

#36(L)

8/30/67

Memorandum 67-51

Subject: Study 36(1) - Condemnation Law and Procedure (Possession Prior to Final Judgment and Related Problems)

The attached tentative recommendation is submitted for your revision and approval prior to printing. In accordance with the Commission's decision at the June meeting, we plan to approve the tentative recommendation for printing at the September meeting.

We are endeavoring to follow the same procedure on condemnation law that we followed on evidence. We will publish a series of tentative recommendations and research studies, distribute them for comment, and consider the comments as we prepare the comprehensive statute. We plan to publish the research study (published in the Santa Clara Lawyer) with the attached tentative recommendation.

You will recall that the Commission determined to submit a recommendation on recovery of the condemnee's expenses on abandonment. See Memorandum 67-50 and the attached Recommendation. Any changes made in the substance of that recommendation will be included in the portions of this tentative recommendation that relate to abandonment.

The staff has made minor editorial changes throughout this draft and the preliminary portion of the recommendation has been rewritten. In addition, we have made the changes that the Commission directed at the June meeting. This draft has been sent to our correspondents on condemnation law, and thus we may be able to incorporate usable suggestions before the September meeting. Also, of course, we would appreciate any of the Commissioner's revisions for the same purpose.

Significant changes not previously approved are listed below.

Section 1249 (page 9 of the "Recommended Legislation")

Paragraph (4) of subdivision (a) of Section 1249 has been revised. The language shown was formulated by the Commission and in view of the great variety of things a condemning agency may do that may affect market value before the commencement of an eminent domain proceeding, it seems impossible to devise more precise language.

Subdivision (b) has been revised as directed at the June meeting. The purpose of the revision is to make the subdivision coincide with subdivision (a), and to make it clear that the precept stated in (a) applies in determining the "before" value of the remainder of a larger parcel.

Sections 1252 and 1255a

Originally, Section 1252 (page 20) was amended in this recommendation solely to provide the correct cross-references. However, since this tentative recommendation undertakes to deal with abandonment, the staff believes that Section 1252 should be clarified and has revised Section 1252 to specify, in effect, that an implied abandonment resulting from the condemnor's failure to pay the award within the time provided by statute has the same consequences as an abandonment on motion of the condemnor.

Section 1255a (page 25) has been revised to delete the sentence (in subdivision (a)) on implied abandonment for failure to pay the amount of the award within the time allowed by statute (the substance of this sentence is included in Section 1252 as revised) and to conform the section to the language used in our recommendation on recovery by the condemnee of his expenses on abandonment.

Chapter 1 (commencing with Section 1268.01; page 31)

Two significant changes were made in this chapter at the June meeting. Subdivision (b) of Section 1268.01 (page 32) has been revised to require that the condemnor have an appraisal made of the property and deposit the amount of that appraisal. The subdivision, in connection with subdivision (b) of Section 1268.02 (page 34), requires that the condemnee be afforded a copy of the appraisal report and that the appraisal report include all information required to be given under our "exchange of information" bill.<sup>1</sup> This subdivision has not previously been considered and approved.

Subdivision (b) of Section 1268.09 (page 44) has been revised to state the "immunity" of a preliminary appraisal in terms of an immunity from impeachment or from being considered an admission. At the last meeting, the staff was directed to consider whether the policy of the subdivision is not wrong, and whether the policy should not be, in effect, to hold the condemnor to the figure shown by the appraisal it uses in

<sup>1</sup> In connection with this requirement, and with our exchange of information bill, the Commissioners may be interested in a study of Pretrial Discovery in Condemnation Proceedings: An Evaluation in 62 ST. JOHN'S L. REV. 52 (No. 1, July 1967). The article states that insofar as the property owner's obtaining valuation information is concerned, perhaps discovery should be an irrelevance, as he ought to be entitled to the condemning agency's valuation data as a matter of course. The study concludes:

It appears that there is a new liberal tendency in both the federal and state areas, favoring pretrial discovery in condemnation cases. Due to the unique nature of a condemnation proceeding, it is evident that additional measures for protection of the condemnee should be adopted. It is urged that a recognition of this fact in a procedural rather than substantive law vein will cause the veil of secrecy to be lifted in condemnation cases. The inequity of a situation which allows the sovereign to negotiate with an ignorant condemnee requires rectification. In this manner, the condemnee who is losing his land through no fault of his own will be better able to conduct proper and useful pretrial negotiations in seeking to receive the just compensation reserved for him by the Constitution.

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making the deposit of probable compensation.

The problem has no exact parallel under existing law as only affidavits are required to justify the amount deposited and only "the amount deposited or withdrawn" is excluded from evidence at the trial.

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The apparent effect of permitting impeachment by reference to the preliminary appraisal report would be to arrive, by indirection, at something resembling the so-called "jurisdictional offer" requirement imposed in many jurisdictions. In other words, the award could hardly be less than the condemnor's own appraisal. But this effect would be obtained only in those cases in which the condemnor is required or chooses to make a deposit. The staff, however, recommends the principle stated in subdivision (b) as shown. The probable effect of "binding" the condemnor to its original figure would be to cause very niggardly deposits to be made and would accentuate the problem of "two trials" of the issue of compensation. (It is highly desirable to prevent the deposit and withdrawal procedure from becoming a "preliminary trial" of the issue of compensation.) Also, even in the many jurisdictions that have a "jurisdictional offer" requirement and impose significant sanctions for the failure to make an adequate offer, the offer actually made is not used as evidence or for purposes of impeachment or as an admission. Rather, the amount offered is made immaterial as an evidentiary matter, but the consequences are made to turn upon the adequacy of the offer as gauged by the eventual result. It should also be recognized that permitting the condemnor to deposit its appraiser's estimate of value (subject, of course, to change on motion of the property owner) is calculated to facilitate withdrawal by giving the condemnor no reason to object to withdrawal of the total amount deposited.

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Therefore, although the more fundamental questions are recognized, the staff recommends retention of the subdivision, having in mind that it pertains only to the deposit, changes in its amount, and its withdrawal.

Chapter 2 (commencing with Section 1269.01; page 46)

With respect to Chapter 2, the Commission at the June meeting was disposed to retain Section 1269.01 which states existing practice in right of way and reservoir cases, and to include Section 1269.02 which provides a very circumspect extension of early possession by noticed motion in other takings by public agencies, entities, and utilities. Both sections have been changed to reflect the fact that our proposal would permit the condemnor to deposit the amount indicated by its appraisal, which amount is subject to change on motion of either party.

Pursuant to the decision made at the June meeting, Section 1269.03 (page 50) has been deleted and the section left blank. Former versions of the section would have provided for an appeal from an order granting or denying "immediate possession." Deletion of this section retains existing practice (which is that appellate review of orders for possession made prior to judgment is obtained by mandamus or prohibition).

Constitutional amendment (page 80)

At the June meeting, the Commission determined to include in the recommendation a revision of Section 14 of Article I of the California Constitution, even though the Commission does not propose to introduce a resolution in the foreseeable future.

The Commission is aware, of course, that the public agencies are opposed to deletion of their "self-executing" authorization for "immediate

possession" in right of way and reservoir cases, and that counsel for property owners are opposed to any change in the assumed prohibition against legislative provision for such possession in other cases. It remains true, however, that detailed provisions on "immediate possession" are not the sort of thing that should be contained in the Constitution, and that the existing provisions came to exist through a rather tortuous course of amendments to Section 14. We should at least record our views as to a revision for the benefit of the Constitutional Revision Commission.

The form of amendment approved at the June meeting is shown on page 80. The effect of the amendment would be to delete the existing authorization for immediate possession and to cause Section 14 to state that the Legislature may provide for possession prior to judgment (a statement that is necessary, if at all, only because of the peculiar history of this subject in California). The limitations upon the Legislature would not be framed as "self executing," but would specify that any legislation authorizing possession prior to judgment must require that probable compensation be deposited for the owner; that the amount be subject to determination by the court on motion of any party; and that the amount be withdrawable immediately under procedure to be provided by the Legislature.

