

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

Condemnation Law and Procedure

Number 1—Possession Prior to Final Judgment
and Related Problems

September 1967

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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NOTE

This pamphlet begins on page 1101. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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September 1, 1967

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to make a study to determine "whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings."

The Commission herewith submits a preliminary report containing its tentative recommendation relating to possession prior to final judgment and related problems and a research study relating thereto prepared by Mr. Clarence B. Taylor, a member of the Commission's legal staff. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one of a series of reports being prepared by the Commission, each report covering a different aspect of condemnation law and procedure. The report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and to give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation.

Communications concerning the tentative recommendation should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California 94305.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman



CONTENTS

	Page
TENTATIVE RECOMMENDATION	1107
STATUTORY REVISION	1107
Extension of Provisions for Possession and Payment Prior to Judgment	1107
Background	1107
Recommendations	1109
Deposit and Withdrawal of Probable Compensation	1110
Deposit on Demand of Property Owner	1112
Possession After Entry of Judgment	1112
Date of Valuation	1113
Changes in Market Value Before the Date of Valuation	1115
Interest on the Award	1115
Abandonment of the Proceeding	1116
Recodification and Miscellaneous Changes	1117
CONSTITUTIONAL REVISION	1118
RECOMMENDED LEGISLATION	1120
Code of Civil Procedure	
§ 1243.4 (repealed)	1120
§ 1243.5 (repealed)	1120
§ 1243.6 (repealed)	1122
§ 1243.7 (repealed)	1123
§ 1249 (amended)	1125
§ 1249a (added)	1128
§ 1249.1 (amended)	1130
§ 1252 (amended)	1131
§ 1253 (amended)	1132
§ 1254 (repealed)	1133
§ 1255a (amended)	1136
§ 1255b (amended)	1138
§ 1257 (amended)	1140
TITLE 7.1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT; OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT	1142
CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT	1142
§ 1268.01. Deposit of amount of appraised value of property	1143
§ 1268.02. Service of notice of deposit	1144
§ 1268.03. Increase or decrease in amount of deposit	1145
§ 1268.04. Withdrawal of deposit prior to judgment	1146
§ 1268.05. Procedure for withdrawal	1146
§ 1268.06. Security when amount in excess of original deposit is withdrawn	1148
§ 1268.07. Withdrawal of deposit after entry of judgment	1149

	Page
§ 1268.08. Withdrawal waives all defenses except claim to greater compensation	1150
§ 1268.09. Repayment of amount of excess withdrawal	1150
§ 1268.10. Limitations on use of evidence submitted in connection with deposit	1151
§ 1268.11. Deposit in State Treasury unless otherwise required	1152
CHAPTER 2. POSSESSION PRIOR TO JUDGMENT	1152
§ 1269.01. Possession by public entity for right of way or reservoir	1152
§ 1269.02. Possession in other cases	1153
§ 1269.03. [Reserved for expansion]	1155
§ 1269.04. Service of order for possession	1155
§ 1269.05. Deposit and possession on motion of certain defendants	1156
§ 1269.06. Right of plaintiff to take possession after vacation of property or withdrawal of deposit	1157
§ 1269.07. Taking possession does not waive right of appeal	1158
§ 1269.08. Court may enforce right to possession	1159
CHAPTER 3. DEPOSITS AND POSSESSION AFTER JUDGMENT	1159
§ 1270.01. Deposit after judgment	1159
§ 1270.02. Order for possession	1160
§ 1270.03. Service of order	1161
§ 1270.04. Increase or decrease in amount of deposit	1161
§ 1270.05. Withdrawal of deposit	1161
§ 1270.06. Repayment of amount of excess withdrawal	1162
§ 1270.07. Taking possession does not waive right of appeal	1162
§ 1270.08. Deposit in State Treasury unless otherwise required	1162
Government Code	
§ 16425. Condemnation Deposits Fund	1163
§ 16426. Investment of fund	1163
§ 16427. Apportionment and disbursement of fund	1163
§ 38090. (amended)	1164
§ 38091. (amended)	1164
Streets and Highways Code	
§ 4203. (amended)	1165
§ 4204. (amended)	1165
Other Conforming Changes in Existing Statutes	1166
RECOMMENDED CONSTITUTIONAL AMENDMENT	1167
Amendment of Section 14, Article I	1167
RESEARCH STUDY	1171
(The detailed Table of Contents for the study begins on page 1171.)	

TENTATIVE RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION

relating to

CONDEMNATION LAW AND PROCEDURE
Number 1—Possession Prior to Final Judgment
and Related Problems

STATUTORY REVISION

Extension of Provisions for Possession and Payment
Prior to Judgment

Background

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

In its general application, Section 14 forbids the taking of property "without just compensation having first been made to, or paid into court for, the owner." In reliance upon this provision, the Supreme Court of California, in *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902), invalidated certain legislation enacted in 1897 that authorized the condemnor to take "immediate possession" in any eminent domain proceeding. The *Steinhart* decision has been considered by some to bar any statutory extension of provisions for possession prior to entry of judgment. The legislation of 1897, however, permitted payment of the eventual award to be secured by bond and thus did not provide for any actual payment to the owner of the property; moreover, the legislation did not require any period of notice to the property owner. The court invalidated that legislation upon the logical ground that, even if money had been deposited, it was not "paid into court for the owner" unless it was available to him. A second ground

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

for the holding was that just compensation is constitutionally required to be ascertained by a jury, unless a jury is waived, before possession of the property could be taken.² The self-executing provisions of Section 14 that now authorize "immediate possession" without payment to the owner "having first been made" were added by various amendments to overcome the effect of the *Steinhart* decision.

The narrow limits of the authorization for early possession in Section 14 reflect a fairly general impression that the best interests of the property owner always lie in postponing the inevitable relinquishment of possession as long as possible. There is some justification for this impression because the California Constitution and statutes for many years failed to provide adequate procedural safeguards for the property owner. Before 1957, there were no provisions for withdrawal of the required deposit. Furthermore, no period of notice to the property owner was specified and the order for possession could be made effective when granted. These pre-1957 rules afforded at least the possibility of serious inconvenience to the property owner.³

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

From the condemnee's point of view, if reasonable notice is given before possession is required and if prompt receipt of the probable value of the property is assured, possession prior to judgment frequently will be advantageous. Upon filing of the condemnation pro-

² Compare *Heilbron v. Superior Court*, 151 Cal. 271, 278, 90 Pac. 706, 708-709 (1907). For a further discussion of the *Steinhart* decision, see the research study, *infra* at 1171, 1202-1203.

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

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

The necessity of determining the right of the condemnor to take the property before such an exchange does not preclude broadened provisions for exchanging probable compensation and possession prior to judgment. The limiting doctrines of "public use" and "public necessity" once played important roles in condemnation cases. Now, however, the only substantial question to be determined in virtually all condemnation proceedings is the amount of compensation. And, because the question of the condemnor's right to take the property is decided by the court, rather than by the jury, procedures can be fashioned to permit expeditious determination of that question in the cases in which it arises.

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

The development of highways, and especially freeways, sometimes necessitates the taking of property outside the right of way. Even though the acquisition is by the state, no authorization exists for early possession of property outside the boundaries of the right of way. Similarly, many acquisitions in which possession prior to judgment would be appropriate are excluded both by the limitation as to entities and by the limitation as to the public purpose for which the property is being acquired. As an example, an assured date of possession is not available for the acquisition of a school site, however great the need and whatever the size or responsibility of the school district.

Recommendations

The Commission has concluded that the range of cases in which possession prior to judgment is available should be substantially extended. At the same time, procedures should be provided that will fully protect

the rights of property owners and assure them of the actual receipt of approximate payment at the time possession is taken. Accordingly, the Commission recommends:

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

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

Deposit and Withdrawal of Probable Compensation

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

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

The recommended procedure would provide a method by which the parties could effect a transfer of the right to possession in exchange for substantial compensation without prejudice to their rights to litigate the issue of compensation. It would benefit both parties to the proceeding. The property owner could withdraw the deposit and thus finance the acquisition of other property and defray other expenses incident to the taking. The withdrawal would benefit the condemnor; the condemnee would, as under existing law, thereby waive all defenses to the proceeding except the claim to greater compensation, and withdrawal

would also permit the condemnor to obtain possession without regard to the uncertain date that the trial and possible appeals may be concluded.

2. Before making the deposit, the condemnor should be required to have an appraisal made by an expert appraiser. The amount deposited should be the amount determined by the appraiser to be the probable amount of compensation that will be awarded in the proceeding. The condemnor should be required to notify interested parties of its having made a deposit and to make available a statement of valuation data (CODE CIV. PROC. § 1272.02) containing the valuation data upon which the amount of the deposit is based. The amount deposited should be subject to review and change by the court on motion of any interested party. Under existing law, the court fixes the amount of the deposit on *ex parte* application of the condemnor. Necessarily, the amount fixed is almost always the amount suggested by the condemnor. Although existing law gives the condemnee the right to have the court redetermine the amount of the deposit, experience has demonstrated that the court, having once made an order fixing the amount of the deposit, is reluctant to reconsider that decision even though the initial order was made on *ex parte* application.

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

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

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

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

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

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

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

Deposit on Demand of Property Owner

The Commission has considered provisions in other states that permit the condemnee, in all cases, to demand approximate compensation at the beginning of the proceedings. Under these provisions, the condemnor usually is given the right to possession upon complying with the demand of the condemnee. Although these provisions have obvious merit, integration of such a requirement into California condemnation procedure does not appear feasible at this time. Nonetheless, a greater incentive should be provided to the condemnor to deposit approximate compensation in cases in which the condemnee's residence is being taken. The need to purchase another home before he receives the final award places a particularly onerous burden upon such a condemnee. The Commission therefore recommends enactment of a provision permitting the condemnee to demand that a deposit be made if the property being taken is residential property having not more than two dwelling units and the condemnee resides thereon. If the deposit is not made, interest at the legal rate of seven percent should be allowed on the amount of the eventual award from the date that the deposit should have been made.

Possession After Entry of Judgment

Code of Civil Procedure Section 1254 permits any condemnor to obtain possession following entry of judgment by depositing the amount of the judgment and an additional sum determined by the court to be adequate to secure payment of any additional amount that may be recovered in the proceeding. The procedure is available even though either party appeals or makes a motion for a new trial. Unlike provisions for possession prior to judgment, this authorization for possession after judgment does not raise constitutional problems. See *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907).

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

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

1. The court should not be required in every case to determine an amount, in addition to the amount of the judgment, that the condemnor must deposit to secure payment of any further recovery in the proceeding. A procedure already exists for increasing or decreasing the amount on deposit on motion of either party. This procedure should be adapted to permit the property owner to make a motion to compel deposit of an additional amount if he deems that course necessary.

2. Existing law should be clarified to permit the condemnee, after entry of judgment, to withdraw a deposit that was made prior to judgment under the same simple procedure provided for withdrawal of a deposit made after entry of judgment. Upon entry of the judgment, any reason for use of the more complex prejudgment procedure disappears.

3. One uniform procedure should be provided for paying the amount of the award into court after entry of judgment, whether or not either party plans to appeal or move for a new trial, and for withdrawing the amount so paid. Under existing law, unnecessary confusion has arisen from the purely theoretical distinction between a payment into court to satisfy the judgment (CODE CIV. PROC. § 1252) and a deposit made pending appeal or motion for new trial (CODE CIV. PROC. § 1254).

4. The court should be authorized to require, in its discretion, that the condemnee provide an undertaking to secure repayment of any excessive withdrawal made after entry of judgment. This will permit the courts to protect the condemnor in cases where it appears that the final judgment will be less than the amount withdrawn. For example, the court might require an undertaking in a case where the condemnor has made a motion for a new trial or has appealed from the judgment and the court believes that it is likely that the judgment will be vacated, reversed, or set aside and a new trial granted.

Date of Valuation

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

The Commission has considered the oft-made proposal that the date of valuation be, in all cases, the date of trial. Much can be said in favor of that change. Unless the condemnor deposits approximate compensation and takes possession of the property at that time, the date the proceedings are begun is not an entirely logical date of valuation. It would seem more appropriate to ascertain the level of the general market and the value of the particular property in that market at the time the exchange of the property for "just compensation" actually takes place. Also, in a rapidly rising market, property values may have increased so much that the property owner cannot purchase equivalent property when he eventually receives the award. In other states in which the power of eminent domain is exercised through judicial proceedings, the majority rule is to fix the date of trial as the date of valuation. Nonetheless, the existing California rules appear to have worked equitably in most cases. The alternative rule might provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation. And, as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date that the trial may begin.

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

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

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

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

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

Changes in Market Value Before the Date of Valuation

It is generally recognized that announcement of a public improvement may cause property to fluctuate in value before any eminent domain proceedings are begun. Existing California statutes do not deal with the problem. Case law establishes, however, that any increase in the value of the property that directly results from the improvement itself is not to be considered in arriving at the compensation to be made for the property. Decisions as to the treatment of any decrease in value are uncertain. Notwithstanding the rule as to increases in value, demands by property owners that alleged decreases in value be considered have most frequently been denied. The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation." As recognized by recent cases, however, the injustice to the property owner is clear if general knowledge of the proposed improvement has actually depreciated the market value of the property prior to the date of valuation. Equitably, the amount awarded to the owner should be equivalent to what the market value of the property would have been on the date of valuation but for the proposed improvement's influence on the market. Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced.

The Commission therefore recommends that a uniform rule for increases and decreases be established by statute. The statute should provide that "market value" on the date of valuation means such value unaugmented by any increase and undiminished by any decrease in such value resulting from (1) the public use to which the property is to be devoted, (2) the public improvement or project for which it is being taken, (3) the eminent domain proceeding itself, or (4) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.

Interest on the Award

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

As to any amount deposited to obtain possession before judgment, interest does not cease until and unless the amount is withdrawn. Thus, under existing law, the property owner may withdraw the deposit and forgo interest on the amount withdrawn, or he may leave the amount on deposit and receive interest at seven percent. While public agencies may offset a portion of this interest obligation by placing the amount deposited in the Condemnation Deposits Fund in the State Treasury, the rate of return from that fund is much lower than the seven percent

rate that accrues to the property owner. Denial of interest can be justified, however, only if the amount deposited can be withdrawn promptly and easily. Although the provisions for withdrawal can and should be streamlined, there appears to be no way to overcome the obstacle presented by the possible existence of separate interests in the property. On trial of the issue of compensation, the condemnor is entitled to have the property valued as a whole, irrespective of the existence of separate interests. The award is segregated only after its total amount has been determined. Deposits prior to judgment are made in the aggregate and are not segregated among separate interests in the property. Condemnors consider it essential to retain these features of the existing law. Hence, there is little justification for tolling interest at the time the deposit is made if the condemnee may no longer have possession and yet be faced with obstacles in withdrawing the deposit.

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

Abandonment of the Proceeding

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

The Commission does not recommend changing the basic rule governing abandonment, even in connection with enactment of more general provisions for the taking of possession before final judgment. Changes should be made, however, in the existing statutory provision that permits the condemnee to recover certain costs and expenses on abandonment. Existing law expresses the policy that the condemnee "be restored to substantially the same position as if the proceeding had not been commenced." Yet, the provision that authorizes the recovery of expenses precludes recovery if the proceeding is dismissed 40 days or more prior to the day set for the pretrial conference or, if no pretrial conference is set, the day set for the trial. It has been held that attorneys' fees are not subject to this 40-day restriction and may be recovered regardless of when the proceeding is dismissed. The restriction applies, however, to all other fees and expenses incurred because of the proceeding. It has also been held that attorneys' fees and fees of other experts may be recovered for services reasonably necessary to defend the condemnee's interest in the proceeding even though a portion of such services are rendered before the complaint is

filed. Because there is no substantive difference between attorneys' fees and fees for the services of appraisers and other experts and other expenses of preparing for trial, the Commission recommends that existing law be amended to provide a uniform rule. The rule should eliminate the existing 40-day restriction and permit the recovery of all fees and expenses reasonably incurred regardless of the particular stage at which the proceeding is abandoned. The rule should also permit recovery of attorneys' fees and fees of other experts that are actually incurred and are reasonably necessary to protect the defendant's interests in the proceeding, whether such fees are incurred for services rendered before or after the proceeding is commenced.⁴

Recodification and Miscellaneous Changes

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

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

⁴For a more detailed statement of the considerations supporting the Commission's recommendation on this topic, see *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1361 (1967).

CONSTITUTIONAL REVISION

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

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

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

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

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

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

2. The lengthy proviso to the first sentence, which authorizes immediate possession in certain cases, should be deleted and a provision should be added giving the Legislature authority to specify (a) the purposes for which, and entities by which, possession may be taken prior to judgment and (b) subject to the requirement of concurrent

payment, the procedure for such cases. It should not be necessary to amend the Constitution every time that it is found that the existing procedures are faulty or can be improved.

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

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

5. The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be deleted. The phrase applies only to "corporations other than municipal" and, oddly, only to takings for right of way or reservoir purposes. The language may be inoperative under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083 (1902). In any event, the complex question of the offsetting of benefits in cases of partial takings should be left to the Legislature.

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

RECOMMENDED LEGISLATION

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

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

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

Code of Civil Procedure

Section 1243.4 (repealed)

SECTION 1. Section 1243.4 of the Code of Civil Procedure is repealed.

~~1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right-of-way, or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.~~

Comment. Section 1243.4 is superseded by Section 1269.01.

Section 1243.5 (repealed)

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

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

security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

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

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

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

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

(c) At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name

the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

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

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

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

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

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

<i>Section 1243.5</i>	<i>Recommended Legislation</i> (Code of Civil Procedure)
Subdivision (a)-----	1268.01, 1269.01
Subdivision (b)-----	1269.01
Subdivision (c)-----	1269.04
Subdivision (d)-----	1268.03
Subdivision (e)-----	1268.10
Subdivision (f)-----	1269.07

Section 1243.6 (repealed)

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

1243.6. When money is required to be deposited as provided by Section 1243.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall

be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

Comment. Section 1243.6 is superseded by Section 1268.11.

Section 1243.7 (repealed)

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

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

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

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

If the undertaking required by this subdivision is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

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

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

(c) The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least 20 days after such service of the application, or until the time for all objections has expired, whichever is later.

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

(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 20-day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If the persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another person claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

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

(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.

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

<i>Section 1243.7</i>	<i>Recommended Legislation</i> (Code of Civil Procedure)
Subdivision (a)-----	1268.04, 1268.05
Subdivision (b)-----	1268.06
Subdivision (c)-----	1268.04, 1268.05
Subdivision (d)-----	1268.05
Subdivision (e)-----	1268.05
Subdivision (f)-----	1268.05
Subdivision (g)-----	1268.08
Subdivision (h)-----	1268.09

Section 1249 (amended)

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

1249. (a) *As used in this section, "market value" means market value unaugmented by any increase and undiminished by any decrease in such value resulting from (1) the public use to which the property is to be devoted, (2) the public improvement or project for which it is being taken, (3) the eminent domain proceeding itself, or (4) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.*

(b) *For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual market value of the property on the date of valuation at that date shall be the measure of compensation for all property to be actually taken; and the basis of measure of the value of the property before injury for the purpose of assessing damages to prop-*

erty not actually taken but injuriously affected; in all cases where such damages are allowed as provided in under Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

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

Subdivision (a). The problems to which subdivision (a) is directed have not heretofore been dealt with in California statutory law, but have been considered in judicial decisions. This subdivision requires that the market value be determined as if there had been no enhancement or diminution in market value due to any of the four mentioned factors.

In *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372 (1888), and subsequent decisions, the courts have held that any increase in the market value of the property to be taken that results directly from the proposed public improvement is not to be included in arriving at the compensable market value. See *United States v. Miller*, 317 U.S. 369 (1943); *City of San Diego v. Boggeln*, 164 Cal. App.2d 1, 330 P.2d 74 (1958); *County of Los Angeles v. Hoe*, 138 Cal. App.2d 74, 291 P.2d 98 (1955). This subdivision is intended to codify the results of these and similar decisions.

Notwithstanding the rule as to enhancement in value, the California decisions are uncertain respecting any decrease in value due to such factors as general knowledge of the pendency of the public project. Several decisions indicate that the rules respecting enhancement and diminution are not parallel, and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See *City of Oakland v. Partridge*, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); *People v. Lucas*, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and *Atchison, T. & S. F. R.R. v. Southern Pac. Co.*, 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly to the contrary are *People v. Lillard*, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963), and *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959) (both cited with approval in *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966)). Subdivision (a) is intended to make the rules respecting appreciation and depreciation parallel by codifying the views expressed in the *Lillard* and *Metrim* decisions.

Under subdivision (b) of this section, the market value of the property on the date of valuation is the "measure of compensation" for property actually taken and the "measure of the value of the property before injury" as to property not taken but injuriously affected. Subdivision (a), however, requires that the influence, if any, of the three mentioned factors upon market value be eliminated in determining compensable market value on the date of valuation. Thus, with respect

to property taken, adjustment for the effect, if any, of those factors has a direct bearing upon the compensation to be awarded. In cases of partial takings, however, the effect is indirect. For the purpose of assessing severance damages and special benefits under Code of Civil Procedure Section 1248, although the influence of those factors is eliminated in determining the value of the remainder in its so-called "before condition," the nature of the public improvement is taken into account in determining the value of the remainder in its "after condition." See *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943).

The purpose of the first exclusion listed in subdivision (a) is to codify the proposition that any increase or decrease in the market value resulting from the use which the condemnor is to make of the property must be eliminated in determining compensable market value. If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See *San Diego Land & Town Co. v. Neale*, *supra*.

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

As to the effect on market value of preliminary actions on the part of the condemnor related to the taking or damaging of the property and of the eminent domain proceeding itself, see *Buena Park School Dist. v. Metrim Corp.*, *supra*. Subdivision (a) codifies the view expressed in the *Metrim* decision.

Subdivision (b). The term "market value" has been substituted for "actual value" in subdivision (b). This change codifies the decisional law which uniformly construed "actual value" to mean "market value." See *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585 (1899). For simplicity of expression, the phrase "date of valuation" has been substituted for former language that referred to "accrual" of the right to compensation and damages. No change is made in existing rules as to persons entitled to participate in the award of compensation or damages (see, e.g., *People v. City of Los Angeles*, 179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); *People v. Klopstock*, 24 Cal.2d 897, 151 P.2d 641 (1944)).

The provisions relating to dates of valuation formerly contained in this section are superseded by Section 1249a. The provision denying compensation for improvements made subsequent to the service of summons is superseded by subdivision (b) of Section 1249.1.

Decisions construing Code of Civil Procedure Section 1249 held that its provisions governing the date of valuation and the making of subsequent improvements do not apply in proceedings by political subdivisions to take the property of public utilities brought either under the general eminent domain statutes or under the provisions of the

Public Utilities Code. *Citizen's Util. Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963); *Marin Municipal Water Dist. v. Marin Water & Power Co.*, 178 Cal. 308, 173 Pac. 469 (1918). This construction is continued under this section and Sections 1249a and 1249.1(b).

Section 1249a (added)

SEC. 6. Section 1249a is added to the Code of Civil Procedure immediately following Section 1249; to read:

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

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

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

(d) If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of such new trial, except that the date of valuation in the new trial shall be the same date as the date of valuation in the previous trial if (within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion) the plaintiff has deposited the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1.

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

(f) Unless an earlier date of valuation is applicable under subdivisions (b) through (e), inclusive, if the plaintiff deposits the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01) of Title 7.1 or deposits the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1, the date of valuation is the date on which the deposit is made.

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

Subdivision (a). Section 1249a provides a date of valuation for all eminent domain proceedings other than certain proceedings by political subdivisions to take property of public utilities. See the Comment to Section 1249.

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

The date of the filing of the complaint, rather than the date of the issuance of summons, is used in determining the date of valuation. Code of Civil Procedure Section 1243 requires that all proceedings in eminent domain "be commenced by filing a complaint and issuing a summons." Ordinarily, the dates are the same but this is not always the case. See *Harrington v. Superior Court*, 194 Cal. 185, 228 Pac. 15 (1924). As the issuance of summons is not essential to establish the court's jurisdiction over the property (see *Harrington v. Superior Court*, *supra*, and *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964)), the date of the filing of the complaint is a more appropriate date.

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

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

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

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

Subdivision (d). Under language formerly contained in Section 1249, questions arose whether the original date of valuation or the date of the new trial should be employed in new trials in eminent domain proceedings. The Supreme Court of California ultimately held that the date of valuation established in the first trial, rather than the date of the new trial, should normally be used. See *People v. Murata*, 55 Cal.2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960). Subdivision (d) reverses the result obtained by that decision unless the date of valuation has been established by the deposit of the amount of the judgment in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1. The subdivision applies whether the new trial is granted by the trial court or by an appellate court. However, if a mistrial is declared, further proceedings are not considered a "new trial," and the date of valuation is determined under subdivision (e) rather than under subdivision (d).

Under subdivision (d), the date of valuation is the date of valuation used in the previous trial if the deposit is made within 30 days after entry of judgment or, if a motion for a new trial or to vacate or set

aside the judgment has been made, within ten days after disposition of such motion. If the deposit is made thereafter but prior to the commencement of the new trial, the date of valuation is the date of deposit under subdivision (f).

Subdivision (e). Under the language formerly contained in Section 1249, the effect, if any, of a mistrial upon the date of valuation was uncertain. An unpublished decision of the court of appeals held that the abortive trial proceeding was of no consequence in this connection and that, if the retrial began more than one year after the date of issuance of summons, the date of valuation was the date of the retrial if the delay was not caused by the condemnee. *People v. Hull*, 2 Civil No. 29159 (2d Dist. 1965). To provide an appropriate rule, subdivision (e) adopts the principle established by subdivision (d) which governs the date of valuation when a new trial is ordered. See the Comment to subdivision (d).

For the purpose of subdivision (e), a "retrial" following a mistrial is distinguished from a new trial following an appeal or a motion for new trial granted under Code of Civil Procedure Section 657. See subdivision (d) and the Comment to that subdivision. As to the distinction, see 3 WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment in Trial Court*, § 24 at 2072 (1954).

Subdivision (f). Subdivision (f) permits the plaintiff, by making a deposit, to establish the date of valuation as of a date no later than the date the deposit is made. The rule under the language formerly contained in Section 1249 was to the contrary; neither the making of a deposit nor the taking of possession had any bearing on the date of valuation. See *City of Los Angeles v. Tower*, 90 Cal. App.2d 869, 204 P.2d 395 (1949). The date of valuation may be earlier than the date of the deposit, and subsequent events may cause such an earlier date of valuation to shift to the date of deposit. But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the preceding subdivisions.

Section 1249.1 (amended)

SEC. 7. Section 1249.1 of the Code of Civil Procedure is amended to read:

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

~~(a)~~

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

~~(b)~~

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

~~(c)~~

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

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

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

Section 1252 (amended)

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

1252. (a) Payment may be made to the defendants entitled thereto, or the money may be deposited in Court for the defendants, and be distributed to those entitled thereto as provided in Chapter 3 (commencing with Section 1270.01) of Title 7.1 and withdrawn by those entitled thereto in accordance with that chapter. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

(b) Subject to subdivision (c):

(1) If the plaintiff fails to pay or deposit the money within the time specified in Section 1251, the defendants may elect to treat such failure as an implied abandonment of the proceeding or may have execution as in civil cases.

(2) If the money cannot be had on execution, the defendants may again elect to treat the plaintiff's failure to pay or deposit the money within the time specified in Section 1251 as an implied abandonment of the proceeding.

(c) The defendants may elect to treat a failure to pay or deposit the money within the time specified in Section 1251 as an implied abandonment of the proceeding only if:

(1) The defendants have filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure; and

(2) The plaintiff has failed for 20 days after such service to pay or deposit the money as provided in subdivision (a).

(d) In case of an implied abandonment of the proceeding, upon motion of the defendants a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements as provided in subdivision (c) of Section 1255a, and such relief and damages as are provided in subdivision (d) of Section 1255a, to the same extent as if the proceeding were dismissed under Section 1255a on motion of the plaintiff.

Comment. Subdivision (a) of Section 1252 is amended to eliminate any distinction between the kinds of deposits that may be made after entry of judgment. This amendment and enactment of Sections 1270.01-1270.07 make it clear that withdrawal of any deposit does not result

in a waiver of appeal or a right to new trial on the issue of compensation if that issue is preserved in accordance with Section 1270.05. In this respect, the prior law is continued. See *People v. Neider*, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961); *People v. Gutierrez*, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

Subdivisions (b), (c), and (d) supersede the second sentence of Section 1252 as it formerly read and a portion of subdivision (a) of Section 1255a.

Subdivision (c) adds a provision that failure to pay or deposit within the time specified in Section 1251 may be treated as an implied abandonment only after 20 days' notice to the plaintiff. This subdivision is included to protect the plaintiff in case of an inadvertent failure to pay the judgment within the time specified in Section 1251. See, e.g., *County of Los Angeles v. Bartlett*, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963).

Subdivision (d) codifies the holding in *County of Los Angeles v. Bartlett*, *supra*, that an implied abandonment has the same consequences as an abandonment on motion of the plaintiff under Section 1255a. See also *Capistrano Union High School Dist. v. Capistrano Beach Acreage Co.*, 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961). Under subdivision (d), the defendants may recover expenses reasonably and necessarily incurred in preparing for trial and during trial and reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendants' interests in the proceeding. See Section 1255a(c). In addition, the defendants are entitled to an order restoring them to possession of the property and to damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendants moved from the property in compliance with an order of possession, whichever is the earlier. See Section 1255a(d).

