#36.35 4/26/71

Memorandum 71-25

Subject: Study 36.35 - Condemnation (Comprehensive Statute--Provisions Relating to Possession Prior to Final Judgment)

Summary

This memorandum is a revised version of Memorandum 71-112, which the Commission previously had no opportunity to consider. It is concerned with Division 7 (commencing with Section 1268.01) of the Comprehensive Statute. Most of this division was considered at the September 1970 meeting and approved. Except as noted below, the provisions of this division reflect the Commission's decisions at the September meeting. This memorandum presents those sections which the Commission has not previously considered. The major policy questions are:

(1) Is the procedure for obtaining an order for possession, as set forth in Sections 1269.01-1269.02, and made to satisfy due process requirements, adequate for all condemnors?

(2) Should the requirements contained in Sections 1268.08 and 1270.05, that withdrawal of deposit waives all defenses except claim to greater compensation, be retained?

Affected Sections

Section 1268.05. In addition to revising subdivision (f) to allow a condemnee to recover the premium reasonably paid to a surety insurer for an undertaking, the Commission further directed the staff to investigate the propriety of the "issue as to title" language contained in this subdivision. As indicated in the Comment to this section, the language is borrowed from California cases and statutes which utilize it to refer to issues of the existence or nonexistence of property interests, but not to questions of the respective amounts of the existing interests. Although the "issue of title"

language may not be as clear as could be desired, it is a convenient shorthand with an accepted legal meaning; no easy alternatives are readily apparent. As a consequence, the staff suggests that the phrase be left unchanged.

Section 1268.08. This section provides for waiver of all defenses except a claim to greater compensation by the condemnee who withdraws a deposit. The Commission suspended consideration of this section pending receipt of new materials from Mr. Kanner. These materials are appended as Exhibit I.

Mr. Kanner's major points can be summarized as follows: The condemnee should be entitled to at least one of the following: (a) possession and use of the property, (b) withdrawal and use of the award, or (c) interest on the award if he cannot withdraw it and has been deprived of the use of his property. Thus, the condemnee who challenges only the amount of compensation can draw down the deposit and make an appeal; the condemnor can take possession and appeal upon deposit of the amount of the award; but the condemnee who wishes to contest the right to take on appeal may find that his property is taken, that he cannot draw down the award, and that it does not accrue interest, and he is thus unfairly discriminated against. Even a criminal is encouraged to appeal, but a condemnee who wishes to challenge the right to take is discouraged from appealing.

This characterization of the status of the condemnee is inaccurate. To begin with, Section 1268.08 authorizes the condemnee to withdraw any amount deposited prior to judgment. A deposit made by a condemnor before any court hearing at all operates simply as an offer, which the condemnee may take or leave. There is no dispossession, no running of interest, no obligations on any party. If the condemnee chooses to accept the offer,

however, he may withdraw the deposit and in so doing waives any defenses other than a claim to greater compensation. If there has been a court hearing and an order of possession, the condemnee may be dispossessed, but interest continues to run until entry of a judgment. Clearly, then, the condemnee up till the time of entry of judgment will always have either his property, or interest running on the deposit, and may nonetheless challenge the right to take in court hearing.

Evidently, then, Mr. Kanner's objections go rather to provisions contained in Section 1270.05, which relates to withdrawal of a deposit after judgment and pending appeal. Generally, interest accrues on a condemnation award until the amount of the award is deposited by the condemnor. See Code Civ. Proc. § 1255b(d). After that time, the condemnee may withdraw the award and appeal as to the amount or leave it in and appeal as to other issues. This is existing law under Code of Civil Procedure Section 1254(f). Is it unfair that one who wishes to contest the right to take on appeal must forgo the award while one who wishes to appeal as to the amount of compensation need not? Such disparate treatment may be reasonable.

Notice first that it is the general rule in civil litigation that the right to accept the fruits of a judgment or order and the right to appeal therefrom are not concurrent but are wholly inconsistent, and election of either is waiver and renunciation of the other. That is, a condemnee could not ordinarily both draw down an award and appeal from it. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). However, this rule is subject to two limited and carefully drawn exceptions. First, the condemnee may draw down the award and, nonetheless, may appeal the amount awarded. Section 1270.05(a), based on Code of Civil Procedure Section 1254(f). Second, the condemnor is allowed to take possession following a judgment

and may nonetheless appeal the amount. Section 1270.07, based on Code of Civil Procedure Section 1254(e). These exceptions and the reasons for them are set forth in the Commission's 1967 study at 1231-1232:

> As noted at the beginning of this article, California law distinguishes sharply between the taking of possession before entry of the "interlocutory judgment" of condemnation, and the taking of possession after that event. Since Section 1254 of the Code of Civil Procedure was revised to meet constitutional objections in 1903, it has permitted the condemnor in any case to obtain possession following entry of judgment by depositing the amount of the award for withdrawal by the defendants. The court may also require deposit of an additional sum to secure payment of any amount that may be recovered in the proceeding. The procedure is available even though the award is attacked by either party by motions in the trial court or by appeal. The only right waived by either party under the procedure is that by withdrawal of the deposit the condemnee waives his right to contend by motion or appeal that the property may not be taken in the proceeding. Unlike provisions for possession prior to judgment, this authorization for possession after judgment does not raise constitutional problems. [Citing Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941); Heilbron v. Superior Court, 151 Cal. 271, 90 P. 706 (1907).]
>
> Provisions for possession after entry of judgment are properly distinguished from similar provisions for possession prior to judgment. Unless the judgment is reversed or set aside, it determines the condemnor's right to take the property, the amount of compensation, and the allocation of the award among defendants. Since motions in the trial court, appeals, and possible new trials may consume a period of years, possession pending appeal is beneficial to both parties. From the condemnee's standpoint, the period during which he is effectively precluded from renting, selling, or improving the property is reduced, and he may withdraw the deposit and carry out his plans for the future. From the condemnor's standpoint, the procedure is essential to prevent the public improvement from being delayed for a protracted period or even being abandoned entirely. The procedure should be retained and improved even though the provisions for possession prior to judgment are greatly extended. [Footnote omitted.] [Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 1231-1232, reprinted in Tentative Recommendation and Study Relating to Condemnation Law and Procedure: Number 1--Possession Prior to Final Judgment, 8 Cal. L. Revision Comm'n Reports 1101, 1231-1232 (1967).]

In essence, the condemnee who desires to appeal the amount of the award may do so while drawing down the deposit because this will facilitate his ability to finance the acquisition of substitute property, or some other purpose. The condemnor is allowed to take possession and further contest the amount of the award because this will facilitate the construction of needed public improvements. The condemnee who wishes to contest the right to take is not allowed to draw down the deposit and then object to the taking because to allow him to do so will hinder the condemnor's ability to utilize the property free of a threat of having to return it--there is no reason for the condemnor to finance an attack on its right to take. After a judgment of condemnation and after the condemnor has paid into court for the landowner the amount of the award, the condemnor in possession need not pay interest on the money paid in while the landowner refuses to accept it in order to prosecute an appeal. Vallejo & Northern R.R. v. Reed Orchard Co., 177 Cal. 249 (1918).

Thus, there is good reason to make a general exception for the condemnor and condemnee concerned only with the amount of an award to the rule that one cannot draw down an award and, at the same time, appeal from it. But there is a rational and legitimate reason for not extending this exception to condemnees who wish to contest the right to take the property at all. Although the disparate treatment of the parties in this case is discriminatory, it is also reasonable.

Further, the condemnee may well be still in possession of his property, and interest may be accumulating on the award while he is appealing. This will occur in the cases where the order for possession is deferred or the order for possession states a distant future date and where the condemnor has chosen not to make a deposit until after the appeal.

Attached as Exhibit II are excerpts from Mr. Kanner's response to the foregoing analysis before revision. The issue is clear and deserves some thought: Is this one of the situations where the existing law must be changed? Is it grossly unfair to deprive a condemnee of both award and interest where he has been dispossessed of his property but desires to appeal the right to take? Mr. Kanner correctly points out that the effect of such a provision is to discourage appeals on the right to take. That is the policy decision the Commission and the Legislature has made. This provision should not be taken in isolation, however; for, if the condemnee is able to defeat the right to take, he may be able to recover all his damages, including interest as well as his attorney's fees. See Code of Civil Procedure Section 1255a and Memorandum 71-22. It is only where the condemnee loses on his appeal on the right to take that he has a problem, for in such a case he must pay not only the litigation costs but also may be deprived of the use of his property without compensation since he receives no interest after the interlocutory judgment is entered and the deposit made. It is recognized that condemnation law is generally slanted in favor of the condemnor. At the same time, the number of changes that can be made in a comprehensive statute are limited if the statute is to have any chance of legislative enactment. We do not consider this to be an essential change.

