivision include those made under Chapter 2 (commencing with Section 1269.01) of Title 7.1, Chapter 3 (commencing with Section 1270.01) of Title 7.1, and Section 1253 of Title 7.

Sec. 6. 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) In ascertaining the actual value of the property on the date of valuation, the property shall be valued at the market value it would have had on that date had its market value not been affected by (1) the public use to which the property is to be devoted, (2) the public improvement or project for which it is being taken, (3) the eminent domain proceeding itself, and (4) any actions on the part of the condemnor preliminary to the eminent domain proceeding.

all
italics

Comment. Section 1249 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 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 by political subdivisions of the property of a public utility under the provisions of the Public Utilities Code and Section 23a of Article XII 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 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, but have been considered in judicial decisions. Subdivision (b) requires that the "actual value" of the property on the date of valuation be determined as the market value it would have had had there been no enhancement or diminution in market value due to any of the four mentioned factors.

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 market value of the property to be taken that results directly from the proposed public improvement is to be deducted in arriving at "actual 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 such factors as general 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.

Under subdivision (a) of this section, the "actual value" of the property on the date of valuation is the "measure of compensation" for property actually taken and the "basis of damages" to property not taken but injuriously affected. "Actual value" generally is synonymous with "market value." Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899). Subdivision (b), however, requires that the effect, if any, of the mentioned factors upon "market value" be taken into account in ascertaining "actual value" on the date of valuation. Thus, with respect to property taken, disallowance of the effect, if any, of the factors has a direct bearing upon the compensation to be awarded. In cases of partial takings, however, the actual value of the property is merely the "basis of damages" to property not taken but injuriously affected. Thus, the effect, if any, of the factors is to be disallowed in determining value in the so-called "before condition" of the property for the purpose of assessing severance damages and special benefits under Code of Civil Procedure Section 1248. The nature of the public improvement is taken into account, of course, in determining the value of the property injuriously affected in the "after condition" for purposes of assessing severance damages and special benefits. See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

The purpose of the first exclusion is to codify the general proposition that the use which the condemnor is to make of the property cannot be considered to have increased or decreased its value. See City of Pasadena v. Union Trust Co., 138 Cal. App. 2d, 31 P.2d 463 (1934). If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See San Diego Land and Town Co. v. Neale, supra.

With respect to the effect of the proposed public improvement itself on the market value of property being taken for that improvement, compare City of Oakland v. Partridge, supra, and People v. Lillard, supra. Subdivision (b) adopts the view expressed in People v. Lillard. See Anderson, Consequence of Anticipated Eminent Domain Proceedings-Is Loss of Value a Factor?, 5 SANTA CLARA LAWYER 35 (1964).

As to the effect upon "actual value" of the imminence of the eminent domain proceeding and any action on the part of the condemnor preliminary to the proceeding, see Buena Park School Dist. v. Metrim Corp., supra. Subdivision (b) codifies the principle of the Metrim and similar decisions.

See generally 4 NICHOLS, EMINENT DOMAIN § 12 at 3151 (3d ed. 1963); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 105 (2d ed. 1953); 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.).

SEC. 7. Section 1249a is added to the Code of Civil Procedure immediately following Section 1249, 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), (e), or (f), if the plaintiff makes a deposit in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1, the date of valuation is the date on which the deposit is made.

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

(d) 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.

(e) 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 of the filing of the complaint.

(f) 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 valuation in the new trial shall be the same date as in the previous trial if (within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion) the plaintiff has deposited:

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

(2) The amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1.

Comment. Section 1249a 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. Under 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 1260.01) 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 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). The date of valuation may be earlier than the date of the deposit, and subsequent events may cause such an earlier date of valuation to shift to the date of deposit. But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the following subdivisions.

§ 1249a

Subdivisions (c)-(e). Subdivisions (c), (d), and (e) establish the date of valuation for cases in which such date is not established by a deposit of probable just compensation in accordance with subdivision (b).

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.

Subdivisions (d) and (e) continue in effect a proviso formerly contained in Section 1249. Subdivision (e) retains the date specified in subdivision (c) as the date of valuation in any case in which the delay in reaching trial is caused by the defendant.

Subdivision (f). 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 (e) rather than under this subdivision. Under subdivision (f), 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 or, a motion for a new trial or to vacate or set aside the judgment has been made, within ten days after disposition of such motion. If the amount of judgment is deposited thereafter, the date of valuation is the date of valuation under subdivision (b).

Sec. 8. 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 the 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.

(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.

Con. Subdivision (b) of Section 1249.1 restates and supersedes a provision of Section 1249.