Section 1253 (amended)

SEC. 9. Section 1253 of the Code of Civil Procedure is amended to read:

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned; *and state the estate or interest acquired therein, by the plaintiff and the purposes of such the condemnation; and if possession is taken. If the court has made an order authorizing the plaintiff to take possession of the property pursuant to Section 1243.5 or 1254 Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1, the final order of condemnation shall also state the date upon or after which the plaintiff was authorized to take possession. prior to the making and entry of the final order of condemnation, the date of such possession. For the pur-*

poses of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

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

Section 1254 (repealed)

SEC. 10. Section 1254 of the Code of Civil Procedure is repealed.

1254. (a) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

(b) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

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

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

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

court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.

(f) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. The court, or a judge thereof, upon application by such defendant, shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

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

(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination; and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Gov-

ernment Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

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

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

(k) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

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

<i>Section 1254</i>	<i>Recommended Legislation</i>
Subdivision (a) -----	C.C.P. § 1270.01
Subdivision (b) -----	C.C.P. § 1270.02
Subdivision (c) -----	C.C.P. § 1270.03
Subdivision (d) -----	C.C.P. § 1270.04
Subdivision (e) -----	C.C.P. § 1270.07
Subdivision (f) -----	C.C.P. § 1270.05
Subdivision (g) -----	C.C.P. § 1270.06
Subdivision (h) -----	C.C.P. §§ 1268.11, 1270.08, Govt. Code §§ 16425-16427
Subdivisions (i) and (j) -----	Govt. Code §§ 16425-16427
Subdivision (k) -----	C.C.P. § 1257(b)

Section 1255a (amended)

SEC. 11. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. ~~and failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.~~

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

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their *recoverable* costs and disbursements; ~~which Recoverable costs and disbursements shall include (1) all necessary expenses reasonably and necessarily incurred in preparing for trial and during trial and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in the proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint. In the case of a partial abandonment, recoverable costs and disbursements shall not include any cost or disbursement, or any portion thereof, which would have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. These Recoverable costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. provided, however, that Upon judgment of dismissal on motion of the plaintiff, the defendants, and each of them, may file a cost bill shall be filed within 30 days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action.~~

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof

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

Comment. The portion of subdivision (a) of Section 1255a, relating to failure to comply with Section 1251 as an implied abandonment, is superseded by Section 1252 as amended.

Subdivision (c) of Section 1255a requires that the plaintiff reimburse the defendant for all expenses reasonably and necessarily incurred in preparing for trial and during trial if the plaintiff fails to carry an eminent domain proceeding through to its conclusion.

Under prior law, reasonable attorney's fees were recoverable regardless of when the proceeding was dismissed, but other expenses incurred in preparing for trial were subject to a limitation that precluded their recovery if the action was dismissed 40 days or more prior to pretrial or trial. *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962). This limitation has been deleted and such expenses may now be recovered without regard to the date that the proceeding is dismissed.

Subdivision (c) provides for the recovery of attorney's fees, appraisal fees, and fees for services of other experts if the fees are reasonable in amount and are reasonably incurred to protect the defendant's interests in the proceeding. If they are so incurred, they may be recovered even though the services are rendered before the filing of the complaint in the eminent domain proceeding. In this respect, the subdivision continues prior law. See *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962) (attorney's fees); *Port San Luis Harbor Dist. v. Port San Luis Transp. Co.*, 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (1963) (engineers' fees); *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964) (attorney's fees allowed under Section 1255a for services in connection with an appeal).

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

In applying this section, and particularly in applying subdivision (c), the appellate courts have formulated the concept of "partial abandonment" so that the section will cover those cases in which the nature of the property or property interest being taken is substantially changed by the condemnor after the proceeding is begun. See *Metro-politan Water Dist. v. Adams*, 23 Cal.2d 770, 147 P.2d 6 (1944); *Peo-*

ple v. Superior Court, 47 Cal. App.2d 393, 118 P.2d 47 (1941); *Yolo Water etc. Co. v. Edmands*, 50 Cal. App. 444, 196 Pac. 463 (1920). The third sentence of subdivision (c) has been added to make clear that, in allowing costs and disbursements on a partial abandonment, the court should not include any items which would have been incurred notwithstanding the partial abandonment. The sentence codifies the view expressed in *County of Kern v. Galatas*, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962), that in such cases the condemnee should not receive a "windfall" by recovering costs and disbursements that he would have incurred regardless of the change in the nature of the taking. See also *Metropolitan Water Dist. v. Adams*, *supra*; *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.*, 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965).

In a variety of relatively unusual situations, the question has arisen whether or not there has occurred such an "abandonment" or "partial abandonment" as to entitle the condemnee to costs and disbursements under this section. See *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962); *Los Angeles v. Agardy*, 1 Cal.2d 76, 33 P.2d 834 (1934); *City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P.2d 993 (1932); *Mountain View Union High School v. Ormonde*, 195 Cal. App.2d 89, 15 Cal. Rptr. 461 (1961); *County of Los Angeles v. Hale*, 165 Cal. App.2d 22, 331 P.2d 166 (1958); *Torrance Unified School Dist. v. Alway*, 145 Cal. App.2d 596, 302 P.2d 881 (1956); *Whittier Union High School Dist. v. Beck*, 45 Cal. App.2d 736, 114 P.2d 731 (1941); *City of Bell v. American States W.S. Co.*, 10 Cal. App.2d 604, 52 P.2d 503 (1934) (total abandonments); *Metropolitan Water Dist. v. Adams*, *supra*; *County of Kern v. Galatas*, *supra*; *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.*, *supra* (partial abandonments). Although certain limited exceptions have been recognized, the courts have generally interpreted the section as intended to require the condemnor to indemnify the condemnee against loss whenever the condemnor fails to complete the proceeding. See *Oak Grove School Dist. v. City Title Ins. Co.*, 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963). The amendment of this section deleting the 40-day limitation from subdivision (c) and making other changes in subdivision (c) is not intended to change the decisional law as to when an abandonment or partial abandonment permitting recovery of costs and disbursements has occurred or to preclude further development of the decisional law in this respect.

Section 1255b (amended)

SEC. 12. Section 1255b of the Code of Civil Procedure is amended to read:

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

- (1) The date of the entry of judgment.
- (2) The date that ~~the~~ possession of the property sought to be ~~condemned~~ is taken or the damage thereto occurs.
- (3) The date after which the plaintiff may take possession of the property as stated in an order ~~authorizing the plaintiff to take for possession.~~

(4) *If the amount determined to be probable just compensation on motion of a defendant made under Section 1269.05 is not deposited on or before the date specified by the moving party, the date specified.*

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

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

~~(c)~~

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

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

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

~~(2)~~

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

~~(3)~~

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

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

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

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

Subdivision (b). This subdivision has been revised to clarify the meaning of the former language. Under the subdivision, the plaintiff is

entitled to offset against interest (1) the value of possession and (2) the net amount of rents or other income received if such rents or income are attributable to the period after the date interest begins to accrue. The last sentence of the subdivision has been added to conform to Section 1269.05.

Subdivision (c). This subdivision has been added to clarify existing law by specifying that the court, rather than the jury, assess interest, including interest required to satisfy the defendant's constitutional entitlement to compensation for possession or damaging of his property prior to conclusion of the eminent domain proceeding. See *Metropolitan Water Dist. v. Adams*, 16 Cal.2d 676, 107 P.2d 618 (1940); *City of North Sacramento v. Citizens Util. Co.*, 218 Cal. App.2d 178, 32 Cal. Rptr. 308 (1963); *People v. Johnson*, 203 Cal. App.2d 712, 22 Cal. Rptr. 149 (1962); *City of San Rafael v. Wood*, 144 Cal. App.2d 604, 301 P.2d 421 (1956). The subdivision also resolves a further uncertainty by specifying that the amount of the offset against interest provided by subdivision (b) is likewise assessed by the court and to provide, in effect, that any evidence on that issue is to be heard by the court, rather than the jury. Compare *People v. Giunarra Vineyards Corp.*, 245 Cal. App.2d 309, 53 Cal. Rptr. 902 (1966), and *People v. McCoy*, 248 Cal. App.2d --- [A.C.A. 30], 56 Cal. Rptr. 352 (1967), with *City of North Sacramento v. Citizens Util. Co.*, *supra*.

Subdivision (d). In subdivision (d), paragraph (1) has been revised to make reference to the appropriate statutory provisions and provide that interest terminates, on entry of judgment, upon an amount deposited before judgment pursuant to Chapter 1 (commencing with Section 1268.01) of Title 7.1. After entry of judgment, such a deposit may be withdrawn pursuant to Section 1268.07. See the Comment to that section. Under prior law, it was uncertain when interest ceased on a deposit made prior to entry of judgment if the amount was not withdrawn. Cf. *People v. Loop*, 161 Cal. App.2d 466, 326 P.2d 902 (1958). Under paragraph (1), interest on the amount on deposit terminates on entry of judgment even though the amount is less than the award.

Paragraph (2) has been added to conform to Section 1269.05, which permits certain defendants to obtain an order determining probable just compensation.

Paragraph (3) has been changed to make reference to the appropriate statutory provisions.

Former paragraph (4) of subdivision (c) has been eliminated as unnecessary. That paragraph referred to the practice of payment into court pursuant to Section 1252, which practice has been eliminated by amendment of Section 1252. All post-judgment deposits now are made under Chapter 3 (commencing with Section 1270.01) of Title 7.1 and, hence, are covered by paragraph (3).

Section 1257 (amended)

SEC. 13. Section 1257 of the Code of Civil Procedure is amended to read:

1257. (a) The provisions of Part II of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceed-

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

(b) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

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

Section 1257 formerly contained an elaborate proviso that related to possession pending appeal or new trial. The proviso has been deleted because possession pending appeal or new trial is now provided for by Chapter 3 (commencing with Section 1270.01) of Title 7.1.

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

SEC. 14. Title 7.1 (commencing with Section 1268.01) is added to Part 3 of the Code of Civil Procedure, to read:

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

Note. The major portion of this tentative recommendation was set in type before the enactment of Chapter 1104 of the Statutes of 1967, which added Chapter 2 (commencing with Section 1272.01) to Title 7. The numbering of Title 7.1, added by this tentative recommendation, commences with Section 1268.01. The sections in Chapter 2 of Title 7 should be renumbered as Sections 1267.01-1267.09; but, in order to minimize the cost of this publication, these sections have not been so renumbered by the recommended legislation.

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 Section 1249a.

(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 Section 1255b.

(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).

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.

(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. If the notice designates a place where and times when the statement may be inspected, 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.

(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.

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).

Section 1268.05. Procedure for withdrawal

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

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

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

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

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in subdivision (e) of Section 1269.04 for service of an order for possession. The plaintiff shall report to the court (1) the names of parties served and the dates of service, and (2) the names and last known addresses of parties who have neither appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in subdivision (e) of Section 1269.04 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served, but if such liability is enforced the plaintiff shall be subrogated to the rights of such parties under Section 1268.09.

(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 recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. Section 1268.05 is based on subdivisions (a), (c), (d), (e), and (f) of former Section 1243.7. Unlike the subsections on which it is based, Section 1268.05 does not forbid withdrawal of the deposit if notice of the application cannot be personally served upon all parties. The section permits the court to exercise its discretion as to withdrawal in such cases, as to the amount to be withdrawn, and as to the requirement of an undertaking.

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

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

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, but not to exceed two percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

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

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.

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 propor-

tionate 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 permits 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.

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.

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

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

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

(c) Upon objection of the party at whose request an appraisal report, statement of valuation data, or other statement was made in connection with a deposit or withdrawal pursuant to this chapter, the person who made such report or statement may not be called at the trial on the issue of compensation by any other party to give an opinion as to value, damages, or benefits.

Comment. Subdivision (a) of Section 1268.10 restates the substance of subdivision (e) of former Section 1243.5. Subdivision (b) and (c) are new. Like subdivision (a), the purpose of subdivisions (b) and (c) is to encourage the plaintiff to make an adequate deposit by protecting the plaintiff from the defendant's use of the evidence upon which the deposit is based in the trial on the issue of compensation. If such evidence could be so used, it is likely that the plaintiff would make an inadequate deposit in order to protect itself against the use at the trial of evidence submitted in connection with the deposit. Subdivisions (b) and (c) apply, of course, to witnesses for the defendants as well as to those for the plaintiff. Subdivision (b) precludes impeachment of a witness at the trial by reference to appraisal reports, statements of valuation data, or other statements made by him in connection with (1) a deposit and notice thereof under Sections 1268.01 and 1268.02, or (2) proceedings to determine or redetermine probable just compensation under Section 1268.03, or (3) an application to withdraw the deposit under Section 1268.04 or Section 1268.07. The subdivision also precludes such reports or statements being considered to be admissions of the party on whose behalf they were made. See Evidence Code Sections 813 and 822. Subdivision (c) is intended to prevent a party from circumventing subdivision (b) by calling another party's appraiser as his own witness.

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 (h) of former Section 1254.

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.

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

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

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

- (1) Is entitled to take the property by eminent domain;
- (2) Is entitled to take possession prior to judgment under subdivision (a); and
- (3) 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 and the estate or interest to be acquired, which description may be by reference to the complaint.

(2) State the purpose of the condemnation.

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

Comment. Subdivision (a) of Section 1269.01 restates the substance of Code of Civil Procedure Section 1243.4. The words "the state or a county, city, district, or other public entity" have been substituted for the words "the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation." See *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal.2d 845, 215 P.2d 462 (1950). The new language encompasses all proceedings by governmental entities, agencies, or officers to acquire rights of way or lands for reservoir purposes, whether the interest to be acquired is a fee, easement, or other interest.

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

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

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

Section 1269.02. Possession in other cases

1269.02. (a) In any proceeding in eminent domain brought by or on behalf of any public entity, public utility, or common carrier, to acquire any property or property interest, the plaintiff may obtain an order for possession of the property or property interest in accordance with this section.

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

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

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

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

(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).

(d) The date after which the plaintiff is authorized to take possession of the property shall be determined by the court and shall not be less than 60 days after the making of the order.

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

Comment. Section 1269.02 is new.

Subdivision (a). Section 1269.01 provides for possession prior to judgment if the taking is for right of way or reservoir purposes. Section 1269.02 provides for possession prior to judgment—whatever the purpose of the acquisition—if the proceeding is brought by a public entity, public utility, or common carrier. Unlike the *ex parte* procedure provided by Section 1269.01, however, this section authorizes an order for possession only upon disposition of a regularly noticed motion.

Subdivisions (b) and (c). Subdivisions (b) and (c) are patterned after provisions in other states which provide for obtaining possession prior to judgment by noticed motion procedure and which require the plaintiff to show a need for such possession. See, e.g., ILL. 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). These subdivisions provide for determination of the motion in keeping with motion practice generally.

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

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

Review of orders authorizing or denying possession. Under former statutes, judicial decisions held that an appeal might not be taken from an *ex parte* order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be the appropriate remedies. See *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal.2d 845, 215 P.2d 462 (1950); *Weiler v. Superior Court*, 188 Cal. 729, 207 Pac. 247 (1922); *State v. Superior Court*, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); *City of Sierra Madre v. Superior Court*, 191

Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an ex parte order for possession following entry of judgment has been held to be an appealable order. *San Francisco Unified School Dist. v. Hong Mow*, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1269.01, Section 1269.02, or Chapter 3 (commencing with Section 1270.01).

Section 1269.03. [Reserved for expansion]

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 1269.01, the plaintiff shall serve a copy of the order on the record owner of the property and on the occupants, if any. The court may, for good cause shown on ex parte application, shorten the time specified in this subdivision to a period of not less than three days.

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

(d) 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.

(e) 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.

(f) 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.

(g) 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.

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

Section 1269.05. Deposit and possession on motion of certain defendants

1269.05. (a) If the property to be taken includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied as his residence by a defendant, and if the plaintiff has not deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), such defendant may move the court for an order determining the amount of such compensation for the dwelling and so much of the land upon which it is constructed as may be required for its convenient use and occupation. The notice of motion shall specify the date on which the moving party desires the deposit to be made. Such date shall not be earlier than 30 days after the date noticed for the hearing of the motion and may be any later date. The motion shall be heard and determined in the same manner as a motion made to modify a deposit under Section 1268.03.

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

(c) If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on 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 deposit may be withdrawn in accordance with Chapter 1 (commencing with Section 1268.01).

(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 P.A. STAT. ANN., Tit. 26, § 1-407(b) (Supp. 1966).

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).

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

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

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 (d) 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 (d) 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.

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 Title 7.1 (commencing with Section 1268.01).

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

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

Comment. Section 1269.08 is new. Subdivision (c) is derived from a sentence formerly contained in Code of Civil Procedure Section 1254. In general, the section codifies judicial decisions which hold that, after an eminent domain proceeding is begun, the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. See, 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 Title 7.1, Chapter 3 (commencing with Section 1270.01) of Title 7.1, and Section 1253 of Title 7.

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.

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

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.

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.

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.

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.

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 construction 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.

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.

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.

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).

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.

Government Code

Sec. 15. Article 9 (commencing with Section 16425) is added to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, to read:

Article 9. Condemnation Deposits Fund

Section 16425. Condemnation Deposits Fund

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

Comment. Sections 16425–16427 restate the substance of a portion of subdivision (h) and all of subdivisions (i) and (j) of former Section 1254.

Section 16426. Investment of fund

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

(b) The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the State Treasurer shall invest or make deposits in bank accounts in accordance with the designations. For the purposes of this subdivision, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

Comment. See the Comment to Section 16425.

Section 16427. Apportionment and disbursement of fund

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

article, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

Comment. See the Comment to Section 16425.

Section 38090 (amended)

SEC. 16. Section 38090 of the Government Code is amended to read:

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

Comment. This section of the Park and Playground Act of 1909 (Government Code Sections 38000-38213) was originally enacted in 1913 (Cal. Stats. 1913, Ch. 246, § 3, p. 417). The section is amended to conform, as near as may be, to new Code of Civil Procedure Section 1249a.

Section 38091 (amended)

SEC. 17. Section 38091 of the Government Code is amended to read:

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

Comment. This section of the Park and Playground Act of 1909 (Government Code Sections 38000-38213) was originally enacted in 1913 (Cal. Stats. 1913, Ch. 246, § 3, p. 418). With respect to the construction of related sections, see *City of Los Angeles v. Glassell*, 203 Cal. 44, 262 Pac. 1084 (1928). The section is amended to conform to Code of Civil Procedure Section 1249.1, which provides that improvements placed upon the property after the *service of summons* shall not be included in the assessment of compensation or damages.

Streets and Highways Code

Section 4203 (amended)

SEC. 18. Section 4203 of the Streets and Highways Code is amended to read:

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

The date of valuation in proceedings under Chapters 7 (commencing with Section 4185) through 10 (commencing with Section 4255) of this part shall be determined in accordance with Section 1249a of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this chapter, the date of the filing of their report with the court shall be deemed the date of the commencement of the trial for the purpose of determining the date of valuation.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000–4443) derives from an enactment of 1909 (Cal. Stats. 1909, Ch. 684, § 5, p. 1038). The section is amended to accord, as near as may be, with provisions of Code of Civil Procedure Section 1249a that specify the date of valuation for condemnation proceedings generally. See *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 283 Pac. 298 (1929); *City of Los Angeles v. Morris*, 74 Cal. App. 473, 241 Pac. 409 (1925).

Section 4204 (amended)

SEC. 19. Section 4204 of the Streets and Highways Code is amended to read:

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

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

Other Conforming Changes in Existing Statutes

Note. No attempt has been made in this tentative recommendation to make all the conforming changes that would be required in existing statutes if the legislation contained in this tentative recommendation were enacted. The other statutes that may require conforming changes include Code of Civil Procedure Section 170(8), Government Code Section 43424, Public Utilities Code Sections 1202.1 and 1419, Streets and Highways Code Sections 858, 869, 4205, 5100, 5101, 25280, and 27166, Water Code Sections 11587, 22455, 35625, and 43531, the following sections contained in uncodified acts contained in West's Water Code—Appendix: Sections 5-19, 6-5, 6-24, 8-16, 9-15, 11-15, 21-5, 26-5, 28-16, 31-22, 34-26, 36-16, 37-23, 51-3.4, 53-3, 54-3, 59-26, 64-3.4, 65-3, 66-3.4, 67-23, 77-24, 80-10, 81-3.4, 82-3, 83-65, 84-3.4, 85-3.4, 86-3.4, 87-3(8), 88-3, 89-3, 90-7, 91-3, 92-3, 93-8, 95-3.4, 96-8, 97-14, 99-3.4, 102-7, and the following uncodified general laws: Cal. Stats. (1st Ex. Sess.) 1960, Ch. 22, § 80, p. 333; Cal. Stats. (1st Ex. Sess.) 1960, Ch. 81, § 81, p. 447; Cal. Stats. (1st Ex. Sess.) 1960, Ch. 82, § 81, p. 464; Cal. Stats. 1951, Ch. 303, § 44, p. 555; Cal. Stats. 1959, Ch. 2037, § 80, p. 4710; Cal. Stats. 1955, Ch. 549, § 45, p. 1018; Cal. Stats. 1951, Ch. 1635, § 45, p. 3680.

RECOMMENDED CONSTITUTIONAL AMENDMENT

The Commission's recommendations would be effectuated by the adoption of the following Constitutional Amendment:

Amendment of Section 14, Article I

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. *Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury. The Legislature may provide for the taking of possession of property and the devoting of such property to public use following commencement of an eminent domain proceeding and may prescribe the persons who may take such possession, the public uses for which such possession may be taken, and the manner in and the time at which such possession may be taken. Legislation authorizing possession to be taken shall require that (1) before possession is taken, the probable amount of compensation to be made for the taking of the property be paid into court for the owner, (2) the amount to be paid into court be subject to determination by the court on motion of any interested party, and (3) the total amount paid into court be available immediately to the persons that the court determines to be entitled thereto and be withdrawable by such persons in accordance with such procedure as the legislation may provide.*; and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor

be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

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

First sentence. No change is made in existing constitutional law respecting "public use," "just compensation," "inverse condemnation," or the general requirement that property not be taken or damaged until compensation is made to or paid into court for the owner. See, e.g., *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959), and *City & County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955) (public use); *Metropolitan Water Dist. v. Adams*, 16 Cal.2d 676, 107 P.2d 618 (1940), and *Sacramento So. R.R. v. Heilbron*, 156 Cal. 408, 104 Pac. 979 (1909) (just compensation); *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), and *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942) (inverse condemnation proceedings); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907), and *McCauley v. Weller*, 12 Cal. 500 (1859) (prepayment or payment into court).

Second sentence. This sentence states the established judicial construction of deleted language that required that "compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." See *City of Los Angeles v. Zeller*, 176 Cal. 194, 167 Pac. 849 (1917). With respect to the requirement that the power of eminent domain be exercised through judicial proceedings, see *Wilcox v. Engebretsen*, 160 Cal. 288, 116 Pac. 750 (1911); and *Weber v. Board of Supervisors*, 59 Cal. 265 (1881). Regarding the assurance of trial by jury in condemnation and inverse condemnation proceedings, see *Vallejo & No. R.R. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238 (1915), and *Highland Realty Co. v. City of San Rafael*, 46 Cal.2d 669, 298 P.2d 15 (1956). The words "Subject to the provisions of Section 23a of Article XII" are included to prevent any implication that Section 23a is superseded by the readoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made

in takings of public utility property. Section 23a is limited in application to property that is already devoted to a public use. See *S.H. Chase Lumber Co. v. Railroad Comm'n*, 212 Cal. 691, 300 Pac. 12 (1931). The procedure for determining just compensation adopted pursuant to Section 23a (see Public Utilities Code Sections 1401–1421) is not exclusive and is an alternative to proceedings under Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. Further, in cases in which compensation is determined by the Public Utilities Commission, the procedures of the Code of Civil Procedure other than those for assessing compensation are available to the parties. See *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963). No change is made in these rules.

Third sentence. This sentence replaces the former authorization for the taking of “immediate possession” by certain entities in right of way and reservoir cases, and removes any doubt whether the Legislature may, by statute, provide for possession prior to judgment. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). Compare *Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220, 30 Pac. 218 (1892); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907). See also Taylor, *Possession Prior to Final Judgment in California Condemnation Procedure*, 7 SANTA CLARA LAWYER 37, 56–74 (1966). The sentence also permits the Legislature to classify condemners and public purposes in this connection.

Fourth sentence. This sentence clarifies the application of the first sentence of this section to the taking of possession in eminent domain proceedings. It requires that, before possession of the property is taken, the probable amount of compensation that eventually will be awarded in the proceeding be paid into court for the owner. It also adds a requirement, not heretofore imposed by this section, that the funds paid into court be available to the property owner prior to termination of the proceeding. This sentence thus accords with decisions of the California Supreme Court holding that, before property is taken, compensation must be paid into court for the owner. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). The sentence will permit the Legislature to specify whether the amount paid into court is determined initially by the plaintiff, by the court, or in some other manner, but requires that such amount be subject to determination by the court on motion of an interested party. The sentence will also permit the Legislature to specify the circumstances under which the property owner must give security to protect the plaintiff in cases where the amount withdrawn may be in excess of the compensation eventually awarded in the proceeding.

Language deleted. In deleting the second portion of the first sentence of this section, this revision eliminates language that prohibited “appropriation” of property in certain cases, “until full compensation therefor be first made in money or ascertained and paid into court for the owner.” This language was held to add nothing to the meaning of the first portion of the sentence. See *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by the fourth sentence of the section as revised.

The revision also deletes language which required that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This limitation as to the offsetting of benefits applied only to private corporations taking rights of way or lands for reservoir purposes and probably was inoperative under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083 (1902). In deleting the language, this revision clarifies and unfetters the power of the Legislature to deal with the offsetting of benefits in eminent domain proceedings. The subject is now governed by Section 1248 of the Code of Civil Procedure.

The proviso to the first sentence of this section, and the next following sentence, which dealt with "immediate possession" in right of way and reservoir cases are superseded by the third and fourth sentences of the revised section.

This revision deletes the last sentence of the section which declared that the taking of property for a railroad "run by steam or electric power" for logging or lumbering purposes should be deemed a taking for a "public use." The provision was added by amendment in 1911 and was never construed or applied by the appellate courts. Its apparent purpose was to preclude a holding that takings for such purposes may not be authorized because they do not effectuate a "public use." (For a collection and discussion of the judicial decisions on this general question, see Annot., 86 A.L.R. 552 (1933).) Takings for such purposes are authorized by existing legislation. See CIVIL CODE § 1001, CODE CIV. PROC. § 1238(11), PUB. UTIL. CODE § 7526(g). The provision would appear to have been rendered obsolete by the replacement of steam and electric locomotives by diesel-powered ones. Moreover, in applying the "public use" limitation, the California courts have consistently refused to be bound by a general declaration and have held that the question must be resolved by reference to the facts of the particular case. For a thorough analysis of the California decisions on a closely analogous problem, see Comment, *Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations*, 7 U.C.L.A. L. REV. 327 (1960).

The last sentence of the section also declared that any person taking property for such purposes "shall thereupon and thereby become a common carrier." This declaration duplicates the result reached independently of any constitutional basis in *Producers Transp. Co. v. Railroad Comm'n*, 176 Cal. 499, 169 Pac. 59 (1917). That decision held that the exercise by a carrier of the statutory power of eminent domain was conclusive evidence of a dedication of its condemned right of way to public use. (See also CAL. CONST., Art. 12, §§ 17, 23; CIVIL CODE § 2168; PUB. UTIL. CODE §§ 211, 216, 230. The judicial decisions on this problem are collected and analyzed in Annot., 67 A.L.R. 588 (1930).)

Deletion of the last sentence, therefore, makes no significant change in existing law respecting either the doctrine of public use or the status and obligations of common carriers.