Sections 1269.01-1269.03. At the September 1970 meeting, the staff presented an argument for a unified procedure by which condemnors could obtain an order of immediate possession. A noticed motion procedure was originally proposed and is set out in Sections 1269.01-1269.03 of the Comprehensive Statute. The staff's proposed noticed motion scheme was described in detail in Memorandum 70-112. The scheme elicited a negative response from Mr. Barry, Court Commissioner of the Los Angeles Superior Court, whose correspondence is attached as Exhibit III.

In essence, Mr. Barry indicates that a noticed motion scheme would severely burden the judicial process, resulting in useless hearings over issues which are not controversial. Mr. Barry suggests, and the staff agrees, that the requirements of due process would be satisfied if:

(1) The condemnor is able to obtain an order for possession on ex parte motion, and

(2) The condemnee is able effectively to challenge the granting of a motion prior to actual dispossession.

Such a scheme--ex parte order with subsequent opportunity to be heard--is subject to at least two difficulties. It has been asserted before the Commission that, once an order for immediate possession has been issued, the court is reluctant to alter the order or to give it serious reconsideration. Mr. Barry states that this is not his experience.

Also it is necessary and desirable to give a court express authority to vacate an order for immediate possession and to stay its enforcement upon application of the condemnee. (The court may have inherent power to do this, but the statute should grant the court express authority so no doubt will exist.) The Commission in its 1960 recommendation relating to immediate possession proposed precisely such a scheme:

> There is no provision in the existing law that permits the condemnee to contest the right of the condemnor to take the property prior to the time possession is taken. Legally, the condemnee has the right to raise the question whether the condemnation is for a public use in every condemnation proceeding. The question of the necessity for the taking of the particular property involved may be raised by a condemnee under certain limited circumstances. But the right to raise these questions may be a meaningless right if, at the time the questions are raised, the condemner has already demolished all improvements on the property, denuded the site of all vegetation, constructed pipes, flumes and conduits and inundated the property with water. The Commission recommends, therefore, that the owner or the occupant of the property to be taken be given the right to contest the condemner's right to take the property by eminent domain or his right to obtain immediate possession of the property, or

> both, by a motion to vacate the order for immediate possession made prior to the time possession is taken. An order vacating or refusing to vacate an order of immediate possession should be appealable. An appeal should not automatically stay proceedings under the order of immediate possession, but either the trial or appellate court should have the right to stay proceedings until the appeal is decided. [Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 Cal. L. Revision Comm'n Reports at B-7 through B-8.]

This proposal for early litigation of right-to-take issues involved in immediate possession may be a promising approach for dealing with the matters in eminent domain cases generally; a bifurcated trial has several virtues. Such a determination, however, should await completion of the Commission's consultant's study of eminent domain procedure.

A uniform procedure for granting an order for immediate possession with the opportunity for subsequent hearing prior to possession is set out in Exhibit IV. Basically, the plan is the same as the presently existing law contained in Code of Civil Procedure Sections 1243.4 and 1243.5, with these changes:

(1) All public utilities and public entities are given the right to take immediate possession.

(2) Immediate possession will be permitted in any condemnation case.

(3) The court must find that the plaintiff needs possession prior to judgment.

(4) The order for possession contains only a description of the property interest taken and the time after which the plaintiff may take possession.

(5) The minimum period after issuance of the order before plaintiff may take possession is 90 days.

(6) Statutory authority is given to the court to vacate the order and to extend the minimum period for hardship to the defendant upon motion prior to possession.

The staff feels that the changes made in existing procedures are desirable for both condemnors and condemnees.

(1) Extension of right of immediate possession to all public entities and to public utilities. Under Code of Civil Procedure Section 1243.4., the right to immediate possession is limited to "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." Since most, if not all, of the public entities are already included in this listing, Section 1269.01(a) simply enlarges the category to include public entities generally. Further, because public utilities are as much in need of and as deserving of the right of immediate possession as are public entities, authority is included for public utilities to obtain orders of immediate possession. These expansions of the present law are consistent with the Commission's 1967 recommendation (page 1110).

(2) Expansion of immediate possession to all eminent domain cases. Presently, the right to take immediate possession is limited to takings of property for reservoir or right of way purposes. Code Civ. Proc. § 1243.4. However, there are many other acquisitions in which possession prior to judgment would be appropriate, such as school sites and sewage disposal plant sites, which are excluded by this limitation as to the public purpose for which the property is being acquired. Consequently, the Commission in its 1967 recommendation expanded the scope of cases in which immediate possession is available. See recommendation at 1109-1110. This expansion is reflected in proposed Section 1269.01(a), which extends the right to any immediate possession case by eliminating the reservoir-right of way restriction.

(3) Need as a prerequisite to immediate possession. Section 1269.01(b)(2) adds a provision new to California law that the condemnor must demonstrate a need to take immediate possession before such an order will be granted. It stands to reason that the condemnor should not be able to take property at potentially great inconvenience and economic hardship to the condemnee if it does not really need early possession for planning purposes or otherwise. Conversely, if the condemnor's necessity for early possession of the property is sufficiently great, that fact ought to be easily demonstrable to a neutral court. Thus, the imposition of this standard of need for issuance of the order of immediate possession will save the condemnee from needless hardship while imposing no undue obstacles on a deserving condemnor. The provision is based on immediate possession standards of other states. See Comment to Section 1269.01.

(4) Streamlined possession order. Under present procedures, Code of Civil Procedure Section 1243.5(b) requires an order authorizing immediate possession to contain a description of the property and the estate or interest sought to be condemned, the purposes of the condemnation, the amount of the deposit, and the date after which the plaintiff is authorized to take possession. Since immediate possession will be available in any condemnation case, the statement of purposes is now irrelevant. And, since the condemnee has been given advance notice of the making of a deposit under Section 1268.02, inclusion of the amount is unnecessary. Accordingly, Section 1269.01(c), setting forth the contents of the order for possession, eliminates these requirements.

(5) New 90-day minimum period after hearing, prior to possession. Present law prescribes a 20-day period prior to the time possession may be taken with allowance for shortening the time specified to three days upon a showing of good cause. Code Civ. Proc. § 1243.5(c). The proposed 90-day minimum period is based upon studies that reveal that any lesser period is both a hardship to

the condemnee and is in most instances not particularly helpful to the condemnor. See generally the Commission's 1967 study at 1222-1225. The study's conclusion is that:

> It would therefore be appropriate to extend the period of notice from the existing 20 days to 60 or 90 days. In addition to further reducing the possibility of serious inconvenience to the property owner, the change will make possible the actual disbursement to the owner of approximate compensation before he is required to relinquish possession of the property. If pending federal legislation is enacted, a conforming additional notice provision should be adopted.

Federal law requires a 90-day minimum period for federal and state federally-aided projects:

> The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by title II will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required. [Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Section 301(5).]

It should be noted that the 90-day period refers only to giving notice rather than to service of an order of possession. However, the appropriate notice, at least under some federal regulations, can only be given after title or right to possession of the property is acquired. Cf. Redevelopment Agency v. Superior Court, 13 Cal. App.3d 561, Cal. Rptr. (1970). The 90-day period is a minimum and refers only to actual service of the order rather than to notice of intent to dispossess. Thus, should the federally required notice period increase, affected agencies will be able to comply simply by giving the appropriate notice and then waiting to take possession.

A further problem with a minimum period is that the state should have some flexibility to take possession instantaneously, perhaps even without court hearing, in case of extreme emergency. The staff believes that this power, while obviously both present and necessary, should not be dealt with in the context of the time for possession prior to judgment. Rather it is an area which requires separate treatment and will be dealt with separately. Of course, the law of eminent domain will be subject to any extraordinary state powers. Consequently, notes to the effect that study of these matters is in progress are included in the Comments to Sections 1269.01 and 1269.04.

(6) Vacate and stay order. There is some question whether California courts, like courts in other jurisdictions, have the power to extend or delay the period for possession because of possible hardship upon the defendant. The Commission's study comments:

> California law has never recognized any criteria or standards for granting or withholding an order for immediate possession, or for delaying the effect of an order once issued. The appellate courts speak of a discretion at the trial level to grant or withhold an "order of immediate possession." [Citing County of Los Angeles v. Anthony, 224 Cal. App.2d 103, 36 Cal. Rptr. 308 (1964).] In each instance, however, they are referring to the order for possession after judgment under Section 1254 of the Code of Civil Procedure. Under that section, the court has discretion whether to grant an order for possession pending appeal. [Citing Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941).] In contrast, the constitutionally authorized order for immediate possession is available to the plaintiff as a matter of right. [Citing Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962).] In many other states, the trial courts are given both discretion and guidance as to granting, denying, or delaying the effect of an order for possession prior to judgment. [1967 Study at 1219.]

Proposed Section 1269.02(a) is intended to create specific statutory authority for a court to delay or extend the time period before which the condemnor may execute an order for possession. The court must balance possible hardship to the defendant against the need of the condemnor for the property for the public improvement. Such discretion is a reasonable means by which the court will be able to soften any harsh results of immediate possession. It is assumed that the instances during which the 90-day period will be increased, like the instances in which it will be decreased for emergency reasons, will be relatively rare: the 90-day period was initially selected because it inherently avoided much hardship to the ordinary condemnee.