In 1961 the Commission recommended deletion of the existing detailed content of Section 14 and inclusion of such a general authorization to the Legislature. However, the companion legislation recommended at that time would have authorized immediate possession in all cases by the existing ex part procedure. It is at least possible that the comparatively modest extension of "immediate possession" by noticed motion provided by this recommendation, and the various additional procedural safeguards afforded the property owner, and certain benefits provided to the property owner

in connection with early possession, will cause this proposed amendment to be viewed in a more favorable light.

Incidentally, there is no problem in connection with this proposed amendment under the other provisions of the California Constitution (e.g., due process) or under the Constitution of the United States; the question is simply what, if anything, Section 14 should say about the taking of possession before judgment.

Respectfully submitted,

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Assistant Executive Secretary

#36

STATE OF CALIFORNIA

CALIFORNIA LAW

REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

CONDEMNATION LAW AND PROCEDURE

Number 1--Possession Prior to Final Judgment and Related Problems

September 1967

California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California



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R E S E A R C H   S T U D Y

(Note: Research study will be included with this material when published)

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE

Number 1--Possession Prior to Final Judgment and Related Problems

STATUTORY REVISION

Extension of Provisions for Possession and Payment  
Prior to Judgment

Background

The Constitution of California, in Section 14 of Article I, authorizes the state, cities, counties, and certain districts to take possession of the property to be condemned immediately upon commencement of an eminent domain proceeding, or at any time thereafter, if the condemnation is for any "right of way" or "lands to be used for reservoir purposes." Except to this limited extent, there is no procedure under the California Constitution and statutes by which the condemnor may obtain possession prior to entry of judgment and, of course, no procedure under which the property owner may receive compensation until that time.<sup>1</sup>

In its general application, Section 14 forbids the taking of property "without just compensation having first been made to, or paid into court for, the owner." In reliance upon this provision, the Supreme Court of California, in Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902), invalidated certain legislation

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<sup>1</sup> Code of Civil Procedure Section 1254 provides a procedure whereby any condemnor may obtain possession "at any time after trial and judgment entered or pending an appeal from the judgment."

enacted in 1897 that authorized the condemnor to take "immediate possession" in any eminent domain proceeding. The Steinhart decision has been considered by some to bar any statutory extension of provisions for possession prior to entry of judgment. The legislation of 1897, however, not only did not require any period of notice to the property owner but it also permitted payment of the eventual award to be secured by bond and thus did not provide for any actual payment to the owner of the property. The court invalidated that legislation upon the logical ground that, even if money had been deposited, it was not "paid into court for the owner" unless it was available to him. The "self-executing" provisions of Section 14 that now authorize "immediate possession" without payment to the owner "having first been made" were added by various amendments to overcome the assumed effect of the Steinhart decision.

The narrow limits of the authorization for early possession in Section 14 reflect a fairly general impression that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible. There is some justification for this impression because the California Constitution and statutes for many years failed to provide adequate procedural safeguards for the property owner. Before 1957, there were no provisions whatever for withdrawal of the required deposit. Furthermore, no period of notice to the property owner was specified and the order for possession could be made effective when granted. These pre-1957 rules afforded at least the possibility of serious inconvenience to

the property owner.<sup>2</sup>

Nevertheless, upon careful analysis, it becomes apparent that more general provisions for early possession, with appropriate safeguards for both parties, would be of benefit to both condemnors and condemnees. To the public agencies, an assurance of timely possession facilitates an orderly program of property acquisition. In acquiring property for public use, it is virtually essential that there be a definite future date as of which all property needed for the public improvement will be available. An undue delay in acquiring even one essential parcel can prevent construction of a vitally needed public improvement and can complicate financial and contractual arrangements for the entire project. To avoid such a delay, the condemnor may be forced to pay the owner of that parcel more than its fair value and more than the owners of similar property received. In general, the need of the public agencies is not for haste, but for certainty in the date of acquisition. The variable conditions of court calendars and the unpredictable period required for the trial, appeal, and possible retrial of the issue of compensation preclude any certainty in the date of acquisition if that date is determined solely by the final judgment in the proceeding. Lack of the right to obtain possession prior to final judgment thus may lead to precipitant filing of proceedings and premature acquisition

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<sup>2</sup> Certain improvements in these rules were made in 1957 and, in 1961, the Legislature enacted legislation recommended by the Commission that partially systematized the law on this subject. See Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at B-1 (1961). See also Cal. Stats. 1961, Ch. 1613, p. 3442, amending or adding CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1249.1, 1253, 1254, 1255a, and 1255b.

of property, all to the disadvantage of both taxpayers and property owners.

From the condemnee's point of view, if reasonable notice is given before possession is required, and if prompt receipt of the probable value of the property is assured, possession prior to judgment frequently will be advantageous. Upon filing of the condemnation proceeding, the land owner loses most of the valuable incidents of ownership. He is practically precluded from selling or financing the property and is legally deprived of any further increase in the value of the property. He is also denied compensation for any improvements made after service of the summons in the proceeding. As a practical matter, the property owner usually must find and purchase another property prior to termination of the litigation. He must also defray the expenses of the litigation. It is possible that these difficulties will force him to settle for an amount less than he would have eventually received in the condemnation proceeding. In contrast, the taking of possession and payment of approximate compensation prior to judgment permits the condemnee to meet these problems and expenses while proceeding with the trial on the issue of compensation. Even if the condemnee has no urgent need for prompt payment, he may invest the amount he receives as approximate compensation in other property or he may leave it on deposit and receive interest at the legal rate of seven percent throughout the proceeding.

The necessity of determining the right of the condemnor to take the property before such an exchange does not preclude broadened provisions for exchanging probable compensation and possession prior

to judgment. The limiting doctrines of "public use" and "public necessity" once played important roles in condemnation cases. Now, however, the only substantial question to be determined in virtually all condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is decided by the court, rather than by the jury, procedures can be fashioned to permit expeditious determination of that question in the cases in which it arises.

The existing constitutional authorization for "immediate possession" in takings for "rights of way" applies to most acquisitions for highway, freeway, and street purposes. As expansively interpreted, the authorization for such possession in takings of "lands for reservoir purposes" applies to most acquisitions of property needed to develop and conserve water resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, a local government may obtain possession of the rights of way for a sewerage system, but may not obtain possession of the site for the sewage treatment plant or other facility.

The development of highways, and especially freeways, sometimes necessitates the taking of property outside the right of way. Even though the acquisition is by the state, no authorization exists for early possession of property outside the boundaries of the right of way. Similarly, many acquisitions in which possession prior to judgment would be appropriate are excluded both by the limitation as to entities and by the limitation as to the public purpose for which the property is being acquired. As an example, an assured date of



possession is not available for the acquisition of a school site, however great the need and whatever the size or responsibility of the school district.

#### Recommendations

The Commission has concluded that the range of cases in which possession prior to judgment is available should be substantially extended. At the same time, procedures should be provided that will fully protect the rights of property owners and assure them of the actual receipt of approximate payment at the time possession is taken. Accordingly, the Commission recommends:

1. Any public entity should be authorized to obtain possession prior to judgment for right of way or reservoir purposes. Most, if not all, public entities now have this privilege under Section 14 of Article I of the California Constitution. The procedure now followed in obtaining possession for these purposes should be retained in substance, except that the period of notice to the owner and occupants of the property should be extended from 20 days to 60 days. The present 20 days' notice can result in serious inconvenience to the owner or occupants of the property. The 60 days' notice requirement will reduce the possibility of such inconvenience and will also make possible the actual disbursement to the property owner of the required deposit before he is required to relinquish possession.

2. In other condemnation proceedings brought by public entities or by common carriers or public utilities, the plaintiff should be permitted to obtain possession prior to judgment if, upon regularly noticed motion and after consideration of the facts of the particular case, the

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court determines that (a) the plaintiff is entitled to take the property and (b) the plaintiff's need for early possession clearly outweighs any hardship the owner or occupant will suffer if possession is taken. The court should be authorized to fix the date for possession in light of the facts of the particular case, but in no event should the date for possession be less than 60 days after the making of the order. This method of obtaining possession should be limited to public entities, public utilities, and common carriers to avoid extending the right to the exceptional cases in which so-called "private" condemnation is authorized.