A STUDY RELATING TO POSSESSION PRIOR TO FINAL JUDGMENT IN CALIFORNIA CONDEMNATION PROCEDURE *

CONTENTS

	Page
I. THE RIGHT TO POSSESSION IN CALIFORNIA AND OTHER JURISDICTIONS	1174
II. POLICY CONSIDERATIONS RELEVANT TO EARLY POSSESSION ..	1179
A. Historical Evolution of the Right to Possession Prior to Judgment	1179
B. The Condemnor's Need for Early Possession	1181
C. Advantages of Immediate Possession to Property Owners ..	1184
D. Effect of Immediate Possession Upon Negotiations and Settlements	1187
E. Effectuating the Policy of Concurrent Payment	1190
III. THE CONSTITUTIONAL QUESTION	1192
A. Constitutional Requirements Generally	1192
B. Derivation of Section 14, Article I, California Constitution ..	1194
C. The Constitutional Convention of 1878-79	1197
D. The Judicial Decisions	1201
E. Conclusion as to Need for a Constitutional Amendment to Extend Right of Immediate Possession	1205
IV. FORMULATING A LEGISLATIVE SOLUTION	1207
A. Constitutional Revision	1207
B. Immediate Possession Practice	1210
1. Classification of condemnors and authorized purposes ..	1212
2. Immediate possession of public utility property	1216
3. Procedure in immediate possession cases	1217
4. Notice to the condemnee	1222
5. Deposit and withdrawal of "probable just compensation"	1225
6. Possession and deposit on demand of the defendant ..	1228
C. Possession After Entry of Judgment	1231
D. Related Problems	1234
1. Abandonment of the proceeding after possession is taken	1234
2. Interest problems in early possession cases	1237
3. Date of valuation and decreases in value before the date of valuation	1240
V. CONCLUSION	1246
APPENDIX	1247

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POSSESSION PRIOR TO FINAL JUDGMENT IN CALIFORNIA CONDEMNATION PROCEDURE*

Clarence B. Taylor**

Across the United States there is a groundswell of interest in the law of eminent domain.¹ The principal concern is whether the philosophy, measures, and details of "just compensation" are being applied appropriately in the era of the freeway and the launching pad. Uniformly, however, it is being discovered that the question of just compensation cannot be considered apart from the total procedure provided for the exercise of the power of eminent domain.²

* This article was prepared to provide the California Law Revision Commission with background information on this subject. However, the opinions, conclusions, and recommendations contained are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

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¹ In approximately half of the states, legislative committees or special commissions are engaged in, or recently have completed, investigations of the subject. The more important published studies include: ALASKA LEGISLATIVE COUNCIL, REPORT ON EMINENT DOMAIN IN ALASKA (1962); KY. LEGISLATIVE RESEARCH COMM'N, RESEARCH REP'T NO. 24, EMINENT DOMAIN PROCEDURE (1965) and KY. LEGISLATIVE RESEARCH COMM'N, INFORMATION BULL. NO. 38, HIGHWAY CONDEMNATION IN KENTUCKY (1965); MD. LEGISLATIVE COUNCIL COMM., REPORT TO REVISE THE CONDEMNATION LAWS OF MARYLAND (1962); N.J. EMINENT DOMAIN REVISION COMM'N, REPORT (1965); N.Y. COMM. ON LAND ACQUISITION LAW & PROCEDURES, REPORT TO THE GOVERNOR (1966); PA. JOINT STATE GOVERNMENT COMM'N, EMINENT DOMAIN CODE (1964); VA. ADVISORY LEGISLATIVE COUNCIL, REPORT ON REVISION OF EMINENT DOMAIN LAWS (1961).

With respect to federal and federally assisted acquisitions, committees of the Congress have submitted thorough studies with far-reaching proposals. See STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88th CONG., 2d SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITIONS IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS (Comm. Print 1964); and *Hearings on Real Property Acquisition, Practices, and Adequacy of Compensation in Federal and Federally Assisted Programs Before the Select Subcommittee on Real Property Acquisitions of the House Committee on Public Works*, 88th Cong., 1st & 2d Sess. (1963-64). See also ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS (1965); *Hearings on S. 1201 and S. 1681 Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations*, 89th Cong., 1st Sess. (1965).

² The conclusion generally reached is that there is a need for statutory revision sufficiently comprehensive "to codify, amend, revise and consolidate the law relating to eminent domain." See, e.g., PA. STAT. ANN. tit. 26, § 1-101 (Supp. 1965). Certain obstacles to that end are obvious. The entire subject is viewed as involving a precarious balance of powers and positions that cannot or should not be disturbed. Statutory and constitutional debris accumulated over decades is a formidable tech-

This article is concerned with one aspect of eminent domain procedure—the troublesome and pivotal problem of determining the stage at which the condemnor may or must take possession of the property.³

I. THE RIGHT TO POSSESSION IN CALIFORNIA AND OTHER JURISDICTIONS

Section 14 of article I of the California Constitution forbids the “taking” or “damaging” of property “without just compensation having first been made to, or paid into court for, the owner.” The general rule, therefore, is that the condemnor is not entitled to possession, and the property owner is not entitled to compensation, until “final judgment” in the eminent domain proceeding.⁴ There are two important exceptions to this rule. The first exception was created by amendments to section 14, adopted in 1918 and 1934, which authorize the state, cities, counties, and certain districts to obtain an order for possession upon commencement of the proceeding if the acquisition is for (1) “any right of way,” or (2) “lands to be used for reservoir purposes.”⁵ This privilege is commonly referred

nical barrier. In addition, the interrelation of “substance” and “procedure” requires meticulous care in any over-all revision.

³ Legislative studies devoted specifically to possession prior to judgment, each setting forth a proposed statute, include: AMERICAN ASS'N OF STATE HIGHWAY OFFICIALS, COMM. ON RIGHT-OF-WAY, IMMEDIATE POSSESSION OF HIGHWAY RIGHT-OF-WAY (1951); HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958); LAW REVISION GROUP, UNIVERSITY OF CHICAGO LAW SCHOOL, STUDY AND ACT RELATING TO VESTING OF POSSESSION BEFORE PAYMENT IN EMINENT DOMAIN PROCEEDINGS 45 (1956). See also Wasserman, *Procedure in Eminent Domain*, 11 MERCER L. REV. 245 (1960); Note, *Montana's Condemnation Procedure—The Inadequacy of the “Commission System” of Determining Compensation*, 25 MONT. L. REV. 105 (1963).

Cal. Stat. 1961, ch. 1613, p. 3442, amending or adding CAL. CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.6, 1243.7, 1249, 1253, 1254, 1255a, and 1255b, relating to taking possession and passage of title; Cal. Stat. 1961, ch. 1612, p. 3439, amending or adding CAL. CODE CIV. PROC. §§ 1248, and 1252.1 and CAL. REV. & TAX. CODE § 5096.3, relating to tax apportionment in eminent domain proceedings; see also 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-1 (1961).

⁴ CAL. CODE CIV. PROC. §§ 1251-1253. The judgment entered in a condemnation proceeding is “interlocutory” in the sense that it confers no right to possession until the time for appeal or motion for new trial has expired, the amount of the award has been paid into court, and the “final order of condemnation” has been recorded. The “final judgment” is simply the judgment originally entered after the period for appeals or motions in the trial court has expired. See Department of Public Works v. Loop, 161 Cal. App. 2d 466, 326 P.2d 902 (1958).

⁵ The pertinent portion of CAL. CONST. art. 1, § 14 is as follows: “[P]rovided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county

to as the "right of immediate possession," although a more appropriate reference would be to "possession prior to judgment."⁶ The constitutional privilege is implemented by sections 1243.4 through 1243.7 of the Code of Civil Procedure. Briefly stated, the significant features of this legislation are

- (1) The condemnor may obtain an order for "immediate possession" on ex parte application.
- (2) The condemnor must deposit the amount the court determines to be the "probable just compensation" which will be made for the property and any damage incident thereto, and the court may increase or decrease the amount of the deposit upon a showing that it is inadequate or excessive.

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

⁶ In condemnation law generally, "immediate possession" does not refer to possession obtainable by administrative action prior to or apart from judicial proceedings. Rather, the reference is to possession taken pursuant to court authorization at some point in the judicial proceedings prior to final determination and payment of compensation. In California, the temporal point of reference is the condemnor's "first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct." CAL. CONST. art. I, § 14. In only a very few states in which the so-called "administrative theory" of condemnation has been carried to its logical conclusion is possession taken through purely administrative procedure. See HIGHWAY RESEARCH BOARD, SPECIAL REP'T. 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958) at 23.

The fact that immediate possession may be obtained only by court order in condemnation proceedings has an important effect upon the tempo of the taking. The difference in timing between a voluntary acquisition and the taking of immediate possession in a condemnation proceeding is illustrated by the following description of the operations of the California Division of Highways, an agency that has and frequently exercises the right to immediate possession: "The first fact graphically illustrated . . . [is] the fixed time requirement of the condemnation process. In California, a minimum period of five months (without expedited handling) is required to secure legal possession of a property which has not been acquired by contract. The process entails drawing condemnation descriptions, preparing resolutions for passage by the Highway Commission, securing such passage, preparing summonses and complaints, filing suit, serving papers, securing orders for possession, and allowing sufficient notice period for vacation of the property . . ." WOMACK, *How Can We Keep Right-of-Way From Slowing Down Our Program Progress?* ORGANIZATION OF AMERICAN STATES, NINTH PAN AMERICAN HIGHWAY CONGRESS, DOC. NO. 50, at 4 (1963). Although this delay would vary with the administrative procedures of particular agencies, it can be seen that in California "immediate possession" is something of a misnomer.

(3) The property owner may withdraw the entire deposit.

(4) Notice of the order for immediate possession must be given the record owner and occupants of the property at least 20 days prior to the time that possession is taken, but for good cause the court may reduce the notice period to not less than three days.

The other exception to the general rule of section 14 is found in section 1254 of the Code of Civil Procedure. Since 1878, this section has permitted the condemnor in any case to obtain possession "after trial and judgment entered or pending an appeal" by depositing for the defendant the amount of the award and an additional sum as security for any increase in the award. Possession under this provision is commonly called "possession pending appeal," although a better term would be "possession after judgment" or "possession prior to final judgment."

Almost all states provide, as does California, for immediate possession in right-of-way takings.⁷ But while California limits immediate possession to right of way and reservoir cases, the federal government and a majority of the states are far more liberal in allowing the exercise of this right for other purposes.

The Federal Declaration of Taking Act,⁸ which provides for an exchange of the right to possession and approximate compensation at the beginning of the proceedings, includes all takings by agencies of the federal government.⁹ Originally patterned after a statute that applied to the District of Columbia,¹⁰ the federal act requires the filing of a petition to condemn, a declaration that the taking is for a public use, a statement of the authority under which the condemnor is proceeding, a description of the property, the plans for the taking, and a statement of the amount estimated by the acquiring authority as just compensation for the property. Once the declaration of taking is filed and the estimated compensation is deposited, title to the property vests in the condemnor. At the same time, the right to just compensation vests in the condemnee. Compensation is determined at a future date in a proceeding for that purpose. In the interim, however, as the act provides, the court has "power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession."

The purposes of the federal act as described by the Supreme Court,¹¹ are (1) to allow the government to take immediate posses-

⁷ HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958) at 29.

⁸ 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958).

⁹ 6 NICHOLS, EMINENT DOMAIN § 27.25 (3d rev. ed. 1966).

¹⁰ D.C. CODE ANN. §§ 16-1353-1355 (Supp. IV, 1965); formerly 45 Stat. 1417.

¹¹ *United States v. Miller*, 317 U.S. 369 (1943).

sion of the property; (2) to permit the land owner to receive an immediate cash payment; and (3) to reduce the interest on the final award.

Although all but three or four states make some provision for possession before judgment, comparison of these provisions reveals considerable variation in authorization and procedures.¹² In several eastern states an administrative method is used for condemning property.¹³ This procedure usually has the effect of making the condemnee the plaintiff and vests title and the right to possession in the condemnor at an initial stage of the proceeding. Thus "immediate possession" is not an issue in these jurisdictions. The property owner is protected by deposit and withdrawal provisions, and is relieved of the onerous burdens of ownership, *e.g.*, risk of loss, payment of taxes.

In a number of states the general condemnation procedure involves a preliminary determination of compensation by commissioners or referees, with a trial *de novo* in a court of general jurisdiction. In these states, "immediate" possession is usually permitted following the preliminary determination and pending the judicial proceedings.¹⁴

In three states that adopted variations of section 14 of article I of the California Constitution, possession prior to judgment ap-

¹² At the time Rule 71A of the Federal Rules of Civil Procedure was adopted in 1951, throughout the United States there were 269 different methods of judicial procedure in various classes of condemnation cases and 56 distinct methods of non-judicial or administrative procedure. See the Notes of the Advisory Committee on Rules of Civil Procedure, p. 4356 following Rule 71A, 28 U.S.C. § 2070 (1952). Although California is fortunate in contributing only two of these methods (see text at note 149, *infra*, as to determination of compensation in certain cases by the Public Utilities Commission), direct comparison of California's immediate possession provisions with those of other states is complicated by the proliferation of condemnation procedures. Exact comparison is also difficult because of the unusual nature of the California Constitution in authorizing immediate possession in terms of two public uses, *i.e.*, rights of way and lands for reservoir purposes. Nevertheless significant comparisons can be made.

A state-by-state analysis of possession-prior-to-judgment legislation is made in each of the studies cited in note 3 *supra*.

¹³ CONN. GEN. STAT. ANN. § 8-129 (Supp. 1965); ME. REV. STAT. ANN. tit. 23, § 154 (1964); MASS. GEN. LAWS ANN., ch. 79, § 3 (Supp. 1965); N.Y. HIGHWAY LAW § 30; OHIO REV. CODE §§ 163.01-.22 (Supp. 1966); PA. STAT. ANN. tit. 26, §§ 1-407 (Supp. 1965); R.I. GEN. LAWS ANN. § 37-6-14 (1956).

¹⁴ ALA. CODE tit. 19, § 18 (1958); ALASKA STAT. § 09.55.380 (1962); IND. ANN. STAT. § 3-1708 (Supp. 1965); IOWA CODE ANN. § 472.25 (Supp. 1964); KAN. GEN. STAT. ANN. § 26-508 (1964); KY. REV. STAT. § 177.086 (1962); MISS. CODE ANN. § 2766 (1942); MO. ANN. STAT. §§ 523.040-.050 (1953); MONT. REV. CODE ANN. § 93-9920 (1963); NEB. REV. STAT. § 76-711 (Supp. 1965); OKLA. STAT. ANN. tit. 69, § 46(4) (Supp. 1964); TEX. REV. CIV. STAT. ANN. § 3268 (1952).

For a criticism of this limitation, see Note, *Montana's Condemnation Procedure—The Inadequacy of the "Commission System" of Determining Compensation*, 25 MONT. L. REV. 105 (1963).

pears to be precluded in all instances.¹⁵ In two of these states, the courts have voided legislative efforts to give the condemnor the right to immediate possession in certain instances.¹⁶

In other states general provision is made for immediate possession when the condemnation is on behalf of a state or other public agency, but not when the plaintiff is a public utility or other non-governmental condemnor.¹⁷ In several of these states this distinction appears to be required by an explicit constitutional provision.

In recent years, a growing number of states have incorporated into their condemnation procedure general and uniform provisions for possession at the outset of the proceeding.¹⁸ Quite frequently, this result is obtained in overall revisions of condemnation law. For example, a recent comprehensive study of eminent domain in New Jersey concluded that:

Except in the rather rare cases in which the right to condemn is questioned, it is essential that the condemning body be permitted to take possession of the property promptly following the filing of the complaint and service of process. . . . As has been stated, many agencies do not currently possess such power.

It is believed that the right to take possession should be granted on a uniform basis to all bodies possessing the power of eminent domain, except individuals or private corporations who are constitutionally prohibited from taking possession until compensation has been paid¹⁹

The trend in all states is to expand the application of immediate possession, even though the authorization may be in terms of particular public acquisition programs.²⁰

¹⁵ Idaho, South Dakota, and Washington. See Note, *Montana's Condemnation Procedure—The Inadequacy of the "Commission System" of Determining Compensation*, 25 MONT. L. REV. 105 (1963).

¹⁶ See note 121 *infra*.

¹⁷ ARK. STAT. ANN. § 76-538 (1957); FLA. STAT. ANN. §§ 74.01, .05 (1964); GA. CODE ANN. § 36-1303 (Supp. 1965); MD. ANN. CODE art. 33A, § 14 (Supp. 1964); MINN. STAT. ANN. § 117.20(7) (1964); N.H. REV. STAT. ANN. §§ 4:29-31 (1955); TENN. CODE ANN. § 23-1526 (Supp. 1966); W. VA. CODE ANN. §§ 5385, (1) (1961, Supp. 1965).

¹⁸ See, e.g., ARIZ. REV. STAT. ANN. § 12-1116 (Supp. 1965); COLO. REV. STAT. ANN. § 50-1-6(6) (1963); DEL. CODE ANN. tit. 10, § 6110 (1953); HAWAII REV. LAWS § 8-26 (1955); NEV. REV. STAT. § 37.100 (1963); N.M. STAT. ANN. § 22-9-43; ORE. REV. STAT. § 35.0502.060 (1963); PA. STAT. ANN. tit. 26, § 1-407 (Supp. 1965); UTAH CODE ANN. § 78-34-9 (1953); VA. CODE ANN. § 25-46.8 (1964).

¹⁹ N.J. EMINENT DOMAIN REVISION COMM'N, REPORT 17 (1965).

²⁰ ILL. STAT. ANN. ch. 47, § 2.3 (Smith-Hurd 1965) (highways); LA. REV. STAT. §§ 48-441 to -460 (1965); MICH. STAT. ANN. §§ 8-174 to -178 (Supp. 1965); N.D. CONST. art. I, § 14 (1956 amend.) (highways); N.J. STAT. ANN. § 20:1-3.1 (Supp. 1964) (defense projects); N.M. STAT. ANN. §§ 22-9-43 (Supp. 1965) (public works); S.C. CODE ANN. § 25-109 (1962) (public works); VT. STAT. ANN. tit. 24, § 4011 (Supp. 1963) (housing); WIS. STAT. ANN. § 32.05 (1964) (highways and public works).

In summary, therefore, it can be said that the trend of the law on this subject is a movement from denial of any right to possession or compensation prior to final judgment to systems involving a preliminary exchange of property for approximate compensation.

II. POLICY CONSIDERATIONS RELEVANT TO EARLY POSSESSION

A. *Historical Evolution of the Right to Possession Prior to Judgment*

In the 19th century when condemnation procedures were established, takings involved few properties that were privately owned and even fewer properties that were highly developed. The economic tempo of that time did not make the taking of immediate possession an important question. Business and governmental activity did not proceed at the pace that has become accepted and expected in this era. The condemners foremost in the mind of law-makers were not governmental entities and agencies, but rather privately owned utilities and common carriers. In California, for example, the eminent domain title of the Code of Civil Procedure was taken directly from the preceding railroad acts.²¹ To encourage establishment of the vast network of public services needed in an undeveloped country, and to facilitate development of natural resources, the power of eminent domain was authorized in the broadest possible terms.²² It was therefore imperative that the power be exercised exclusively through judicial proceedings, and that interference with private property prior to payment of the final judgment be precluded.

Although determination of just compensation was then, as now, the principal problem in the great majority of proceedings, the condemnation action determined other important issues. The constitutional limitation that property be taken only for "public use" was litigated in many cases.²³ Further, the statutory requirements that a "public necessity" exist for a particular project or improvement, and that the taking of the property be necessary for the improvement, were issues to be litigated in every case.²⁴ Beginnings of

²¹ See the Code Commissioner's Notes to subdivision 4 in CAL. CODE CIV. PROC. § 1238 (Deering 1959).

²² The vestiges of this approach to conferring the power of eminent domain can still be seen in the expansive statement of "public uses" in CAL. CODE CIV. PROC. § 1238 and in the authorization in CAL. CIV. CODE § 1001 for "any person . . . without further legislative action" to take property for such uses.

²³ For studies of the constitutional concept of "public use" and statements of its declining importance, see Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Comment, 58 YALE L.J. 599 (1949); Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717 (1964); Note, *"Public Use" As a Limitation on the Exercise of the Eminent Domain Power by Private Entities*, 50 IOWA L. REV. 799 (1965).

²⁴ With respect to the issue of "public necessity" in California condemnation,

the existing broad statutory provisions for conclusive legislative or administrative determination of these issues did not appear in California law until 1913.²⁵

In this framework, the pressures for possession prior to judgment soon developed. It became apparent that condemnation litigation would delay acquisition of sites and construction of facilities by governmental entities and agencies as well as by privately owned enterprises vested with the power of eminent domain. The agitation for changes in procedure from enactment of the Code of Civil Procedure in 1872 to adoption of the first immediate possession "proviso" to section 14 of article I of the California Constitution in 1918 was predominantly prompted by takings for railroad purposes. The development of the automobile and the need for highways added further pressures. California's constitutional provision for immediate possession in right of way cases is roughly equivalent to the special condemnation procedures adopted in a great many states that are limited in application to acquisitions for highway and freeway purposes.²⁶ The last change made in California constitutional law in 1934 to authorize such possession in takings of "lands for reservoir purposes" evinced the early and continuing importance in this state of developing water resources.²⁷

The circumstances, other than the pressing need for public facilities of various kinds, that have made provisions for immediate possession both necessary and feasible are several. First, the congestion of trial and appellate court calendars is a relatively recent phenomenon. Despite all efforts to expedite the disposition of condemnation proceedings, it has become clear that this approach cannot afford an adequate solution to the problems.²⁸ More importantly,

see *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923); *People v. Chevalier*, 52 Cal. 2d 299, 340 P.2d 598 (1959). See also Lavine, *Extent of Judicial Inquiry Into the Power of Eminent Domain*, 28 So. CAL. L. REV. 369 (1955); CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE §§ 8.1-.58 (1960); Note, *Eminent Domain: Right of Exercise by a Private Person*, 44 CALIF. L. REV. 785 (1956); Comment, 7 U.C.L.A. L. REV. 327, 333-35 (1960).

²⁵ See the legislative history in CAL. CODE CIV. PROC. § 1241 (Deering 1959).

²⁶ HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958) at 6.

²⁷ See the argument to the voters submitted with the 1934 amendment in *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal. 2d 845, 850, 215 P.2d 462, 465 (1950) (dissenting opinion).

²⁸ Various measures introduced in the California Legislature in recent years would have required expeditious handling of condemnation cases. For example, Senate Bill 1200 introduced in 1965 would have required that, in all cases, the issue of compensation be tried within 180 days from the filing of the complaint. It appears, however, that in the populous counties the courts are hard pressed to bring condemnation cases to trial within one year and that a special effort is made to do so to preserve the basic date of valuation specified by CAL. CODE CIV. PROC. § 1249. See *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (1964); *County of San Mateo v. Bartole*, 184 Cal. App. 2d 422, 7 Cal. Rptr. 569 (1960).

the condemnation proceeding itself has evolved from a general trial of multiple issues into a sophisticated inquiry into the issues of compensability and values. As the Supreme Court of the United States has had occasion to emphasize, in such proceedings "the vital issue—and generally the only issue—is that of just compensation."²⁹ The still theoretically important doctrine of "public use" has dwindled in importance as a factor in the actual litigation of cases. In the very few cases in which there is a genuine issue of "public use," the issue may be determined by the appellate courts on writ procedure, as well as in the trial court and on appeal from the judgment in the condemnation proceeding.³⁰ Although the issue of "public necessity" is still litigable in a considerable range of acquisitions, in the vast majority of takings the issue is conclusively resolved by administrative or legislative determination.³¹

Notwithstanding the erratic and unsystematic development of the law on this subject, an essentially simple idea of general application has emerged: The law has evolved to a point where it is necessary and feasible to devise procedures for taking possession of property and devoting it to public use prior to judgment and, at the same time, for furnishing the property owner approximate compensation at the time possession is taken. Admittedly there are problems in devising acceptable procedures, but as experience in other states demonstrates, these problems can be overcome to the advantage of both the tax-paying and property-owning public.

B. *The Condemnor's Need for Early Possession*

The most direct consequence of delay between commencement of condemnation proceedings and the taking of possession is the forestalling of construction of much needed public facilities. If a suitable alternative can be devised, it seems especially poor policy to permit such delay in a state of burgeoning population and unprecedented growth. The only administrative method of overcoming the delay is to increase the "lead time" allowed for acquisition of the necessary property following final planning of the project. Usually this means that property within the project area must be acquired months or even years before it is actually needed, thus depriving the property owner of the use of the property for that period to the ultimate disadvantage of both condemnor and condemnee. Attempts to overcome this obstacle can also lead to precipitant filing of proceedings and premature and ill-considered acquisition of property.

²⁹ *McCandless v. United States*, 298 U.S. 342, 348 (1936).

³⁰ See *County of Marin v. Superior Court*, 53 Cal. 2d 633, 2 Cal. Rptr. 758, 349 P.2d 526 (1960); *City of Sierra Madre v. Superior Court*, 191 Cal. App. 2d 587, 12 Cal. Rptr. 836 (1961).

³¹ See text accompanying notes 140-2 *infra*.

In acquiring property for public use, it is virtually essential that there be a definite future date as of which all property needed for the public improvement will be available. In short, the need is for certainty rather than haste. Public works are accomplished through the letting of contracts and advertising for bids, all of which require definite dates upon which acquiring agencies can rely for having use of the property. Contracts for public work usually assure the contractor of use and occupancy of the site or right of way on a definite date. An unanticipated delay in obtaining such possession can even subject the public agency to suits for breach of contract. Other considerations, such as the need for a definite date for utility relocations, for the removal of existing improvements and obstructions, and for integrating the construction with related work also underscore the need for certainty in the date of possession.

The general need for promptness in accomplishing public improvements and the practicalities of performing public work are not the only considerations that argue for early and assured dates of possession. Under prevailing economic conditions, with ever-rising costs of labor and material, delays in commencing a project reflect themselves in increased costs of the public improvement. As a minimum consequence, this increase in cost is reflected in increased taxes and utility rates. As the extreme, this economic phenomenon can preclude construction of the improvement altogether. This problem is so prevalent in California and elsewhere at the present time as to be recurring front page news. Moreover, as many public improvements are financed by the issuance of bonds, an inability for any reason to accomplish the project in timely fashion often results in the funds being inadequate to complete the project. Even if the bond proceeds prove to be sufficient, delay in construction increases interest costs borne by the tax-paying and rate-paying public. Incurrence of these costs before construction has begun seems especially unfortunate if the delay results from correctable awkwardness in the condemnation process.

Still another oblique but important aspect of the need for promptness in site and right of way acquisition is the need to obtain, and indeed to compete for, federal financial participation in many projects. Notwithstanding the flood of federal funds to state and local governments, it is generally the responsibility of the local government or agency to acquire the necessary property. Until and unless such property is acquired or its acquisition is assured, there usually is no basis for application for federal participation. As an exception, early possession and control of rights of way in highway work is assured by federal legislation. For a number of years, the federal highway acts have provided that if a state is unable to obtain rights of way "with sufficient promptness," the Secretary of Com-

merce may acquire such rights under federal law, including the Federal Declaration of Taking Act,³² and thereafter convey them to the state.³³

While these requirements of property acquisition programs have been recognized for decades, construction of public improvements has often been delayed for excessive periods of time, partially because of the inability of entities and agencies to expedite the taking of possession. In California this result has stemmed largely from the assumption that the constitutional problem is insurmountable. Probably the largest class of acquisitions not accompanied by the right to possession prior to judgment are those for school purposes. Development of school sites usually does not present the problems of land assembly typically encountered in acquisitions for rights of way or reservoir purposes, but school districts are forced to compete in volatile suburban land markets and are expected to provide facilities promptly³⁴ and indeed to overcome the notorious lag in school facilities.

The problems of acquiring land for public use in California exist in many areas outside the existing constitutional authorization for immediate possession. In fact, any program of public improvement will give rise to pressures for early possession of necessary property. For example, control of water pollution is being stressed currently by federal, state, and local governments. One of the repercussions in the property acquisition field is succinctly stated in the following extract from a motion adopted by the San Francisco Regional Water Quality Control Board:

[T]his Regional Water Quality Control Board has experienced extensive delays in obtaining correction of water pollution problems

³² 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958).

³³ This provision is now codified as 23 U.S.C. § 107(a) (1958). For an indirect application of the statute, see *Eden Memorial Park Ass'n v. Department of Pub. Works*, 59 Cal. 2d 412, 29 Cal. Rptr. 790, 380 P.2d 390 (1963).

³⁴ Letter From Harold W. Culver, San Diego City Schools, to the California Law Revision Commission, June 30, 1966, stating: "The times involved extended from May 1958, when preliminary arrangements were made . . . , to the board action authorizing eminent domain on 3/10/59, to the negotiated purchase on 4/10/61, and the plant completion on 2/14/62. This school was made more than twelve months late by the actions of the defendant.

. . . .
The district has found that some landowners and their attorneys use the delays made possible by the lack of the right of immediate possession as a negotiating tool. The right of immediate possession would eliminate the ability of these uncooperative persons to delay the school district in its acquisition of land or to threaten to delay the school district and hinder its acquisition of land needed for school sites.

The backlog of cases awaiting trial in the superior courts, coupled with the time necessary to properly prepare a condemnation case, can seriously delay the date on which a school district is able to provide the school facilities required for any particular area. The right of immediate possession would eliminate these delays and would not, to our knowledge have any offsetting, undesirable effects."

because the offending public agency could not obtain immediate possession of property on which to construct the necessary waste treatment facilities and appurtenances. The Board understands that appropriate constitutional changes would be necessary to make such immediate possession possible, and requests that such changes be drawn up by the California Law Revision Commission and made a part of its recommendations.³⁵

Since it seems inevitable that the area of these problems will continue to expand, the search should be for an overall and enduring solution. As a minimum, any remediable or unnecessary delays or barriers in the condemnation process should be eliminated.