Section 1269.04. This section requires the condemnor to serve copies of the order for possession upon occupants and the "record owner." The Commission queried whether record owner was a sufficiently broad term to include all interested parties. Record owner is defined in subdivision (a) to include both the holder of legal title and any person entitled to the property under a lease or land sale contract. Because of this definition, the parties entitled to receive copies of the order will be all parties in use or possession of the property; other interested parties, such as mortgagees, trustees, etc., who have a primarily financial interest in the property do not need to receive a copy of the order, for they are notified of the initial deposit (§ 1268.02) and, in case of overlapping interests, are protected by undertakings of those withdrawing the deposit (§ 1268.05). The only other parties who could be adversely affected by the possession itself would be holders of intangible interests in the property, such as holders of easements and beneficiaries of restrictive covenants. However, to require service of an order of possession on all known interested parties, regardless how trivial or remote, may be overly burdensome. The staff recommends,

therefore, that notice to occupants and record owners only, as provided in Section 1269.04, be retained. We are unaware of any problems that have arisen under the existing law which is continued in Section 1269.04.

The 60-day period prescribed for service of the order for possession should be changed to 90 days to conform with Section 1269.01, as should the reference in the Note.

Sections 1270.01-1270.08. These sections were approved. However, the Commission requested the staff to look into the problems of transfer of ownership liability and risk of loss upon issuance of an order for immediate possession. The staff feels that these problems are part of the larger related problems concerning time of passage of title and its incidents. These areas are being given separate consideration.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

EXHIBIT I

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September 28, 1970

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Re: Proposed Sec. 1268.08, 1967 Tent. Recommendation and Study relating to Possession and Related Problems

Gentlemen:

Pursuant to the discussion at the September, 1970 meeting, the following are my comments concerning the problems arising when the right to take is challenged, and the condemnee appeals.

Under existing law, and under the statutory scheme suggested by the 1967 recommendation, such a condemnee is thrust onto the horns of a dilemma.

First, he can be dispossessed. Second, he may not draw down his money, because if he does he waives his right to appeal the taking. Third, while he has neither his property nor his award he is further deprived of interest because of the provisions of CCP §1255b which terminate the accrual of interest when the deposit is made into Court.

This situation has come about as a result of the Commission's 1960 Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings.

I suggest that a fair reading of that recommendation and study makes it clear that the situation of the condemnee who wishes to appeal the right to take was not contemplated, and the discussion and analysis was directed solely to the condemnee who wishes to appeal the amount of his compensation. Thus, at page 8-60, the study expressly noted that where a condemnee is dispossessed under CCP §1254, he ". . . may withdraw the amount of the judgment without waiving his right of appeal on the amount of the award."

The study then went on to note that in situations where possession is not taken under CCP §1254 ". . . it is not unjust to deprive the condemnee of the use of the money deposited if he wishes to appeal, for the condemnee retains the use of the property. He should not be able to have the use of the money and the use of the property at the same time. Nor is it unjust to deprive

the condemnee of interest on the judgment after such a deposit. The condemnee would be compensated for a loss not suffered if he were permitted to have interest on the deposit at the same time that he has the use of the property for which the deposit was made." Page B-61.

It seems quite clear that it was contemplated that the condemnee should not be entitled to double compensation; that he should be entitled to no more than one of the following elements: (a) possession and use of the property, (b) withdrawal and use of the award, or (c) interest on the award where he cannot withdraw it and has been deprived of the use of his property. (Note that the Commission felt that he should be deprived of interest on the award deposited only in those situations where he retained possession of the property.)

However, this statutory scheme breaks down when it is sought to be applied to a condemnee who wants to appeal the right to take. Unlike his counterpart who appeals the compensation and who is entitled to receive one of the foregoing three elements, the condemnee who

challenges the taking gets none of them.*/ Thus, he is simultaneously deprived of his property, he cannot draw down the award because that destroys his right to appeal the taking, and while he is thus simultaneously deprived of the use of his property and of the award, he gets no interest. This, I suggest, is wrong.

It must be kept in mind that the underlying theory is that the award takes the place of the property and has not been paid within the meaning of Art. I, §14, unless the owner can take it. See Steinhart v. Superior Court (1902) 137 Cal 575, 579. And it has been held on many occasions by both the U.S. Supreme Court and the California State Courts that where the owner is simultaneously deprived of the possession of the property and of his award (in that he cannot draw down and use the award), he is entitled to an additional element of just compensation for this simultaneous deprivation of the property and of the award. Interest at the legal rate has repeatedly been held to constitute a proper measure of this element of just compensation.

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*/ To add insult to injury, the condemnor gets the interest. See CCP §1254(j).

Yet, the condemnee who wishes to challenge the right to take is deprived of all these economic and legal benefits. I suggest that that constitutes invidious discrimination and places an unreasonable burden on such a condemnee; a burden which appears to serve no legitimate purpose, and is designed to make it oppressively difficult for people to challenge the right to take. It has been said in the context of criminal appeals:

> "Since the State has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." People v. Henderson (1963) 60 Cal 2d 482, 597.

I suggest that when such solicitude for the right to appeal is the law of the land as to convicted criminals, it is not unreasonable to suggest that a similar solicitude be extended to perfectly innocent property owners in condemnation cases who have done nothing wrong and whose only "sin" is that their lawfully held property by chance wound up in the path of a public project.

What makes this situation quite unfair is that in the 1960 recommendation and study, an entirely different standard of fairness was applied to condemnors:

> "Under existing law, any condemnor is permitted to take possession of the property to be condemned after entry of judgment even though an appeal is pending. However, it has been held that the condemnor waives his right of appeal by taking possession of the property. This rule seems unfair to the condemnor: if the condemnor takes possession, it will have to pay the award even though it is based upon error by the trial court, but if it chooses to attack the award by appeal, a needed public improvement may be delayed for a period of years or even have to be abandoned if rising costs exceed the amount available for the construction of the improvement."
> Page B-8.

Thus, when it came to the condemnor, the Commission saw quite clearly the unfairness inherent in predicating the right to appeal on harsh conditions.

It is difficult to see why this reasoning should not cut both ways. If the condemnor wants to appeal the award there is no reason why it should have to forego taking possession under CCP §1254. To the extent this rule was recommended by the Commission in 1960 it is difficult to quarrel with. But by parity of reasoning, it is difficult to understand why the condemnee who wants to challenge the right to take should not be the beneficiary of the same attitude of fairness. There is no reason why he should have to abandon his right to appeal the right to take or in the alternative undergo enormous financial hardship */ as a price for

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*/ Because awards in condemnation cases reflect the high values of California land, interest on the award can mount into surprisingly large figures. In one case in which I represented the owner, interest on the award came to $145,000 per year, and it took about 3 1/2 years to complete the appellate review process. Don't you think that risking $500,000 is a bit steep as price of admission to the appellate courts? See Regents etc. v. Morris (1968) 266 CA 2d 616, 633-634.

getting his day in the appellate courts.*/

Stated simply, the condemnee who challenges the right to take, finds himself the object of invidious discrimination. This is wrong. I cannot overemphasize that in the context of the current unabashed encouragement of criminal appeals, our law should not impose Draconian conditions upon an innocent citizen's right to appeal what he believes to be an unlawful overreaching by his government. The substantive law relating to the right to take is enough of a stacked deck,**/ without making its procedural aspects prohibitive.

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*/ Some suggestion was made at the September 1970 meeting that such hardship can be justified because the condemnee in such situtations has had his adjudication in the trial court, and appeal was in the nature of an "extra". California law, however, is contrary to that suggestion: "The right of every man to his day in court is not limited to the trial court but embraces as well his day in the appropriate reviewing court." People v. Becker (1952) 108 CA 2d 764, 768[3]; "The right of appeal is as sacred and inviolable as the right to a trial, . . ." Wuest v. Wuest (1942) 53 CA 2d 339, 345[5].

**/ This view is hardly original with me. See McIntire, "Are Court Rules Made to Be Broken? - Eminent Domain Trial Preparation and the Swartzman Case", 43 Cal. State Bar Jour. 556, 559-560 (1968).

> "When the legislature, in an effort to prevent any inquiry of the validity of the particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." Ex Parte Young (1908) 209 U.S. 123, 146, 52 L Ed 714, 723.

This principle has been applied many times by both the U.S. and California supreme courts, in a variety of factual contexts. It is indeed difficult to understand why a condemnee should be singled out as the only kind of litigant to be placed beyond the pale of this rule's operation. Isn't his right to final adjudication of whether he can keep his own property at least as socially valuable as a welfare recipient's right to bar the authorities from searching his home to ascertain whether he is collecting welfare payments illegally? See Parrish v. Civil Service Commission (1967) 66 Cal 2d 260, 270-271, where in the welfare context the court had a great

deal to say about the "doctrine of unconstitutional conditions", and how disfavored is the principle of conditioning the exercise of a right on waivers of other rights. Why shouldn't this principle apply to a property owner who hasn't done anything and doesn't want anything, except to mind his own business on his own land?