#### Deposit and Withdrawal of Probable Compensation

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The Commission recommends that the substance of the existing procedure for making deposits prior to judgment be retained with the following principal modifications:

1. Existing law provides for the depositing of approximate compensation only in connection with an order for possession. However, any condemnor, whether or not it seeks possession prior to judgment, should be authorized to make a deposit of the probable amount of compensation that will be awarded in the proceeding. After a deposit is made, the condemnor should be entitled to an order for possession, effective 30 days after the making of the order, if the defendants entitled to possession either vacate the property or withdraw the deposit.

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The recommended procedure would provide a method by which the parties could effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to

litigate the issue of compensation. It would benefit both parties to the proceeding. The property owner could withdraw the deposit and thus finance the acquisition of other property and defray other expenses incident to the taking. The withdrawal would benefit the condemnor, for it would, as under existing law, waive all defenses to the proceeding except the claim to greater compensation and it would also permit possession to be obtained without regard to the uncertain date that the trial and possible appeals may be concluded.

2. Before making the deposit, the condemnor should be required to have an appraisal made by an expert appraiser. The amount deposited should be the amount determined by the appraiser to be the probable amount of compensation that will be awarded in the proceeding. The condemnor should be required to notify interested parties of its having made a deposit and to make available a copy of the appraisal report upon which the amount of the deposit is based. The amount deposited should be subject to review and change by the court on motion of any interested party. Under existing law, the court fixes the amount of the deposit on ex parte application of the condemnor. Necessarily, the amount fixed is almost always the amount suggested by the condemnor. Although existing law gives the condemnee the right to have the court redetermine the amount of the deposit, experience has demonstrated that the court, having once made an order fixing the amount of the deposit, is reluctant to reconsider that decision even though the initial order was made on ex parte application.

The recommended procedure would streamline existing practice by eliminating the need for an ex parte application to have the court fix the amount of the deposit in every case. Yet it would fully protect the property owner because he will be entitled to consider the appraisal report on which the amount of the deposit is based and to have the court review and revise that amount in any case where he believes that the

deposit is inadequate.

3. The existing system for withdrawing the deposit should be streamlined to eliminate obstacles and delays. The following changes are recommended:

(a) A party seeking to withdraw a deposit should be permitted to serve the notice of his application by mail on the other parties and their attorneys, if any, in all cases in which the other party has appeared or been served with the complaint and summons. Under existing practice, withdrawal is not permitted unless personal service of the notice is made upon all parties.

(b) The existing absolute prohibition of withdrawal if personal service cannot be had should be eliminated. Quite often "defendants" in eminent domain proceedings can easily be shown to have no compensable interest in the property. The courts can protect the rights of persons upon whom it is not possible to make service by requiring a bond or limiting the amount withdrawn in any case where it appears that the party not served actually has a compensable interest in the property.

(c) Where there are conflicting claims to the amount to be withdrawn, the requirement of an undertaking should be left to the discretion of the court, rather than being required as a matter of course. In many cases, there will be no practical danger that the amount withdrawn will exceed the eventual award to the party and the existing requirement that an undertaking be provided imposes an unnecessary obstacle to withdrawal. In any case where there is an actual risk of an excessive withdrawal, the court can require an undertaking or limit the amount to be withdrawn.

4. Existing law requires the condemnor to repay the cost of bond premiums where the need for the bond arises from the condemnee's efforts to withdraw an amount greater than that originally deposited. Repayment is not required under existing law if the bond is required because of competing claims among defendants. The latter rule should be changed to require reimbursement unless the need for the bond arises primarily from an issue as to title between the claimants.

Conflicting claims to a deposit usually result from the need to allocate the award among owners of separate interests in the property. Hence, the need for the allocation--as well as for the bond--arises from the condemnation proceeding rather than from any act or omission of the defendants. Imposition of the cost of the bond on the condemnor is therefore justified.

#### Deposit on Demand of Property Owner

The Commission has considered provisions in other states that permit the condemnee, in all cases, to demand approximate compensation at the beginning of the proceedings. Under these provisions, the condemnor usually is given the right to possession upon complying with the demand of the condemnee. Although these provisions have obvious merit, integration of such a requirement into California condemnation procedure does not appear feasible at this time. Nonetheless, a greater incentive should be provided to the condemnor to deposit approximate compensation in cases in which the condemnee's residence is being taken. The need to purchase another home before he receives the final award places a particularly onerous burden upon

such a condemnee. The Commission therefore recommends enactment of a provision permitting the condemnee to demand that a deposit be made if the property being taken is residential property having not more than two dwelling units and the condemnee resides thereon. If the deposit is not made, interest at the legal rate of seven percent should be allowed on the amount of the eventual award from the date that the deposit should have been made.

#### Possession After Entry of Judgment

Code of Civil Procedure Section 125<sup>4</sup> permits any condemnor to obtain possession following entry of judgment by depositing the amount of the judgment and an additional sum determined by the court to be adequate to secure payment of any additional amount that may be recovered in the proceeding. The procedure is available even though either party appeals or makes a motion for a new trial. Unlike provisions for possession prior to judgment, this authorization for possession after judgment does not raise constitutional problems. See Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907).

Even though the judgment may be reversed or set aside, provisions for possession after entry of judgment are properly distinguished from those for possession prior to judgment. The judgment determines the condemnor's right to take the property, the amount of the award, and the allocation of the award among defendants. Since motions in the trial court, appeals, and possible new trials may take years, the procedure is beneficial to both parties. The period during which the property owner is precluded from renting, selling, or improving

the property is reduced, and he may withdraw the deposit and carry out his plans for the future. From the condemnor's standpoint, the procedure is virtually essential to prevent public improvements being delayed for protracted periods or having to be abandoned altogether. The Commission therefore recommends retention of this post-judgment procedure with the following principal modifications:

1. The court should not be required in every case to determine an amount, in addition to the amount of the judgment, that the condemnor must deposit to secure payment of any further recovery in the proceeding. A procedure already exists for increasing or decreasing the amount on deposit on motion of either party. This procedure should be adapted to permit the property owner to make a motion to compel deposit of an additional amount if he deems that course necessary. Thus, the total procedure for deposits would be streamlined and a single simplified procedure would be made applicable to deposits made after judgment as well as to those made before judgment.

2. Existing law should be clarified to permit the condemnee, after entry of judgment, to withdraw a deposit that was made prior to judgment under the simpler provisions for withdrawal of a deposit made after entry of judgment. Upon entry of the judgment, any reason for two different withdrawal procedures disappears.

3. One uniform procedure should be provided for paying the amount of the award into court after entry of judgment, whether or not either party plans to appeal or move for a new trial, and for withdrawing the amount so paid. Under existing law, unnecessary

confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment (CODE CIV. PROC. § 1252) and a deposit made pending appeal or motion for new trial (CODE CIV. PROC. § 1254).

#### Date of Valuation

Since 1872, Code of Civil Procedure Section 1249 has required that the property to be taken be valued as of the date the summons is issued. In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not brought to trial within one year and the delay is not caused by the defendant, the date of valuation is the date of trial. Neither the taking of possession nor the depositing of approximate compensation has any bearing in determining the date of valuation. In cases in which the issue of compensation is once tried and a new trial is necessary, the Supreme Court of California has held that the date of valuation remains the same date used for that purpose in the original trial.

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits approximate compensation and takes possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that market at the time the exchange of the property for "just compensation"



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actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation. Nonetheless, the existing California rules appear to have worked equitably in most cases. The alternative rule might provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation. And, as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial may begin.

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The Commission therefore recommends retention of the existing rules with the following modifications:

1. The condemnor should be permitted to establish an early date of valuation by depositing the probable amount of compensation for withdrawal by the property owner. In addition to being a needed incentive to condemnors to provide approximate compensation, the rule would accord with the supportable view that the property should be valued as of the time payment is made. For convenience, the date of valuation should be the date the deposit is made unless an earlier date is made applicable by the existing rules. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding.