C. *Advantages of Immediate Possession to Property Owners*

To appreciate fully the ways in which a system for possession and approximate payment prior to judgment can benefit property owners, as well as condemning agencies, it is necessary to consider the dual role of the condemnee. Although he is a civil litigant, he is also a seller of property—involuntary though the sale may be. The resulting position usually is not an enviable one. A leading author on eminent domain, in comparing the administrative and judicial methods of condemnation, has aptly described the property owner's problems as follows:

Under the system of condemnation by administrative order, the title to the condemned property vests in the condemner at the very outset of the proceeding. Here the principal hardship is the delay in the determination of compensation and in the postponement of payment. Although the owner is entitled to interest for the delay, this is often insufficient to repay him for his loss, for the uncertainty of the date of payment and of the amount of compensation makes it difficult, and in some cases, impossible for him to secure the financing necessary to re-instate him in his business or in a new home. Under the system of condemnation by judicial decree, title to the property sought to be acquired does not vest in the condemner until the payment of compensation. Although here the owner remains technically in control of his property, the effects of the expropriation are often more severe under this method than under the alternative procedure. For it usually happens that the very institution of the condemnation proceeding puts the property under a blight. If the land is vacant, the owner is foreclosed from erecting structures on it or otherwise improving it. On the other hand, if the property is improved, it would be foolhardy for the owner to make alterations or additional improvements, and even substantial expenditures for maintenance are unwarranted in view of the impending condemnation. Yet, if the owner allows the property to run down, its condition at the time of trial may greatly reduce the award that he might otherwise have re-

³⁵ Motion adopted June 16, 1966, as presented in Letter From the San Francisco Regional Water Quality Control Board to the California Law Revision Commission, July 19, 1966.

ceived. Moreover, the income that the owner derives from the property may be materially reduced by the imminence of the condemnation.³⁶

Although this description ignores the usual requirement of a deposit for the property owner in administrative condemnation and assumes the absence of immediate possession provisions in connection with the judicial method, it is accurate as to California cases in which immediate possession is not taken. Upon the filing of the condemnation proceeding, the California condemnee loses many of the valuable incidents of ownership. He is not compensated for any improvements to the property made after that time.³⁷ He is precluded, as a practical matter, from selling or renting the property as any transaction will be subject to the inevitable outcome of the condemnation suit.³⁸ He is deprived of any increase in the value of the property occurring thereafter, for the condemnation award ordinarily is based on the value of the property at the commencement of the proceeding.³⁹

Because their property is being taken, many condemnees must find and purchase replacement property and prepare to move. At the same time they incur the costs of litigating the condemnation action. While these expenses are incurred whether immediate possession is taken or not, the landowner receives no compensation until the conclusion of the litigation unless such possession is taken. It is at least possible that a property owner without substantial assets other than the property being taken will be forced to settle his claim for an inadequate amount simply to relieve the immediate economic hardship. In contrast, the relinquishment of possession and the receipt of approximate compensation prior to judgment permits the condemnee to meet these problems and expenses while proceeding with the trial on the issue of compensation. When immediate possession is taken, existing California statutory provisions assure the property owner that he will have available an amount fixed by the court as the probable compensation to be awarded in the proceeding.⁴⁰ These provisions permit the condemnee to go to trial on the issues of compensation and damages, and still receive sufficient funds to obtain other property while awaiting trial, or to leave the amount on

³⁶ 2 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 247, at 263 (2d ed. 1953).

³⁷ CAL. CODE CIV. PROC. § 1249.

³⁸ A "lis pendens" must be recorded at the outset of every eminent domain proceeding. CAL. CODE CIV. PROC. § 1243.

³⁹ CAL. CODE CIV. PROC. § 1249.

⁴⁰ See CAL. CODE CIV. PROC. §§ 1243.5(a) (condemnor seeking immediate possession must deposit "probable just compensation" for the property), 1243.5(d) (condemnee may obtain order increasing the amount of an inadequate deposit), and 1243.7(a) (condemnee may withdraw the amount deposited).

deposit and receive interest at the legal rate of seven percent throughout the proceeding.⁴¹

The reality of these advantages is indicated by the fact that property owners have sought unsuccessfully to compel the condemnor to take possession and to make the required deposit. Another indication is the repeated suggestion by counsel for property owners to allow immediate possession procedures to be initiated by the condemnee.⁴²

It is apparent that several of these advantages accrue only if the deposit is made available to the condemnee at the time possession is taken. Further, the series of advantages is not logically complete unless the owner is treated, in all respects in which it is to his advantage, as though he had actually sold the property on the date possession is taken.

The absence of detailed provisions for immediate possession in section 14 of article I of the Constitution has given rise to the widespread but unanalyzed impression that it is always in the best interest of the property owner to postpone relinquishment of possession. From 1918 to 1957, there were no statutory provisions for withdrawal of the required deposit, and therefore the property owner was always deprived of his property for a substantial period before actual receipt of any amount. Furthermore, if the deposit was made to obtain possession following entry of judgment, the amount could be withdrawn immediately, but if the deposit was made to obtain possession before judgment, withdrawal was not permitted even upon entry of judgment.⁴³

Even more irritating to condemnees was the absence of legislation providing for any of the consequences of early possession. For example, it was necessary for the California Supreme Court to devise a means of compensating the property owner for use and possession of the property during the period of immediate possession.⁴⁴ Intercession of that court also was necessary to prevent the property owners being required to pay taxes and special assessments accruing during the period of immediate possession.⁴⁵ The existence of these shortcomings for several decades after immediate possession was authorized has left impressions that are difficult to overcome. But, as the California Supreme Court recently has had occasion to declare, provisions for an exchange of possession for approximate

⁴¹ CAL. CODE CIV. PROC. § 1255(b).

⁴² See text accompanying note 194 *infra*.

⁴³ See *Deacon Inv. Co. v. Superior Court*, 220 Cal. 392, 31 P.2d 372 (1934).

⁴⁴ See *People v. Peninsula Title Guar. Co.*, 47 Cal. 2d 29, 301 P.2d 1 (1956).

⁴⁵ See *Metropolitan Water Dist. v. Adams*, 16 Cal. 2d 676, 107 P.2d 618 (1940).

compensation during the progress of condemnation litigation are for the mutual benefit of both condemnors and condemnees, and are to be construed accordingly.⁴⁶

D. *Effect of Immediate Possession Upon Negotiations and Settlements*

In all cases in which "just compensation" is ultimately determined by court or jury, it is clear that the right to immediate possession has no effect in determining compensation. The single problem that arises in this connection is that in certain cases, especially when structures have been razed, it may be more difficult to determine compensation because the court or jury is unable to obtain a clear picture of what the property actually looked like prior to the taking. Although this problem is regarded as serious by some practitioners, it can be largely overcome by the preparation of appraisals, together with photographs, in the interim between service of the order for immediate possession and the date possession is actually taken. This general disadvantage of immediate possession is also substantially offset by a corresponding advantage. Since severance damages and the offsetting of benefits are major factors in ascertaining compensation, expediting construction of the public facility may assist in arriving at a more accurate estimate of these amounts.

A more subtle question is whether the availability of immediate possession to the condemnor has any significant effect upon negotiations and settlements in cases in which the issue of compensation is resolved by the parties. An oft-stated purpose of immediate possession provisions is to prevent property owners from using the possibility of protracted litigation as a negotiating factor. For example, the argument submitted to the voters in connection with the constitutional amendment of 1918 (rights of way) emphasized this point as follows:

Experience has shown that cities, in acquiring long stretches of rights of way for public purposes, are often held up by unreasonable and arbitrary owners who attempt to take advantage of a rule which requires that the city can not go into possession prior to a jury actually fixing the compensation to be paid.⁴⁷

It is probably true that in exceptional circumstances, such as a need for possession to meet a construction deadline, a California condemnor that cannot take immediate possession may be forced to pay an excessive price. In general, however, public entities and

⁴⁶ See *People v. Neider*, 55 Cal. 2d 832, 13 Cal. Rptr. 186, 361 P.2d 916 (1961).

⁴⁷ See SECRETARY OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 34 (1918).

agencies have limitations on the extent to which they can negotiate and upon their particular method or procedure of negotiation. Governmental agencies are precluded from paying more than their appraisals without cogent reasons supporting a determination of higher just compensation.⁴⁸ Delay in construction of the public facility or an increase in allotted "lead time," would therefore appear to be more probable consequences than payment of excessive prices.

Conversely, many attorneys fear that broad provisions for possession prior to judgment would permit condemners to force unfair settlements. Similar apprehension is reflected in the following formulation of policy for federal legislation:

In no event should the head of a federal agency either advance the time of condemnation, or defer the condemnation and the deposit of funds in court for the use of the owner, in order to compel an agreement on the price to be paid for the property. If an agency head cannot reach an agreement with the owner, after negotiations have continued for a reasonable time, he should promptly institute condemnation proceedings and, at the same time or as soon thereafter as practicable, file a declaration of taking and deposit funds with the court in accordance with the [Federal Declaration of Taking Act].⁴⁹

Although it does not appear that agencies having the right of immediate possession systematically make lesser offers than agencies without such right,⁵⁰ it is probably true that in the absence of notice of the order for possession and a period of delay in its effective date, or of any provision for withdrawal of the required deposit of probable just compensation, the right of immediate possession is subject to the possibility of administrative abuse. In the view of private practitioners, it is not the taking of immediate possession itself that affects negotiation of the issue of compensation. Rather, the difficulty lies in the possibility that immediate possession might be taken and the property owner be left without either property or compensation for a prolonged period.⁵¹ It would appear that the adoption in 1961

⁴⁸ CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE § 6.6 (1960).

⁴⁹ STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 148 (Comm. Print 1964).

⁵⁰ *Ibid.* See also CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE §§ 11.1-19 (1960).

⁵¹ Letter From Leslie R. Tarr to the California Law Revision Commission, Aug. 4, 1960, stating: "There have been times when agents for public bodies actually threatened property owners with the taking of immediate possession, wherein the owner would be deprived of his property and have no funds either to move or to purchase other property. And it has been dynamite to [the] business of industrial firms, forcing settlements to avoid business losses and financial failure."

of general provisions for withdrawal of the total deposit have overcome this unfairness.

Providing property owners with even partial compensation at the outset of the proceedings does supply funds with which to conduct the litigation. It does not seem realistic, however, to conclude that this substantially increases the number of contested cases and thereby hampers acquisition of property for public use. Furthermore, rudimentary fairness to the property owner dictates that he not be deprived of his "day in court" through sheer economic necessity.

In a majority of the states, the condemnor is required to make a "jurisdictional offer" to purchase the property and to establish inability to agree with the property owner before beginning the condemnation proceeding.⁵² Since enactment of the Code of Civil Procedure in 1872, California law has not included any such requirement, and negotiating practices have varied from agency to agency and from entity to entity.⁵³ Legislation calculated to force the condemnor to make a definite offer before beginning the condemnation proceeding has been repeatedly introduced in the California legislature, but has failed of enactment.⁵⁴ Whatever the merits of the "jurisdictional offer," the purpose of the requirement is largely served by comprehensive deposit and withdrawal provisions related to the taking of possession prior to judgment. From the property owner's point of view, the latter provisions afford the additional advantages of a judicial review of the amount of the deposit and permit him to press his claim for greater compensation if he chooses. From the condemnor's standpoint, deposit and withdrawal provisions are less advantageous in that acceptance of the "jurisdictional offer" would avoid or terminate the condemnation proceeding. However, if the condemnor has made a bona fide offer, it would not appear to be subjected to additional hardship by being required to deposit the amount of the offer for withdrawal by the property owner.

⁵² For a survey of this legislation, see 6 NICHOLS, *EMINENT DOMAIN* § 24.62[1] (3d rev. ed. 1966). For a summary of judicial decisions applying the requirement, see Annot., 90 A.L.R.2d 211 (1963).

⁵³ *Supra* note 48.

⁵⁴ For example, Senate Bill No. 69 introduced in the 1959 Legislature would have added the following provision: "Where the State, or any of its agencies, seeks to acquire property pursuant to any law and commences negotiations with the owner of the property in contemplation of the subsequent condemnation thereof if necessary, the state agency or officer involved in the negotiations shall offer a fair and equitable price for such property. In connection with such offer, the negotiator shall make available to the owner of the property, upon his written request therefor, the appraisal or reports relating to the value of such property upon which the offer is based."

E. *Effectuating the Policy of Concurrent Payment*

Adoption of the immediate possession provisions of section 14 of article I of the state constitution reversed a long-standing policy that property may not be taken unless compensation has first been made. The 1961 statutory provisions for withdrawal of the total deposit, however, permit the property owner to receive approximate compensation months or even years earlier than he would if possession were postponed. The extent of this discrepancy can be seen by reference to the provisions governing payment of the award in ordinary condemnation proceedings.

Code of Civil Procedure section 1251 requires that the compensation assessed must be paid within 30 days after "final judgment." For this purpose, "final judgment" is defined as "a judgment when all possibility of direct attack thereon by way of appeal, motion for new trial, or motion to vacate the judgment has been exhausted."⁵⁵

The 30-day period within which the condemnor must pay the award is therefore extended an additional 60 days within which an appeal may be filed after entry of judgment or disposition of a motion for new trial.⁵⁶ The period is also extended by the 10 days from notice of the entry of judgment within which either party may move for a new trial, or move to vacate or set aside the judgment.⁵⁷ During this delay, there is no means by which the condemnor can be compelled to take or pay for the property.⁵⁸

If the plaintiff is the State of California or a "public corporation," and bonds must be sold to pay the sum assessed, payment need not be made until one year after the date of the judgment and, in computing the one-year period, any period of litigation affecting the validity of the bonds is discounted.⁵⁹ Considering that these

⁵⁵ CAL. CODE CIV. PROC. § 1264.7.

⁵⁶ CAL. CT. R. 2. *City of Los Angeles v. Aitken*, 32 Cal. App. 2d 524, 90 P.2d 377 (1939). The 30-day period is computed from the filing of the remittitur, and if payment is not made or deposited within that 30-day period the proceeding may be dismissed. *County of Los Angeles v. Bartlett*, 223 Cal. App. 2d 353, 36 Cal. Rptr. 193 (1963).

⁵⁷ CAL. CODE CIV. PROC. § 659 (motion for new trial), § 663a (motion to vacate or set aside the judgment); *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444 (1903).

⁵⁸ *County of Los Angeles v. Lorbeer*, 158 Cal. App. 2d 804, 323 P.2d 542 (1958).

⁵⁹ CAL. CODE CIV. PROC. § 1251. This provision now reads as follows: "In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said State or of any agency thereof, or of said public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; *provided further*, that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which payment must be made" (emphasis in original).

periods of delay are additional to the time needed to proceed to trial and judgment, it is apparent that the constitutional assurance of *prepayment* has not been effective in assuring *prompt payment*. Although it is arguable that the constitutional policy of prepayment is intended only to protect property owners from financial irresponsibility or administrative abuse on the part of condemners,⁶⁰ it appears that a secondary purpose of the policy is to assure a businesslike and substantially simultaneous exchange of property and compensation. Long before "immediate possession" became a serious problem in the law of eminent domain, this objective of the law was recognized. As quaintly stated in an early decision:

The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder Court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary by the forms of law, to conduct the inquiry⁶¹

In the economic pace of the last few decades, something more than an abstract constitutional guarantee of prepayment is required. The most promising approach to a general solution has been found in schemes for a preliminary exchange of the property for approximate compensation. In federal condemnation practice, for example, the deposit required to be made with the filing of a declaration of taking is "paid forthwith for or on account of the just compensation to be awarded in said proceeding."⁶² More significantly, even in cases in which a declaration of taking is not filed, the plaintiff in condemnation may make a deposit and "in such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation."⁶³

For a decision questioning the constitutionality of the provision and giving it a highly restrictive interpretation, see *People v. Thompson*, 5 Cal. App. 2d 655, 43 P.2d 600 (1935). The principle application of the provision is to permit issuance of revenue or general obligation bonds by local governments to acquire ownership of utility systems from private ownership. See, e.g., *City of Sacramento v. Citizens Util. Co.*, 239 Cal. App. 2d 103, 48 Cal. Rptr. 547 (1965). Use of the extension is greatly restricted by the rule that the related period for abandonment of the proceeding is not similarly extended. After 30 days from final judgment, the proceedings may not be abandoned by the condemnor even though the extension for issuance of bonds is applicable and even though the bond proceeds have not been forthcoming within that period. *Southern Pub. Util. Dist. v. Silva*, 47 Cal. 2d 163, 301 P.2d 841 (1956).

⁶⁰ See *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal. 2d 845, 850, 215 P.2d 462, 465 (1950) (Carter, J., dissenting opinion).

⁶¹ *Parks v. Boston*, 32 Mass. 198, 208 (1834).

⁶² 46 Stat. 1421 (1931); 40 U.S.C. § 258a (1958).

⁶³ FED. R. CIV. P. 71A(j).

Existing California law provides for the deposit of probable just compensation only in connection with an application for an order of immediate possession in the limited range of cases in which such possession is authorized. An appropriate broadening of the range of immediate possession is a practical method of effectuating the constitutional policy of concurrent payment.

III. THE CONSTITUTIONAL QUESTION

A. *Constitutional Requirements Generally*

The Constitution of the United States imposes no direct limitation upon state statutory or constitutional provisions for possession prior to judgment. Neither the fifth amendment's "just compensation" clause nor the fourteenth amendment's due process clause require that compensation be determined in advance of possession, or that any amount be paid into court for the property owner before his possession is disturbed. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."⁶⁴ However, a source of compensation must be assured before any change of possession or other activity which is deemed to be a "taking" in the constitutional sense. For example, it is sufficient for a governmental entity to pledge the public faith and credit for eventual payment if an adequate means of enforcing the claim to compensation is provided.⁶⁵ Essentially the same rule applies to non-governmental condemners, except that greater security for ultimate payment must be provided to the property owner.⁶⁶

This general requirement applies to the California condemnation process irrespective of any more specific limitation or authorization in section 14 of article I of the California Constitution.⁶⁷ In applying the first clause of section 14 and, impliedly, the federal requirement, California decisions have invalidated statutory schemes for the making of public improvements that involved the taking or damaging of private property without preexisting provision for the ascertainment and payment of compensation.⁶⁸ These decisions,

⁶⁴ *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 569 (1898). See also 18 AM. JUR. *Eminent Domain* § 304 (1938); 3 NICHOLS, *EMINENT DOMAIN* § 8.71 (3d rev. ed. 1966).

⁶⁵ *Adirondack Ry. v. New York*, 176 U.S. 335 (1900).

⁶⁶ *Cherokee Nation v. Southern Kan. Ry.*, 135 U.S. 642 (1890).

⁶⁷ See *Marin Municipal Water Dist. v. Marin Water & Power Co.*, 178 Cal. 308, 173 Pac. 469 (1918).

⁶⁸ Most of these decisions are cited and discussed in *Beals v. City of Los Angeles*,

however, concerned situations in which the property was not being acquired through formal condemnation. They invalidated statutory authorization of governmental activities that would have constituted so-called "inverse condemnation." Consequently, the decisions shed little light upon the limitations applicable in connection with the usual judicial condemnation proceedings. It is clear that federal "due process" does not preclude provisions for possession prior to judgment in such proceedings. The limited provisions for immediate possession in the California Constitution have been sustained when challenged on federal grounds.⁶⁹

In addition to the fundamental requirement of eventual compensation, the constitutions of approximately half the states contain special provisions regarding the method or time of payment in eminent domain proceedings. In terms of the language used, these constitutional provisions can be divided roughly into three groups: (1) provisions that seemingly require that compensation be actually *paid* in advance of the taking;⁷⁰ (2) provisions that require, as does section 14 of article I, that compensation be paid, *paid into court*, or deposited in some other fashion for the owner;⁷¹ and (3) provisions that require only that compensation be paid *or secured*.⁷²

The courts have generally found no conflict between these constitutional provisions and the "immediate possession" statutes.⁷³ Provisions of the second category are not often construed to require that the determination of the amount to be paid into court be final,

23 Cal. 2d 381, 144 P.2d 839 (1943). A typical statement is found in *Bigelow v. Ballerino*, 111 Cal. 559, 564, 44 Pac. 307, 309 (1896): "The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: 1. The right to compensation; and 2. The right to have that compensation made or paid into court before his property is taken or injuriously affected. . . . [T]he property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them."

⁶⁹ *Peck v. Superior Court*, 138 Cal. App. 222, 31 P.2d 104 (1934); *Marblehead Land Co. v. Superior Court*, 62 Cal. App. 408, 217 Pac. 536 (1923).

⁷⁰ ALA. CONST. art. I, § 23; COLO. CONST. art. II, § 15; GA. CONST. art. I, § 3; IDAHO CONST. art. I, § 14; IND. CONST. art. I, § 18; LA. CONST. art. I, § 2; MD. CONST. art. III, § 40; MISS. CONST. art. III, § 17; S.D. CONST. art. VI, § 13.

⁷¹ ARIZ. CONST. art. II, § 17; ARK. CONST. art. XII, § 9; FLA. CONST. art. XVI, § 29; KAN. CONST. art. XII, § 4; MO. CONST. art. II, § 21; MONT. CONST. art. III, § 14; N.D. CONST. art. I, § 14; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, § 24; S.C. CONST. art. IX, § 20; TEXAS CONST. art. I, § 17; WASH. CONST. art. I, § 16.

⁷² IOWA CONST. art. I, § 18; KY. CONST. §§ 13, 242; MICH. CONST. art. VIII, § 1; MINN. CONST. art. I, § 13; NEV. CONST. art. I, § 8; ORE. CONST. art. XI, § 4; PA. CONST. art. I, § 10; S.D. CONST. art. XVII, § 18; W. VA. CONST. art. III, § 9.

⁷³ See LAW REVISION GROUP, UNIVERSITY OF CHICAGO LAW SCHOOL, STUDY AND ACT RELATING TO VESTING OF POSSESSION BEFORE PAYMENT IN EMINENT DOMAIN PROCEEDINGS 45, 61 (1956); Wasserman, *Procedure in Eminent Domain*, 11 MERCER L. REV. 245, 261, 275 (1960).

rather than preliminary, or be made by jury. The more usual construction imposes the single condition that the property owner have the right to withdraw the amount deposited prior to termination of the condemnation proceeding.⁷⁴

It is possible, however, to compound the requirement of payment into court with the requirement of jury trial and to conclude that the payment into court can be made only after the issue of compensation is tried and determined. Although the matter is far from clear, this conclusion is commonly assumed to be the California position. Hence, proposals for change in California procedure have uniformly taken the form of proposed amendments to section 14 of article I. Since the section's last amendment in 1934, approximately thirty proposed constitutional amendments have been introduced in the Legislature.⁷⁵ To determine whether this general assumption is well founded and whether statutory revision without a constitutional amendment is precluded, a consideration of the background of section 14 and of the judicial decisions construing that section is required.

B. *Derivation of Section 14, Article I, California Constitution*

The various amendments to section 14 have made it virtually unreadable. For example, it is impossible to know that the phrase "right of way or lands to be used for reservoir purposes" refers to two distinct types of acquisitions without also knowing that the words "or lands to be used for reservoir purposes" were added by separate amendment. However, in historical perspective, the section can be at least grammatically untangled.

As adopted in 1879, the section read:

Private property shall not be taken *or damaged* for public use without just compensation *having been first made to, or paid into Court for, the owner,*

and no right of way shall be appropriated to the use of any corpora-

⁷⁴ See 3 NICHOLS, EMINENT DOMAIN § 8.713[2] (3d rev. ed. 1966).

⁷⁵ Most of these amendments would have extended immediate possession to other entities or agencies as to takings for additional public purposes. Among other changes, they would have provided possession prior to judgment in acquisitions for expositions or fairs (Assembly Constitutional Amendment No. 77, 1935); public beaches, public buildings or civic centers (Assembly Constitutional Amendment No. 9, 1947); airports, schools or "borrow sites" for flood control or highway projects (Assembly Constitutional Amendment No. 25, 1949); facilities for sanitary and sanitation districts (Assembly Constitutional Amendment No. 52, 1949); redevelopment agencies (Senate Constitutional Amendment No. 6, 1957); rights of way for electric, water, gas, telephone and telegraph corporations subject to the jurisdiction of the Public Utilities Commission (Assembly Constitutional Amendment No. 57, 1957).

tion other than municipal until full compensation therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation,

which compensation shall be ascertained by a jury, unless a jury be waived, as in other cases in a Court of record, as shall be prescribed by law.

The unitalicized words of the first clause comprised the entire wording of the provision on eminent domain in the constitution of 1849.⁷⁶ Major ambiguities in the additional language are apparent. To determine whether compensation paid into court must, in general, have been previously determined by jury, it must be decided whether the words "which compensation" in the third clause refer to "just compensation" in the first, or to "full compensation" in the second. The source of the language indicates that the words refer to "full compensation" and have nothing to do with the initial general language of the section. Even if the words refer to the second clause, however, it can be argued in instances of takings for right of way purposes by "any corporation other than municipal" that a previous jury determination is necessary. It then must be determined whether the second clause is addressed only to the offsetting of "benefits" or also imposes a requirement that a jury determine the compensation to be paid into court for the owner. Again, the source of the language indicates that the provision concerns only the problem of offsetting benefits.

Subsequent amendments to section 14 have obscured but not changed these basic problems of construction. An amendment of 1918 changed the second clause to enlarge the words "corporation other than municipal" to "corporation, except a municipal corporation or a county." This amendment also added the first version of the elaborate proviso dealing with immediate possession that now follows the third clause. The proponents of the 1918 amendment assumed, or at least argued, that the second clause prevented offsetting benefits, and that the addition of the proviso was necessary to permit any condemnor to take possession prior to jury determination of the amount of compensation. This proposed amendment was submitted to the voters with the following argument:

The principal purpose of this amendment is to permit the State, a county, municipal corporation, or a drainage, irrigation, levee or reclamation district, when acquiring *rights of way only*, in eminent domain proceedings, to take possession upon commencing a condemnation

⁷⁶ CAL. CONST. art. I, § 8 (1849). As to this derivation of section 14, see Historical Notes in CAL. CONST. art. I, § 14 (West 1954); CAL. CONST. ANN., art. I, § 14 (Mason ed. 1953).

suit and depositing in court such amount of *cash* money as is fixed by court to secure the owners

. . . .

Another change effected by the amendment is to extend to counties the same privileges that a municipal corporation now has to set off benefits that might result to an owner's property in determining the compensation that must be paid.

. . . .

As the law now stands, . . . possession of the property can not be obtained until after a jury has determined the amount of compensation to be paid for taking of such property.

. . . .

Under existing law, no matter how urgent may be the necessity, or how great may be the damages suffered by delay, possession can not be obtained until after what may become protracted litigation. [Emphasis in original.]⁷⁷

An amendment of 1928 added the words "or the State" to the exception of the second clause, presumably to assure offsetting benefits in takings by the State of California.

The last amendment in 1934 added "lands to be used for reservoir purposes" to both the exception of the second clause and to the immediate possession proviso. In addition, the amendment included "metropolitan water districts, municipal utility districts, municipal water districts, water conservation districts, and similar public corporations" in the proviso dealing with immediate possession. Furthermore, the amendment added to the second clause all the districts, including drainage, irrigation, levee, and reclamation districts which previously had appeared only in the immediate possession proviso, plus the phrase "similar public corporations." The argument submitted to the voters in connection with the amendment of 1934 was similar to the one advanced in 1918.⁷⁸

Decisions since 1934 have held that a taking for airport purposes is not the taking of a "right of way"⁷⁹ and that a condemnation to acquire water wells is not a taking of "lands for reservoir purposes."⁸⁰ These decisions recognize that the existing authorization for possession prior to judgment is constitutional, rather than

⁷⁷ See SECRETARY OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 35 (1918).

⁷⁸ The argument is set forth in full in *Central Contra Costa Sanitary Dist. v. Superior Court*, 34 Cal. 2d 845, 215 P.2d 462 (1950).

⁷⁹ *Almada v. Superior Court*, 149 P.2d 61 (3d Dist. Ct. App. 1944). In 1958, the Legislature submitted, but the voters rejected, a proposal that would have extended the immediate possession provisions of section 14 to include takings for airport purposes and takings by school districts.

⁸⁰ *O. T. Johnson Corp. v. Superior Court*, 103 Cal. App. 2d 278, 229 P.2d 849 (1951).

statutory. Similarly, condemners other than the entities named in the proviso to section 14 may not take possession prior to entry of judgment in any case because there is no authorization for their doing so.⁸¹

C. *The Constitutional Convention of 1878-79*

The proposals and debates of the constitutional convention afford a rather clear insight into the intended meanings of section 14. They also afford classic considerations of some of the fundamentals of eminent domain. Two versions of the proposed section were introduced in the convention. One provided:

Private property shall not be taken for public use without just compensation be [*sic*] first made, or secured by deposit of money to the owner, and such compensation shall be ascertained by jury of twelve men, without deduction for benefit to any property of the owner, in a court of record, as shall be prescribed by law.⁸²

The other proposal read:

[N]or shall private property be taken or damaged for public use without just compensation. Such compensation shall be ascertained by jury, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested.⁸³

From these proposals, the Committee on Preamble and Bill of Rights prepared this version:

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having been made to or paid into court for the owner, except in cases of war, riot, fire, or great public peril, in which cases compensation shall afterwards be made; such compensation or damages to be assessed by a jury, unless waived by the parties⁸⁴

That version, however, was referred to the Committee on Judiciary and Judicial Department which proposed the following:

Sec. 14. Private property shall not be taken for public use without just compensation having been first made to or paid into court for the owner.⁸⁵

⁸¹ *City of Sierra Madre v. Superior Court*, 191 Cal. App. 2d 587, 12 Cal. Rptr. 836 (1961).