Any recommended legislation relating to taking possession should recognize and correct the present anomaly in the law. When the owner is dispossessed, he should either have the right to draw down the award without any enforced "waivers" of his right to appeal the taking, or in the alternative be entitled to interest on the award until such time as he can draw it down without coercive "strings".

Very truly yours,

GIDEON KANNER

GK/ms

EXHIBIT II

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Re: Memorandum 70-112

Gentlemen:

I have reviewed the above Memorandum, and have a couple of additional comments to those I made in my letter of September 28, 1970.

First, Memorandum 70-112 does not really address itself to the only problem I sought to raise. To say that there is indeed discrimination against the take-contesting condemnee, but that it is reasonable is to gloss over the problem. Besides, who says it's reasonable? On the basis of what policy and ethical criteria? On the basis of what comparative analysis of permissible and impermissible discrimination in other fields of the law?

The fact remains, that the imposition of a financially ruinous condition as prerequisite to appeal, destroys that right to appeal. And such schemes, in all fields other than eminent domain, have - to the best of my knowledge - uniformly been condemned and struck down by

the courts as falling within the constitutionally proscribed doctrine of coerced waivers. For a recent example at the U. S. Supreme Court level (in the labor law context), see Nash v. Florida Industrial Commission (1967), 389 U.S. 235, 239; 19 L.Ed.2d 438, 442.

* * * * *

The foregoing paragraph, hopefully, puts its finger on the heart of the matter. It may well be that the Commission or the staff feel that owners should not have the right to appeal the right to take, or perhaps not even to contest it in the first place. If that be so, then the proposed legislation ought to say so and stand the gaff of constitutional review, and of the reaction of the people expressing themselves through the legislature. But such a drastic and draconian end should not be sought by indirection. Care should be exercised here to distinguish policy reasons from "environmental assumptions"*/ and personal predilections.

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*/ See Traynor, No Magic Words Could Do It Justice, 49 Cal. L.R. 615, 629 (1961).

Also, as a practical matter, the rationale for the admittedly discriminatory treatment of the take-contesting owner (Memorandum 70-112, p.5) does not withstand analysis. It is said there that the reason for the discrimination is not to ". . . hinder the condemnor's ability to utilize the property free of a threat of having to return it . . .". But the condemnor is always so threatened when the right to take is appealed, regardless of whether interest on the award does or does not run. Thus, the reason for the discriminatory treatment of the take-contesting condemnees is exposed not as a legitimate benefit to the condemnor, but as a device openly designed to discourage and thereby prevent the final adjudication of the right to take on the merits. Surely, I need not cite the countless decisions in which courts have exalted determination on the merits as the desirable policy of a rational judicial system.

* * * * *

I am perfectly aware of the fact that we live in a period in which the judiciary has all but abdicated its right and duty to pass on the constitutionality of legislative and administrative acts when the power to take by eminent domain is involved.*/ There are, however, other views, and these views are increasingly making themselves felt. See e.g., McGee, "Urban Renewal in the

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*/ It ought to give us pause to recall that in California necessity is not justiciable even where there is fraud, bad faith and abuse of discretion on the part of the condemnor, People v. Chevalier (1959) 52 C2d 299, 307. Or, see County of Los Angeles v. Anthony (1964) 224 CA2d 103, where the court solemnly pronounced a taking for a "Hollywood Motion Picture and Television Museum" to be run at a profit as a public relations device for the entertainment industry (which isn't noted for its eleemosynary nature) to be a public use. (For the benefit of those of you who have not followed this particular fiasco, the "Museum" was never built; there never were any real plans or financing for it. The Anthony property just sits there on Highland Avenue in Hollywood off the tax rolls. "Public use", indeed!)

Crucible of Judicial Review", 56 Va.L.R. 826. */

The fact remains that the constitutions require "public use" as prerequisite to a taking, however much silly-putty-elasticity that phrase may have acquired. The fact also remains that the right to take is reviewable on appeal. If the Commission feels that these rights should be done away with, then it should say so. But these rights ought not be undermined or whittled away by indirection. In these days, particularly, one should keep firmly in mind that if one part of the Bill of Rights can be disposed of in this fashion, so can others.

The proposed legislation should be amended so as to preserve the take-contesting owner's right to appeal free of onerous or discriminatory conditions, and on the same basis as the condemnor's right to appeal.

Very truly yours,

GIDEON KANNER

GKh

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*/ It is not only the much-abused process of urban renewal that is beginning to get its richly-deserved lumps in the courts. Freeway builders have recently discovered to their amazement that they too have to obey the law, at least on occasion. (See Citizens Committee for the Hudson Valley v. Volpe (1970, 2d Cir.) 425 F2d 97, D.C. Federation of Civic Associations v. Airis (1968, D.C.Cir.) 391 F2d 478).

EXHIBIT III

The Superior Court
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

November 24, 1970

Mr. John H. De Moully, Esq.
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Re: Motions for Orders for Possession

Dear John:

My only interest in the above is to urge that you do not recommend legislation that will burden the courts with a multitude of noticed motions on matters which can with few exceptions be disposed of by unobjectionable ex parte procedures.

I may not be up to date on this. It is impossible for me to keep up with your massive output. However, I have looked over the material received from you and find nothing to indicate that there has been any realization of the amount of court time that would be required by the procedures that are being proposed.

Presently, in the Central District of this court, we sign more than one hundred Orders for Immediate Possession each month. The orders are ex parte and mostly routine. They are based on affidavits as to necessity and as to the security deposit. They are seldom controversial. They do not become effective until the statutory period of twenty days after service. If there is a controversy there is an opportunity to be heard. Perhaps the opportunity should be extended to sixty or ninety days as you are presently proposing. However, I do not think the noticed motion procedure should be mandatory and it should be limited to cases where the condemnee wants a hearing.

I am mindful of the fact that the right of possession will probably be extended to all condemners pursuant to your proposals. If so, the number of orders will multiply. If each order must be

calendared for a hearing it becomes evident that we would have a massive calendar that would be devoted to the preparation for and hearing of such matters.

I know your staff assumes that the ex parte application is unfair to the condemnee as well as unconstitutional. On page 9 of your memorandum of 70-112 of 10/15/70, the statement is made that a hearing should be had to allow a contest before irreversible damage results and "is also an ideal time to allow the condemnee to challenge the amount of the deposit, thus promoting procedural efficiency and conserving judicial time." With respect thereto it is my opinion that a lot of ineffectual challenges would be invited and there would be a great waste of judicial time. Please consider the following:

The important safeguard should be that there is an adequate opportunity to be heard. It should be recognized however that far from being an "ideal time," hearings on the adequacy of security deposits seem to be at a time when neither side is prepared for a valuation trial, or if one side is prepared, he is unwilling to make full disclosures on a unilateral basis. There are exceptions, of course, but valuation pursuant to declarations is about all that is available at that stage in the proceedings. At that point, settlement conferences are usually hopeless even though we know that all but a small percentage of the cases will eventually be settled. A valuation trial is generally not necessary at all. When a trial is necessary then both sides should be well prepared. It seems unrealistic to schedule unproductive valuation trials over security deposits or trials over the right to take simply because an order for possession is requested. I do not mean to suggest that security deposits cannot be challenged successfully. They can be, but I see no advantage to a procedural routine in cases where no challenge is offered.

I seriously doubt that the Sniadach case (395 U.S. 337) means that orders of immediate possession cannot be obtained except on noticed motion. The Sniadach case if not limited to attachment of wages does not necessarily apply to every possessory writ and particularly if there is ample notice and opportunity to be heard. It seems impractical to give constitutional dimension to procedures so that hearings have to be scheduled when no owner has requested a hearing.

In most cases there is no reason why anyone would request a hearing. There is no element of surprise. Mostly, the date of possession has been agreed to. Often and probably in most cases, no occupant is disturbed. The property may be vacant land. The part taken may be far from any structure. Street widenings and other public works often require possession without requiring that the occupants give up possession.

I hope you will consider the foregoing as sufficient to deter the adoption of required noticed motions or the requirement that the court receive evidence for the purpose of making numerous determinations in cases where neither possession nor the deposit has been contested.

With best regards,

Richard Barry

36.35-10

March 4, 1971

Mr. Richard Barry
Court Commissioner
The Superior Court
111 North Hill Street
Los Angeles, California 90012

Dear Mr. Barry:

Your letter of November 24, 1970, pointing out the drawbacks of a noticed-motion procedure for immediate possession, is most persuasive. We would appreciate it very much if you would comment on the following specific problems which have concerned the Commission.

You make the point that, if an order for immediate possession is issued and the condemnee has some objection to the order, he will have an opportunity to be heard. Could you further elaborate upon present procedures whereby this is accomplished? It is our understanding that a stay is not available and that writs reviewing such an order are difficult to obtain.