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2. In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation

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unless the condemnor deposits the amount awarded in the original trial within a reasonably brief period after entry of judgment in the original trial. Unless such a deposit has been made, the date used in the original trial is of no practical or economic significance. To clarify existing law, a similar rule should be provided for a "retrial" following a mistrial, except that the amount to be deposited should be determined in the same manner as a deposit made to obtain possession before judgment.

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

4. The Street Opening Act of 1903 (STS. & JERMS CODE §§ 4000-4443) and the Park and Playground Act of 1909 (GOVT. CODE §§ 38000-38213) specify dates of valuation that differ from those provided by the Code of Civil Procedure. As there appears to be no justification for the discrepancy, these acts should be amended to conform them to the provisions of the Code of Civil Procedure.

#### Changes in Market Value Before the Date of Valuation

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It is generally recognized that announcement of a public improvement may cause property to fluctuate in value before any eminent domain proceedings are begun. Existing California statutes do not deal with the problem. Case law establishes, however, that any increase in the

value of the property that directly results from the improvement itself is to be ascertained and disallowed in arriving at the compensation to be made for the property. Decisions as to the treatment of any decrease in value are uncertain. Notwithstanding the rule as to increases in value, demands by property owners that alleged decreases in value be considered have most frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation." The injustice to the property owner is clear, however, if general knowledge of the proposed improvement has actually depreciated the market value of the property prior to the date of valuation. Equitably, the amount awarded to the owner should be equivalent to what the market value of the property would have been on the date of valuation but for the proposed improvement's influence on the market. Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced.

The Commission therefore recommends that a uniform rule for increases and decreases be established by statute. The statute should provide that "market value" on the date of valuation means such value unaffected 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, or (4) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.

### Interest on the Award

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

As to any amount deposited to obtain possession before judgment, interest does not cease until and unless the amount is withdrawn. Thus, under existing law, the property owner may withdraw the deposit and forgo interest on the amount withdrawn, or he may leave the amount on deposit and receive interest at seven percent. While public agencies may offset a portion of this interest obligation by placing the amount deposited in the Condemnation Deposits Fund in the State Treasury, the rate of return from that fund is much lower than the seven percent rate that accrues to the property owner. Denial of interest can be justified, however, only if the amount deposited can be withdrawn promptly and easily. Although the provisions for withdrawal can and should be streamlined, there appears to be no way to overcome the obstacle presented by the possible existence of separate interests in the property. On trial of the issue of compensation, the condemnor is entitled to have the property valued as a whole, irrespective of the existence of separate interests. The award is segregated only after its total amount has been determined. Deposits prior to judgment are

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made in the aggregate and are not segregated among separate interests in the property. Condemnors consider it essential to retain these features of the existing law. Hence, there is little justification for tolling interest at the time the deposit is made if the condemnee may no longer have possession and yet be faced with obstacles in withdrawing the deposit.

Accordingly, the Commission recommends retention of the substance of of the existing rules on payment of interest with one significant change: Interest on amounts deposited prior to judgment should cease to accrue upon entry of judgment. Under existing law, interest does not cease upon an amount deposited before judgment even upon entry of judgment. Upon entry of judgment, however, the amount that may be withdrawn by each party has been determined and no obstacles to withdrawal exist.

#### Abandonment of the Proceeding

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Before 1961, a condemnor could abandon the proceeding at any time before expiration of 30 days from final judgment, even if possession of the property had been taken. On the Commission's recommendation, the Legislature in 1961 enacted the equitable principle that abandonment without the consent of the condemnee will not be permitted if the court determines that the condemnee has changed his position in justifiable reliance upon the proceeding. This equitable rule applies whether or not the plaintiff has taken possession, but it has particular application to a case in which possession has been taken.

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The Commission does not recommend changing the basic rule governing abandonment, even in connection with enactment of more general provisions for the taking of possession before final judgment. Changes should be made, however, in the existing statutory provision that permits the condemnee to recover certain costs and expenses on

abandonment. Existing law expresses the policy that the condemnee "be restored to substantially the same position as if the proceeding had not been commenced." Yet, the provision that authorizes the recovery of expenses precludes recovery if the proceeding is dismissed 40 days or more prior to the day set for the pretrial conference or, if no pretrial conference is set, the day set for the trial. It has been held that attorney's fees are not subject to this 40-day restriction and may be recovered regardless of when the proceeding is dismissed. The restriction applies, however, to all other fees and expenses incurred because of the proceeding. It has also been held that attorney's fees and fees of other experts may be recovered for services reasonably necessary to defend the condemnee's interest in the proceeding even though a portion of such services are rendered before the complaint is filed. Because there is no substantive difference between attorney's fees and fees for the services of appraisers and other experts and other expenses of preparing for trial, the Commission recommends that existing law be amended to provide a uniform rule. The rule should eliminate the existing 40-day restriction and permit the recovery of all fees and expenses reasonably incurred regardless of the particular stage at which the proceeding is abandoned. The rule should also permit recovery of attorney's fees and fees of other experts that are actually incurred and are reasonably necessary to protect the defendant's interests in the proceeding, whether such fees are incurred for services rendered before or after the proceeding is commenced.

#### Recodification and Miscellaneous Changes

Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure, which deals with eminent domain, has been amended many times since its enactment in 1872. Certain sections have grown to several pages in length, and the organization of the title could be improved. Provisions for deposits, withdrawals, and possession before final judgment should be organized in a new title of the code consisting of three chapters dealing,

<sup>3</sup> For a more detailed statement of the considerations supporting the Commission's recommendation on this topic, see Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 00 (1967).

respectively, with the deposit and withdrawal of probable just compensation, possession before entry of judgment, and possession after entry of judgment.

In connection with the recodification of the provisions of Title 7 that deal with possession, deposits, and related matters, numerous changes should be made in existing statutory language. Certain of these changes would reflect appellate decisions construing existing provisions. Others should be made in the interest of clarity and logical organization. The reasons for, and effects of, these changes are indicated in the comments to the particular sections of the legislation recommended by the Commission.

#### CONSTITUTIONAL REVISION

The Commission has concluded that Section 14 of Article I of the California Constitution should be revised. This section grants the right of "immediate possession" only to specified public agencies in right of way and reservoir cases. It does not assure the property owner that he will actually receive compensation at the time his property is taken.

The addition of the immediate possession provisions to Section 14 reversed a long-standing policy of this state that property may not be taken unless compensation has first been made, which was originally adopted as a part of the present Constitution in 1879. Prior to that time, the Constitution had merely required that the owner of property taken for public use be given just compensation, and it was held that payment might be made within a reasonable time after the taking. In 1879, the present Constitution was adopted with the provision that private property may not be taken or damaged for public use "without just compensation having first been made." The provisions of Section 14

that now authorize immediate possession without payment to the owner "having first been made" were adopted to overcome this limitation.

The Commission believes that the policy underlying the original provision of the 1879 Constitution is sound and that the contrary policy now expressed in the immediate possession provisions of Section 14 is undesirable. A person's property should not be taken from him unless he has the right to be paid concurrently for the property, for it is at the time of the taking that he must meet the expenses of locating and purchasing property to replace that taken and of moving to the new location.

Another serious defect in Section 14 is that it severely limits the agencies by which and the purposes for which possession prior to judgment may be taken. This right is of great value to the public, for it permits the construction of needed public projects without undue delay. The Legislature should, therefore, have the power to decide from time to time what agencies are to have the power and for what purposes the power may be exercised. It should not be necessary to amend the Constitution each time a change in the needs of the people of the state warrants either an extension or contraction of the purposes for which the right to possession prior to judgment may be exercised.

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

1. An explicit provision should be added assuring property owners that they will be compensated concurrently whenever possession of their property is taken.



2. The lengthy proviso to the first sentence, which authorizes "immediate possession" in certain cases, should be deleted and a provision should be added giving the Legislature authority to specify (a) the purposes for which, and entities by which, possession may be taken prior to judgment and (b) subject to the requirement of concurrent payment, the procedure for such cases. It should not be necessary to amend the Constitution every time that it is found that the existing procedures are faulty or can be improved.