⁸² DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 104 (1880) [hereinafter cited as DEBATES AND PROCEEDINGS].

⁸³ *Id.* at 97.

⁸⁴ *Id.* at 232.

⁸⁵ *Id.* at 262, 344.

This version was reported to the convention for adoption. The ensuing debate led to the proposal of the following additional language:

[A]nd no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury in a court of record, as shall be prescribed by law.⁸⁶

Thus, the language relating to jury trial was introduced as an integral part of the additional language, with no apparent reference to the initial proposal. Further, the statement supporting the addition indicated that it was proposed only to reverse "a rule of the past that when damages were assessed for a right of way, to allow the prospective advantages to offset the damages."⁸⁷ The Judiciary Committee indicated that although such a rule might have existed under the railroad acts, it had been changed by enactment in 1872 of section 1248 of the Code of Civil Procedure to provide a uniform rule on offsetting benefits.⁸⁸

The proponent's statements concerning the additional language indicate that it may have been intended to distinguish between so-called "general" benefits and "special" benefits. As one proponent stated:

It must be borne in mind that, as land becomes more valuable, as it is more generally taken up and cultivated, and as the railroads increase, they can not be run across the country without doing very material damage; without severing farms into irregular shape; without separating buildings and destroying orchards, and there is no justice in permitting the *general advantages accruing to the community* to offset that class of damages. [Emphasis added.]⁸⁹

This possible interpretation of the additional language was subsequently adopted in *Beveridge v. Lewis*.⁹⁰ That decision holds that the second clause of section 14 refers only to general benefits; that the provision forbids their being set off by "corporations other than municipal"; that to make sense of the clause, and to avoid

⁸⁶ *Id.* at 344.

⁸⁷ *Ibid.* The reference was to *San Francisco, A.&S. R.R. v. Caldwell*, 31 Cal. 367 (1866).

⁸⁸ See DEBATES AND PROCEEDINGS (remarks of Barnes and Edgerton) 345, 346. Incidentally, the question whether "special benefits" might be offset against the value of the property taken, as well as against severance damages, was not finally settled in California until the amendment of CAL. CODE CIV. PROC. § 1248(3) in 1965 to provide that "benefits shall in no event be deducted from the value of the portion taken." Cal. Stat. 1965, ch. 51, § 1, p. 932.

⁸⁹ *Id.* at 346.

⁹⁰ 137 Cal. 619, 70 Pac. 1083 (1902).

conflict with the United States Constitution's equal protection clause it must be read so as not to discriminate between condemners in this respect; and that, therefore, the provision merely prevents setting off of *general* benefits by all condemners. Although inconsistent language exists in decisions rendered both before and after the 1902 *Beveridge* decision, presumably that decision still accurately states the constitutional law on "benefits."⁹¹

Numerous statements indicate that the *sole* concern of the proponents was with the offsetting of benefits:

I did not expect, when I offered that amendment, that it was going to create so much discussion. It is admitted finally by the gentlemen on my left that the rule is to offset absolute damages by supposed benefits. Now, my amendment covers that one single idea alone and no other; that is, that absolute damages shall not be set off by supposed benefits. There is no question of bonds. Neither does it enable any individual to lie in the way of any corporation in any manner that does not now exist . . .⁹²

The allusion to bonds refers to the series of California Supreme Court decisions which culminated in an 1879 holding that railroads might not take immediate possession upon furnishing bonds because such bonds simply did not constitute "just compensation" within the meaning of the Constitution of 1849.⁹³

To complete the origin of the language in the convention, after

⁹¹ See *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 2 P.2d 790 (1931); *People v. McReynolds*, 31 Cal. App. 2d 219, 87 P.2d 734 (1939); Gleaves, *Special Benefits in Eminent Domain, Phantom of the Opera*, 40 Cal. S.B.J. 245 (1965).

Seemingly inconsistent decisions intervened between adoption of the Constitution of 1879 and the *Beveridge* decision in 1902. Decisions in *Muller v. Southern Pac. Branch Ry.*, 83 Cal. 240, 23 Pac. 265 (1890), and *Pacific Coast Ry. v. Porter*, 74 Cal. 261, 15 Pac. 774 (1887), referred to the discrimination between "corporations other than municipal" and all other condemners, but in establishing and applying the so-called "before and after rule" as to the value of the remainder they permitted, in effect, the offsetting of special benefits.

Decisions in *Moran v. Ross*, 79 Cal. 549, 21 Pac. 958 (1889), and *Pacific Coast Ry. v. Porter*, 74 Cal. 261, 15 Pac. 774 (1887), recognized and seemingly applied what the latter decision refers to as the "absurd and unjust" discrimination between classes of condemners, but it is not clear whether those decisions were dealing with general or special benefits. In *San Bernardino & E. Ry. v. Haven*, 94 Cal. 489, 29 Pac. 875 (1892), the court also referred to that discrimination, but it is clear that the decision dealt with general rather than special benefits.

⁹² DEBATES AND PROCEEDINGS at 350.

⁹³ See *Vilhac v. Stockton & Ione R.R.*, 53 Cal. 208 (1878); *Sanborn v. Belden*, 51 Cal. 266 (1876); compare *Fox v. Western Pac. R.R.*, 31 Cal. 538 (1867). The *Vilhac* decision also held that, because section 1254 of the Code of Civil Procedure as it existed before an amendment of 1878 was unconstitutional in permitting bonds to be posted, all of the bonds given as security on taking possession prior to judgment were void. Undoubtedly this decision led to the amendment of the code in 1878 and influenced the choice of language in the constitutional convention of 1878-79.

the proposal of this additional language, it was amended on the floor of the convention by its proponent to include the words "other than municipal" after the word "corporation." Again, that change had reference to benefits rather than to any question of payment or ascertainment of just compensation prior to possession.⁹⁴

Later in the convention, the first clause of section 14 was amended to include the words "or damaged" after the word "taken." The remarks of both the proponents and opponents of that change indicate that its purpose was to assure that damaging, as well as taking, of property would fall within the constitutional requirement of just compensation. In short, the intention was to expand the range of compensability; "damage" was not used to refer to possession prior to payment of compensation or jury verdict.⁹⁵

The third clause of section 14 was also amended to include the words "unless a jury be waived, as in other civil cases" after the word "jury." In connection with this change, it was pointed out that section 7 of article I of the constitution as proposed at the convention also guaranteed jury trial in eminent domain proceedings. The change was adopted, but it is clear that there was no intention to relate the requirement of jury trial to the language of the first clause.⁹⁶ The section, as set forth above, was adopted with these changes.

Any analysis of the origin of the language of section 14 demonstrates the futility of a grammarian's or logician's approach to interpretation of the section. The word "first" in the initial clause has a fundamental import, but it is not directed to the provisions made for possession, or to jury trial, in regularly instituted eminent domain proceedings. An amendment to the language that would have had that precise effect was proposed and rejected in the convention.⁹⁷

California Supreme Court decisions both immediately before and after the constitutional revision of 1879 held (1) that takings by eminent domain must be via judicial proceedings *first* instituted,⁹⁸ and (2) that compensation must be *first* made or paid into court.⁹⁹

⁹⁴ DEBATES AND PROCEEDINGS at 347.

⁹⁵ *Id.* at 1190.

⁹⁶ *Ibid.*

⁹⁷ See DEBATES AND PROCEEDINGS at 351-53 (motion of Waters).

⁹⁸ *McCauley v. Weller*, 12 Cal. 500 (1859); *Weber v. County of Santa Clara*, 59 Cal. 265, 266 (1881).

⁹⁹ *San Mateo Waterworks v. Sharpstein*, 50 Cal. 284, 285 (1875) "The taking in this case amounts to a taking of private property for public use in the sense in which that phrase is used in the Constitution, and can only be effected upon the conditions prescribed in the Constitution—that is, upon just compensation being simultaneously made."; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 318 (1859) "there is nothing in the legislation of this State which gives any right of

The subsequent decision in *Steinhart v. Superior Court*¹⁰⁰ is confusing in other respects, but it is demonstrably correct in holding that the first clause of section 14 precludes taking of possession by filing a bond or furnishing security other than deposit in court, and that the deposit must be available to the owner. In this regard, the revision of section 14 in 1879 merely continued pre-existing constitutional policies.

D. *The Judicial Decisions*

Since adoption of the California Constitution in 1879, the bearing of article I, section 14, upon possession prior to final judgment has come before the California Supreme Court on four occasions: *Spring Valley Water Works v. Drinkhouse*¹⁰¹ in 1892, *Steinhart v. Superior Court*¹⁰² in 1902, *Heilbron v. Superior Court*¹⁰³ in 1907, and *Central Contra Costa Sanitary District v. Superior Court*¹⁰⁴ in 1950.

From the first three decisions, it is possible to derive an argument that statutory provisions for possession pending appeal are constitutional, but that provisions for possession at any time prior to the interlocutory judgment in condemnation proceedings would be unconstitutional. The last decision gives an expansive interpretation to the existing limited constitutional provision.

To understand the argument, it is necessary to trace the evolution of Code of Civil Procedure section 1254, which now deals only with possession pending appeal. As enacted in the eminent domain title of the Code of Civil Procedure in 1872, section 1254 provided that at any time after service of summons, the plaintiff might have possession by giving "security" approved by the court.¹⁰⁵ The Code Commissioners' Notes indicate that the Code Commission "in a first report, proposed to provide for a preliminary assessment of damages, and that the amount thereof shall be deposited in Court before the entry can be made." The note proceeds to explain the Commissioners' reasons for providing the alternative of permitting the posting of "security," especially a bond. That section was declared

possession until the compensation is made, nor, if we may indicate our ideas of policy, should there be in any State."; *Johnson v. Alameda County*, 14 Cal. 106, 107 (1859) "The compensation should have preceded or accompanied the taking and without it every act of the [condemnor] was illegal and void."

¹⁰⁰ 137 Cal. 575, 70 Pac. 629 (1902).

¹⁰¹ 95 Cal. 220, 30 Pac. 218 (1892).

¹⁰² 137 Cal. 575, 70 Pac. 629 (1902).

¹⁰³ 151 Cal. 271, 90 Pac. 706 (1907).

¹⁰⁴ 34 Cal. 2d 845, 215 P.2d 462 (1950).

¹⁰⁵ See Legislative History in CAL. CODE CIV. PROC. § 1254 (Deering 1959).

unconstitutional by a number of Supreme Court decisions in the 1870's.¹⁰⁶

In 1877 the section was changed to provide for possession "at any time after trial by jury and judgment entered . . . wherever the plaintiff shall have paid into Court, for the defendant, the full amount of the judgment . . ." As this was the provision in effect at the time of the Constitutional Convention of 1879, it can be argued that the first clause of section 14 of article I merely adopts this statutory provision. The difference in language, however, could also indicate a calculated difference in the constitutional requirement and the then existing statutory provision.

In *Spring Valley Water Works v. Drinkhouse*,¹⁰⁷ the California Supreme Court held the 1877 version of section 1254 constitutional, rejecting various arguments based upon the wording of section 14 of article I of the constitution as adopted in 1879.

In 1897 the Legislature changed the section entirely and provided that possession might be had "at any time after the filing of the complaint, and the issuance and service of the summons thereon." Most remarkably, in view of the history of this subject, that version permitted the plaintiff to "pay a sufficient sum of money into court, or give security for the payment thereof, to be approved by the judge of such court." Obviously, in case of the posting of a bond, no funds could be withdrawn by the property owner. The section was hopelessly ambiguous whether funds paid into court, if that course were followed, could have been withdrawn on deposit or only upon final judgment.

An order for "immediate possession" under those provisions came before the California Supreme Court in *Steinhart v. Superior Court*.¹⁰⁸ The opinion does not indicate whether, in that particular instance, a bond was filed or cash was deposited. The court granted prohibition to prevent execution of the order. All that one can learn for certain from the decision is that a railroad might not acquire immediate possession in 1902 under such provisions.

The decision is usually analyzed as requiring that the funds deposited must be subject to withdrawal by the property owner before possession may be taken.¹⁰⁹ The author of the opinion did observe:

¹⁰⁶ See cases cited note 93 *supra*.

¹⁰⁷ 95 Cal. 220, 30 Pac. 218 (1892).

¹⁰⁸ 137 Cal. 575, 70 Pac. 629 (1902).

¹⁰⁹ For a discussion of the *Steinhart* case making this analysis, see Note, *Montana's Condemnation Procedure—The Inadequacy of the "Commission System" of Determining Compensation*, 25 MONT. L. REV. 105, 130 (1963). See also 2 LEWIS, EMINENT DOMAIN § 836 at 1465-66 (3d ed. 1909).

I do not agree to the proposition that compensation is made to the owner by paying into court a sum of money before the damage has been judicially determined and when the property-owner cannot take the money. Surely he is not compensated until he may take the money. It is not paid into court *for him* until he can take it. In the Spring Valley case he might have taken; here he could not, and therefore compensation in such a case is not *first* made.¹¹⁰

The decision is not based upon any distinction between "corporations other than municipal" and other condemners. In other words, the court applied the first, rather than the second, clause of section 14.¹¹¹ In fact, the opinion seems to suggest that any such distinction might violate the equal protection clause of the fourteenth amendment to the Constitution of the United States.

In all charity, the opinion in *Steinhart* is unfathomable. In this respect, it parallels the opinion in the companion case of *Beveridge v. Lewis*¹¹² which dealt with the offsetting of benefits. Each decision has had the effect of obscuring the law on the respective subjects for over half a century.

In 1903 the Legislature again amended Code of Civil Procedure section 1254 to provide for possession "at any time after trial and judgment entered or pending an appeal" upon the payment into court "for the defendant, the full amount of the judgment." The section was also changed to provide, as it now does, for immediate withdrawal of the total amount deposited by the defendant. An order for possession under these provisions came before the court in *Heilbron v. Superior Court* (another railroad case).¹¹³ The court sustained the provisions without criticizing or commenting on the *Steinhart* decision, other than to say that the 1897 provisions did not provide for payment of compensation into court "for the owner" as required by the first clause of section 14, article I, of the California Constitution. The court observed that the provisions of 1903 met constitutional requirements:

The constitution merely guarantees that there shall be ascertained and paid into court before plaintiff's right of entry attaches, the amount of the judgment, and this, notwithstanding that the judgment may be reversed and that the defendant may ultimately obtain a verdict for a much larger amount of money.¹¹⁴

¹¹⁰ 137 Cal. 575, 579, 70 Pac. 629, 630 (1902) (emphasis in original).

¹¹¹ *Ibid.* Decisions in states with provisions identical to the first and second clauses of section 14 differ as to whether the language of the second clause distinguishes between condemners in the matter of possession prior to judgment. Compare *Hughes Tool Co. v. Superior Court*, 91 Ariz. 154, 370 P.2d 646 (1962), with *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. 794 (1893).

¹¹² 137 Cal. 619, 70 Pac. 1083 (1902). See text accompanying note 90 *supra*.

¹¹³ 151 Cal. 271, 90 Pac. 706 (1907).

¹¹⁴ *Id.* at 278, 90 Pac. at 708.

Following this decision in 1907, the various amendments to section 14 began, including in particular the amendment of 1918 to authorize immediate possession in acquisitions of rights of way and the amendment of 1934 to include takings for reservoir purposes. Language added by the amendment of 1934 was presented to the court for construction in *Central Contra Costa Sanitary Dist. v. Superior Court*.¹¹⁵ The question of construction was whether sanitary districts were included in the amendment as "similar public corporations." The court held such districts to be included. A contrary view was expressed by Justice Carter, dissenting, as follows:

I think it is clear that the people of this state have not thus far expressed their willingness to confer such power upon a sanitary district and the holding of the majority to the contrary is a palpable distortion of the plain language used to express the intention of those who drafted the 1934 amendment and the voters who adopted it. . . . The people of the state should have the opportunity to decide what public agency should be given the power to take immediate possession.¹¹⁶

Although that argument goes only to construction of the existing constitutional authorization for "immediate possession," it does emphasize the long standing assumption that changes in the procedures for possession prior to judgment are to be made by amending section 14 of article I of the California Constitution. The court's emphatic rejection of that approach in construing section 14 may indicate that the assumption is not necessarily correct. Other appellate decisions, dealing with the date of valuation in immediate possession cases, use reasoning compatible with the Legislature's freedom to legislate in this area.¹¹⁷

Some support for the view that the Legislature may provide for possession prior to judgment, within the reasonable limitations of the first clause of section 14, can be derived from decisions arising under section 14 1/2. That section authorizes condemnation of property in addition to that actually needed for certain projects

¹¹⁵ 34 Cal. 2d 845, 215 P.2d 462 (1950).

¹¹⁶ *Id.* at 854, 215 P.2d at 467.

¹¹⁷ "[T]he constitutionally guaranteed right to receive just compensation of property taken or damaged for public purposes neither includes nor implies the right to have such compensation ascertained by any particular procedure or as of any certain date." *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 315, 283 Pac. 298, 305 (1929). "[I]t cannot be successfully contended that the mere entry into possession by the condemnor amounts to such a complete and irrevocable taking as to require application of the rule that the owner is entitled to the value of his land at the time it is taken. The Constitution guarantees that he be compensated only for whatever is taken from him—the value of the use for the time he is deprived of it, and the value of the fee or easement, and damages as of the time when title either actually or constructively passes." *City of Los Angeles v. Tower*, 90 Cal. App. 2d 869, 875-76, 204 P.2d 395, 400 (1949).

under very limited circumstances. The decisions have held that the section is not exclusive and does not preclude legislative authorization of similar acquisitions in other situations.¹¹⁸

E. Conclusion as to Need for a Constitutional Amendment to Extend Right of Immediate Possession

In view of the tangled history of the subject, it is obviously impossible to predict with certainty the position the California Supreme Court would take as to legislation, rather than a constitutional amendment, respecting possession prior to judgment.

The peculiar history of section 14 has resulted in constitutional language under which the existing authorization for "immediate possession" is seemingly cast as an exception to requirements that (1) compensation be paid or paid into court and (2) that the amount of such compensation be determined by jury before possession is taken. As has been demonstrated, however, that construction of the existing language does not stand up under careful analysis.

The two amendments to section 14 to provide the existing authorization were necessary because the added proviso does not purport to comply with the general requirement that compensation have "first been made to, or paid into court for, the owner." Although the constitutional "proviso" for immediate possession requires "security" for eventual payment of the award, the lack of any provisions whatever for withdrawal by the property owner of the amount deposited make the proviso a true exception to the requirement of payment into court *for the owner*. It is probably correct to state that the amendments were adopted to "overcome" the *Steinhart* decision. In view of their particular form, they not only overcome the result of that decision; they ride roughshod over the decision's construction of the first clause of section 14. The amendments and the resulting surface appearance of section 14 should therefore not be considered to preclude *legislation* authorizing possession prior to judgment on payment into court, for withdrawal by the property owner, of the amount of probable compensation determined by the court.

With respect to any assumed requirement of a previous determination *by jury* of the amount of compensation, it is notable that the decisions construing section 14, including *Steinhart*, are not based on any such requirement. The *Heilbron* decision, in fact,

¹¹⁸ *People v. Garden Grove Farms*, 231 Cal. App. 2d 666, 42 Cal. Rptr. 118 (1965); see also *Redevelopment Agency v. Hayes*, 122 Cal. App. 2d 777, 266 P.2d 105 (1954).

points out instances under existing legislation in which compensation is not "ascertained by jury" before possession is taken.

The *Steinhart* decision, however, is demonstrably correct in its view that section 14 is not so much concerned with security for eventual payment as it is with the assurance of prompt payment.¹¹⁹ Unfettered provisions for withdrawal of the amount deposited would therefore have to be (and should be) included in any legislation.¹²⁰ The lack of such assurance is a marked shortcoming of the existing "immediate possession proviso" in section 14.

Also, under the decisions from other states that have copied section 14, such legislation must provide for determination of the amount to be deposited by the court, rather than the condemning agency.¹²¹ As to this requirement, existing procedures conforming to the proviso in section 14 are adequate.

The ruling of the court would also depend upon its view of the fairness and practicality of the particular provisions enacted. The Supreme Court of Illinois recently overruled its contrary decision

¹¹⁹ See cases cited note 99 *supra*.

¹²⁰ See *People v. Neider*, 55 Cal. 2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961).

¹²¹ The Supreme Court of Washington invalidated that state's procedures because they required deposit of the amount of the condemnor's last offer to the property owner. *State v. Yelle*, 46 Wash. 2d 166, 279 P.2d 645 (1955). The Arizona Supreme Court has sustained a statute providing for determination of the amount of the deposit by the court. *Bugbee v. Superior Court*, 34 Ariz. 38, 267 Pac. 420 (1928). See also *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 370 P.2d 652 (1962). A concurring opinion in the Washington case explains the differences and the essential problem as follows: "The significant difference in the Arizona statutory procedure is the fact that thereunder the trial judge, without a jury, takes evidence as to *probable damages or compensation*, and thereupon determines or fixes the amount of *probable damages or compensation*. [Emphasis by the court.]

.....

"If legislation of the latter-mentioned type, comparable to that involved in [Arizona] had existed, it is my best judgment, and I am strongly convinced, that the court in the early Washington cases could, and probably would, have decided the basic questions involved in the same manner, but without being compelled to advert to the broad, sweeping language with reference to the matter of prepayment of compensation or damages.

.....

"These defects render our legislation invalid constitutionally (art. I, § 3, state constitution), strictly upon the ground of a lack of acceptable due process safeguards for property owners in eminent domain proceedings, where the state is seeking immediate possession of property for right-of-way purposes. The defects in the eminent domain procedure, as I see them, may be corrected by appropriate legislation, without the necessity of constitutional amendment." *State v. Yelle, supra* at 176, 279 P.2d at 651. Idaho invalidated a statute under which the deposit was determined by the condemnor's affidavit as to value. *Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955). Louisiana also held its statute to violate a constitutional provision prohibiting taking "until after just and adequate compensation" because the statute provided for a deposit by the condemnor of its own estimate of compensation. *State v. Phares*, 245 La. 534, 159 So. 2d 144 (1963).

of only seven years standing, to sustain provisions for possession prior to judgment in a well-designed statutory plan.¹²²

The result might also depend upon the aid offered the court in reconstructing the constitutional background of this subject. The Supreme Court of Arizona very recently sustained that state's immediate possession statute under constitutional provisions copied without change from the first and second clauses of section 14 of article I of the California Constitution.¹²³ The formal basis for the court's decision was its inquiry into the intentions and purposes manifested in that state's constitutional convention. These decisions represent the overwhelming weight and trend of authority in the other states.¹²⁴

Nevertheless, in its recommendation of 1961 on this subject, the Law Revision Commission resolved these considerations in favor of proposing a constitutional amendment and recommending enactment of statutory provisions made contingent upon adoption of that amendment.¹²⁵ That course would again seem appropriate whether the legislation be separate provisions for payment and possession or part of a comprehensive revision of the eminent domain title of the Code of Civil Procedure.

IV. FORMULATING A LEGISLATIVE SOLUTION

A. *Constitutional Revision*

The preceding analysis indicates that legislation broadening the right of immediate possession probably would be held constitu-

¹²² *Department of Pub. Works v. Butler Co.*, 13 Ill. 2d 537, 150 N.E.2d 124 (1958), *overruling* *Department of Pub. Works v. Gorbe*, 409 Ill. 211, 98 N.E.2d 730 (1951), and *sustaining* ILL. REV. STAT. 1957, ch. 47, §§ 2.1-2.10 (1957). See LAW REVISION GROUP, UNIVERSITY OF CHICAGO LAW SCHOOL, STUDY AND ACT RELATING TO VESTING OF POSSESSION BEFORE PAYMENT IN EMINENT DOMAIN PROCEEDINGS 45 (1956).

¹²³ *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 370 P.2d 652 (1962).

¹²⁴ Recent decisions sustaining application of statutes for possession prior to judgment under varying constitutional provisions include: *Adams v. Arkansas State Highway Comm.*, 235 Ark. 808, 363 S.W.2d 134 (1962); *Vivian v. Board of Trustees*, 152 Colo. 556, 383 P.2d 801 (1963); *Town of Darien v. Kavookjian*, 151 Conn. 684, 202 A.2d 147 (1964); *State Rd. Dep't v. Abel Inv. Co.*, 165 So. 2d 832 (Fla. 1964); *State Highway Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964); *State v. Marion Circuit Court*, 239 Ind. 327, 157 N.E.2d 481 (1959); *State v. Bradford*, 242 La. 1095, 141 So. 2d 378 (1962); *Portland Renewal Authority v. Reardon*, 159 Me. 31, 187 A.2d 634 (1963); *Heidenreich v. Second Judicial District Court*, 76 Nev. 249, 352 P.2d 249 (1960); *Pittsburgh Rys. v. Port of Allegheny County Authority*, 415 Pa. 177, 202 A.2d 816 (1964); *Jefferson County Drainage Dist. No. 6 v. Gary*, 362 S.W.2d 305 (Texas 1965).

For reviews of decisions on "immediate possession," see ABA SECTION ON LOCAL GOVERNMENT LAW, COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURE, REPORTS, 1963 at 143, 1964 at 112, 1965 at 137, 1966 at 138.

¹²⁵ See 3 CAL. LAW REVISION COMM., REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-1, B-10 (1961).

tional in California without any amendment of the California Constitution if such legislation included adequate procedural protections to the property owner. Nevertheless, an appropriate amendment of section 14, article I, is desirable in order to avoid any doubt concerning the constitutionality of such legislation.

The basic objective in any revision of section 14, article I, of the California Constitution should be to revise the section to make it clear that (1) the Legislature may determine the entities and agencies to benefit from provisions for possession prior to judgment and may specify the public purposes for which the privilege may be exercised, and (2) the property owner is guaranteed that he will actually receive compensation at the time possession of his property is taken.

Such a revision would make it unnecessary to amend the constitution every time it is found that existing procedures or authorizations need change. Not the least of the benefits to be derived from the amendment would be the restoration of clarity and precision to the principal section of the California Constitution dealing with eminent domain. Moreover, such an amendment would coincide with the efforts of the Constitution Revision Commission established by the California Legislature. The work of that commission, partially completed, looks to total revision of the California Constitution.

An appropriate amendment might take one of several forms. The entire content of section 14, except the basic guarantees of the first clause, could be eliminated.¹²⁶ The states that have most recently adopted constitutions have followed that course.¹²⁷

However, those public agencies that now have the privilege of possession prior to judgment in right of way and reservoir cases uniformly and strongly oppose deletion of the direct authorization from the constitution. There is at least political merit in that view and the authorization does not hamper revision of the constitutional and statutory law.

¹²⁶ In a study of the law of New York, two authorities have concluded that: "Article I, section 7 of the New York Constitution dealing with eminent domain should be amended to provide a simple but firm guaranty that any individual be fairly compensated in condemnation proceedings. In all other respects, we recommend that the constitutional provisions concerning details and methods of payment should be deleted since they form no proper part of a constitution. These simply clutter the constitution, which can be amended only with great difficulty; the details can be left to legislative decision. Municipal and state authorities should adopt the federal practice providing for payment of an estimated amount of compensation as a condition to vesting title, the exact amount to await the actual trial. . . ." Searles and Raphael, *Current Trends in the Law of Condemnation*, 27 *FORDHAM L. REV.* 529, 553 (1959).

¹²⁷ ALASKA CONST. art. I, § 18; HAWAII CONST. art. I, § 18.

Specifically, section 14 of Article I should be amended as follows:

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

2. The existing authorization for possession prior to judgment in right of way and reservoir cases should be retained, but should be subjected to a clear requirement of prompt compensation. The authorization in such cases also should be extended to all governmental entities and agencies having the right to take for right of way or reservoir purposes.

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

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

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

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

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

(d) The language of the first sentence requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed by such corporation" should be eliminated. The complex question of the offsetting of benefits in cases of partial takings should be left to treatment by the Legislature in keeping with more fundamental guarantees of the state and federal constitutions.

(e) The last sentence of the section, which provides, in effect,

that property may be taken for certain logging and lumbering railroads, and that such taking constitutes the taker a common carrier, should be deleted.¹²⁸

After such an amendment, section 14 would read:

(a)(1) Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner.

(2) Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury.¹²⁹

(b) Subject to subdivision (d) of this section, in a proceeding in eminent domain brought by the state or a county, city, district, or other public entity to acquire any property, whether a fee or other interest be sought, the plaintiff may take possession of the property or property interest following commencement of the proceeding and prior to the final judgment if the property or property interest being acquired is (1) any right of way, or (2) lands to be used for reservoir purposes.

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

(d) Before possession of any property or property interest is taken in an eminent domain proceeding, just compensation shall be made to the owner or the plaintiff shall deposit such amount of money as the court determines to be the probable just compensation to be made for the property or property interest and any damage incident to the taking. The money so deposited shall be available immediately to the person or persons the court determines to be entitled thereto and may be withdrawn in accordance with such procedure and upon such security as the Legislature may prescribe.

B. *Immediate Possession Practice*

Adoption by the voters of the recommended constitutional amendment would not, of itself, substantially change existing Cali-

¹²⁸ This provision, added in 1911, has never been construed or applied by the California appellate courts. The portion of the sentence making the taker a common carrier is merely an instance of a broader proposition inherent in the nature of power of eminent domain. *Western Canal Co. v. Railroad Comm'n*, 216 Cal. 639, 15 P.2d 853 (1932); *Traber v. Railroad Comm'n*, 183 Cal. 304, 191 Pac. 366 (1920). Deletion of the sentence clarifies, rather than changes, existing law.