It has been asserted that a condemnee who has had an ex parte order issued against him stands little chance of getting a judge to reverse the order because, once the judge has made a decision, he is reluctant to admit he was wrong. Has this also been your experience, or are you able to ascertain this point at all?

A major concern appeared to be that a noticed-motion will force a massive calendar for hearings. But the Commission's background study, prepared by Mr. Taylor, intimates that a noticed-motion procedure will occupy no more judicial time than an ex parte procedure in most cases.

> Disposition of the motion, however, does not entail consideration of any evidence or matters not considered, at least in theory, on ex parte application. As any evidence offered by the property owner would be presented by affidavit or declaration, disposition of the motion in the great majority of cases should prove to be as expeditious as consideration of an ex parte application. [Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37, 55 (1966), reprinted in Tentative

Recommendation and A Study Relating to Condemnation Law and Procedure; Number 1--Possession Prior to Final Judgment and Related Problems, 8 Cal. L. Revision Comm'n Reports 1101, 1219 (1967).]

Is this inference correct?

You indicate in your letter that it would be unwise to encourage valuation disputes prior to trial because neither side is prepared or willing to enter into such a determination at such an early time. Nonetheless, security deposits are being challenged at present. Do you find these challenges ineffectual or wasted? What are the present circumstances surrounding such challenges?

When the Commission first recommended immediate possessionpprocedures in 1960, it recommended a system much as you suggest--ex parte order with a subsequent opportunity upon motion of the condemnee to stay for hardship or vacate for lack of immediate possession authority. The provisions for subsequent attack on the order were deleted by the Legislature for two reasons: (1) provision for stay would permit the courts, rather than the administrative agencies, to determine the essentially administrative question of the need for early possession; (2) courts are already authorized under other Code of Civil Procedure sections (viz. former Section 937) to vacate or modify orders issued on ex parte application without notice or hearing. Would you care to comment on the merits of these arguments?

Finally, you are aware that the Commission's recommendation would extend the right of immediate possession to all authorized condemnors. The result of this extension may well be that condemnors of lesser stature than Public Works and Water Resources will be involved in taking property when not really necessary or in takings based upon inadequate security deposits. These problems may be aggravated by the fact that there will be residents dispossessed by such activity, for the takings may well be within cities for schools or parks rather than in rural areas for reservoirs or road widening. If such a speculative situation were to result, would this affect your judgment concerning the merits of noticed-motion procedures?

We would very much appreciate your views and information concerning these problems. The staff is at present engaged in revising Memorandum 70-112 and hopes to present it to the Commission within the next few months. A prompt response, if possible, would help the Commission immensely in concluding its work on immediate possession.

Sincerely,

Nathaniel Sterling
Legal Counsel

NS:aj

The Superior Court
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

March 26, 1971

Nathaniel Sterling, Esq.
Legal Counsel
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. Sterling:

I shall try to furnish you with the further information requested in your letter of March 4, 1971.

As to the opportunity to be heard: if the taking of possession is objectionable then it is my opinion that the court can certainly vacate or modify its Order of Immediate Possession upon good cause being shown. The condemnee may present an ex parte order with a supporting declaration. Setting aside one ex parte order with another is generally unsatisfactory in cases of apparent controversy. Therefore, the court can be expected to make a limited ex parte order to provide that the effective date of possession will be deferred until the controversy can be resolved on a noticed-motion. Although such motions are infrequent, it has been my experience that they can be employed successfully. If they have obvious merit, they may even be conceded by a condemner (e.g., an erroneous description, a defective resolution or an evaluation that failed to consider some essential factor such as deprivation of access, etc.).

The above seems fundamental to me. Even when the effective date has gone by, the court is not powerless. The controversy may arise at any time before actual possession. For example, when a writ of assistance is requested, the court is naturally hesitant about lending a hand to such a harsh procedure unless there is a very convincing affidavit. In this connection we also usually require a noticed motion in cases of apparent controversy. Condemners with possessory orders are empowered to remove persons and improvements but, of course, they never do without a further order directing the sheriff to remove people.

The court has inherent power over its orders, and I see no reason not to vacate or modify an order if there is proper cause, and particularly when there is a hardship on one side and no prejudice will result to the other side. Although the law may

not be too explicit, I cannot imagine an appellate court reversing a trial court for exercising sound discretion in that respect.

I do not agree with the idea that any judge would be reluctant to reverse an ex parte order. By doing so, he does not "admit he was wrong" as suggested in your letter. It is more likely that the court will conclude that the order was correct when made, but based on an additional factual showing, there is good cause to make a new order. I find it very difficult to believe the assertion that a condemnee "stands little chance... once the judge has made a decision..." on an ex parte order. It is the nature of such orders that they are dictated by that which is offered by one side. In the infrequent instances when the other side is heard from, the court must then decide which side is right. Good cause appearing, the earlier order should be set aside without the slightest reluctance.

The ex parte orders I sign each day are usually part of a large pile that will also include other "chamber business" such as judgments pursuant to stipulation. They are all thoroughly checked by one of my clerks. Unless a question is raised clerically, I do not have occasion to devote much time to these ex parte matters, despite their large volume. I do not think it is correct to assume that noticed-motions could be handled as expeditiously. There would be conflicting declarations in most cases, and they are usually difficult to weigh without cross-examination. A hearing would be essential in most cases. Otherwise, the court might be faced with no reasonable basis for selecting one declaration over another. In any event, making all of the determinations required in your proposed Section 1269.02 would seem to provide an adversarial potential over "findings" on matters that generally have not and should not now be made into subjects of controversy and unnecessary judicial review and scrutiny. Many attorneys would feel a duty to a client would require them to file something in opposition and appear in matters that are presently handled ex parte and without controversy. As I said before, the safeguard should be the opportunity to be heard. However, a hearing should not be had unless requested. On any noticed-motion procedure, the court is obliged to review each case and arrive at tentative conclusions in advance, if possible, to expedite the hearing. Each hearing would be followed by at least one minute order, prior to a formal order. I cannot agree that such procedures would be as expeditious as ex parte procedures in most cases. I believe that motions (in opposition to possession) should be permitted but certainly should not be a required procedure for orders of immediate possession.

You ask about challenges to security deposits and if they are ineffectual and wasted. They can be effectual. For example, if there is an entire taking, a need for money to purchase other property, which may be in escrow, a property owner's counsel may choose to disclose enough of his valuation data to overcome anything offered by the condemner. Such motions are not often made. In such cases, I suspect the owner often receives enough cooperation from the condemner so that he is not forced to move before he can arrange his financing, and usually, this is accomplished by means of settlement. In the more controversial cases, and particularly with a large severance damage claim, neither side is willing to go to trial over the security deposit. If settlement negotiations are promising, there is usually no desire on either side to fight about the amount of the deposit. If the case is not going to be settled, the appraiser for the owner is usually gathering valuation data until it is time for the exchange of such data. Until then, each side is usually playing it close to the vest.

I do believe it is generally true that early trials over security deposits do not occur often because neither side is ready and the time of appraisers is so expensive. For settlement purposes, the appraiser can "eyeball" the property. For convincing testimony, they must be prepared to do a great deal more than that either on direct or cross-examination.

You ask for my comments on the authority of the court to stay possession. There are no special provisions therefor or for writs of assistance, that I am aware of. C.C.P Section 187 would provide basis jurisdiction and Section 937 would be in point. As indicated, I believe such authority is inherent. Certainly it would be an abuse of discretion to stop an entire project just because an issue has been raised, but if it appears that irreparable damage may result to an individual if he is not afforded a chance to prove there is no public purpose in taking his property (in excess takings, for example), then surely the judicial inquiry must be made.

Finally, you ask if my judgment concerning the merits of noticed-motion procedures might be affected by extension of the possessory authority to condemners of "lesser stature." I do not think so. I believe all cases should be treated alike in this respect and that a right of a noticed-motion to challenge the authority should be sufficient. The public school districts are represented by County Counsel. The smaller cities are generally represented by counsel who are the City Attorney for a number of cities or by Special Counsel. In any event most of their cases in which possession is involved are presently for public street or road purposes and such counsel are familiar with, and knowledgeable about, the requirements for Order of

Possession.

By this elaboration I am not sure that I have added anything that will be very helpful, and I hope I have answered your questions.

I am pleased that you have found my views persuasive because I do feel that burdensome court procedures must be avoided in this respect and wherever possible. In that connection, it does seem that eminent domain must be kept in the market place, with litigation as a last resort. The work of your commission in providing such assistance as moving expenses for a property owner must surely encourage public purchases without a need for judicial intervention. Bonus payments, where appropriate, and less control by funding agencies it seems to me could provide relief for taxpayer and property owner alike.

These views are my own. As you know, this court has proposed legislation for judicial reform (not material here, as far as I am aware) and we are all asked not to speak for the court lest our statements be misinterpreted as court policy related to the court's present effort.

I am sorry that it has not been possible to reply more promptly to your letter.