3. In the first sentence, the phrase "which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law" should be clarified to state that "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."

4. The second portion of the first sentence, prohibiting "appropriation" of property "until full compensation therefor be first made in money or ascertained and paid into court for the owner," should be deleted as surplusage.

5. The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be deleted. The phrase applies only to "corporations other than municipal" and, oddly, only to takings for right of way or reservoir purposes. The language may be inoperative under 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). In any event, the complex question of the offsetting of benefits in cases of partial takings should be left to the Legislature.

6. The last sentence of the section, which declares certain logging and lumbering railroads to be "public uses" and specifies that the taking of property for such purposes constitutes the taker a common carrier, should be deleted. Takings for this purpose are authorized by existing legislation, and the constitutional provision is obsolete since it applies only to "a railroad run by steam or electric power." Such railroads have been largely replaced by railroads using diesel powered locomotives. Moreover, the sentence adds little if anything to decisional law (some of which is based on the Constitution of the United States) relative to takings for such purposes and also to the status and obligations of "common carriers."

## RECOMMENDED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measures:

An act to amend Sections ~~1247~~ 1249, 1249.1, 1252, 1253, 1255a, 1255b, and 1257 of, to add Title 7.1 (commencing with Section 1268.01) to Part 3 of, to add Section 1249a to, and to repeal Sections 1243.4, 1243.5, 1243.6, 1243.7, and 1254 of, the Code of Civil Procedure and to amend Sections 38090 and 38091 of, and to add Article 9 (commencing with Section 16425) to Chapter 2 of Part 2 of Division 4 of Title 2 of, the Government Code and to amend Sections 4203 and 4204 of the Streets and Highways Code, relating to eminent domain.

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

### CODE OF CIVIL PROCEDURE

#### Section 1243.4 (repealed)

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 public 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.~~

REPEALED

Comment. Section 1243.4 is superseded by Section 1269.01.

Section 1243.5 (repealed)

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

1243.5. (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 30 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 1212.7.

(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:

<u>Section 1243.5</u>	<u>Recommended Legislation</u> (Code of Civil Procedure)
Subdivision (a)-----	1268.01, 1269.01
Subdivision (b)-----	1269.01
Subdivision (c)-----	1269.04
Subdivision (d)-----	1268.03
Subdivision (e)-----	1268.09
Subdivision (f)-----	1269.07

Section 1243.6 (repealed)

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.

Section 1243.7 (repealed)

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 1243.6, 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.



(e) 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 person 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

Section 1249 (amended)

Sec. 5. Section 1249 of the Code of Civil Procedure is amended to read:

1249. (a) As used in this section, "market value" means market value unaffected 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 preliminary actions on the part of the condemnor related to the taking or damaging of the property.

(b) For the

purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued as the date of the issuance of summons and its actual value of the property on the date of valuation. ~~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.

market

Roman type

measure of the value of the property before injury for the purpose of assessing

Comment. Section 1249 states the measure of compensation in eminent domain proceedings.

Subdivision (a). The problems to which subdivision (a) is directed have not heretofore been dealt with in California statutory law, but have been considered in judicial decisions. This subdivision requires that the market value be determined as if there had 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 effect, in arriving at the compensable market value. See U.S. v. Miller, 317 U.S. 369 (1943); City of San Diego v. Boggeln, 164 Cal. App.2d 1, 330 P.2d 74 (1958); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). This subdivision is intended to codify the results of these and similar decisions.

Notwithstanding the rule as to enhancement in value, the California decisions are uncertain respecting any decrease in value due to 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 (a) is intended to make the rules respecting appreciation and depreciation parallel.

Under subdivision (b) of this section, the market value of the property on the date of valuation is the "measure of compensation" for property actually taken and the "measure of the value of property before injury" as to property not taken but injuriously affected. Subdivision (a), however, requires that the influence, if any, of the mentioned factors upon market value be considered in determining compensable market 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 effect is indirect. The influence of the factors is eliminated 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 listed in subdivision (a) is to codify the general proposition that the use which the condemnor is to make of the property cannot properly be considered to have increased or decreased

its market value. See City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 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 (a) 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 on market value of preliminary actions on the part of the condemnor related to the taking or damaging of the property, and of the eminent domain proceeding itself, see Buena Park School Dist. v. Metrim Corp., supra. Subdivision (a) codifies the view expressed in the Metrim and similar decisions.

Subdivision (b). The term "market value" has been substituted for "actual value" in subdivision (b). This change codifies the decisional law which uniformly construed "actual value" to mean "market value." See Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909); Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899). For simplicity of expression, the phrase "date of valuation" has been substituted for former language that referred to "accrual" of the right to compensation and damages. 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,

§ 1249

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)).

The provisions relating to dates of valuation formerly contained in this section are superseded by Section 1249a. The provision denying compensation for improvements made 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 by political subdivisions to take the property of public utilities 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).

§ 1249a

SEC. 6. 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) If the issue of compensation is brought to trial within one year after the filing of the complaint, the date of valuation is the date of the filing of the complaint.

(c) If the issue of compensation is not brought to trial within one year after the filing of the complaint, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case the date of valuation is the date of the filing of the complaint.

(d) If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of such new trial, except that the date of valuation in the new trial shall be the same date as the date of valuation 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



§ 1249a

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

(e) In any case in which a mistrial is declared and the retrial of the case is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of the retrial of the case, except that the date of valuation in the retrial of the case shall be the same date as the date of valuation in the trial in which the mistrial was declared if, within 30 days after the declaration of the mistrial, the plaintiff deposits the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1.

(f) Unless an earlier date of valuation is applicable under subdivisions (b) through (e), inclusive, if the plaintiff deposits the probable just compensation 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.

Comment. Section 1249a supersedes those portions of Code of Civil Procedure Section 1249 that formerly specified two alternative dates of valuation.

Subdivision (a). Section 1249a provides a date of valuation for all eminent domain proceedings other than valuation proceedings before the Public Utilities Commission. See the Comment to Section 1249.

Subdivisions (b) and (c). Subdivisions (b) and (c) establish the date of valuation for cases in which that date is not established by an earlier deposit of probable just compensation in accordance with subdivision (f).

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

Subdivision(c), which continues in effect a proviso formerly contained in Section 1249, retains the date specified in subdivision (b) as the date of valuation in any case in which the delay in reaching trial is caused by the defendant.

With respect to the date that a trial is commenced, see Evidence Code Section 12 and the Comment to that section.

If a new trial is ordered or a mistrial is declared and the new trial or retrial is not commenced within one year after the filing of the complaint, the date of valuation is determined under subdivision (d) or (e) rather than under subdivision (b) or (c). However, if the new trial or retrial is commenced within one year after the filing of the complaint, the date of valuation is determined by subdivision (b).

Notwithstanding subdivision (c), the date of valuation may be an earlier date if a deposit of probable just compensation is made. See subdivision (f).

Subdivision (d). Under language formerly contained in 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 valuation established in 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). Subdivision (d) 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 Chapter 3 (commencing with Section 1270.01) of Title 7.1. 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 subdivision (e) rather than under subdivision (d).

Under subdivision (d), the date of valuation is the date of valuation used in the previous trial if the deposit is made within 30 days after entry of judgment or, if 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 deposit is made thereafter but prior to the commencement of the new trial, the date of valuation is the date of deposit under subdivision (f).

Subdivision (e). Under the language formerly contained in Section 1249 the effect, if any, of a mistrial upon the date of valuation was uncertain. An unpublished decision of the court of appeals held that the abortive trial proceeding was of no consequence in this connection and that if the retrial began more than one year after the date of issuance of summons, the date of

valuation was the date of the retrial. People v. Hall, 1 Civil No. 29159 (Second Dist.)(1966). To provide an appropriate rule, subdivision (e) adopts the principle established by subdivision (f) which governs the date of valuation when a new trial is ordered. See the Comment to subdivision (f).