¹²⁹ The purpose of making this paragraph "subject to the provisions of section 23a of article XII" is to prevent any implication that section 23a is superseded by the readoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to be made in takings of public utility property. See the text accompanying note 149 *infra*.

fornia practice respecting possession in eminent domain proceedings. The precise effect of the amendment would be to permit all governmental entities and agencies, rather than only those entities now named, to obtain "immediate possession," under existing procedures and with existing consequences, in takings of "rights of way" and "lands for reservoir purposes." The constitutional provision for such possession has been held to be self-executing in the sense that no legislation is required to authorize a condemning agency to avail itself of the provision.¹⁸⁰ However, the essential purpose of the amendment is to permit the Legislature to deal with the matter of possession in a comprehensive revision of the law applicable to all eminent domain proceedings. There would remain for legislative consideration the questions of how inclusive provisions for possession prior to judgment should be; whether existing procedures in immediate possession cases are appropriate; and whether the incidents and effects of possession being taken prior to judgment should be changed.

Before considering immediate possession practice in detail it will be useful to outline briefly the existing procedure. A California condemnor may obtain an order for immediate possession upon a showing to the court that all of the following requirements are satisfied:

- (1) The plaintiff must be one of those public bodies authorized to obtain immediate possession;
- (2) The purpose of the condemnation must be for a right of way or a reservoir;
- (3) Proper notice of the order for possession must be given to the property owner and occupants of the property;
- (4) The condemnor must deposit "probable just compensation" for the property as determined by the court on ex parte application.

If these requirements are met, the court will issue an order, also on ex parte application, authorizing the condemnor to take immediate possession and use of the property. If a defendant believes that the amount deposited is inadequate, he may move the court for an order increasing the amount. A property owner is entitled to withdraw all or any portion of the amount deposited. If he withdraws any portion of the deposit, however, he waives all defenses to the taking except his claim for greater compensation.¹⁸¹

¹⁸⁰ *Young v. Superior Court*, 216 Cal. 512, 15 P.2d 163 (1932); *Fletcher v. District Court of Appeal*, 191 Cal. 711, 714, 218 Pac. 391, 392 (1923): "The right to the possession of the property was transferred by the constitution itself . . . upon the compliance with the terms fixed by the constitution."

¹⁸¹ CAL. CODE CIV. PROC. §§ 1243.4, 1243.5, 1243.7. See also CALIFORNIA CON-

1. Classification of Condemnors and Authorized Purposes

Both the California Constitution and statutory law limit the public agencies that can obtain an order of immediate possession 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."¹³² The only decision construing the term "similar public corporation" has held a sanitary district to be included.¹³³ This existing list of entities has resulted from piecemeal amendments to the constitution, and there appears to be no logical basis for a distinction between the entities included and those omitted.

The purposes for which immediate possession may be taken are limited to "rights of way" and "lands to be used for reservoir purposes." The court order authorizing the taking of possession must state that the condemnation is for one of these purposes.¹³⁴ The term "right of way" is given its common or lay meaning, rather than a legal interpretation. For example, the authorization includes the easement necessary for sanitary sewers,¹³⁵ but does not include the property interest necessary for airports or approaches to airports.¹³⁶ The phrase "lands to be used for reservoir purposes" is given an expansive meaning. The term has been held to include lands containing dredger tailings taken for fill, even though the land was located six miles from the project. The court rejected the contention that the term included only the dam or reservoir site itself.¹³⁷

It is apparent that these two authorizations apply in a wide range of cases. "Rights of way" includes most acquisitions for street and highway purposes, and a great number of municipal improvements. At the level of state government, the authorization is roughly equivalent to acquisitions by the Division of Highways. As expansively interpreted, the authorization for "lands for reservoir purposes" has facilitated the acquisition of property for the development and conservation of water resources. Again at the level of state government, it covers most activities of the Department of

TINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE §§ 11.1-19 (1960); CAL. DEP'T OF PUBLIC WORKS, CONDEMNATION PROCEDURE MANUAL, IV-1 to IV-49 (1966).

¹³² CAL. CONST. art. I, § 14; CAL. CODE CIV. PROC. § 1243.4.

¹³³ Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal. 2d 845, 215 P.2d 462 (1950).

¹³⁴ CAL. CODE CIV. PROC. § 1243.5(d)(2).

¹³⁵ See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal. 2d 845, 215 P.2d 462 (1950).

¹³⁶ Almada v. Superior Court, 149 P.2d 61 (3d Dist. Ct. App. 1944).

¹³⁷ State v. Superior Court, 208 Cal. App. 2d 659, 25 Cal. Rptr. 363 (1962).

Water Resources. It has become apparent, however, that these two classes are neither entirely logical nor sufficiently inclusive. For example, local governments may take possession of the rights of way for a sewerage system, but may not obtain possession of the site for a sewage treatment plant. The development of highways, and especially freeways, sometimes necessitates the taking of property outside the rights of way. Even though the acquisition is by the Division of Highways, no authorization exists for early possession of property outside the boundaries of the right of way.

Rather than stating and limiting the authorization for possession prior to judgment in terms of certain named public entities and two public uses, legislation should classify condemnors and acquisitions in accordance with the nature of the issues that may be raised in the condemnation proceeding, and specify procedures applicable to each class that will fully protect the rights of persons whose property is being taken. In terms of condemnation procedure, the most meaningful distinction can be made in connection with the procedural aspects of the question of "public necessity." In every acquisition by eminent domain, taking of the property must be "necessary."¹³⁸ Thus, it must be determined that there is a public necessity for the particular improvement or project, that the taking of the particular property is necessary to accomplish the public project or improvement, and that the project or improvement is planned or located in a manner most compatible with the greatest public good and the least private injury.¹³⁹

As a general proposition, these issues are to be determined by the court after consideration of evidence in the condemnation proceeding. The most significant development in California condemnation law since adoption of the Code of Civil Procedure, however, has been the enactment of statutes which relegate the issue of "public necessity" to the legislative or administrative branches of government, rather than to the courts. This development began in 1913 by amendment of the second subdivision of Code of Civil Procedure section 1241 to provide that a resolution or ordinance adopted by a city or county and authorizing a condemnation proceeding has the effect in such proceeding of being "conclusive evidence" of any issue of necessity.¹⁴⁰ The resolution or ordinance has that effect, however, only if adopted by vote of two-thirds of the members of the governing body, and if the taking is of property within the terri-

¹³⁸ CAL. CODE CIV. PROC. § 1241(2). As to the issue of public necessity generally, see 1 NICHOLS, EMINENT DOMAIN § 4.11 (3d rev. ed. 1966).

¹³⁹ See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE § 8.1-.58 (1960).

¹⁴⁰ Cal. Stat. 1913, ch. 293, § 1, p. 549.

torial limits of the city or county. Since 1913, the section has been amended many times to add a great range of local governments, including the principal types of public districts.

From this beginning, conclusive legislative or administrative determination of the issue of "public necessity" has spread to most authorizations for taking by public agencies and entities.¹⁴¹ For example, of the ten state agencies authorized to condemn property, the resolutions of eight are made conclusive of the existence of public necessity; the resolutions of the other two are made "prima facie evidence" on that issue.¹⁴²

The pervasive effect of these conclusive resolutions, ordinances, or declarations in condemnation proceedings can be seen in the reasoning of the leading California Supreme Court decision:

[T]he questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvements cannot be made justiciable issues To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive, but would open the door to endless litigation and perhaps conflicting determinations of the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement.¹⁴³

In short, such a resolution substantially eliminates any possibility of the proceeding failing and reduces the condemnation action to an evaluation proceeding in virtually all cases. This inevitability of the taking warrants appropriate provisions for possession prior to judgment, whatever the public use or purpose for which the property is being acquired.

The lack of any correspondence between the provisions for immediate possession and those for conclusive determination of necessity has always been an anomaly. If an entity or agency is sufficiently responsible to determine conclusively the need for acquiring the property, it should also be considered sufficiently responsible to invoke procedures for early possession.

A wide range of cases still fall outside the provisions for conclusive non-judicial determination of "public necessity." Takings

¹⁴¹ An exhaustive list of these agencies, entities, and statutes is contained in the Appendix.

¹⁴² The resolutions of the State Park Commission (CAL. PUB. RESOURCES CODE § 5006.1) and the declaration of the State Adjutant General (CAL. MIL. & VET. CODE § 438) are prima facie evidence of necessity.

¹⁴³ *People v. Chevalier*, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959). See also *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923).

by cities, counties, and most local governments that are not authorized by two-thirds vote of the governing body, or that pertain to property outside the territorial limits of the entity, are excluded.¹⁴⁴ Acquisitions by entities or agencies whose resolution is only prima facie evidence of necessity, or whose resolution is given no assigned effect in the condemnation proceeding, are also omitted.¹⁴⁵ As conclusive resolutions issue only from governmental bodies, all acquisitions by public utilities, common carriers, and other public service corporations are not affected. In these takings, the certificate of public convenience and necessity obtained from the Public Utilities Commission plays a vital role in the court's determination of necessity.¹⁴⁶ Lastly, the very limited cases in which private persons may invoke the power of eminent domain under Civil Code section 1001 are not covered.¹⁴⁷

Although it would be reasonable to extend the right to early possession to all condemners empowered to make a conclusive determination of necessity, the provisions for such possession should not be restricted to those bodies. In some situations an identical public service may be provided by a governmental entity whose resolution of necessity is conclusive, an entity whose resolution is not conclusive, or a public utility. Even though the issue of public necessity is handled differently as to each condemner, the need for early possession is the same in each case. In acquisitions not affected by a conclusive resolution of necessity, the necessary safeguard should be incorporated into the immediate possession procedure. As to this class of takings, it would be appropriate to prescribe a noticed motion procedure in which the court may determine preliminarily any issue of public necessity, the right to acquire the property generally,

¹⁴⁴ For an example of the litigation of the issue of necessity in such cases, see *City of Hawthorne v. Peebles*, 166 Cal. App. 2d 758, 333 P.2d 442 (1959).

¹⁴⁵ For examples of the determination of necessity in such cases, compare *People v. Van Gorden*, 226 Cal. App. 2d 634, 38 Cal. Rptr. 265 (1964), and *People v. O'Connell Bros.*, 204 Cal. App. 2d 34, 21 Cal. Rptr. 890 (1962). For other decisions in which the taking by a public entity or agency was not governed by a conclusive resolution, see *Rialto Irrigating Dist. v. Brandon*, 103 Cal. 384, 37 Pac. 484 (1894); *Los Altos School Dist. v. Watson*, 133 Cal. App. 2d 447, 284 P.2d 513 (1955); *Housing Authority v. Forbes*, 51 Cal. App. 2d 1, 124 P.2d 194 (1942); *Montebello Unified School Dist. v. Keay*, 55 Cal. App. 2d 839, 131 P.2d 384 (1942).

¹⁴⁶ See *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App. 2d 472, 14 Cal. Rptr. 899 (1961). As to the issue of necessity in takings by public utilities and common carriers, see *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 92 Pac. 849 (1907); *San Francisco & S.J.V. Ry. v. Leviston*, 134 Cal. 412, 66 Pac. 473 (1901); *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681 (1891); *California Cent. Ry. v. Hooper*, 76 Cal. 404, 18 Pac. 599 (1888); *Eel River & Eureka R.R. v. Field*, 67 Cal. 429, 7 Pac. 814 (1885); *Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. 896 (1910). See also Comment, 7 U.C.L.A. L. Rev. 327, 333-35 (1960).

¹⁴⁷ See *Lingi v. Garovotti*, 45 Cal. 2d 20, 286 P.2d 15 (1955). See also Note, *Eminent Domain: Right of Exercise by a Private Person*, 44 CALIF. L. Rev. 785 (1956).

the right to invoke the early possession procedure, and the amount of probable compensation to be deposited.¹⁴⁸ This right to obtain possession upon noticed motion should be limited, however, to public entities, public utilities, and common carriers. The right should not be extended to the exceptional cases of so-called "private" condemnation.

2. Immediate Possession of Public Utility Property

The recommended scheme for possession prior to judgment takes account of all California condemnation with a single exception. Section 23a of article XII of the California Constitution permits the Legislature to authorize the Public Utilities Commission to "fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings." Legislation implementing this authorization constitutes the only exception to the uniform application of the eminent domain title of the Code of Civil Procedure (sections 1237-1266.2) to all condemnation.¹⁴⁹

Pursuant to this constitutional authority, the Legislature has enacted Public Utilities Code sections 1401-1421. These sections permit any "political subdivision" to take "the land, property, and rights of any character whatsoever of any public utility" and to have the compensation for such taking determined by the Public Utilities Commission. To obtain the determination of the Commission, the political subdivision may proceed in either of two ways. It may file a "petition of the first class" stating its intention to acquire the public utility by eminent domain proceedings, or it may file a "petition of the second class" stating its intention to submit to its voters a proposition to acquire the public utility.¹⁵⁰ In either case, if the public utility declines to accept the compensation determined by the Commission, eminent domain proceedings are begun by the political subdivision and, in those proceedings, the court includes the Commission's determination of value in its judgment.¹⁵¹

A consequence of extending the provisions for possession prior to judgment to all condemners whose resolution of necessity is conclusive would be to encompass these proceedings under the Public

¹⁴⁸ As to motion and ex parte procedure, see the text at note 158 *infra*.

¹⁴⁹ Two local improvement acts seemingly set forth systems for taking property entirely apart from the provisions of the Code of Civil Procedure. On analysis, however, these acts merely restate the provisions of the Code of Civil Procedure except that, at the option of the property owner, compensation is determined by three referees appointed by the court, rather than by the court or jury. See the Street Opening Act of 1903 (CAL. STS. & HY. CODE §§ 4000-4443) and the Park and Playground Act of 1909 (CAL. GOVT. CODE §§ 38000-38213).

¹⁵⁰ CAL. PUB. UTIL. CODE § 1403.

¹⁵¹ CAL. PUB. UTIL. CODE § 1416.

Utilities Code. Under existing law, there is no correspondence between the constitutional authorization for immediate possession and these provisions for acquisition of public utility systems by political subdivisions.¹⁵² Although it would be possible simply to exclude application of the recommended provisions for possession prior to judgment to these proceedings, there is no impelling reason to do so. As the eminent domain proceedings are filed after the determination of value by the Public Utilities Commission, the court would determine probable just compensation to be, and require deposit of, the amount determined by the Public Utilities Commission. Early possession in these proceedings would obviate several problems of compensation and property valuation that are peculiar to takings of public utility property and that arise from any protracted period between the filing of the eminent domain proceeding and final judgment.¹⁵³

The procedures of the Public Utilities Code are expressly made alternative to proceedings under the Code of Civil Procedure.¹⁵⁴ The political subdivision may therefore proceed directly with a judicial condemnation action. In these cases the court or jury determines compensation, but valuation methods similar to those employed by the Public Utilities Commission are applied.¹⁵⁵ Under the recommended scheme, possession prior to judgment would be available in these cases.

3. Procedure in Immediate Possession Cases

Section 14 of article I of the California Constitution does not undertake to specify the procedure for effectuating the "immediate possession" which it authorizes. Before 1961, there were no statutes on the subject, but it was assumed that the order was obtained by *ex parte* application and that practice developed. As added in 1961, Code of Civil Procedure section 1243.5 continues and delineates the practice.

Although section 1243.5 was enacted on recommendation of the Law Revision Commission, an important feature of the Commis-

¹⁵² The single exception pertains to takings necessary to eliminate grade crossings. CAL. PUB. UTIL. CODE § 1202.1 expressly provides for the taking of possession prior to the determination of compensation in railroad crossing proceedings, whether the proceeding is begun initially in the superior court or before the Public Utilities Commission.

¹⁵³ See, *e.g.*, *City of North Sacramento v. Citizens Util. Co.*, 218 Cal. App. 2d 178, 32 Cal. Rptr. 308 (1963) holding that the interest-less-benefits provisions of CAL. CODE CIV. PROC. § 1255b do not apply in takings of public utility property.

¹⁵⁴ CAL. PUB. UTIL. CODE § 1421.

¹⁵⁵ See *Citizens Util. Co. v. Superior Court*, 59 Cal. 2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963).

sion's recommendation was not adopted. The recommendation would have effected a compromise between ex parte procedure and noticed motion procedure by permitting the condemnee to contest the taking of the property or the taking of immediate possession before possession can be taken under the order for possession. Under that recommendation the following language would have been included.

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 of an occupant of the property, may:

(1) Stay the order upon a showing that the hardship to the moving party of having immediate possession taken clearly outweighs the hardship of the stay to the plaintiff.

(2) Vacate the order if the court determines that the plaintiff is not entitled to take the property by eminent domain or that the plaintiff is not authorized to take immediate possession of the property.

....

Failure of a party to make a motion to stay or vacate an order authorizing immediate possession is not an abandonment of any defense to the action or proceeding.¹⁵⁶

Forceful objections were made to that proposal on two grounds. First, it was contended that any provision for stay of the order for possession would permit the courts, rather than administrative agencies, to determine the essentially administrative question of the need for early possession. Second, it was pointed out that, although legislation makes no reference to modification of an order for possession, the court making the order is authorized under Code of Civil Procedure section 937 to modify or vacate the original order upon ex parte application, without notice or hearing.¹⁵⁷

Other states divide about equally in providing for immediate possession by ex parte application or by noticed motion procedure. For example, the model statute prepared by the Highway Research Board exemplifies provisions enacted in many states, and has been used as the basis for legislation, especially in those states in which distinctive treatment is given condemnation for highway purposes.¹⁵⁸ The model statute proposed by the Highway Research Board provides alternatives: (1) an immediate possession order obtained upon

¹⁵⁶ 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-14 (1961).

¹⁵⁷ Letter From Robert E. Reed, California Department of Public Works, to California Law Revision Commission, Sept. 1, 1960. The single appellate decision sanctioning this procedure is *Darbee v. Superior Court*, 138 Cal. App. 710, 33 P.2d 464 (1934).

¹⁵⁸ HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33, at 13 (1958).

ex parte application of the condemnor, or (2) an immediate possession order obtained upon noticed motion.

The obvious purpose of noticed motion procedure is to permit the property owner, if he chooses, to be heard on the questions of the right of the plaintiff to take the property and of its right and need to take early possession. The objections are that such procedure entails greater burdens to the plaintiff and the courts and may tend to dissipate the advantages of "immediate" possession to the condemnor. 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.

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."¹⁵⁹ 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.¹⁶⁰ In contrast, the constitutionally authorized order for immediate possession is available to the plaintiff as a matter of right.¹⁶¹ 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. For example, the comprehensive statute recently enacted in Illinois requires notice of motion for an order of immediate possession to include the following:

[T]he formally adopted schedule or plan of operation for the execution of the petitioner's project; the situation of the property to which the motion relates, with respect to such schedule or plan; and the necessity for taking such property in the manner requested¹⁶²

Acting on this information and any evidence offered by the property owner, the court finds whether "reasonable necessity" requires taking of possession in the manner requested.¹⁶³ The statute

¹⁵⁹ *E.g.*, *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103, 36 Cal. Rptr. 308 (1964).

¹⁶⁰ *Housing Authority v. Superior Court*, 18 Cal. 2d 336, 115 P.2d 468 (1941).

¹⁶¹ See, *e.g.*, *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).

¹⁶² ILL. REV. STAT. ch. 47, § 2.1 (Supp. 1965).

¹⁶³ ILL. REV. STAT. ch. 47, § 2.2 (Supp. 1965).

was promptly attacked on constitutional grounds, principally because of its asserted lack of sufficient standards, and was sustained in this and other respects by that state's supreme court.¹⁶⁴

In an extension of existing California procedure beyond right of way and reservoir cases, the court should be expressly authorized to weigh the relative needs of the parties. In addition to putting the right to early possession on a rational basis, any possibility of administrative abuse of the privilege would be precluded.

Under existing practice, an appeal may not be taken from an order authorizing or denying possession prior to entry of judgment. Mandamus, prohibition, or certiorari are the appropriate remedies.¹⁶⁵ However, the order for possession following entry of judgment is an appealable order.¹⁶⁶

The legislation proposed by the Law Revision Commission in 1961 would not have permitted a defendant to appeal from an order for immediate possession. To have done so would have substantially nullified the right to such possession. However, the following provision was recommended:

The plaintiff may appeal from an order staying the order authorizing immediate possession. Any aggrieved party may appeal from an order granting or denying a motion to vacate an order authorizing immediate possession. The appeal does not stay the order from which the appeal is taken or the order authorizing immediate possession; but the trial or appellate court may, in its discretion, stay the order authorizing immediate possession pending review on appeal or for such other period or periods as to it may appear appropriate.¹⁶⁷

The concern of the Commission was not the right to early possession, but rather the ultimate right of the plaintiff to take the property.¹⁶⁸ A final determination of any genuine issue as to "public use" or "public necessity" should precede the condemnor's tak-

¹⁶⁴ Department of Pub. Works v. Butler Co., 13 Ill. 2d 537, 150 N.E.2d 124 (1958).

¹⁶⁵ County of Marin v. Superior Court, 53 Cal. 2d 633, 2 Cal. Rptr. 758, 349 P.2d 526 (1960); Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal. 2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922); State v. Superior Court, 208 Cal. App. 2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App. 2d 587, 12 Cal. Rptr. 836 (1961).

¹⁶⁶ San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App. 2d 668, 267 P.2d 349 (1954); Housing Authority v. Forbes, 47 Cal. App. 2d 358, 117 P.2d 722 (1941). Following the second decision, the section was amended to prevent appeal of an order for possession after judgment in condemnations by school districts. Cal. Stat. 1955, ch. 929, § 1, p. 1557. That special provision was eliminated in the general revision of the section in 1961.

¹⁶⁷ 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-14 (1961).

¹⁶⁸ *Id.* at B-7.

ing of possession. These defenses may be rendered meaningless if, at the time the questions are finally determined, the condemnor has demolished structures or completed the public improvement. On application for immediate possession under existing law, the court is required to determine whether "the plaintiff is entitled to take the property by eminent domain,"¹⁶⁹ but that determination is preliminary rather than final.¹⁷⁰

Conceding the need of property owners for protection in this respect, it is not clear that a provision for appeal, rather than existing writ practice, would be an improvement. Recent appellate decisions permit any issue as to the plaintiff's right to take the property to be determined in an extraordinary writ proceeding dealing with an order or proposed order for possession.¹⁷¹ In the ensuing eminent domain proceeding that determination is final.¹⁷² Writ practice has the additional advantages of expedition and of eliminating the need to have the trial court record prepared.

In connection with the enforcement of orders for possession, it should be noted that neither an order for immediate possession, an order for possession pending appeal, nor the final order in condemnation, is the equivalent of a "writ of possession" or "writ of assistance." Although such orders entitle the condemnor to possession in accordance with their terms, they must be enforced by other process. The writ of assistance is the remedy available to a condemnor entitled to possession under any order of the condemnation court.¹⁷³ Section 1254 of the Code of Civil Procedure formerly made provision for writs of assistance in condemnation proceedings, but those provisions were deleted, apparently through inadvertence, in one of the many revisions of section 1254 for other purposes.¹⁷⁴ The writ is, however, obtainable as a matter of right, and mandamus will issue to require its issuance and execution.¹⁷⁵ A court may also issue orders preventing the plaintiff from taking possession of the

¹⁶⁹ CAL. CODE CIV. PROC. § 1243.5(b).

¹⁷⁰ CAL. CONST. art. I, § 14 contemplates situations in which the preliminary determination may ultimately be overturned. It provides in this respect that the security deposited must cover this eventuality. The section accords with CAL. CODE CIV. PROC. § 1255a, dealing with abandonment, which provides for restoration of the property to the defendant if a proceeding is abandoned after possession has been taken or the plaintiff is determined not to have the right to take the property.

¹⁷¹ See cases cited note 165 *supra*. Accord, *United States v. Cobb*, 328 F.2d 115 (9th Cir. 1964) (Federal practice).

¹⁷² *State v. Natomas Co.*, 239 Cal. App. 2d 608, 49 Cal. Rptr. 64 (1966).

¹⁷³ See *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305 (S.D. Cal. 1921).

¹⁷⁴ CAL. CODE CIV. PROC. § 1254, as amended by Cal. Stat. 1897, ch. 127, § 1, p. 186; deleted by Cal. Stat. 1903, ch. 98, § 1, p. 109.

¹⁷⁵ *Rafferty v. Kirkpatrick*, 29 Cal. App. 2d 503, 88 P.2d 147 (1938).

property or restoring the defendant to possession.¹⁷⁶ In the interest of codification, these existing powers and practices should be stated in section 1247 of the Code of Civil Procedure.

In summary, therefore, the *ex parte* procedure now provided for cases in which immediate possession of property is being taken for right of way or reservoir purposes should be continued. In the expanded range of cases in which any condemnor whose resolution of necessity is conclusive may obtain possession prior to judgment, *ex parte* procedure should be provided, but the court should be required to find that the plaintiff has, in fact, adopted such a resolution. In these cases, after being served with an order for possession, any owner or occupant of the property should be permitted to move for a stay or vacation of the order.

In all other cases in which immediate possession is authorized, the application should be made by noticed motion. On hearing of the motion, the court should consider relevant evidence, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to that schedule or plan. It should make an order authorizing the plaintiff to take possession of the property only if it determines that the need of the plaintiff for possession of the property outweighs any hardship the owner or occupant of the property will suffer if possession is taken.

4. Notice to the Condemnee

By its terms section 14 of article I of the California Constitution does not require any notice or delay in the effective date of the order of immediate possession for which it provides. In 1957, section 1243.5 was added to the Code of Civil Procedure to require three days' notice in immediate possession cases. On recommendation of the Law Revision Commission, Code of Civil Procedure section 1243.5 was amended in 1961 to require that the condemnee be given 20 days' notice prior to the time possession is taken.¹⁷⁷ The section contains an exception to the normal 20 days' notice which permits the court, upon "good cause shown by affidavit," to reduce the notice period to not less than three days.

Section 1243.5 also requires that notice be served on both the record owners of the property and upon any occupants. The section requires personal service of the order upon the condemnee unless

¹⁷⁶ See *Neale v. Superior Court*, 77 Cal. 28, 18 Pac. 790 (1888); *In re Bryan*, 65 Cal. 375, 4 Pac. 304 (1884).

¹⁷⁷ CAL. CODE CIV. PROC. § 1243.5(c). See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-6 (1961).

he has been served with a copy of the summons and complaint or has appeared in the proceedings. In the latter cases, service of the order may be made by mail on either the condemnee or his attorney. If a condemnee resides outside of the state, is absent from the state, or cannot with due diligence be found within the state, the condemnor may serve such condemnee by mail at his last known address. The court may, for good cause shown, authorize the condemnor to occupy the property without serving the order for possession upon a record owner who is not occupying the property.

Gauged by the current concern over the dislocation of persons by governmental activities,¹⁷⁸ existing procedure may be defective in failing to assure the homeowner or businessman a reasonable time in which to vacate the property. Only 20 days' notice can cause the occupant serious inconvenience and affords at least the possibility of coercive use of the right of immediate possession in settlement negotiations.

Massachusetts enacted legislation in 1964 which provides that no person shall be required to vacate property acquired by eminent domain until four months after he has been given notice of the taking.¹⁷⁹ A study prepared by the staff of the Select Subcommittee on Real Property Acquisition of the Committee on Public Works of the United States House of Representatives contains a recommendation that "clearing or construction should be so scheduled that an occupant is not compelled to move from a home, business, or farm without at least 180 days written notice of the date by which the move is required."¹⁸⁰ Senate Bill 1201 was introduced in the 89th Congress to effectuate the recommendations of the staff of the Select Subcommittee. Hearings were held on the bill,¹⁸¹ but no action was taken because various agencies requested time to study the comprehensive proposals of the Select Subcommittee.

¹⁷⁸ See, e.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESSES DISPLACED BY GOVERNMENTS (1965).

¹⁷⁹ Section 8B of chapter 79 of the General Laws of Massachusetts. MASS. GEN. LAWS ANN. ch. 79, § 8B (Supp. 1965) provides: "Section 8B. No person in possession of property which has been taken under the provisions of this chapter shall be required to vacate any portion of such property which is being used by him as a dwelling place or place of business at the time the order of taking is made until four months after notice of such taking has been given to him in accordance with the provisions of section seven C."

¹⁸⁰ STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 122-124 (Comm. Print 1964).

¹⁸¹ *Hearings on S. 1201 and S. 1681 Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 89th Cong., 1st Sess.* (1965).

Generally speaking, persons testifying took the view that the recommendation would impose a feasible requirement. For example, a representative of the Bureau of Public Roads stated the following view:

The amount of time required for planning is not the controlling factor since in many instances the notice could not be given until the planning is complete and final right-of-way lines have been established. The 180-day requirement would provide additional leadtime for the orderly right-of-way acquisition. After an initial slowdown to provide this leadtime, the program should proceed without further delays because of the requirement.¹⁸²

House Resolution 7984, the Housing and Urban Development Act of 1965, as passed by the House, contained the following provision:

(6) The construction or development of any public improvements shall be so scheduled that no person lawfully occupying the real property shall be required to surrender possession on account of such construction or development without at least 90 days' written notice from the applicant of the date on which such construction or development is scheduled to begin.