Sincerely,

Richard Barry

RB/cb

The Superior Court
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

RICHARD BARRY
COURT COMMISSIONER

April 2, 1971

Nathaniel Sterling, Esq.
Legal Counsel
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. Sterling:

In my letter of March 26 the third full paragraph on page three should be corrected at line four so that "basis" reads "basic." The word "old" should precede the cited section (937) and section 473 should also have been cited.

As to the lack of authority generally for vaeating orders that were granted as distinguished from orders denied see 45 State Bar Journal 483 (1970). The article appears to be thoroughly researched although I note that section 937 is cited as existing authority.

I should like to add that it seems logical that Orders of Possession be viewed as having been granted conditionally in the sense that they do not become effective until there has been a compliance with section 1243.5 and the terms of the order. Upon a showing that the terms including the immediate need or that any jurisdictional facts were incorrectly stated in the documents that had supposedly supported the order, then surely the court should not permit the order to have its intended effect. For example, if in opposition to an application for a writ of assistance the court becomes aware of the fact that a condemner did not have authority from its own legislative body to enter upon the remainder of the subject property and sever portions of a building and therefore should not have been granted such authority in the Order of Possession (although the affidavits had supported the order), would it not be error for the court to refuse to vacate its said order? I think the court would abuse its discretion by such a refusal. By the same token, I believe the court does have continuing discretion to vacate a void order and all reasonable discretion to vacate or amend a possessory order upon timely application and to see that

the ends of justice are best served thereby. I do not believe an ex parte Order of Possession can ever be held to be with prejudice against an opportunity to be heard in opposition thereto.

Sincerely,

Richard Barry

RB:sd

Memorandum 71-25

EXHIBIT IV

COMPREHENSIVE STATUTE § 1269.01

Staff recommendation April 1971

§ 1269.01. Order for immediate possession

1269.01. (a) If the plaintiff is a public entity or public utility, the plaintiff may apply ex parte to the court for an order for possession under this chapter at the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment.

(b) The court shall make an order that authorizes the plaintiff to take possession of the property if the court determines all of the following:

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

(2) The plaintiff needs possession of the property prior to judgment.

(3) The plaintiff has deposited the amount indicated by an appraisal to be the compensation for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

(1) Describe the property to be acquired, which description may be by reference to the complaint.

(2) State the date after which the plaintiff is authorized to take possession of the property, which date shall be not less than 90 days after the service of the order.

Comment. Section 1269.01 prescribes the procedures to be followed in order for the condemnor to obtain immediate possession of property. With respect to the relief available from an order for immediate possession, see Section 1269.02.

Subdivision (a). Subdivision (a), like former Code of Civil Procedure Section 1243.5(a), provides an ex parte procedure for obtaining an order for immediate possession. It further permits the condemnor, if a public entity or public utility, to make application for an order for possession prior to judgment in any condemnation case. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was allowed only if the taking was for right of way or reservoir purposes, and the right to immediate possession was limited to certain public entities; public utilities did not have the right to obtain immediate possession.

Subdivision (b). Subdivision (b) specifies the determinations a court must make before it may issue an order for immediate possession. The required determination that the plaintiff is entitled to take the property by eminent domain, and that it has deposited the amount of probable just compensation, is derived from former Code of Civil Procedure Section 1243.5(b). The requirement of a determination that the plaintiff is authorized to take immediate possession, formerly found in Code of Civil Procedure Section 1243.5(b), has been deleted since only authorized condemnors may apply to the court under subdivision (a) of Section 1269.01. The requirement that plaintiff show a need for immediate possession is new to California but is based upon comparable

provisions in other jurisdictions. See, e.g., Ill. Stat. Ann., Ch. 47, §§ 2.1-2.3 (Supp. 1966); Dep't 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).

Subdivision (c). Subdivision (c) describes the contents of an order for possession. The contents are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, the requirement that the order state the amount of the deposit has been eliminated since Section 1268.02 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since immediate possession is now authorized for any public use. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes rights and interests therein. See Section 101 (defining "property").

Subdivision (c) incorporates the additional requirement of a 90-day period following the service of the order before possession can be physically assumed. Because the order is obtained on ex parte rather than noticed motion, the time period is computed from the date of service rather than the date of the order. See Section 1269.04(b). The 90-day period is a minimum period; it is in the court's discretion and is subject to extension under conditions specified in Section 1269.02. The period is also subject to decrease in cases of emergency. See NOTE to Section 1269.04.

§ 1269.02. Authority of court to stay or vacate order

1269.02. At any time after the court has made an order authorizing immediate possession and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the owner of the property or an occupant of the property, and upon considering all relevant information, 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, may:

(a) Stay the order if the hardship to the moving party of having possession taken at the time specified in the order clearly outweighs the hardship to the plaintiff of a stay.

(b) Vacate the order if it determines that the plaintiff is not entitled to take the property by eminent domain, does not need possession of the property prior to judgment, or has not deposited the amount indicated to be the compensation for the taking of the property.

Comment. Section 1269.02 is new. It grants authority to the court to stay or vacate an order for immediate possession upon motion of the property owner or occupant. Of course, failure of a party to make a motion to stay or vacate an order is not an abandonment of any defense to the condemnation action or proceeding.

Subdivision (a). Subdivision (a) permits the court to stay an order for possession if hardship to the dispossessed clearly outweighs the hardship to the condemnor that would be caused by a stay. Since the minimum period

for an order of immediate possession under Section 1269.01 is 90 days, cases where an extension of time is appropriate will be rare.

Subdivision (b). Subdivision (b) permits the court to vacate an order if it finds that the requirements for immediate possession prescribed in Section 1269.01(b) have not been complied with.

Review of orders authorizing or denying possession. Under former statutes, judicial decisions held that an appeal may not be taken from an 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 P. 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 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). No change is made in these rules as to orders made under Sections 1269.01 and 1269.02 or Chapter 3 (commencing with Section 1270.01).

COMPREHENSIVE STATUTE

COMPREHENSIVE STATUTE § 1268.01 et seq.

Tentatively approved September 1970

DIVISION 7. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

Note: Unless otherwise specified, all section references are to the Tentative Eminent Domain Code.

CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT

Comment. This chapter supersedes Code of Civil Procedure Sections 1243.6 and 1243.7 and those portions of Section 1243.5 that relate to the deposit and withdrawal of 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. The deposit may be made whether or not possession of the property is to be taken. This deposit serves a number of purposes:

(1) It is a condition to obtaining an order for possession prior to entry of judgment under Chapter 2 (commencing with Section 1269.01).

(2) It may entitle the condemnor to obtain an order for possession after entry of judgment under Chapter 3 (commencing with Section 1270.01). See Section 1270.02.

(3) In some cases, it fixes the date of valuation. See

(4) 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

(5) If the deposit is withdrawn, the withdrawal entitles the plaintiff to an order of possession. 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). However, deposits made under Chapter 1 may be increased to the amount of the judgment after entry of judgment. See Section 1268.03(b).

Code of Civil Procedure

[Code of Civil Procedure Section 1249a].

[Code of Civil Procedure Section 1255b].

Section 1268.01. Deposit of amount of appraised value of property

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 the appraisal referred to in subdivision (b) to be the compensation for the taking of any parcel of property included in the complaint. 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 under this section, 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.

(c) Subject to subdivision (d), before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property prepare a statement of valuation data justifying the appraisal referred to in subdivision (b). The statement of valuation data 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 with respect 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. special

(d) Upon ex parte application, the court may make an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date the deposit is made if the plaintiff, by affidavit, presents facts showing that an emergency exists and that the statement of valuation data cannot reasonably be prepared prior to making the deposit.

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.

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. However, pre-judgment interest is not required to be estimated or deposited under this section because the termination date of such interest and the ultimate effect of any offsets would be speculative at the time the deposit is made.

The appraisal required by subdivision (b) and the statement of valuation data required by subdivision (c) may be made either by a member of the condemnor's appraisal staff or by an independent appraiser.

The statement of valuation data required by subdivision (c) is necessary to enable the plaintiff to comply with Section 1268.02 which requires the notice of the deposit to be accompanied by or to refer to the statement of valuation data which justifies the amount of the deposit. The required statement must contain all the information required to be included in a statement of valuation data. See [Code of Civil Procedure Section 1272.02 (added by Chapter 1104 of the Statutes of 1967)] which 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. An appraisal report containing all of such information could be used as a statement of valuation data. See [CODE CIV. PROC. § 1272.02(f)].

Under emergency circumstances, it may be possible to make only a rough, preliminary appraisal of the property. In such cases, subdivision (d) permits the plaintiff to apply ex parte to the court for an order permitting the plaintiff to defer preparation of the statement of valuation data for a reasonable time not exceeding 50 days from the date of the deposit. Even where the plaintiff obtains such an order, the order does not relieve the plaintiff from depositing the amount of its appraisal of the property.

