

#36.80

7/5/73

Memorandum 73-57

Subject: Study 36.80 - Condemnation (Chapter 11--Postjudgment Procedure)

Attached to this memorandum are two copies of a revised version of Chapter 11 of the Eminent Domain Law. We hope that the chapter can be tentatively approved (after any necessary revisions) and can be distributed to the State Bar Committee after the July meeting. The revised chapter now includes provisions previously approved in connection with other provisions of this title as well as provisions which attempt to carry out the directions given and the decisions made by the Commission at the June 1973 meeting. There is little that is substantively new; however, we have renumbered the sections to conform to our proposed organization for the entire statute and have made some editorial revisions.

We plan to go through the statute section by section at the July meeting. Please mark your editorial revisions on one copy for the staff and raise any policy questions at the meeting. A section-by-section discussion follows.

Analysis

Sections 1235.120 ("final judgment" defined), 1235.130 ("judgment" defined) (green pages). These two sections are to be inserted in Article 2 of Chapter 2. Section 1235.120 is new to the Commission; Section 1235.130 was previously approved. Both sections are based on present Section 1264.7 and provide definitions that are used in Chapter 11 and in other chapters.

Section 1268.010 (payment of judgment). The substance of this section was approved in June. The section has been revised to incorporate the term "final judgment" defined in Section 1235.120 and to include appropriate cross-references to the withdrawal and deposit provisions.

Section 1268.020 (defendant's remedies if judgment not paid). Section 1268.020 is new. It incorporates the decision made at the June meeting that a defendant may have execution where the judgment is not paid; in this regard, present law is continued. Alternatively, Section 1268.020 authorizes the defendant to move for a dismissal. Under present law, if the time for payment has passed, the plaintiff is not permitted to cure his default; the failure to pay is treated as an implied abandonment under Section 1255a, and the defendant is entitled to a dismissal (and litigation expenses) regardless of whether plaintiff tenders payment before a notice of motion for dismissal is made. County of Los Angeles v. Bartlett, 223 Cal. App.2d 353 (1963)(petition for hearing by supreme court denied). The rule in Bartlett rests on a straightforward interpretation of the present statute. As a matter of policy, it seems more fair to permit the plaintiff to cure his default, and the Commission previously determined he should have this right. Section 1268.020 permits such cure (without any showing of inadvertence or excusable neglect) for a period of 20 days after service of notice of dismissal. However, by so doing, the mandatory 30-day period provided by subdivision (a) of Section 1268.010 is made an indefinite period of not less than 50 days and, if payment is not made, the defendant must move for dismissal to start the 20-day period running.

Section 1268.030 (final order of condemnation). The staff has revised this section (in accordance with the Commission's directions) to provide that (1) either party may apply for the final order of condemnation, (2) the party who obtains the order shall then given notice to the other parties affected by the order that the order has been granted, and (3) any party affected may then record the order and give notice of the recordation to the other parties affected by the order.

Section 1268.030 also makes clear that the final order of condemnation may only be obtained following a final judgment. This point is presently unclear, but Section 1268.030 appears to be consistent with the case law. See Comment to Section 1268.030.

Article 2 (Sections 1268.110-1268.170)(deposit and withdrawal of award). The substance of this article has generally already been tentatively approved. The staff has revised Sections 1268.110 and 1268.140 to make clear that, after a judgment has been reversed, vacated, or set aside, deposits made under this article are to be treated as deposits made prior to judgment, and the procedures relating to deposit prior to judgment are to be followed. Subdivision (b) of Section 1268.150 is added to continue a portion of present Section 1245.3.

Article 3 (Sections 1268.210-1268.240)(possession after judgment). The substance of this article has also generally already been tentatively approved. The staff has revised Section 1268.210 to make clear that, after a judgment has been reversed, vacated, or set aside, the plaintiff must use the procedure for possession prior to judgment. Otherwise, we have simply renumbered and made editorial revisions.

Article 4 (Sections 1268.310-1268.340)(interest).

Article 5 (Sections 1268.410-1268.430)(proration of property taxes). Both these articles have been previously approved. We have simply renumbered them and made editorial and conforming changes.

Section 1268.510 (abandonment). This section is the same in substance as portions of present Section 1255a. The provisions in Section 1255a relating to the defendant's recovery of costs, expenses, and damages are continued in Sections 1268.610 and 1268.620. It should be noted that, under Section 1268.510, a plaintiff cannot "abandon" more than 30 days after final judgment. He can, of course, refuse to pay and, under our Section 1268.020, the defendant may

then elect to have execution or move for dismissal. We wonder whether execution should be more limited by deleting the time limit for abandonment (or changing it to refer to any time prior to payment). If this is done, abandonment would still be denied where the defendant has substantially changed his position in reliance upon the proceeding, but otherwise the plaintiff could preclude execution by "abandoning."