The Senate did not include this portion of the bill because Senate Bill 1201 and other bills were pending in a Senate Subcommittee.¹⁸⁸

Most California condemnees receive notice of impending condemnation long before the filing of any action. For example, the Department of Public Works provides advance notice of the date when possession is required by letters to occupants, personal visits, public hearings on proposed projects, public meetings held to discuss right of way procedures, and pamphlets mailed or delivered prior to inspection of the property for purposes of appraisal.

In addition to being of convenience to property owners, this effort facilitates the long range land acquisition programs of public agencies. As an official of the Department of Public Works has written:

It has long been established policy in California that a condemnation suit should not be filed, nor should possession be taken under court order, until a property owner has had a reasonable time in which to consider the state's offer to buy his property. The policy recognizes the necessity of the property owner as well as the value of good public relations. From time to time, however, the basic value of the policy has been brought forcibly home when other considerations have forced its abrogation.

¹⁸² *Id.* at 236.

¹⁸⁸ *Id.* at 188.

Unrealistic project deadlines which do not allow a property owner sufficient time for consideration and orderly relocation generate public rejection of efforts which might otherwise be met enthusiastically. . . .¹⁸⁴

A deficiency of informal notification given outside, and possibly before, the condemnation proceeding is that the property owner cannot rely explicitly upon such notice. He has no remedy in the event of a change in the condemning agency's plans.¹⁸⁵ Therefore, rather than following the federal proposals, it would be more appropriate to lengthen the period of notice given in connection with the court's order for "immediate" possession. If enacted, however, the federal legislation would apply to all federally assisted acquisitions. In that event, it would be almost imperative to adopt a conforming requirement in California law.

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 property 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.

5. Deposit and Withdrawal of "Probable Just Compensation"

Section 14 of article I of the California Constitution requires the condemnor, before immediate possession is taken, to deposit an amount determined by the court to be "reasonably adequate to secure to the owner of the property sought to be taken payment of just compensation for such taking and any damage incident thereto. . . ."

The section also provides that:

The court may, upon motion of any party to the eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.

Code of Civil Procedure section 1243.5, added in 1961, restates

¹⁸⁴ WOMACK, *How Can We Keep Right-of-Way From Slowing Down our Progress?*, ORGANIZATION OF AMERICAN STATES, NINTH PAN AMERICAN HIGHWAY CONGRESS, Doc. No. 50, at 6 (1963).

¹⁸⁵ See, e.g., *Hilltop Properties, Inc. v. State*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965). In that case the state communicated its intention to acquire two strips of plaintiff's property in order to widen a highway. The plaintiff allegedly left the strips unused at the specific request of the state. The court held that, in the absence of actual public work or interference with the property, the plaintiff was without remedy.

these procedures, clarifying the constitutional requirement to specify that the amount deposited must be "the probable just compensation" to be made for the property and any damages.¹⁸⁶ Although the established ex parte procedure was continued in the 1961 legislation, a duty was imposed upon the court to assure that the amount deposited be "probable just compensation."

Neither the amount deposited nor any amount withdrawn may be given in evidence or referred to in the trial of the issue of compensation.¹⁸⁷ Section 1243.6 of the Code of Civil Procedure, also added in 1961, requires that any amount to be deposited be deposited in the "Condemnation Deposits Fund" of the state treasury unless the condemnor requests that the money be deposited with the county treasurer. Interest or other earnings of the state fund are returned to the condemning agency.¹⁸⁸

The existing statutory provisions for determining the amount of probable just compensation and providing for its deposit result from the recommendation of the Law Revision Commission to the 1961 Legislature. At that time, the Commission appraised the existing practice and studied the great variety of procedures in other jurisdictions.¹⁸⁹ It was recognized that the amount deposited is determined more administratively than judicially, and typically is based upon the condemnor's staff or independent appraisals. It was also recognized that final awards generally exceed deposits. However, the property owner usually is not prepared to present evidence on the question of value at the time application is made to the court and considerations of time and expense preclude extensive inquiry into the issue of compensation. For these and other reasons considered in the earlier study, ex parte procedures for determining the amount of the deposit should be retained.

¹⁸⁶ CAL. CODE CIV. PROC. § 1243.5(a),(d).

¹⁸⁷ CAL. CODE CIV. PROC. § 1243.5(e).

¹⁸⁸ CAL. CODE CIV. PROC. § 1254.

¹⁸⁹ See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-38 (1961). A number of states follow the Federal Declaration of Taking Act, 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958), by permitting the preliminary determination of compensation to be made solely by the condemnor. Other jurisdictions require a hearing and consideration of evidence produced by the property owner. See HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33, at 8 (1958). The federal act requires deposit "of the sum of money estimated by said acquiring authority to be just compensation for the land taken." 40 U.S.C. § 258a. By its terms, the act makes no provision for judicial review of the amount of the deposit. The federal courts are in disagreement whether the court may order a change in the amount of the deposit for "abuse of discretion" or "bad faith" on the part of the condemnor. Very restrictive decisions include *United States v. Cobb*, 328 F.2d 115 (9th Cir. 1964) and *Washington v. United States*, 214 F.2d 33 (9th Cir. 1954). Decisions permitting such review include *United States v. 44 Acres of Land*, 234 F.2d 410 (2d Cir. 1956) and *United States v. 45.33 Acres of Land*, 266 F.2d 741 (4th Cir. 1959).

The most significant accomplishment of the 1961 legislation was to permit all condemnees to withdraw the full amount deposited for their property interests.¹⁹⁰ Section 1243.7 was added to the Code of Civil Procedure to provide a detailed procedure whereby the deposit may be withdrawn even though there may be conflicting claims to the award, and notwithstanding the fact that the amount deposited may have been increased on motion of the defendants.

The condemnee must apply to the court for an order permitting withdrawal. Such an order may not be made until 20 days after service on the condemnor of the application for withdrawal. Within the 20-day period, the condemnor may object to the withdrawal on the ground that other persons are known or believed to have interests in the property. If the condemnor objects, it must attempt to serve personally such other persons with a notice that they must appear within 10 days of service of such notice if they wish to contest the withdrawal. If the condemnor is unable to make such personal service, the person attempting to withdraw the deposit must make the service. Failure of a person so served to appear and object within 10 days after service waives "any right to such amount withdrawn or further rights against the [condemnor] to the extent of the sum withdrawn."

If a person served appears and objects to the withdrawal, or if the condemnor so requests, the court is required to hold a hearing, after notice to all parties, and to determine the amounts to be withdrawn. If the court determines that a party is entitled to withdraw any portion of a deposit claimed by another, it must require such party to file an undertaking to assure repayment of any excess withdrawal. When the final judgment determines the amount to which each party is entitled, any excessive withdrawal must be repaid to the person entitled, together with interest from the date of withdrawal.

If the total amount sought to be withdrawn prior to judgment exceeds the amount originally deposited, the person or persons attempting to withdraw any amount in excess of the original deposit must file an undertaking to assure repayment of the excess. The statute provides that bond premiums for such purposes are costs recoverable by the defendants in the proceeding. Any amount withdrawn is credited upon the final award. The statute also provides procedures for enforcing repayment of any excess withdrawals.

Withdrawal of the deposit is made a waiver by the person mak-

¹⁹⁰ CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE §§ 11.1-.19 (1960).

ing such withdrawal of all defenses to the condemnation proceeding except a claim for greater compensation.

At the time these provisions were adopted, the procedures were reviewed and revised in response to the Commission's recommendations¹⁹¹ and appear to have been working satisfactorily in most cases. Therefore, no basic changes in the system are indicated. The system should, however, be streamlined to further eliminate, insofar as possible, obstacles to withdrawal. For example, under existing law, the property owner is not necessarily notified of the making of a deposit unless and until he is served with an order of immediate possession. Notice of the deposit should be required to be given in all cases to facilitate withdrawal of the funds by the defendants. Under existing practice withdrawal of a deposit is not permitted unless personal service of the application to withdraw is made upon all parties. This requirement should be simplified by permitting service by mail upon the other parties and their attorneys, if any, in all cases in which the party has appeared in the proceedings or has been served with the complaint and summons. The existing absolute prohibition of withdrawal for lack of personal service also should be eliminated. Quite often "defendants" named in eminent domain proceedings can easily be shown to have no compensable interest in the property. In such cases, withdrawal should be permitted even in the absence of personal service. In all cases, the requirement of an undertaking for withdrawal should be left to the sound discretion of the court, rather than being required as a matter of course upon the appearance of any possible conflict, however technical, in claims to the eventual award.

6. Possession and Deposit on Demand of the Defendant

The several definite advantages accruing to the condemnee when immediate possession is taken have been outlined earlier in this article. In addition to permitting prompt receipt of "probable just compensation," the procedure alleviates various hardships faced by certain property owners in the substantial period of delay between filing of the condemnation proceeding and final judgment.

These considerations, and the fact that the advantages accrue only if early possession is taken, have led to recommendations in other states that the condemnee be given an option to require a preliminary transfer of possession and approximate compensation. For example, the recent study of New Jersey's law produced the following recommendation:

¹⁹¹ 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-1, B-7 (1961).

From time to time, agencies may institute proceedings, but not take possession of the property until after an award has been made. In the meantime, the owner is without funds to acquire substitute property and is unable to efficiently manage his property because of loss of tenants and inability to re-rent *pendente lite*. This is a great hardship to property owners, particularly to owners of small properties. It is recommended that if the condemning body does not take possession within three months after institution of the proceedings, any party in interest, upon application to the court, may require the condemning body to take such possession and make the deposit herein required unless for good cause, the court shall direct otherwise.¹⁹²

At least one state has enacted legislation based on a similar recommendation. The recently enacted Pennsylvania Eminent Domain Code provides:

If within sixty days from the filing of the declaration of taking, the condemnor has not paid just compensation as provided in subsection (a) of this section, the condemnee may tender possession or right of entry in writing and the condemnor shall thereupon make payment of the just compensation due such condemnee as estimated by the condemnor. If the condemnor fails to make such payment the court, upon petition of the condemnee, may compel the condemnor to file a declaration of estimated just compensation or, if the condemnor fails or refuses to file such declaration, may at the cost of the condemnor appoint an impartial expert appraiser to estimate such just compensation. The court may, after hearing, enter judgment for the amount of the estimated just compensation.¹⁹³

An official comment to the section makes clear its purpose and effect:

Even though the condemnor does not desire immediate possession after the condemnation, the condemnee, who may want to move immediately, has the right under this section, if the condemnor has not asked for possession within sixty days after the filing of the declaration of taking, to deliver possession to the condemnor and take the condemnor's estimate of just compensation without prejudice to his right to prosecute his claim for damages.

Although specific legislation to this effect appears never to have been proposed for California, the objective of such measures is often suggested by counsel for property owners.¹⁹⁴ Under existing

¹⁹² N.J. EMINENT DOMAIN REVISION COMM'N, REPORT 19 (1965).

¹⁹³ PA. STAT. ANN., tit. 26, § 1-407 (Supp. 1965).

¹⁹⁴ E.g., Letter From Julius H. Selinger to California Law Revision Commission, Jan. 4, 1966, stating: "A case discloses a void in the condemnation law which created . . . an injustice to the condemnees. That void consists in the inability of the condemnee to compel the condemnor to take immediate possession, deposit security for the part taken, and allow the condemnee to proceed with the remainder of the construction without waiting the outcome of the ultimate trial and thus delay the construction on the remainder with the consequent losses to the condemnee The state did not request an order for immediate possession and consequently there was no security deposit for the take I petitioned the court for an order directing the state to

law, the option to resort to the immediate possession and deposit procedures lies entirely with the condemning agency. Neither the court nor the condemnee has any powers in this respect, whether the objective of the property owner is merely to obtain compensation promptly¹⁹⁵ or to alleviate such a problem as that presented by a half-completed building.¹⁹⁶

Notwithstanding the novelty of such a procedure in California, it would not appear that most condemnors would be seriously inconvenienced. Filing of the condemnation proceeding is preceded by a legislative or administrative decision to acquire the property, and negotiations with the property owner have proved fruitless. As the time of filing the proceeding lies entirely within the discretion of the condemning agency, a requirement that it take possession and deposit probable just compensation promptly should not present inordinate administrative or fiscal difficulties. The major consequence of the procedure would be to virtually eliminate the condemnor's privilege to abandon the proceeding. Also, there are certain cases in which the public funds for acquisition of property are not available at the outset of eminent domain proceedings. Improvement, revenue, or general obligation bonds may have to be sold.¹⁹⁷ In certain limited situations, it is also necessary or convenient for the value of the property to be determined before the amount of the bond issue is established. It would be possible, however, to exclude such situations by permitting the condemning agency to file its affidavit that funds are not available in keeping with existing practice under Code of Civil Procedure section 1251.

Still another alternative would be to permit the condemnor to decline to make the deposit, but to provide that if it does so, interest on the eventual award accrues from the outset of the proceeding. Most importantly for condemnors, if possession is taken

take immediate possession of the taken portion so that the work on the remainder might proceed, pointing out the losses, delay in the completion of the twelve-unit structure on the remainder with cost to the condemnees. The court held that there was no legal authority by statute to compel the state to take immediate possession even under these circumstances, and the court would not resort to its inherent equitable power to compel the state to do so. The court held that under C.C.P. 1243.5, the condemnor alone is the judge of whether he wishes to take immediate possession and the courts may not compel the condemnor to do so From the foregoing I reached the conclusion that there ought to be in the proper case a mutuality of remedy; the condemnee ought to have the right to compel the condemnor to take immediate possession or in the alternative that damages resulting from failure to do so after a demand therefor be deemed proper elements of damage recoverable by the condemnees."

¹⁹⁵ See *County of Los Angeles v. Hunt*, 198 Cal. 753, 247 Pac. 897 (1926).

¹⁹⁶ See, e.g., *Consumers Holding Co. v. County of Los Angeles*, 204 Cal. App. 2d 234, 22 Cal. Rptr. 106 (1962).

¹⁹⁷ See CAL. CODE CIV. PROC. § 1251.

and a deposit is made on demand of the condemnee, interest should not be paid on the amount deposited after the date of such deposit. The resulting savings in interest costs would make such a requirement much more acceptable to the public agencies.¹⁹⁸ Another substantial advantage would accrue to condemnors from a corollary provision that compliance with a demand for depositing probable compensation results in a waiver of all defenses to the proceeding except claims to greater compensation.

It is therefore recommended that a provision entirely new to California law be enacted which permits the condemnee to move the court for an order determining probable compensation at the beginning of the proceedings or soon thereafter. On depositing the amount determined for withdrawal by the condemnee, the condemnor should be permitted to obtain an order for possession of the property. No interest on the eventual award should be payable to the extent of the amount deposited on demand of the condemnee. The condemnor should be permitted to decline to make the deposit, but in that event, interest at the legal rate of seven percent should accrue on the final award from the outset of the proceedings.

C. Possession After Entry of Judgment

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 de-

¹⁹⁸ A view typical of that expressed by public agencies is the following: "We submit that the condemning agency should retain discretion with respect to whether or not it should take immediate possession. The cost to the public at 7 percent interest, which runs under current law from the date of possession, is a substantial cost factor which should not be imposed upon the public if the condemning agency cannot use that possession in the best interest of the public."

"In the event that the Commission might deem it desirable to allow a property owner to require the condemnor to take possession, then as a corollary of such change in present law, the condemnor should be empowered to require the condemnee to withdraw the money deposited to secure the order of immediate possession. Perhaps the law could be drafted to provide that in the event that the condemnee obtains an order requiring the condemnor to take possession that in such event no interest would be payable on the deposit to secure the order. We feel that such provisions would balance the equities between the legitimate public interest in holding the line on the cost of public improvements and the legitimate interest of some defendants in obtaining a sum of money approximately equivalent to the value of their property prior to the final determination of the valuation of the property." Letter From Terry C. Smith, Los Angeles Deputy County Counsel, to California Law Revision Commission, Dec. 15, 1965.

posit of an additional sum to secure payment of any additional amount that may be recovered in the proceeding. The procedure is available even though the award is attacked by either party by motions in the trial court or by appeal. 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.¹⁹⁹

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 abandoned entirely. The procedure should be retained and improved even though the provisions for possession prior to judgment are greatly extended.²⁰⁰

Before 1961, the scope of the procedure for possession pending appeal was greatly restricted by an appellate decision that the condemnor might not deposit the award, take possession, and thereafter appeal.²⁰¹ This resulted in the procedure being entirely one-sided. It was available, in effect, only in those cases in which the defendant appealed or moved for a new trial. On recommendation of the Law Revision Commission,²⁰² this limitation was removed in 1961. The section now provides that:

¹⁹⁹ *Housing Authority v. Superior Court*, 18 Cal. 2d 336, 115 P.2d 468 (1941); *Heilbron v. Superior Court*, 151 Cal. 271, 90 Pac. 706 (1907).

²⁰⁰ The comparable provisions in other states are cited and discussed in HIGHWAY RESEARCH BOARD, SPECIAL REP'T 33: CONDEMNATION OF PROPERTY FOR HIGHWAY PURPOSES (1958) at 45. As to federal practice, the Declaration of Taking Act permits the declaration to be filed "with the petition or at any time before judgment." 40 U.S.C. § 258a. Similarly, Rule 71A of the Federal Rules of Civil Procedure has no application to deposits made by the government after judgment. *United States v. Hirsch*, 206 F.2d 289 (2d Cir. 1953). Notwithstanding these rules, the district courts are authorized by appellate decisions to permit any condemnor to take possession after judgment upon deposit of the amount of the award. *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455 (4th Cir. 1963).

²⁰¹ *Mt. Shasta Power Corp. v. Dennis*, 66 Cal. App. 186, 225 Pac. 877 (1924).

²⁰² 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-8, B-50 (1961).

The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.

Since 1961, related problems have arisen. Section 1252 of the Code of Civil Procedure enables the condemnor to deposit the amount of the award whether or not an appeal is to be taken, or post-judgment motions are to be made, by either party. Many condemnors deposit the award at the same time judgment is entered to avoid the computation and payment of interest.²⁰³ For years, statements have appeared in cases indicating that a defendant's withdrawal of a deposit made under section 1252 waives his right of appeal, while withdrawal of a deposit made under section 1254 would not.²⁰⁴

A recent decision has cast doubt on the validity of these statements by holding that a defendant may withdraw a deposit made under section 1252 without waiving his claim to a new trial on the issue of compensation.²⁰⁵ In brief, the decision held that a deposit made after judgment—not intended as a deposit to obtain possession—may be withdrawn by the defendant just as though it were a deposit made to obtain possession after judgment. Procedurally, the defendant can file a receipt and waiver of all defenses except his claim to greater compensation (the procedure specified in section 1254) and preserve his right to a new trial or appeal on the issue of compensation. The court held, however, that because of its effect as a waiver of all claims except to greater compensation, the withdrawal resulted in a surrender of the right of possession to the condemnor.

Another recent decision, however, has held that a post-judgment deposit may not be treated by the defendant as a payment made to "satisfy the judgment and end the litigation" within the meaning of Code of Civil Procedure section 1049.²⁰⁶ In short, by withdrawing the deposit the defendant may not preclude a motion for a new trial or appeal by the plaintiff.

This confusion between deposits made to obtain possession under section 1254 and deposits made in satisfaction of the judgment under section 1252 should be eliminated by providing a single

²⁰³ See *People v. Richman*, 242 A.C.A. 427, 51 Cal. Rptr. 454 (1966); CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE §§ 11.9-.10 (1960).

²⁰⁴ See *People v. Neider*, 55 Cal. 2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961); *People v. Dittmer*, 193 Cal. App. 2d 681, 14 Cal. Rptr. 560 (1961).

²⁰⁵ *People v. Gutierrez*, 207 Cal. App. 2d 759, 24 Cal. Rptr. 781 (1962).

²⁰⁶ *People v. Richman*, 242 A.C.A. 427, 51 Cal. Rptr. 454 (1966).

post-judgment deposit procedure. In this respect, provisions for deposit and possession after entry of judgment should be made to parallel those for deposit and possession before entry of judgment. Neither party should be prejudiced in the matter of appealing or moving for the new trial by making or withdrawing a deposit in either case. The single exception should be, as under existing law, that in either case withdrawal of the deposit by the defendant waives defenses other than the claim to greater compensation.

There are various other procedural and clarifying changes that should be made in a revision of section 1254. These are especially necessary to conform and adapt post-judgment procedures with the provisions and procedures for deposits and possession prior to judgment. As a matter of codification, all provisions for deposit and withdrawal of compensation and possession prior to final judgment in the proceeding should be organized in a new title of the Code of Civil Procedure consisting of three chapters dealing, respectively, with (a) the deposit and withdrawal of probable just compensation, (b) possession before entry of judgment, and (c) deposit and withdrawal of the award and possession after entry of judgment. The provisions for possession should be clarified by providing that an application for possession prior to judgment may be made after entry of judgment if the judgment entered has been reversed, vacated, or set aside. More importantly, existing law should be clarified to permit deposits made prior to judgment to be withdrawn after entry of judgment under the relatively simple provisions for withdrawal of deposits made after judgment.

D. *Related Problems*

1. Abandonment of the Proceeding After Possession is Taken

Abandonment of eminent domain proceedings is covered by section 1255a of the Code of Civil Procedure. Whether or not possession has been taken, the section permits the condemnor to abandon the proceeding at any time after the filing of the complaint and before expiration of 30 days after final judgment. In other words, the proceeding may be abandoned at any time before payment of the final award is required. However, upon motion of the condemnee, the court may set aside an abandonment if it determines "that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced."²⁰⁷

²⁰⁷ CAL. CODE CIV. PROC. § 1255a(b).

This express restriction upon abandonment was added to section 1255a in 1961 upon recommendation of the Law Revision Commission.²⁰⁸

From the condemnor's point of view, abandonment after possession is taken may also be precluded, as a practical matter, after the required deposit has been withdrawn by the property owner. Although both Code of Civil Procedure sections 1243.7 and 1254 provide for recovery of an excessive withdrawal if the excess results from over-valuation of the property or payment to an improper person, no provision is made for recoupment in the case of abandonment.

In federal practice and in a growing majority of states, the proceeding may not be abandoned without consent of the condemnee after possession is taken.²⁰⁹ Some California practitioners consider elimination of the privilege of abandonment important even though the equitable principle enacted in 1961 would appear to prevent abandonment in virtually all cases in which possession has been taken.²¹⁰ If a homeowner has moved, a business has been relocated, a deposit has been withdrawn and expended, or property cannot be restored to its original condition, the statutory restriction should apply.

Absolute prohibition of abandonment after an order for possession is obtained usually would force the condemning agency to devote the property to another use, dispose of it on the market, or compromise with the condemnee. While these consequences can be justified theoretically, they would not appear necessary to adequate protection of property owners.

California experience has indicated that there have been and will be very few abandonments following possession. As an official of the Department of Public Works has written:

There are not many examples of total abandonments after entry into possession by any of the condemnors who presently have the right to immediate possession, due to the fact that such possession is taken for the purpose of immediate construction of expensive public improvements, which projects would be highly uneconomical to abandon. . . .

[M]ost "abandonments" are not total abandonments but are slight

²⁰⁸ See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-9, B-47 (1961). Earlier judicial decisions had created a similar restriction. See *Times-Mirror Co. v. Superior Court*, 3 Cal. 2d 309, 44 P.2d 547 (1935).

²⁰⁹ See Wasserman, *Procedure in Eminent Domain*, 11 MERCER L. REV. 245, 277 (1960). See also 6 NICHOLS, *EMINENT DOMAIN* §§ 26.42[1], 27.4 (3d rev. ed. 1966).

²¹⁰ See Riemer, *Abandonment of an Eminent Domain Action: The Buyer Disappears*, 9 ORANGE COUNTY BAR BULL. 85 (1966).

changes in right of way alignments such as where by mistake the taking line has gone through a small portion of an existing building where the alignment can be drawn back to protect the improvements and minimize damages. In this situation a statute . . . [precluding abandonment] would permit the condemnee to force the state into compensating him to obtain his consent to an abandonment. Another example of the same type of situation is an amendment to take a lesser interest, such as a reservation of mineral and oil interests to the property owner. . . .²¹¹

There are also reported instances in which proceedings have had to be abandoned because of the taking or proposed taking of the property by another condemnor having a superior power of eminent domain.²¹² To allow for these highly technical cases of abandonment, the privilege should not be eliminated altogether even in connection with the enactment of broad provisions for possession prior to final judgment.

In one important respect, however, section 1255a of the Code of Civil Procedure is unsatisfactory. Subdivision (c) permits recovery by the defendant of his costs and necessary expenses upon abandonment. The general purpose of this provision is to compensate the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry the proceeding through to its conclusion.²¹³ It has been held that the defendant may recover reasonable attorney's fees actually incurred in connection with a proceeding, even though a portion of the legal services were rendered before the complaint was filed.²¹⁴ All other expenses, however, including appraisal fees, may not be recovered if the proceeding is discontinued 40 or more days before the date set for pretrial.²¹⁵

In most cases, a defendant's attorney cannot properly advise his client without first obtaining appraisal data and consulting appraisers. Thus the landowner must usually incur appraisal fees at

²¹¹ Letter From Robert E. Reed, California Department of Public Works, to California Law Revision Commission, Sept. 1, 1960.

²¹² See, e.g., *Torrance Unified School Dist. v. Alwag*, 145 Cal. App. 2d 596, 302 P.2d 881 (1956).

²¹³ See *Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co.*, 234 Cal. App. 2d 352, 44 Cal. Rptr. 410 (1965); *Oak Grove School Dist. v. City Title Ins. Co.*, 217 Cal. App. 2d 678, 32 Cal. Rptr. 288 (1963); *County of Kern v. Galatas*, 200 Cal. App. 2d 353, 19 Cal. Rptr. 348 (1962). For a summary of California decisions, see Annot., 92 A.L.R.2d 355, 377 (1963).

In the absence of an abandonment, neither attorney, appraisal, nor expert witness fees may be recovered. *City of Los Angeles v. Vickers*, 81 Cal. App. 737, 254 Pac. 687 (1927); *Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36 (1914).

²¹⁴ *Decoto School Dist. v. M. & S. Tile Co.*, 225 Cal. App. 2d 310, 37 Cal. Rptr. 225 (1964) (attorney's and appraiser's fees).

²¹⁵ *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal. 2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962).

approximately the same time that he obtains an attorney.²¹⁶ It would seem, therefore, that failure to allow the defendant to recover appraisal fees and other expenses is neither logical, practical nor fair. The 40-day limitation should be eliminated and a uniform rule applied to all expenses.

2. Interest Problems in Early Possession Cases

In eminent domain cases in which possession is not taken prior to judgment, interest at seven percent upon the award runs from the entry of judgment to the date the award is paid into court for the defendants.²¹⁷

Before 1959 there was no statutory provision governing the payment of interest in immediate possession cases. Also, there was no statutory method for compensating the defendant for the use of his property for the period between the taking of possession and the entry of judgment. In the absence of any statute, the California Supreme Court had held that compensation for such use must be made, and that an appropriate way of computing the amount is to award interest at seven percent from the taking of possession to the date of payment.²¹⁸

In 1959, Code of Civil Procedure section 1255b was added to provide that, in immediate possession cases, the compensation and damages awarded in the proceeding draw interest from the effective date of the order for possession. In 1961, on recommendation of the Law Revision Commission,²¹⁹ the previously uncodified rules on interest were gathered together and restated in Code of Civil Procedure section 1255b. The revision of that section continued the substance of the 1954 provision. The section now provides that the award accrues interest from "the date after which the plaintiff may take possession of the property as stated in the order authorizing the plaintiff to take possession." An additional provision was added, however, specifying that if, after the date that interest begins to accrue, the defendant remains in actual possession of the property or re-

²¹⁶ See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE § 1.37: "The attorney should obtain an appraisal of the property as soon as possible after accepting the case. Until he has this appraisal in his possession and has thoroughly analyzed it, the lawyer is not in a proper position to evaluate his case completely or to open or respond to negotiations with the condemnor's agents or attorneys."

²¹⁷ CAL. CODE CIV. PROC. § 1255b; *Bellflower City School Dist. v. Skaggs*, 52 Cal. 2d 278, 339 P.2d 848 (1959).

²¹⁸ *Metropolitan Water Dist. v. Adams*, 16 Cal. 2d 676, 107 P.2d 618 (1940).

²¹⁹ 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings* at B-9, B-48, B-56 (1961).

ceives rent or other income, the value of such possession and the amount of such income must be offset against interest.²²⁰

There is little, if any, disagreement over the policy expressed in these provisions, since if the property is physically taken, the condemnee has for all practical purposes lost his property and should be allowed legal interest until he is paid the award.