SEC. 9. 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 1276.01) 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 1252 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 1252 waives the defendant's right of appeal while withdrawal of a deposit made under Section 1254 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 1252 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 greater compensation, provided in Section 1254 (recodified in Section 1270.05).

This amendment of Section 1252 and enactment of Sections 1270.01-1270.07 makes 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. 10. 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. Section 1253 is amended to change the references to the appropriate statutory provisions.

Sec. 11. Section 1254 of the Code of Civil Procedure is repealed.

1254. (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.

(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 proceedings, 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 diminutions, but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding), 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 withheld, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive

all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16130, 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 designations.

(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 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.

(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.

Comment. The disposition of the provisions of Section 1254 is indicated below.

<u>Section 1254</u>	<u>Recommended Legislation</u>
Subdivision (a) -----	C.C.P. § 1270.01
Subdivision (b) -----	C.C.P. § 1270.02
Subdivision (c) -----	C.C.P. § 1270.03
Subdivision (d) -----	C.C.P. § 1270.04
Subdivision (e) -----	C.C.P. § 1270.07
Subdivision (f) -----	C.C.P. § 1270.05
Subdivision (g) -----	C.C.P. § 1270.06
Subdivision (h) -----	C.C.P. § 1270.08, Govt. Code §§ 16425-16427
Subdivisions (i) and (j) -----	Govt. Code §§ 16425- 16427
Subdivision (k) -----	C.C.P. § 1257(b)

Sec. 12. 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 and reasonably incurred as a result of the proceeding to take the property, whether such fees were incurred for services rendered before or after the proceeding was commenced.*

all
italics

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 shall 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) of Section 1255a 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 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.

Sec. 13. 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 legal 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.

(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 21st 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.

~~(4)~~

(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 ~~1244.5~~ 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.

~~(3)~~

(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.

~~(4)~~

(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.

thereafter

Comment. Section 1255b states the rules that determine when interest begins to accrue and when interest ceases to accrue.

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. See People v. Guinarra Vineyards Corp., 245 Cal. App. , Cal. Rptr. (1956).

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

1257. (a) The provisions of Part II 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.

§1257

Comment. The proviso to Section 1257 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).

Sec. 15. 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 supercedes 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. A deposit may also be made under this chapter after the original entry of a judgment in the proceeding if that judgment has been reversed, vacated, or set aside by the trial or appellate courts. The deposit may be made whether or not possession of the property is to be taken. This deposit serves several purposes: First, it is a condition to obtaining an order for possession under Section 1269.01, 1269.02, 1269.03(3), or 1269.05. Second, in some cases, it fixes the date of valuation. See Section 1249a. Third, if the deposit is withdrawn, interest ceases on the amount withdrawn on the date of withdrawal, and interest ceases in any event on the amount deposited upon entry of judgment. See Section 1255b. Fourth, if the deposit is withdrawn, the withdrawal entitles the plaintiff to an order of possession prior to judgment. See Section 1269.06.

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

1268.01. Order for 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. Such application may also be made after entry of judgment in the proceeding, if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. 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, 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. Section 1268.01 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. See Weller v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922).

As used in this section and in this chapter, "compensation" refers to all elements of compensation, including the value of the property actually taken and any severance or other damages less those special benefits, if any, that are required to be offset against such damages. See Code of Civil Procedure Section 1248. The phrase is also intended to coincide in meaning with the phrase "just compensation for such taking and any damage incident thereto" in Section 14 of Article I of the Constitution of California.

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 redetermine the amount upon motion of the plaintiff or of any party having an interest in the property for which the deposit is made. If the court redetermines the amount after entry of judgment and before that judgment has been reversed, vacated, or set aside, it shall redetermine the amount to be the amount of the judgment. If the plaintiff has taken possession or obtained an order for possession 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.

The court may stay its redetermination of the amount of probable just compensation until after a motion for a new trial has been determined.

§ 1268.02

Comment. Section 1268.02 restates the substance of Code of Civil Procedure Section 1243.5(d) except that reference to the order for possession is eliminated. 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.

§ 1268.03

Comment. Section 1268.03 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. This section dispenses with separate notice of the deposit if such an order is obtained and served.

1268.04. Application for withdrawal of deposit

1268.04. (a) Except as provided in subdivision (b), 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.

(b) Application for withdrawal after entry of judgment shall be made under the provisions of Section 1270.05 unless the judgment has been reversed, vacated, or set aside and no other judgment has been entered.

Comment. Section 1268.04 restates existing law. It is derived from Code of Civil Procedure Section 1243.7(a) and (c).

After entry of judgment, providing the judgment entered has not then been reversed, vacated, or set aside, application for withdrawal is made under Section 1270.05, rather than under this section.

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. The notice shall be served in the manner provided in subdivision (e) 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 (e) 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 1268.06.