For the purpose of subdivision (e), a "retrial" following a mistrial is distinguished from a new trial following an appeal or a motion for new trial granted under Code of Civil Procedure Section 657. See subdivision (e) and the Comment to that subdivision. As to the distinction, see Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928 (1946); WITKIN, 3 CALIFORNIA PROCEDURE 2072, § 24 (1954).

Subdivision (f). This subdivision permits the plaintiff, by depositing probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) of Title 7.1 of the Code of Civil Procedure, to establish the date of valuation as of a date no later than the date the deposit is made. The rule under the language formerly contained in 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 preceding subdivisions.

Section 1249.1 (amended)

⑦ ~~Sec. 2.~~ 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.

for

(b) *No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.*

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

Section 1252 (amended)

8 Sec. 1252. Section 1252 of the Code of Civil Procedure is amended to read:

(a) 1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in Court for the defendants, and be distributed to those entitled thereto as provided in Chapter 3 (commencing with Section 1270.01) of Title 7.1 and withdrawn by those entitled thereto in accordance with that chapter. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be had 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.

(b) If the plaintiff fails to pay or deposit the money within the time specified in Section 1251, the defendants may elect to treat such failure as an implied abandonment of the proceeding or may have execution as in civil cases. If the money cannot be had on execution, the defendants may again elect to treat the plaintiff's failure to pay or deposit the money within the time specified in Section 1251 as an implied abandonment of the proceeding. In case of an implied abandonment of the proceeding, upon motion of the defendants a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements as provided in subdivision (c) of Section 1255a, and such relief and damages as are provided in subdivision (d) of Section 1255a, to the same extent as if the proceeding were dismissed under Section 1255a on motion of the plaintiff.

Comment. Subdivision (a) of 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.

Subdivision (b) supersedes the second sentence of Section 1252 as it formerly read and a portion of subdivision (a) of Section 1255a. The subdivision codifies the holding in Southern Public Utility Dist. v. Silva, 47 Cal.2d 167, 302 P.2d 5 (1956), and also makes it clear that an implied abandonment for failure to pay or deposit within the time specified in Section 1251 has the same consequences as an abandonment on motion of the plaintiff under Section 1255a. Thus, the defendants may recover expenses reasonably and necessarily incurred in preparing for trial and during trial and reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendants' interests in the proceeding. In addition, the defendants are entitled to an order restoring them to possession of the property and to 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 defendants moved from the property in compliance with an order of possession, whichever is the earlier.

Section 1253 (amended)

9.

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 each 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, 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.

by the plaintiff and

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. If the court has made an order authorizing the plaintiff to take possession of the property

Comment. Section 1253 is amended to change the references to the appropriate statutory provisions and to make nonsubstantive, clarifying changes.

, the final order of condemnation shall also state the date upon or after which the plaintiff was authorized to take possession.



Section 1254 (repealed)

10

SEC. 1254. 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 proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

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

(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution, but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the 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 withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury; in which case the court shall order deposit in the 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 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designation.

(i) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

(j) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the 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) ----- <sup>4</sup>	C.C.P. § 1257(b)

Section 1255a (amended)

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 1253 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 fees, appraisal~~

recoverable

reasonably and necessarily

fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in the proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint.

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 30 days or more prior to the time set for the pretrial conference to 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.

Subdivision (c), of course, permits recovery of fees and expenses only if a complaint is filed and the proceeding is later dismissed. The subdivision has no application if the efforts or resolution of the plaintiff to acquire the property do not culminate in the filing of a complaint.

Section 1255b (amended)

12.

Sec. ~~1255b~~ 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 first day following the date of the order determining such amount.

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

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

~~(c)~~

(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 ~~1242.5~~ 1268.01) of Title 7.1, the date that such amount is withdrawn by the person entitled thereto, or if not withdrawn, on the date that judgment is entered.

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

~~(2)~~

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

~~(3)~~

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

(4) If the full amount the defendant is then entitled to receive is 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.

on or before the date specified by the moving party, the date specified.

thereafter

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

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

Subdivision (b). This subdivision has been revised to clarify the meaning of the former 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 has been added to conform to Section 1269.05.

Subdivision (c). This subdivision has been added to codify existing law by specifying 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 codifies existing law by specifying 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. Giumarra Vineyards Corp., 245 Cal. App.2d \_\_\_, 53 Cal. Rptr. 902 (1966).

Subdivision (d). In subdivision (d), paragraph (1) has been revised to make reference to the appropriate statutory provisions and provide that interest terminates, on entry of judgment, upon an amount deposited before judgment 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 paragraph (1) 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 1268.03. 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 (3) has been changed to make reference to the appropriate statutory provisions.

Former paragraph (4) of subdivision (c) has been eliminated as unnecessary. That paragraph referred to the practice of payment into court pursuant to Section 1952, which practice has been eliminated by amendment of Section 1952. All post-judgment deposits now are made under Chapter 3 (commencing with Section 1270.01) of Title 7.1 and, hence, are covered by paragraph (3).



Section 1257 (amended)

**13.** ~~Sec. 1254~~ 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.

Comment. Subdivision (b) is the same as and supersedes subdivision (k) of former Code of Civil Procedure Section 1254. It is included in this section because Section 1254 will be repealed, but the inclusion of subdivision (b) does not mean that the Law Revision Commission has approved the substance of this subdivision. Subdivision (b) will be studied during the course of the Commission's study of eminent domain law and the Commission's recommendation concerning this subdivision will be contained in a subsequent recommendation.

Section 1257 formerly contained an elaborate proviso that related to possession pending appeal or new trial. That proviso was added in 1877 in connection with related changes in Code of Civil Procedure Section 1254, which dealt with possession after entry of judgment. See Code Am. 1877-78, Ch. 651, p. 109, §§ 1-2. Several subsequent changes to former Section 1254 deprived the proviso of any effect. See Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941).

Accordingly, the proviso has been deleted from subdivision (a). Possession pending appeal or new trial is now provided for by Chapter 3 (commencing with Section 1270.01) of Title 7.1.

Title 7.1 (added)

11.

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

CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT

Comment. This chapter supersedes Code of Civil Procedure Sections 1243.6 and 1243.7 and those portions of Section 1243.5 that relate to the deposit and withdrawal of compensation prior to judgment. Under this chapter, the condemnor may deposit the amount indicated by an appraisal to be the compensation 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 Chapter 2 (commencing with Section 1269.01). 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. Deposit of the amount of the appraisal

1268.01. (a) At any time after filing the complaint and prior to entry of judgment in any proceeding in eminent domain, the plaintiff may deposit with the court the amount indicated by an appraisal report to be the compensation for the taking of any parcel of property included in the complaint. Such deposit 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. The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit pursuant to subdivision (a) the plaintiff shall have an appraisal made of the property for which the deposit is to be made. The appraisal shall be made by an expert qualified to express an opinion as to the value of the property. The expert shall prepare an appraisal report which shall set forth all amounts, opinions, and supporting data required by Code of Civil Procedure Section 1272.02 to be included in a statement of valuation data, including but not limited to:

- (1) The value of the property or property interest being valued.
- (2) If the property is a portion of a larger parcel, the amount of the damage, if any, to the remainder of the larger parcel.
- (3) If the property is a portion of a larger parcel, the amount of the benefit, if any, to the remainder of the larger parcel.

Comment. Section 1268.01 is new. In contrast with former practice, (1) the deposit may be made without obtaining the court's order therefor and without regard to an order for possession and (2) the amount of the initial deposit is determined by an appraisal obtained by the plaintiff, rather than by the court upon ex parte application of the plaintiff. Under Section 1268.03, however, the amount deposited may be determined or redetermined by the court on motion of any interested party.

§ 1268.01

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 one complaint. See Weiler 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; Evidence Code Sections 811 and 812.