Section 1268.02. Service of notice of deposit

1268.02. (a) On making a deposit pursuant to this chapter, the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding who have an interest in the property for which the deposit was made. Service of such notice shall be made in the manner provided in Section 1269.04 for service of an order for possession.

(b) The notice shall either (1) be accompanied by a copy of the statement of valuation data referred to in subdivision (c) of Section 1268.01 or (2) state the place where and the times when such statement may be inspected and copied. If the notice designates a place where and times when the statement may be inspected and copied, the plaintiff shall make the statement available to all parties who have an interest in the property at such place and times.

(c) If the plaintiff has obtained an order under Section 1268.01 deferring completion of the statement of valuation data, the plaintiff shall comply with subdivision (a) on making the deposit and shall comply with subdivision (b) upon completion of the statement.

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 1268.07).

Section 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.

(d) 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 of the Code of Civil Procedure].

(e) 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.

(f) The plaintiff may at any time increase the amount deposited without making a motion under this section. In such case, notice of the increase shall be served as provided in subdivision (a) of Section 1268.02.

Nothing in this subdivision precludes the court from making a determination or redetermination that probable just compensation is greater than the amount 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 just compensation. As to the duty of the plaintiff and the power 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. Subdivision (d) 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. Subdivision (d) applies only where the plaintiff has not taken possession of the property; if the plaintiff has taken possession, subdivision (c) requires that the plaintiff increase the amount of the deposit in accordance with the court's order.

Section 1268.09 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 (e) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn.

Subdivision (f) of Section 1268.03 is included primarily so that the deposit may be increased after entry of judgment without the need for a court determination under this section.

Section 1268.04. Withdrawal of deposit prior to judgment

1268.04. Prior to entry of judgment, any defendant who has an interest in the property for which a deposit has been made under this chapter may apply to the court for the withdrawal of all or any portion of the amount deposited in accordance with Sections 1268.05 and 1268.06. 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.

Comment. Section 1268.04 is derived from Section 1243.7(a), (c).

former Code of Civil Procedure

Section 1268.05. Procedure for withdrawal

1268.05. (a) Subject to subdivisions (c) and (d), 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) 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 (d) 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 (d) 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 1268.09.

(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. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the amount shall not exceed double such portion.

(f) Unless the undertaking is required primarily because of an issue as to title between the applicant and another party or person, if the undertaking is executed by an admitted surety insurer the applicant filing the undertaking is entitled to reasonably recover the premium paid for 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 Code of Civil Procedure 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).

Section 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 1268.03 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. The undertaking may be executed by two or more sufficient sureties approved by the court, and in such case the undertaking shall be in double such amount, 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.

(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 as a part of the recoverable costs in the eminent domain proceeding.

reasonably

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

Code of Civil Procedure

except that the two-percent limitation in the former section of the amount recoverable for a premium on an undertaking has been replaced by the "reasonably paid" limitation.

Section 1268.07. Withdrawal of deposit after entry of judgment

1268.07. (a) After entry of judgment, whether or not the judgment has been reversed, vacated, or set aside, any defendant who has an interest in the property for which a deposit has been made under this chapter may apply to the court for the withdrawal of all or any portion of the amount deposited.

(b) Subject to subdivisions (c), (d), and (e), upon application of a defendant under this section, the court shall order that the defendant be paid the amount to which he is entitled under the judgment, whether or not such judgment has been reversed, vacated, or set aside.

(c) If the amount deposited is not sufficient to permit payment to all defendants of the amount to which they are entitled under the judgment, the court, upon application of a defendant under this section, shall order that the defendant be paid that portion of the amount deposited that the amount to which he is entitled under the judgment bears to the total amount of the judgment. Nothing in this subdivision relieves the plaintiff from the obligation imposed by subdivision (c) of Section 1268.03 to increase the amount of the deposit.

(d) 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 entry of judgment.

(e) No payment shall be made under this section unless the defendant receiving payment files (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.

Comment. Section 1268.07 is new, but it provides a procedure for withdrawing deposits that was available under former Sections 1243.7 and 1254. Under former practice, where a deposit was made to obtain possession prior to judgment, the defendant was nonetheless entitled to proceed under the comparatively simple provisions for withdrawal provided by Section 1254 after the entry of judgment. See *People v. Dittmer*, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). Section 1268.07 has been added to provide explicitly for this practice. Section 1268.07 thus permits a defendant, after entry of judgment, to withdraw a deposit that was made before judgment under the same simple procedure provided for withdrawal of a deposit made after entry of judgment. Compare Section 1270.05 (withdrawal of a deposit made after entry of judgment). Upon entry of the judgment, any reason for use of the more complex pre-judgment withdrawal procedure (see Sections 1268.05 and 1268.06) disappears.

Code of Civil Procedure

Code of Civil Procedure

Subdivision (c) provides for the possible situation in which a defendant applies to withdraw the amount to which he is entitled under the judgment, but the amount then on deposit is insufficient to satisfy the judgment. The subdivision permits him to withdraw his proportionate part of the amount on deposit. For example, if the amount of the deposit is $20,000, the total judgment is for $30,000, and the particular defendant is entitled to $15,000 under the judgment, the subdivision permits him to withdraw $10,000. The subdivision thus obviates any question as to the entitlement of a defendant in such a situation and prevents withdrawal of a disproportionate share of the deposit by any particular defendant.

Subdivision (d) authorizes the court to require an undertaking to secure repayment of an excessive withdrawal. The subdivision thus per-

mits the court to protect the condemnor or another defendant in a case in which the court believes that it is likely that the judgment entered will be vacated, reversed, or set aside and that the ultimate recovery by the applicant in the proceeding will be less than the amount to which he is entitled under the judgment. The subdivision makes any such requirement discretionary with the court; it does not entitle any party to the proceedings to insist upon an undertaking. Further, the subdivision contemplates that any objection to withdrawal will be made known to the court by the objecting party; it imposes no duty upon either the court or the applicant to ascertain whether a party may have such an objection.

Subdivision (e) requires the defendant receiving payment to file either (1) a satisfaction of judgment or (2) a receipt and an abandonment of claims and defenses other than his claim to greater compensation. The requirement is the same as the one imposed in connection with the withdrawal of a deposit made after entry of judgment. See Section 1270.05(b).

Section 1268.08. Withdrawal waives all defenses except claim to greater compensation

1268.08. 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.

Code of Civil Procedure

Comment. Section 1268.08 restates the substance of subdivision (g) of former Section 1243.7. In addition to the defendant's waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit may also entitle the plaintiff to an order for possession. See Section 1269.06. *Cf. People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

Section 1268.09. Repayment of amount of excess withdrawal

1268.09. 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 which ordered such withdrawal 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 1268.09 restates the substance of subdivision (h) of former Section 1243.7.

Code of Civil Procedure

Section 1268.10. Limitation on use of evidence submitted in connection with deposit

1268.10. Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall be given in evidence or referred to in the trial of the issue of compensation.

Comment. Section 1268.10 restates the substance of subdivision (e) of former Code of Civil Procedure Section 1243.5. Its purpose is to encourage the plaintiff to make an adequate deposit by preventing the amount deposited or withdrawn from being given in evidence on the issue of compensation. This section does not prevent the defense either from using the appraisal data for impeachment purposes or from calling the appraiser as an expert witness on its its own behalf. See People v. Cowan, 1 Cal. App.3d 1001, 81 Cal. Rptr. 713 (1969).

Section 1268.11. Deposit in State Treasury unless otherwise required

1268.11. (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 1268.11 is the same in substance as former Section 1243.6. Subdivision (b) is based on the first two sentences of subdivision (b) of former Section 1254.

Code of Civil Procedure

Code of Civil Procedure

CHAPTER 2. POSSESSION PRIOR TO JUDGMENT

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 1270.01). See Section 1270.02.

§ 1269.01. Application for order for possession prior to judgment

1269.01. If the plaintiff is a public entity or a public utility, the plaintiff may apply to the court for an order for possession under this chapter at the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment. The application for the order for possession shall be made by motion. Notice of the motion shall be served in the same manner as an order for possession is served under Section 1269.04.

Comment. Section 1269.01 permits the condemnor, if a public entity or public utility, to make application for an order for possession prior to judgment in any condemnation case. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was allowed only if the taking was for right of way or reservoir purposes, and the right to immediate possession was limited to public entities; public utilities did not have the right to obtain immediate possession.

Section 1269.01 requires that notice be given of the motion for the order for possession. Former Code of Civil Procedure Section 1243.5(a) provided an ex parte procedure for obtaining an order for immediate possession, a procedure that appears to violate the due process clause of the Fourteenth Amendment to the U.S. Constitution, which requires an opportunity for interested persons to be heard.

§ 1269.02. Hearing

1269.02. (a) On hearing of the motion for the order for possession, 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 all of the following:

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

(2) The plaintiff needs possession of the property prior to judgment.

(3) The plaintiff has deposited the amount indicated by an appraisal to be the compensation for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01).