(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. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under subdivision (c). 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. ^{may be} The undertaking ~~is~~ executed by two or more sufficient sureties approved by the court, the amount shall not exceed double such portion.

and in such case

(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 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. Section 1268.05 is based on Code of Civil Procedure Section 1243.7(a), (c), (d), (e), and (f). Unlike the section on which it is based, Section 1268.05 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. Noyes, 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 appli-

cant 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 waive the undertaking required by this section or may consent to an undertaking that is less than the amount stated by 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. Section 1268.06 is the same in substance as subdivision (b) 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. Section 1268.07 restates the substance of subdivision (g) of Code of Civil Procedure Section 1243.7. In addition to waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit also entitles the plaintiff to an order for 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. Section 1268.08 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.

No reference shall be made in the trial of the issue of compensation to the fact that a party has or has not offered evidence or any particular evidence in connection with a deposit or withdrawal pursuant to this chapter.

Comment. Section 1268.09 restates the substance of subdivision (e) of Code of Civil Procedure Section 1243.5. The second sentence of Section 1268.09 is new. The principal purpose of the new sentence is to preclude impeachment of a witness at the trial by reference to evidence given in connection with proceedings to determine or redetermine probable just compensation (Sections 1268.01 and 1268.02) or to withdraw any amount deposited as probable compensation (Section 1268.05).

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 Section 1268.10 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, 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,

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. Such application also may be made after entry of judgment if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The court shall authorize the plaintiff to take possession of the property if the court determines that the plaintiff:

- (1) Is entitled to take the property by eminent domain; and
- (2) Has deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1269.01).

(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 1269.01).

(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.

§ 1269.01

Comment. This chapter provides for orders for possession prior to 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 Section 1269.01 restates the substance of Code of Civil Procedure Section 1243.4.

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.

With respect to the appellate relief available as to orders for possession, see the Comment to Section 1269.03.

1269.02. Possession in other cases

1269.02. (a) In any proceeding in eminent domain brought by or on behalf of any public entity, public utility, or common carrier, ~~to acquire any property or property interest~~ 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 apply to the court for an order for possession. Such application also may be made after entry of judgment if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The application shall be made by noticed motion, and 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).

(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.

§ 1269.02

Comment. Section 1269.02 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 purpose of the acquisition--if the proceeding is brought by a public entity, public utility, or common carrier. Section 1269.01 and this section are not mutually exclusive. In a proceeding falling within either of the sections, the plaintiff may elect the section under which to obtain possession prior to judgment.

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.

1269.03. Appeals from orders for possession

1269.03. (a) An order granting or denying an application for an order for possession under Section 1269.01 is not appealable.

(b) Any aggrieved party may appeal from an order granting or denying an application for an order for possession made pursuant to Section 1269.02. The appeal does not stay an order for possession made under Section 1269.02; but the trial or appellate court may, in its discretion, stay such order pending review on appeal or for such other period or periods as to it may appear appropriate.

Comment. Section 1269.03 is new.

Judicial decisions have held that an appeal may not be taken from an ex parte order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari are the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922); 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, an ex parte 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); Housing Authority v. Forbes, 47 Cal. App.2d 358, 117 P.2d 722 (1941). These rules are continued in connection with orders made under Section 1269.01 or Chapter 3 of this title.

Subdivision (b) distinguishes between the ex parte orders made under Section 1269.01 and those made on noticed motion under Section 1269.02. As to the latter an appeal by either party is authorized. Such authorization does not imply that, in any particular proceeding, an appeal is a sufficient remedy to preclude mandamus, prohibition or other writ procedure. In general, 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-7, B-14 (1961).

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 or 1269.06, the court may, for good cause shown on ex parte application, 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 summons in the proceeding. If the person has appeared or been served with the summons, 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.

(e) The court may, for good cause shown on ex parte application, 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.

§ 1269.04

Comment. Section 1269.04 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. The requirement that an affidavit be filed concerning service by mail has been eliminated. 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

includes

1269.05. (a) If the property to be taken is a dwelling containing not more than two residential units and the dwelling or one of its 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 move the court for an order determining the amount of such compensation for the dwelling and so much of the land upon which it is constructed as may be required for its convenient use and occupation. 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 make and enter its order determining the amount of such probable just compensation.

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 21st 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.

(d) 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. Section 1269.05 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.

This section is intended to make available to homeowners a procedure by which probable just compensation may be determined, deposited and withdrawn within a brief period after the beginning of the proceeding. For a comparable provision applicable to all eminent domain proceedings, see ~~PENN.~~ EMINENT DOMAIN CODE § 407(b). Although this section does not require the plaintiff to deposit the amount determined, if no deposit is made, interest on the eventual award begins to accrue. If the proceeding is abandoned or dismissed, 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 1255b(a). Interest ceases on any amount deposited under this section upon the date of the deposit. See Code of Civil Procedure Section 1255b(d)(2).