Subdivision (b) contemplates that the required appraisal be made either by a member of the condemnor's appraisal staff or by an independent appraiser. An appraisal report is necessary to enable the plaintiff to comply with Section 1268.02 which requires the notice of deposit to be accompanied by or to refer to the appraisal report upon which the amount of the deposit is based. The subdivision requires that the report contain all information required to be included in a statement of valuation data. In general, Code of Civil Procedure Section 1272.02 (as added by Cal. Stats. 1967, Ch. \_\_\_, § 2, p. \_\_\_ ) requires that such a statement set forth the appraiser's opinions as to the property's value, severance damages, and special benefits and specified items of supporting data, including "comparable" transactions, to the extent that the opinions are based thereon.

1268.02. Service of notice of deposit.

1268.02 (a) On making a deposit pursuant to this chapter,  
~~1268.02. 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 pos-  
session. Service of an order for possession that recites the  
amount deposited pursuant to this chapter is sufficient com-  
pliance with the requirement of this section.~~

(b) The notice shall either (1) be accompanied by a  
copy of the appraisal report upon which the amount of the  
deposit is based or (2) state the place where and the times  
when such report may be inspected. If the notice designates  
a place where and times when the report may be inspected, the  
plaintiff shall make such report available to all parties who  
have an interest in the property at such place and times.

1268.02

Comment. Section 1268.02 is new. It requires that notice of the deposit be given in all cases to facilitate motions to change the amount of the deposit (Section 1268.03) or applications to withdraw the funds deposited (Sections 1268.04 and 1268.05). The appraisal report referred to in subdivision (b) is the one required by subdivision (b) of Section 1268.01.

1268.03. Increase or decrease in amount of deposit

1268.03. (a) At any time after a deposit has been made pursuant to this chapter, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be made for the taking of the property.

(b) 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 a motion for redetermination of the amount is made after entry of judgment and a motion for a new trial is pending, the court may stay its redetermination until disposition of the motion for a new trial.

(c) If the plaintiff has taken possession or obtained an order for possession and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased accordingly. If the court determines that the probable amount of compensation exceeds the amount deposited and the amount on deposit is not increased accordingly within 30 days from the date of the court's order, no deposit shall be considered to have been made for the purpose of subdivision (f) of Section 1249a.

(d) After any amount deposited pursuant to this chapter has been withdrawn by a defendant, the court may not determine or redetermine the probable amount of compensation to be less than the total amount already withdrawn.

Comment. Section 1268.03 is new. It supersedes Code of Civil Procedure Section 1243.5(d) which provided for redetermination of the amount of "probable

§ 1268.03

just compensation." 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).

Under subdivision (f) of Code of Civil Procedure Section 1249a the making of a deposit under this chapter establishes the date of valuation unless an earlier date is applicable. The second sentence of subdivision (c) of Section 1268.03 denies that effect to the making of a deposit if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination. The second sentence applies only where the plaintiff has not taken possession of the property; if the plaintiff has taken possession, the first sentence of subdivision (c) requires that the plaintiff increase the amount of the deposit in accordance with the court's order.

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. Accordingly, subdivision (d) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn



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.~~

a deposit has been

(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 is derived from Section 1243.7(a), (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; conflicting claims to 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 (c) of Section 1269.04 for service of an order for possession. The plaintiff shall report to the court (1) the names of parties served and the dates of service, and (2) the names and last known addresses of parties who have neither appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in subdivision (c) of Section 1269.04 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served, but if such liability is enforced the plaintiff shall be subrogated to the rights of such parties under Section 1268.08.

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

(e) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. 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. ~~If~~ The undertaking may be 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 subdivisions (a), (c), (d), (e), and (f) of former Section 1243.7. Unlike the subsections on which it is based, Section 1268.05 does not forbid withdrawal 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, as to the amount to be withdrawn, 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 and People v. Nogarr, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

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

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

1268.03

and in such case

The undertaking may be

(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.

but the maximum amount that may be recovered from such sureties is the amount by which the total amount to be withdrawn exceeds the amount originally deposited.

Comment. Section 1268.06 is the same in substance as former subdivision (b) of 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 1268.03.

§ 1268.07

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 former (g) of 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. Cantierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

1268.08. Repayment of amount of excess withdrawal

which

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 former

(h) of Section 1213.7.

1268.09. Limitations on use of evidence submitted in connection with deposit

1268.09. (a) 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.

(b) In the trial of the issue of compensation a witness may not be impeached by reference to his appraisal report or other statements made in connection with a deposit pursuant to this chapter, nor shall such a report or statement be considered to be an admission of any party.

Comment. Subdivision (a) of Section 1268.09 restates the substance of subdivision (e) of former Section 1243.5. Subdivision (b) is new. The purpose of the subdivision is to preclude impeachment of a witness at the trial by reference to appraisal reports or other statements made in connection with (1) a deposit and notice thereof under Sections 1268.01 and 1268.02, or (2) proceedings to determine or redetermine probable just compensation under Section 1268.03, or (3) an application to withdraw the amount deposited under Section 1268.04 or Section 1268.05. The subdivision applies, of course, to witnesses for the defendants as well as to those for the plaintiff. The subdivision also precludes such reports or statements being considered to be admissions of the party on whose behalf they were made. See Evidence Code Sections 813 and 822.

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 former in substance as Section 1243.6. Subdivision (b) is based on the former first two sentences of subdivision (h) of Section 1254.



Title 7.1—Chapter 2

CHAPTER 2. POSSESSION PRIOR TO JUDGMENT

1269.01 Possession by public entity for right of way or reservoir

or on behalf of

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

(b) At any time after filing the complaint and prior to entry of judgment, the plaintiff may apply ex parte to the court for an order for possession. 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) Is entitled to take possession prior to judgment under subdivision (a); and

(3)

~~(3) 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.~~

(1)

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

(2)

~~(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).~~

(3)

~~(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.~~

the amount indicated by an appraisal report to be the compensation for the taking of the property

subdivision (b) of

§ 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. The words "the State or a county, city, district, or other public entity" have been substituted for the words "the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation." See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950). The new language encompasses all proceedings by governmental entities, agencies, or officers to acquire rights of way or lands for reservoir purposes, whether the interest to be acquired is a fee, easement, or other interest.

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

Subdivision (c) is the same in substance as Code of Civil Procedure Section 1243.5(b), except that the requirement that the order state the amount of the deposit has been eliminated. Section 1268.02 requires that a notice of the making of a deposit be served on interested parties.

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

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, common carrier, ~~or public utility~~ 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.

or

(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 ~~motion~~ 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) ~~and~~.

clearly

the amount indicated by an appraisal report to be the compensation for the taking of the property

be determined by the court and shall

(d) The date after which the plaintiff is authorized to take possession of the property shall not be less than ~~60~~ days after the making of the order, ~~and may be any later date specified by the plaintiff.~~

60

(e) Before making an order for possession under this section the court shall dispose of any pending motion under Section 1268.03 to determine or redetermine the amount of probable compensation and, if an increase in the amount of the deposit is determined, shall require the additional amount to be deposited by the plaintiff.

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. Unlike the ex parte procedure provided by Section 1269.01, however, this section authorizes an order for possession only upon disposition of a regularly noticed motion.

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). See also, Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 SANTA CLARA LAWYER 37, 81-86 (1966). These subdivisions provide for determination of the motion in keeping with motion practice generally.

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

Subdivision (e). See Section 1268.03 and the Comment to that section.

Review of orders authorizing or denying possession. Under former statutes, judicial decisions held that an appeal might not be taken from an ex parte order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be 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 has been held to be 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). No change is made in these rules as to orders made under Section 1269.01, Section 1269.02, or Chapter 3 (commencing with Section 1270.01).

1269.03. [Reserved for expansion]

1269.04. Service of 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 ~~10~~ 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 1269.02,~~ 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.

(d) 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.

(e) 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.

(f) 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.

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

(c) An order for possession made under Section 1269.02 shall be served on the record owner and occupants, if any, within 10 days after the making of the order.

made under Section 1269.01,

§ 1269.04

Comment. Section 1269.04 is derived from former Section 1243.5(c). The requirement that an affidavit be filed concerning service by mail has been eliminated. Subdivision (g) is a clarification of a sentence in the first paragraph of Section 1243.5(c). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post-office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address.