(b) Before making an order for possession under this chapter, the court shall:

(1) Dispose of any pending motion under Section 1268.03 to determine or redetermine the probable amount of compensation and, if an increase in the amount of the deposit is determined, shall require the additional amount to be deposited by the plaintiff.

(2) Determine the date after which the plaintiff is authorized to take possession, which date shall be not less than 60 days after the making of the order and shall take into consideration the need of the

plaintiff for early possession of the property and the hardship the owner or occupant will suffer if possession is taken before judgment.

Comment. Section 1269.02 specifies the determinations to be made at the hearing on the motion for immediate possession.

Subdivision (a). The required findings that the plaintiff is entitled to take the property by eminent domain, and that the plaintiff has deposited the amount of probable just compensation, are derived from former Code of Civil Procedure Section 1243.5(b). The requirement that plaintiff show a need for immediate possession is new to California but is based upon comparable provisions in other jurisdictions. See, e.g., Ill. Stat. Ann., Ch. 47, §§ 2.1-2.3 (Supp. 1966); Dep't 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).

Subdivision (b). With respect to paragraph (1) of subdivision (b), see Section 1268.03 and the Comment to that section.

Paragraph (2) of subdivision (b) provides a minimum 60-day period following the rendering of the order before possession can be physically assumed. Because the order is obtained by regularly noticed motion, the time period is computed from the date of the order, rather than the date of its service. However, if the order is not promptly served, the period is tolled under Section 1269.04. The 60-day period is a minimum period; the period is to be determined by the court in each case, taking into account the need of the plaintiff for

possession of the property and the hardship to the defendant. Nothing in subdivision (b) should be construed to limit the state's ability to take property immediately in case of an emergency.

Review of orders authorizing or denying possession. Under former statutes, judicial decisions held that an appeal might not be taken from an 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 P. 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 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). No change is made in these rules as to orders made under Section 1269.02, or Chapter 3 (commencing with Section 1270.01).

Note: See note to Section 1269.04.

§ 1269.03. Contents of order for possession

1269.03. The order for possession shall:

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

(b) State the date after which the plaintiff is authorized to take possession of the property.

Comment. The contents of the order for possession are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, 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. Also, the requirement that the order state the purpose of the condemnation has been omitted since immediate possession is now authorized for any public use.

Section 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 60 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.02, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

or such longer time as the court prescribes,

(c) At least 30 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.06, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any.

(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.

Comment. Section 1269.04 is derived from former Section 1243.5(e). 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(e). 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.

Code of Civil Procedure

former Code of Civil Procedure

Note: The 60-day notice requirement does not, of course, apply to an emergency taking pursuant to the police powers, a matter that also is under study.

Tentatively approved September 1970

for relocation purposes

Section 1269.05. Deposit 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.

if the court determines that the defendant will use the amount deposited for relocation purposes only.

(c) If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on abandonment. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the moving party, then such interest shall be computed on the amount of such award. If no such determination is ever made, then such interest shall be computed on the amount of probable just compensation as determined on the motion. The moving party shall be entitled to the full amount of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

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

(e) Notice of a deposit made under this section shall be served as provided by subdivision (a) of Section 1268.02. The defendant may withdraw the deposit in accordance with Chapter 1 (commencing with Section 1268.01) on condition the deposit is used for relocation purposes only.

(f) No motion may be made by a defendant under this section after entry of judgment in the proceeding unless the judgment is reversed, vacated, or set aside and no other judgment is entered.

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 Section 1251] 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 but much broader provision, see PA. STAT. ANN., Tit. 26, § 1-407(b)(Supp. 1966).

for relocation purposes

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, 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)].

[Code of Civil Procedure

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[Code of Civil Procedure

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.

Under subdivision (c), abandonment by the plaintiff entitles the defendant to recover interest in the manner provided for recovery of other costs, as prescribed in [subdivision (c) of Code of Civil Procedure Section 1255a]. The plaintiff may not abandon, however, if the defendant, to his detriment, has substantially changed his position in justifiable reliance upon the proceeding. [Code Civ. Proc. § 1255a(b).]

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.

Section 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) Expresses his willingness to surrender possession of 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 has:

(1) Expressed his willingness to surrender possession of 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 subdivision (c) of Section 1269.04 on the day the order is made.

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 each of the defendants entitled to possession has expressed his willingness to surrender it. Service of the order for possession is required by subdivision (c) of Section 1269.04.

Section 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 to request a new trial by taking possession of the property pursuant to this chapter.

Code of Civil Procedure

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 1268.08, 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.

Section 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 Division 7 (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, *e.g.*, *Neale v. Superior Court*, 77 Cal. 28, 18 Pac. 790 (1888); *In re Bryan*, 65 Cal. 375, 4 Pac. 304 (1884); *San Bernardino Valley Municipal Water Dist. v. Gage Canal Co.*, 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). 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 *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305 (S.D. Cal. 1921); 3 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment*, § 64 (1954)), orders for possession contemplated by the section include those made under Chapter 2 (commencing with Section 1269.01) of Division 7, Chapter 3 (commencing with Section 1270.01) of Division 7, and [Section 1253 of Code of Civil Procedure].

CHAPTER 3. DEPOSITS AND POSSESSION AFTER JUDGMENT

Comment. This chapter relates to deposits that may be made and orders for possession that may be obtained after entry of the "interlocutory judgment" in condemnation. The chapter supersedes 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).

Section 1270.01. Deposit after judgment

1270.01. (a) Unless the plaintiff has made a deposit under Chapter 1 (commencing with Section 1268.01) prior to entry of judgment, 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. The deposit may be made notwithstanding an appeal, a motion for a new trial, or a motion to vacate or set aside the judgment, and may be made whether or not the judgment has been reversed, vacated, or set aside.

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

Comment. Subdivision (a) of Section 1270.01 is similar to subdivision (a) of former Section 1254. However, the deposit provided for in this subdivision 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. Although this section applies only to the making of a deposit after judgment, a deposit made before judgment may be increased after entry of judgment pursuant to subdivision (f) of Section 1268.03.

Code of Civil Procedure

Code of Civil Procedure

Subdivision (b) is new. In requiring that notice of the deposit be given, it parallels Section 1268.02 which requires that notice of a prejudgment deposit be sent to the parties having an interest in the property for which the deposit is made. Under former Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

Code of Civil Procedure

Section 1270.02. Order for possession

1270.02. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, whether or not the judgment has been reversed, vacated, or set aside, apply ex parte to the court for an order for possession, and the court shall authorize the plaintiff to take possession of the property pending conclusion of the litigation if:

(1) The judgment determines that the plaintiff is entitled to take the property; and

(2) The plaintiff has deposited for the defendants an amount not less than the amount of the judgment, together with the interest then due thereon, in accordance with Section 1270.01 or Chapter 1 (commencing with Section 1268.01).

(b) 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.

Code of Civil Procedure

Section 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.

Code of Civil Procedure

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.

Section 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.

Code of Civil Procedure

Comment. Section 1270.04 supersedes subdivision (d) of former Section 1254. The additional amount referred to in Section 1270.04 is the amount determined by the court to be necessary, in addition to the amount of the judgment and the interest then due thereon, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. Deposit of the amount of the judgment itself after entry of judgment is provided for by Section 1270.01.

Code of Civil Procedure

Former Section 1254 was construed to make the amount, if any, to be deposited in addition to the judgment discretionary with the trial court. *Orange County Water Dist. v. Bennett*, 156 Cal. App.2d 745, 320 P.2d 536 (1958). This contruction is continued under Section 1270.04.

For the provision permitting increase or decrease in a deposit made prior to entry of judgment, see Section 1268.03.

Section 1270.05. Withdrawal of deposit

1270.05. (a) Any defendant for whom an amount has been deposited upon the judgment pursuant to this chapter is entitled to demand and receive the amount to which he is entitled under the judgment upon obtaining an order from the court, whether or not such judgment has been reversed, vacated, or set aside. 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 entry of judgment.

Comment. Section 1270.5 is based on subdivision (f) of former Section 1254.

Former 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. See *People v. Gutierrez*, 207 Cal. App.2d 759. 24 Cal. Rptr. 781 (1962). That construction is continued in effect by Section 1270.05. Inferentially, Section 1254 permitted withdrawal only of the amount deposited upon the judgment and not the additional amount, if any, deposited as security. That construction also is continued in effect.

For the provision for withdrawal after entry of judgment of a deposit made prior to judgment, see Section 1268.07.

Code of Civil Procedure

Code of Civil Procedure

former Code of Civil Procedure

Section 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.

Code of Civil Procedure

Section 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 to request a new trial by depositing the amount of the judgment or taking possession pursuant to this chapter.

Code of Civil Procedure

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).

COMPREHENSIVE STATUTE § 1270.08

Tentatively approved September 1970

Section 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 1268.11 and the provisions of that section are applicable to the money so deposited.

Comment. Section 1270.08, which incorporates by reference Section 1268.11, supersedes a portion of subdivision (h) of former Section 1254.

Code of Civil Procedure