Making of a deposit under this section entitles the plaintiff to obtain an order for possession upon vacation of the property or withdrawal of the deposit. See Section 1269.06.

The reference in subdivision (a) to the amount of land "required for the convenient use and occupation" of the dwelling is taken from Section 1183.1 of the Code of Civil Procedure which deals with mechanic's liens. The limitation precludes application of this section to land being taken and owned in common with the dwelling, but unnecessary to the convenient use of the dwelling.

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

1269.06. (a) If the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) possession of the property or property interest for which the deposit was made may be taken in accordance with this section at any time after each of the defendants entitled to possession:

or
Section
1269.05 of
this chapter,

- (1) Vacates the property; or
- (2) Withdraws any portion of the deposit.

(b) 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 the

plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) and that each of the defendants entitled to possession have:

- (1) Vacated the property; or
- (2) Withdrawn any portion of the deposit.

(c) The order for possession shall:

- (1) Recite that it has been made under this section.
- (2) Describe the property and the estate or interest to be acquired, which description may be by reference to the complaint.

(3) State the date after which 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.

or Section
1269.05 of
this chapter,

Comment. Section 1269.06 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. Section 1269.05 requires the plaintiff to deposit probable just compensation in certain cases to preclude the accrual of interest.

This section makes applicable to withdrawal of a deposit made 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). It also permits the plaintiff to obtain possession of the property after it has been vacated by all the persons who are entitled to possession. Service of the order for possession is required by Section 1269.04. The time limits for service of the order for possession on the record owner and occupants are the same as for an order for possession under Section 1269.01.

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.

to

§ 1269.07

Comment. Section 1269.07 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, and 1269.05. Under Section 1268.07, the defendant also retains his right to appeal or to 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 JUDGMENT

1270.01. Deposit after 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, but a deposit may not be made under this section after the judgment entered has been reversed, vacated, or set aside and no other judgment has been entered.

(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 procedures of the chapter apply notwithstanding the pendency of an appeal from the judgment or a motion to vacate or set aside the judgment. However, after the "interlocutory judgment" has been reversed, vacated, or set aside, deposit and possession procedures are governed by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01), rather than this chapter. See Sections 1268.01 and 1269.01. 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. In requiring that notice of the deposit be given, it parallels Section 1268.03 which requires that notice of a pre-judgment deposit be sent to the parties having an interest in the property for which the deposit is made. 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 conclusion of the litigation. 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. Section 1270.02 restates the substance of a portion 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. Section 1270.03 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.

1269.04. 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. Section 1270.04 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) Subject to subdivision (e), 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 that 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 prior to judgment.

(c) Application for withdrawal after entry of judgment shall be made under the provisions of Section 1268.04 if the judgment has been reversed, vacated, or set aside and no other judgment has been entered.

oment. Section 1270.5 is based on subdivision (f) of Code of Civil Procedure Section 1254. For the parallel provisions for withdrawal of a deposit 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 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, 226 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. Gutierrez, 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.

The remedy of a party entitled to an amount upon a judgment where that amount has been withdrawn prior to judgment by another party is set forth in Section 1268.08.

1270.06. Repayment of amount of excess withdrawal

1270.06. 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 the judgment accordingly.

Comment. Section 1270.06 is the same in substance as subdivision (g) of Code of Civil Procedure Section 1254.

1270.07. Taking possession does not waive right of appeal

1270.07. 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.

§ 1270.07

Comment. Section 1270.07 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).

1270.08. Deposit in State Treasury unless otherwise required

1270.08. 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. Section 1270.08, which incorporates by reference Section 1268.10, supersedes the first three sentences of subdivision (h) of Code of Civil Procedure Section 1254.

Sec. 16. 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.

Sec. 17. 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.

Sec. 18. 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.

Sec. 19. 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 (commencing with Section 4185) through 10 (commencing with Section 4255) of this part 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 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 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. 489 (1925). The section is amended to accord with Code of Civil Procedure Section 1249a.

Sec. 20. 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.

Senate Constitutional Amendment No. _____—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 2nd 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; 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 there- of or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of com-

petent 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.

(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.

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 XII" 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. It removes any doubt whether the Legislature may authorize possession prior to judgment in cases other than those provided for by the amendments of 1918 (rights-of-way) and 1934 (reservoirs). 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). See also 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 deposited 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 in accordance with such procedure as may be 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" in right of way and reservoir cases 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 is intended to clarify, rather than change, existing law.