A more difficult problem is presented as to termination of interest in immediate possession cases. Section 1255b now provides that interest ceases on the date the deposit is withdrawn. This permits the property owner to decline to withdraw the deposit and to recover seven percent interest on the final award from the date that interest begins to accrue. Unlike California, the federal government and a number of states stop interest on the money deposited from the time of the deposit.²²¹ Interest must be paid, of course, on any difference between the final award and the amount deposited. The federal policy is underscored by an administrative directive preventing the use of federal highway funds to pay interest on any amount "available to" the property owner.²²²

In other jurisdictions, the policy is to the contrary. A recent Indiana decision, for example, reasons as follows:

It seems logical that the Legislature, in its wisdom, intended to give the defendants in a condemnation proceeding an option whether or not to withdraw their share. One defendant desiring and perhaps needing immediate return for his property could file a written request for payment and assume the burdens and terms of the statute. On the other hand, another defendant could wait the orderly determination of the eminent domain proceedings with assurance that he would be put in as good position moneywise by the addition of interest as he would have been had his property not been taken. The statutory language permits such construction, and not only equitable, but constitutional principles require such construction.²²³

²²⁰ Before the amendment of 1961, neither rent received by the land owner nor the value of possession could be offset against the interest accruing after the effective date of an order for possession. *People v. Podrat*, 194 Cal. App. 2d 696, 15 Cal. Rptr. 343 (1961) (rent); *People v. Forster*, 58 Cal. 2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962) (possession).

²²¹ See, e.g., 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958); ILL. ANN. STAT. ch. 47, § 2.6 (Cum. Supp. 1964); TENN. CODE ANN. § 23-1526 (Cum. Supp. 1964). See also 3 NICHOLS, EMINENT DOMAIN § 8.63(2)(3d rev. ed. 1966). The federal courts have pointed out, however, that only immediate availability of the deposited funds justifies denial of interest. See, e.g., *Bishop v. United States*, 288 F.2d 525 (5th Cir. 1961).

²²² Bureau of Public Roads, U.S. Dep't of Commerce, Instructional Memorandum 21-9-65 (Sept. 13, 1965), provides, in part: "Federal funds will not be available for reimbursement of any interest payments to the property owner after the date payment is made available to him, on the portion of the final settlement or award represented by such partial payment."

²²³ *State v. Young*, 199 N.E.2d 694, 698 (Ind. 1964).

Ideally, procedure in eminent domain cases would be such that interest ceases upon an amount deposited by the condemnor, whether the amount is or is not withdrawn by the property owner. Fairness does not require that the property owner be given an option to withdraw the deposit or to leave the amount on deposit and draw interest at seven percent. Even though the public entity or agency may place the amount deposited in the state Condemnation Deposits Fund in the state treasury and partially recoup the amount of such interest, the income from that fund does not approach the seven percent rate that must be paid on the award in the eminent domain proceeding.

Denial of interest is appropriate, however, only if the amount deposited may be withdrawn promptly and easily. Although the provisions for withdrawal of a deposit made prior to judgment can be and should be streamlined, there appears to be no way to overcome the obstacle presented by the possible existence of separate interests in the property. On trial of the issue of compensation, the condemnor is entitled to have the property valued as a whole, irrespective of the existence of separate interests.²²⁴ Thus, deposits before judgment are made in the aggregate and are not segregated among severable interests in the property.²²⁵ These privileges are regarded as pivotal by condemnors. Hence, there is little justification for tolling interest at the time of the deposit as the condemnee may no longer have possession and yet be faced with obstacles in withdrawing the deposit. Accordingly, even though withdrawal procedures may be simplified, the general rule on termination of interest should not be changed.

Under existing law, however, interest does not cease upon an amount deposited prior to judgment even upon entry of judgment.²²⁶

²²⁴ CAL. CODE CIV. PROC. § 1246.1, added in 1939, provides that the plaintiff is entitled to have the total amount of the award first determined as between the plaintiff and all defendants, and that, thereafter in the same proceeding, the respective rights of the defendants shall be determined. With respect to this statute, similar statutes, and the problems to which they are directed, see 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 107-112 (2d ed. 1953).

²²⁵ Before adoption of CAL. CODE CIV. PROC. § 1246.1, case law required a condemnor to make separate deposits for each "parcel" and for each separate interest in a given parcel. See *Weiler v. Superior Court*, 188 Cal. 729, 207 Pac. 247 (1922); *Marblehead Land Co. v. Superior Court*, 61 Cal. App. 777, 215 Pac. 922 (1923). Condemnors assume that this view has been changed by enactment of section 1246.1, and the uniform practice is to make an unsegregated deposit. Problems may remain, however, especially in view of the fact that the earlier cases were based upon an interpretation of CAL. CONST. art. I, § 14.

²²⁶ CAL. CODE CIV. PROC. § 1255b(c)(4) provides as follows: "If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment [interest ceases on] the date of such payment." The effect of the language is to preclude further accrual of interest when the full amount of the judgment is deposited in court after judgment, whether or not the

Since the justification for the rule requiring payment of interest on amounts deposited prior to judgment is that the property owner may not be free to withdraw the amount deposited, and since upon the entry of judgment such amount becomes immediately available for withdrawal, interest on amounts deposited prior to judgment should cease upon the entry of judgment.

Before 1959, case law permitted the defendant to show that a higher rate of return than the legal rate of interest was required to give him fair compensation for the loss of possession prior to judgment.²²⁷ This showing was made to the jury in jury trials. After the Legislature provided in 1959 that such compensation should be computed in all cases as seven percent interest, this element of compensation has been determined by the court. Since 1961 it has been uncertain whether interest, and the offset against interest, are to be determined by the court or by the jury.²²⁸ Apart from the tendency of such issues to confuse the jury, determination by jury requires each of the parties to present evidence inconsistent with the position taken upon trial of the main issue of compensation. Section 1255b should therefore be clarified to provide that the court shall determine the amount of the interest in all cases, including interest constitutionally required as compensation for possession prior to payment. The section also should provide that the amount of any offset against interest should be determined by the court, and that evidence on that issue should be presented to the court, rather than to the jury.

3. Date of Valuation and Decreases in Value Before the Date of Valuation

After a half-century of experience with "immediate possession," California law has worked out suitable distinctions and adaptations for early possession cases with a single general exception.²²⁹ Neither legislation nor case law dealing with the date of valuation in eminent domain proceedings attaches any significance to the taking of possession, the depositing of probable compensation, or the withdrawal of the funds. Consideration of the date of valuation raises problems and

plaintiff resorts to the possession provisions of section 1254. However, the words "finally determined" apparently preclude application of the provision to prevent further accrual of interest after the entry of judgment in immediate possession cases. See *People v. Loop*, 161 Cal. App. 2d 466, 326 P.2d 902 (1958); compare *People v. Neider*, 55 Cal. 2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961).

²²⁷ See *People v. Loop*, 161 Cal. App. 2d 466, 326 P.2d 902 (1958).

²²⁸ See *People v. Guimarra Vineyards Corp.*, 245 A.C.A. 342 (1966); *People v. Salem Dev. Co.*, 216 Cal. App. 2d 652, 31 Cal. Rptr. 193 (1963). Compare *Citizens Util. Co. v. Superior Court*, 59 Cal. 2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963).

²²⁹ For a remarkable example of the extent to which the effects of possession prior to judgment have been woven into California law, see the contentions of the appellant in *State v. Whitlow*, 243 A.C.A. 641, 52 Cal. Rptr. 336 (1966).

presents alternatives beyond the range of "immediate possession" or of any provisions for the exchange of possession and approximate compensation. Nevertheless, the subjects are, or should be, inter-related. Especially if much broader provisions for early possession and preliminary payment are to be enacted, careful consideration should be given to the date of valuation and to the connected problem of changes in the market value of the property before the date of valuation caused by the project itself.

Since 1872, section 1249 of the Code of Civil Procedure has fixed the date of issuance of summons as the date of valuation in all eminent domain proceedings. The single judicially created exception is that the date of valuation in takings of public utility property is the date of trial rather than the date of summons.²³⁰ In an attempt to improve the position of the property owner and to compel the condemnor to expedite the proceeding, a provision was added in 1911 specifying that, if a case is not tried within one year from its commencement, and the delay is not caused by the defendant, the date of valuation is the date of trial.²³¹ In cases in which the issue of compensation is once tried, and a new trial is necessary, the California Supreme Court recently held that the date of valuation remains the same date used for that purpose in the original trial.²³²

Under existing law, the dates of valuation specified in Code of Civil Procedure section 1249 are not affected in any way by the plaintiff's taking possession of the property and depositing probable just compensation prior to trial. This result has been reached because no explicit provision for a different date of valuation is made in such cases and, secondly, because section 1249 is viewed as a purely "procedural" statute.²³³

The principal criticism of section 1249, however, has not been directed to its anomalous application in immediate possession cases. Rather, the view of property owners and their advocates has been that fixing the basic date of valuation as the date of summons, instead of the date of trial or payment of the award is supported only by analogy to other civil actions; that in eminent domain proceedings, however, commencement of the proceedings is not logically relevant to ascertaining the date at which the level of the general

²³⁰ See *Citizens Util. Co. v. Superior Court*, 59 Cal. 2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963).

²³¹ As to the purposes of the alternate date of valuation, see *People v. Murata*, 55 Cal. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960); *Redevelopment Agency v. Maxwell*, 193 Cal. App. 2d 414, 14 Cal. Rptr. 170 (1961).

²³² See *People v. Murata*, 55 Cal. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960).

²³³ *City of San Rafael v. Wood*, 144 Cal. App. 2d 604, 301 P.2d 421 (1956); *City of Los Angeles v. Tower*, 90 Cal. App. 2d 869, 204 P.2d 395 (1949). See also *County of Los Angeles v. Hoe*, 138 Cal. App. 2d 74, 291 P.2d 98 (1955).

market, and the value of the particular property in that market, should be considered; and that, in a rising market, by the time the property owner receives the award, property values often will have increased so much that he cannot purchase equivalent property with the award.

Before the adoption of section 1249 in 1872, the rule appears to have been to value the property as of the time of taking²³⁴ or the date of the actual payment of compensation.²³⁵ Immediately after its adoption, the date-of-issuance-of-summons rule was held unconstitutional, but that departmental decision was overruled by the full supreme court.²³⁶ Since that time, the rule has been challenged, but uniformly sustained by the appellate courts, on many occasions.²³⁷

Although the matter soon became highly controversial as a question of compensation and economics, it seems clear that the draftsmen of the Code of Civil Procedure considered the date of valuation to be purely a point of civil procedure. Under the law of that era, issuance of summons in actions *in rem* was deemed to mark inception of the court's jurisdiction over the property, and that date was accordingly chosen.²³⁸

In a minority of states in which the date of valuation is fixed at the inception of the proceedings,²³⁹ however, justifications have been found for the rule. An early Massachusetts decision puts these succinctly, as follows:

This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the pub-

²³⁴ Central Pac. R.R. v. Pearson, 1 Cal. Unrep. 790 (1873).

²³⁵ Bensley v. Mountain Lake Water Co., 13 Cal. 307 (1859).

²³⁶ California So. R.R. v. Colton Land & Water Co., 2 Cal. Unrep. 247, 4 Pac. 44 (1884), *overruling department decision in* 2 Cal. Unrep. 244, 2 Pac. 38 (1884).

²³⁷ See, e.g., City of Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526 (1927); Tehama County v. Bryan, 68 Cal. 57, 8 Pac. 673 (1885); California So. R.R. v. Kimball, 61 Cal. 90 (1882); City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929); City of Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23 (1917); Sacramento Terminal Co. v. McDougall, 19 Cal. App. 562, 126 Pac. 503 (1912); City of Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17 (1909).

²³⁸ See Harrington v. Superior Court, 194 Cal. 185, 228 Pac. 15 (1924).

²³⁹ In most jurisdictions in the United States, including many in which no date of valuation is specified by statute, the date of valuation is deemed to be the date of "taking." "Taking," in turn, may refer to a number of events in the acquisition process, including the taking of possession or the filing of a document that passes title to the condemnor. See 3 NICHOLS, EMINENT DOMAIN § 8.5[1] (3d rev. ed. 1965); 4 *id.* § 12.23[1]. This is also federal practice. See United States v. Dow, 357 U.S. 17 (1958). It is only in those jurisdictions in which compensation is determined prior to the "taking" that it is necessary to fix a more or less arbitrary date of valuation. See 3 NICHOLS, EMINENT DOMAIN § 8.5[2] (3d rev. ed. 1965); 4 *id.* § 12.23[2]. Even in these states, the majority rule is to assess compensation and damages as of the date of trial. See 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 21 n.29 (2d ed. 1953).

lic use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by the acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than a valuation of the estate at any subsequent point of time.²⁴⁰

This reasoning obviously is much more persuasive in those states employing the so-called "administrative method" of condemnation in which the estimated amount of compensation is deposited for withdrawal by the property owner at the outset of the court proceedings.

Proposals for change in California's basic rule have been many and well considered. Counsel for property owners uniformly urge adoption of the date of trial as the basic date of valuation. The following suggestion is typical:

Generally, the client will be better off if the date of valuation is the date of trial. As a matter of equity, there should be legislation providing that in all condemnation proceedings the date of valuation shall be the date of trial. The client will have to replace his property or otherwise reinvest the award at the price that is prevailing after the trial. It therefore seems that just compensation would be better provided by the trial date valuation in every case, except perhaps where the defendant deliberately stalled the proceeding.²⁴¹

A refinement of this change in the date of valuation would select the date *initially set* for trial, and add a provision that if the trial is continued upon motion of either party, the date of valuation would be, at the option of the opposing party, either the date then set for trial or the date to which trial is continued. The considerations favoring this change in existing law have been stated as follows:

1. It would provide for valuation in eminent domain proceedings at current prices in keeping with the real estate market in general where properties are bought and sold at current prices rather than, as under the existing CCP 1249, as of a price level existing approximately 8 to 12 months prior to trial. This is both fair and realistic whether the market be rising, falling or remaining static.

2. It would facilitate the trial of eminent domain proceedings, particularly when tried to a jury in that the trier of fact would not be required to perform the mental gymnastic feat of projecting his thinking backward for a period of 8 to 12 months.

3. It would eliminate the frequently occurring and troublesome question of who caused a delay in the trial of an eminent domain proceeding, which exists under the present form of CCP 1249.

²⁴⁰ *Burt v. Merchant's Ins. Co.*, 115 Mass. 1, 14 (1874).

²⁴¹ CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONDEMNATION PRACTICE § 1.25 (1960). See also *id.* §§ 9.1-.29.

4. It would eliminate the anomalous and unfair situation where, on a falling market, (a) the condemnee by his own delay can secure a higher price for his property than its market value at date of trial and (b) the condemnor by delaying can acquire the property at a lower price. . . .²⁴²

On the other hand, counsel for condemnors uniformly urge retention of the existing rules. They believe that these rules work well and equitably in practice and that any alternative would provide an undesirable incentive to condemnees to delay the proceedings to obtain the latest possible date of valuation.²⁴³ They also point out that as a matter of convenience, there is merit in fixing the date of valuation as of a date certain, rather than by reference to the uncertain date when the trial begins, as appraisals and appraisal testimony must be directed to market value as of a specific date.

Although these conflicting views and considerations cannot be completely reconciled, reasonable compromises seem possible. The first change in existing rules should permit any condemnor to establish an early date of valuation by depositing probable just compensation for withdrawal by the property owner. If it does so, the date of valuation should be the date of the deposit. A date of valuation thus established should not be subject to change by any subsequent development in the proceeding. In other cases, a compromise should be made between California's two existing rules, and the date of valuation fixed as the date six months after the filing of the complaint. The provision making the date of valuation the date of trial if, without fault of the defendant, the case is not tried within one year, should be retained. In case of a new trial, the date of the new trial, rather than the date used in the original trial, should be the date of valuation unless the condemnor deposits the amount awarded in the original trial within a specified and reasonably brief period after the entry of judgment in the original trial.

Whether the date of valuation is fixed at the issuance of summons, the date of trial, or some other point in the condemnation proceeding, it has become increasingly clear that changing the statutory date is not an appropriate way of dealing with the pervasive problem of increases or decreases in value, because of the imminence

²⁴² *E.g.*, Letter From Thomas G. Baggott to California Law Revision Commission, Feb. 22, 1966. See also *County of Los Angeles v. Bartlett*, 203 Cal. App. 2d 523, 21 Cal. Rptr. 776 (1962); *County of San Mateo v. Bartole*, 184 Cal. App. 2d 422, 7 Cal. Rptr. 569 (1960); *People v. Murata*, 55 Cal. App. 2d 1, 9 Cal. Rptr. 601, 357 P.2d 833 (1960) (containing a good discussion of these problems).

²⁴³ Letter From Robert E. Reed, California Department of Public Works, to California Law Revision Commission, March 13, 1961; Letter From Terry C. Smith, Office of the Los Angeles County Counsel, to California Law Revision Commission, Dec. 15, 1965.

of the taking, prior to the established date of valuation.²⁴⁴ A more promising solution, enacted in a few states²⁴⁵ and embodied in proposed federal legislation, provides:

Any change in [market price] prior to the date of valuation caused by the public improvement for which the property is acquired, and any decrease in such price caused by the likelihood that the property would be acquired for the proposed public improvement, other than that caused by physical deterioration within the reasonable control of the owner, shall be disregarded in determining such price.²⁴⁶

Other studies have reached the same conclusion. For example, the recent report of the New Jersey Eminent Domain Revision Commission concludes:

Property owners are similarly affected by public announcements by agencies of proposed projects, highway routes and the like. Years may elapse between the date of the announcement and the consummation, and the final plan may and probably will differ substantially from the original scheme. The Commission realizes that a public body must be afforded a wide range of time within which to reach its final conclusion, and to this end, will publicize various thoughts to test public opinion. But some consideration should be given to the persons whose property is thus placed in a test tube, and boiled in the cauldron of public and political bickerings

The Commission therefore suggests that any increase or decrease in the value of property caused by administrative actions, or public announcements of proposed public improvements (other than that due to physical depreciation within the reasonable control of the owner) shall be disregarded in determining the compensation for the taking²⁴⁷

This problem of increase or decrease in market value prior to the date of valuation is not dealt with by the California Code of Civil Procedure. Case law establishes, however, that any *increase* in the value of the property directly resulting from the improvement itself is to be ascertained and deducted in arriving at the compensation to be made for the property.²⁴⁸ Notwithstanding the rule as to increases

²⁴⁴ See generally 4 NICHOLS, EMINENT DOMAIN § 12.3151 (3d ed. 1966); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 105 (2d ed. 1953); Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAW. 35 (1964); Annot., 5 A.L.R.3d 901 (1966).

²⁴⁵ See, e.g., PA. STAT. ANN. tit. 26, § 1-604 (Supp. 1965); MD. STAT. art. 33A, § 6 (Supp. 1965).

²⁴⁶ See sections 102(a)(b)(1)(A) and 112(c)(2) of the "Fair Compensation Act of 1965" as that act would have been adopted by Senate Bill 1201, 89th Cong. (1st Sess.). See also STAFF OF SELECT SUBCOMM. ON REAL PROPERTY ACQUISITION, HOUSE COMM. ON PUBLIC WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 156 (Comm. Print 1964).

²⁴⁷ N.J. EMINENT DOMAIN REVISION COMM'N, REPORT 27 (1965).

²⁴⁸ *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. 372 (1888); *City of San Diego v. Boggeln*, 164 Cal. App. 2d 1, 330 P.2d 74 (4th Dist. 1958); *County of Los Angeles v. Hoe*, 138 Cal. App. 2d 74, 291 P.2d 98 (2d Dist. 1955).

in value, demands by property owners that alleged decreases in value be ascertained and added to the value at the date of valuation have most frequently been denied.²⁴⁹ The reason commonly given is that any attempt to determine the existence or amount of such a decrease would be to engage in "unfathomable speculation."²⁵⁰ The injustice to the property owner is clear, however, if the proposed improvement has actually depreciated the value of the property prior to the date of valuation. Equitably, the amount awarded to the owner should be equivalent to what the "market value" of the property would have been on the date of valuation irrespective of the proposed improvement's influence on the market. Such influence can be shown by expert testimony and by direct evidence as to the general condition of the property and its surroundings as well where the value is depressed as where the value is enhanced. A provision should therefore be enacted requiring that any such changes in value be taken into account and providing a uniform rule for both increases and decreases.

V. CONCLUSION

A recent directive of the Legislature requires the California Law Revision Commission to study the law of eminent domain "with a view to recommending a comprehensive statute that will safeguard the rights of all parties."²⁵¹ A basic question in comprehensive revision of the California eminent domain law is whether existing provisions for immediate possession should be broadened. A careful review of the benefits and detriments that result when the right of immediate possession is narrowly limited, as in California, leads to the conclusion that the broadening of this right would be of substantial benefit to both condemnors and condemnees if the condemnee is assured that he will receive the approximate value of his property at the time possession is taken and if procedural safeguards are provided to protect the condemnee from being seriously inconvenienced by having to vacate his property within a limited time.

²⁴⁹ Several decisions seem to indicate that the rules respecting enhancement and diminution are not parallel, and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See *City of Oakland v. Partridge*, 214 Cal. App. 2d 196, 29 Cal. Rptr. 388 (1963); *People v. Lucas*, 155 Cal. App. 2d 1, 317 P.2d 104 (1957); and *Atchison, T. & S.F. Ry. v. Southern Pac. Co.*, 13 Cal. App. 2d 505, 57 P.2d 575 (1936). Cf. *Redevelopment Agency v. Zwerman*, 240 A.C.A. 70, 49 Cal. Rptr. 443 (1966); *People v. Lillard*, 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (1963); *Buena Park School Dist. v. Metrim Corp.*, 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (1959); and *County of Los Angeles v. Hoe*, 138 App. 2d 74, 291 P.2d 98 (1955).

²⁵⁰ For an excellent analysis of this problem in California, see Anderson, *Consequence of Anticipated Eminent Domain Proceedings—Is Loss of Value a Factor?*, 5 SANTA CLARA LAW. 35 (1964).

²⁵¹ Cal. Stat. 1965, res. ch. 130, p. 5289.

Legislation enacted in recent years on recommendation of the Law Revision Commission has accomplished a great deal toward putting possession, payment, and related problems in condemnation law on a more rational basis. The possibilities for further improvement deserve the critical attention of those possessing the power of eminent domain, those groups having special knowledge of the subject, and, not least, property owners and their counsel.

APPENDIX

STATE OF CALIFORNIA

AGENCY	STATUTE
University of California	ED. CODE § 23152
State Pub. Works Bd.	GOV. CODE § 15855
State Housing Comm'n	HEALTH & SAF. CODE § 34878
State Lands Comm'n	PUB. RESOURCES CODE § 6808
State Hwy. Comm'n	STS. & HY. CODE § 103
Cal. Toll Bridge Auth.	STS. & HY. CODE § 30404
Dep't of Water Resources	WAT. CODE § 251
Dep't of Water Resources (Central Valley Project)	WAT. CODE § 11582
State Reclam. Bd.	WAT. CODE § 8595

LOCAL PUBLIC ENTITIES

ENTITY	STATUTE
County	CODE CIV. PROC. § 1241(2) STS. & HY. CODE § 4189 (Street Opening Act of 1903) STS. & HY. CODE § 6121 (Improvement Act of 1911) STS. & HY. CODE § 11400 (Pedestrian Mall Law of 1960)
City	CODE CIV. PROC. § 1241(2) GOV. CODE § 38081 (Park and Playground Act of 1909) STS. & HY. CODE § 4189 (Street Opening Act of 1903) STS. & HY. CODE § 6121 (Improvement Act of 1911) STS. & HY. CODE § 11400 (Pedestrian Mall Law of 1960)
City	STS. & HY. CODE §§ 31590, 31592 (Acquisitions for parking districts) WAT. CODE § 71694 (Municipal Water District Act of 1911) WAT. CODE APP. § 20-12(7) (Municipal Water District Act of 1911)

OTHER PUBLIC ENTITIES

County Sanitation Dist.	CODE CIV. PROC. § 1241(2)
Irrigation Dist.	CODE CIV. PROC. § 1241(2)
Public Utility Dist.	CODE CIV. PROC. § 1241(2); PUB. UTIL. CODE § 16404
Rapid Transit Dist.	CODE CIV. PROC. § 1241(2)
Sanitary Dist.	CODE CIV. PROC. § 1241(2)

School Dist.	CODE CIV. PROC. § 1241(2)
Transit Dist.	CODE CIV. PROC. § 1241(2)
Water Dist.	CODE CIV. PROC. § 1241(2)
San Francisco Harbor	HARB. & NAV. CODE § 1917
Harbor Improvement Dist.	HARB. & NAV. CODE § 5900.4
Harbor Dist.	HARB. & NAV. CODE § 6076
Port Dist.	HARB. & NAV. CODE § 6296
Recreational Harbor Dist.	HARB. & NAV. CODE §§ 6590, 6593, 6598 (repealed)
River Port Dist.	HARB. & NAV. CODE § 6896
Small Craft Harbor Dist.	HARB. & NAV. CODE § 7147
San Diego Unified Port Dist.	HARB. & NAV. CODE APP. § 27
Joint Muni. Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5740.01, 5740.06 (repealed)
Regional Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5991, 5998 (re- pealed)
Regional Park Dist.	PUB. RESOURCES CODE § 5542
Regional Shoreline Park and Recreation Dist.	PUB. RESOURCES CODE § 5722 (repealed)
Municipal Utility Dist.	PUB. UTIL. CODE § 12703
Transit Dist. (Alameda or Contra Costa Counties)	PUB. UTIL. CODE § 25703
S.F. Bay Area Rapid Transit Dist.	PUB. UTIL. CODE § 28954
Orange County Transit Dist.	PUB. UTIL. CODE § 40162
Stockton Metropolitan Transit Dist.	PUB. UTIL. CODE § 50162
Marin County Transit Dist.	PUB. UTIL. CODE § 70162
San Diego County Transit Dist.	PUB. UTIL. CODE § 90402
Santa Barbara Metropolitan Transit Dist.	PUB. UTIL. CODE § 96002
Los Angeles Metropolitan Auth.	PUB. UTIL. CODE APP. 1, § 4.7
Fresno Metropolitan Transit Auth.	PUB. UTIL. CODE APP. 2, § 6.3
West Bay Rapid Transit Auth.	PUB. UTIL. CODE APP. 3, § 6.6
Joint Highway Dist.	STS. & HY. CODE § 25052
Bridge & Highway Dist.	STS. & HY. CODE § 27166
Parking Dist.	STS. & HY. CODE § 35401.5
Water Replenishment Dist.	WAT. CODE § 60230(8)
American River Flood Control Dist.	WAT. CODE APP. § 37-23
Antelope Valley-East Kern Water Agency	WAT. CODE APP. § 98-61(7)
Crestline-Lake Arrowhead Water Agency	WAT. CODE APP. § 104-11(9)
Desert Water Agency	WAT. CODE APP. § 100-15(9)
Donner Summit Public Utility Dist.	WAT. CODE APP. § 58-3
Lassen-Modoc County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 92-3(f)
Mendocino County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 54-3(f)
Metropolitan Water Dist.	WAT. CODE APP. § 35-4(5)
Morrison Creek Flood Cont. Dist.	WAT. CODE APP. § 71-3(f) (repealed)
Olivehurst Public Utility Dist.	WAT. CODE APP. § 56-3
Orange County Water Dist.	WAT. CODE APP. § 40-2(8)
Plumas County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 88-3(f)
San Diego County Flood Control Dist.	WAT. CODE APP. § 105-6(12)
San Geronio Pass Water Agency	WAT. CODE APP. § 101-15(9)
San Mateo County Flood Cont. Dist.	WAT. CODE APP. § 87-3(8)
Santa Cruz County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 77-24
Sierra County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 91-3(f)
Siskiyou County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 89-3(f)
Sonoma County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 53-3(f)

Tehama County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 82-3(f)
Upper Santa Clara Valley Water Agency	WAT. CODE APP. § 103-15(7)
Vallejo Sanitation & Flood Cont. Dist.	WAT. CODE APP. § 67-23
Yolo County Flood Cont. & Water Conserv. Dist.	WAT. CODE APP. § 65-3(f)
Bethel Island Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 22, § 80, p. 333, CAL. GEN. LAWS ANN. Act 5239e (Deering Supp. 1965)
Embarcadero Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 81, § 81, p. 447, CAL. GEN. LAWS ANN. Act 5239c (Deering Supp. 1965)
Estro Municipal Improvement Dist.	Cal. Stats. (1st Ex. Sess.) 1960, Ch. 82, § 81, p. 464, CAL. GEN. LAWS ANN. Act 5239d (Deering Supp. 1965)
Fairfield-Suisun Sewer Dist.	Cal. Stats. 1951, Ch. 303, § 44, p. 555, CAL. GEN. LAWS ANN. Act 7551a (Deering Supp. 1965)
Guadalupe Valley Municipal Improvement Dist.	Cal. Stats. 1959, Ch. 2037, § 80, p. 4710, CAL. GEN. LAWS ANN. Act 5239b (Deering Supp. 1965)
Montalvo Municipal Improvement Dist.	Cal. Stats. 1955, Ch. 549, § 45, p. 1018, CAL. GEN. LAWS ANN. Act 5239a (Deering Supp. 1965)
Mt. San Jacinto Winter Park Auth.	Cal. Stats. 1945, Ch. 1040, § 4.9, p. 2013, CAL. GEN. LAWS ANN. Act 6385 (Deering Supp. 1965)
Solvang Municipal Improvement Dist.	Cal. Stats. 1951, Ch. 1635, § 45, p. 3680, CAL. GEN. LAWS ANN. Act 5239 (Deering Supp. 1965)