1269.05. Deposit and possession on motion of certain defendants

1269.05. (a) If the property to be taken includes 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 notice of motion shall specify the date on which the moving party desires the deposit to be made. Such date shall not be earlier than 30 days after the date noticed for the hearing of the motion and may be any later date. The motion shall be heard and determined in the same manner as a motion made to modify a deposit under Section 1268.03.

(b) The court shall make its order determining the probable just compensation. If the plaintiff deposits the amount stated in the order on or before the date specified by the moving party, (1) interest upon that amount shall not accrue and (2) the plaintiff may, after making the deposit and upon ex parte application to the court, obtain an order for possession that authorizes the plaintiff to take possession of the property 30 days after the date for the deposit specified by the moving party. If the deposit is not made on or before the date specified by the moving party, the compensation awarded in the proceeding to the moving party shall draw legal interest from that date.

(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



§ 1269.05

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.

(e) A deposit made under this section may be withdrawn in accordance with Sections 1268.05 and 1268.06.

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. Section 1269.05 makes available to homeowners a procedure by which probable just compensation may be determined, deposited and withdrawn within a relatively 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).

§ 1269.05

Although Section 1269.05 does not require the plaintiff to deposit the amount determined, if no deposit is made interest on the eventual award begins to accrue. See Section 1255b(a)(4). 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 Section 1255b(a)(1). Interest does not accrue as to any amount deposited under this section after the date the deposit is made. See Section 1255b(d)(2).

Under subdivision (b) the timely making of a deposit under this section entitles the plaintiff to an order for possession effective 30 days after the date for the making of the deposit specified in the notice of motion served by the moving party.

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

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:

- (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.

subdivision (b) of

§ 1269.06

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. 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 take 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 subdivision (b) of 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 made under Section 1269.01.

§ 1269.07

1269.07. Taking possession does not waive right of appeal

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

Comment. Section 1269.07 is the same in substance as former 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 Section 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.

1269.08. Court may enforce right to possession.

1269.08. The court in which a proceeding in eminent domain is brought has the power to:

(a) 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).

(b) Enforce any of its orders for possession by appropriate process.

(c) Stay any actions or proceedings brought against the plaintiff arising from possession of the property.

Comment. Section 1269.08 is new. Subdivision (c) is derived from a sentence formerly contained in Code of Civil Procedure Section 1254. In general, the section codifies judicial decisions which hold that after an eminent domain proceeding is begun the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. 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, 88 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). 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 decisions cited supra), orders for possession contemplated by the section 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.

Title 7.1--Chapter 3

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.

§ 1270.01

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, 1269.01, and 1269.02. The chapter supersedes former 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 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 former 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 supersedes the deposit procedures formerly provided by Sections 1252 and 1254.

Subdivision (b) is new. In requiring that notice of the deposit be given, it parallels Section 1268.02 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 former 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 former Section 1254. With respect to the last sentence, see the Comment to Section 1269.04.

1270.04. Increase or decrease in amount of deposit

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

Comment. Section 1270.04 supersedes subdivision (d) of former Section 1254. For the parallel provision permitting increase or decrease in a deposit made prior to entry of judgment, see Section 1268.03.

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 made under Section 1268.03, 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 (c), 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.

Comment. Section 1270.5 is based on subdivision (f) of former 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 Section 1254 after the entry of judgment. People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). See also People v. Neider, 55 Cal.2d 832, 361 P.2d 916 (1961). Compare G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934) (practice before any provision existed for withdrawal of a deposit made before judgment). The language of this section has been changed to incorporate this construction. The section also has been changed to permit the court to require security as a condition to withdrawal in appropriate cases.

Code of Civil Procedure Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment, whether or not the plaintiff applied for or obtained an order for possession. People v. Outierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 761 (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

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 former 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~~ <sup>to</sup> to this chapter.

Comment. Section 1270.07 is the same in substance as subdivision (e) of former Section 1254. Under Section 1270.05, the defendant may also retain his right to appeal or to 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 former Section 1254.

GOVERNMENT CODE

16425. Condemnation Deposits Fund

15.

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. 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 former Section 1254.

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.

Government Code § 38090 (amended)

16

Sec. 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 1219a 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.~~

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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. 117, § 3). It has not been amended previously to conform to the various changes that have been made over the years in the Code of Civil Procedure. The section is amended to conform, as near as may be, to the Code of Civil Procedure. See new Code of Civil Procedure Section 1249a.

§ 38091 (Government Code)

Government Code § 38091 (amended)

17

Sec. 17 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 or damages.

§ 4203 (Streets and Highways Code)

STREETS AND HIGHWAYS CODE

Streets and Highways Code § 4203 (amended)

18.

Sec. 4203. 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.*

the commencement of the

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. 504, 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. 469 (1925). The section is amended to accord with Code of Civil Procedure Section 1249a.

§ 4204, (Streets and Highways Code)

Streets and Highways Code § 4204 (amended)

19

Sec. 4204. 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.



RECOMMENDED CONSTITUTIONAL AMENDMENT

(Amendment of Section 14, Article I)

Sec. 14.

Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. 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. The Legislature may provide for the taking of possession of property and the devoting of such property to public use following commencement of an eminent domain proceeding and may prescribe the manner in and the time at which such possession may be taken. Legislation authorizing possession to be taken shall require that (1) before possession is taken, the probable amount of compensation to be made for the taking of the property be paid into court for the owner, (2) the amount to be paid into court be subject to determination by the court on motion of any interested party, and (3) the total amount paid into court be available immediately to the persons that the court determines to be entitled thereto and be withdrawable by such persons in accordance with such procedure as the

legislation may provide. and no right-of-way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or

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

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

Comment. The effect of this revision of Section 14 is as follows:

First sentence. No change is made in existing constitutional law respecting "public use," "just compensation," "inverse condemnation," 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, 213 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 payment into court).

Second sentence. This sentence states the established judicial construction of deleted language that required 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, 166 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., 159 Cal. 545, 147 Pac. 238 (1915), and Highland Realty Co. v. San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956). The words "Subject to the provisions of Section 23a of Article XII" are included 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. Comm'n, 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 Util. Co. v. Superior Court, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963). No change is made in these rules.

Third sentence. This sentence replaces the former authorization for the taking of "immediate possession" by certain entities in right-of-way and reservoir cases, and removes any doubt whether the Legislature may, by statute, provide for possession prior to judgment. 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 Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 SANTA CLARA LAWYER 37, 56-74 (1966). The sentence also permits the Legislature to classify condemnors and public purposes in this connection.

Fourth sentence. This sentence clarifies the application of the first sentence of this section to the taking of possession in eminent domain proceedings. It requires that, before possession of the property is taken,

the probable amount of compensation that eventually will be awarded in the proceeding be paid into court for the owner. It also adds a requirement, not heretofore imposed by this section, that the funds paid into court be available to the property owner prior to termination of the proceeding. 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 permits the Legislature to specify whether the amount paid into court is determined initially by the plaintiff, by the court, or in some other manner, but requires that such amount be subject to determination by the court on motion of an interested party.

Language deleted. In deleting the second portion of the first sentence of this section, this revision eliminates language that prohibited "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 was held to add nothing to the meaning of the first portion of the sentence. See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by the fourth sentence of the section as revised.

The revision also deletes language which required that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This limitation as to the offsetting of benefits applied only to private corporations taking rights of way or lands for reservoir purposes and probably was inoperative under 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 revision clarifies and unfetters 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, which dealt with "immediate possession" in right of way and reservoir cases are superseded by the third and fourth sentences of the revised section.

In deleting the last sentence of this section, this revision eliminates a provision which stated, in effect, that property might be taken by eminent domain for certain logging or lumbering railroads, and that such taking constituted the taker a common carrier. The provision was added in 1911 and was never construed or applied by the 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 that made the taker a common carrier was declaratory of judicial decisions which hold that acquisition of the right of way by eminent domain is cogent proof that the carrier is a "common carrier" with respect to that line. 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). See also Annots., 86 A.L.R. 552 (1933), 67 A.L.R. 588 (1930). Deletion of the sentence therefore makes no change in existing law.