Article 7 (Sections 1268.610-1268.620)(expenses and damages upon dismissal or judgment of no right to take). These sections are based generally on present law. The only significant change is that reimbursement of litigation expenses (and other damages) would be authorized whenever a proceeding is dismissed-- including dismissals for failure to prosecute. See Comment to Section 1268.610.

Article 8 (Sections 1268.710 and 1268.720)(costs). At the June meeting, the staff was directed to attempt to codify the rules relating to payment of costs in an eminent domain proceeding. Sections 1268.710 and 1268.720 carry out this direction. See also Article 7 above.

Subdivision (a) of Section 1268.710 replaces obsolete Section 1255. It simply provides that every defendant is entitled to recover his ordinary court costs. See Comment to Section 1268.710. Subdivision (b) reenacts a portion of Section 1246.1. Subdivision (c) preserves the substance of subdivision (k) of former Section 1254. In effect, it requires a defendant to pursue a new trial at the risk of not only obtaining a small award but of paying the costs of the second trial as well if his award is smaller. A defendant in an eminent domain proceeding is constitutionally entitled to just compensation. The staff suggests that the principle expressed in City & County of San Francisco v. Collins (i.e., to require the defendant to pay any part of the costs incidental to the trial of the issues would reduce just compensation by the amount so required to be paid) should be extended to cover any

costs incidental to a proper trial of the issues whether or not this requires more than one trial. It might be noted that a plaintiff in a personal injury action is not required to secure a larger verdict in order to obtain costs on retrial so long as he prevails in both trials. See Section 1032. But see Section 998 (offer to compromise if not accepted may bar recovery of costs). See also Chodos v. Superior Court, 226 Cal. App.2d 703 (1964)(order for new trial may be conditional upon payment by moving party of other party's costs). This analogy is not perfect since such a plaintiff will be taxed costs if the defendant prevails in the second trial. In this regard, it should be noted that the condemnee in an eminent domain proceeding always prevails in the sense that he must receive some compensation for the property taken; hence, it might be argued that the only way to determine whether the defendant in an eminent domain proceeding has failed to prevail is by comparing the respective awards. However, the staff is not persuaded by this argument, and we suggest that subdivision (c) be deleted.

Subdivision (d) is included for the sake of clarity. The Commission may wish to strike this subdivision and rely solely on Section 1230.040 (rules of practice in eminent domain proceeding).

Section 1268.720 deals with the rules governing costs on appeal. As the Comment points out, the rules in this area are not completely clear. We believe that we have codified them accurately; we note, however, that there is no statute presently dealing with costs on appeal and, while the law is perhaps unnecessarily ambiguous, the staff does not find it otherwise unsatisfactory. In this circumstance, we wonder if the Commission desires to have any provision at all dealing with this matter.

With regard to the subject of costs generally, we bring to your attention the following excerpt from a report dated June 4, 1973, from the State Bar Committee on Condemnation to the Board of Governors:

One matter referred to the Committee by the Board of Governors for recommendation was 1972 Conference Resolution 9-5 recommending that the Board of Governors sponsor legislation to amend Section 1255 of the Code of Civil Procedure to permit the trial court, in eminent domain proceedings, where it finds that such is necessary to insure just compensation to defendants and where the court finds that the defendant was compelled to litigate because of an unreasonable pre-litigation offer, to award the defendant all reasonable expenses of litigation, including attorney's fees, appraisal fees and fees of other experts. Said resolution was considered at our meeting of December 2, 1972, at which time it was approved upon condition that the proposal be amended to expressly exclude recoverability of attorney's fees.

At said meeting the Committee resolved that the issue of recoverability or non-recoverability of expenses of litigation in eminent domain matters, is important to our field of practice, and that any sponsorship or support of, or opposition to a proposal relating thereto, in accordance with the views of our Committee should be given priority.

In short, the State Bar Committee favors a liberalization of the rules expressed in the Comment to Section 1268.710. However, in this regard, we note that Senate Bill 476 (which would have required the payment of litigation expenses, including attorney's fees, where the judgment exceeds by 10 percent or more the last written offer of a state agency-condemnor) was rejected by the Senate Finance Committee after passing the Senate Judiciary Committee. The staff proposes no change from what is submitted, but we do note the ferment in this area.

Respectfully submitted,

John H. DeMouly
Executive Secretary

SECTIONS TO BE ADDED TO ARTICLE 2 OF CHAPTER 2

(Chapter 2--Words and Phrases Defined)

Note. The following sections replace present Sections 1235.120 and 1235.130 as set out in the draft attached to Memorandum 73-49.

EMINENT DOMAIN LAW § 1235.120

Staff draft July 1973

§ 1235.120. Final judgment

1235.120. "Final judgment" means a judgment with respect to which all possibility of direct attack by way of appeal, motion for a new trial, or motion under Section 663 to vacate the judgment has been exhausted.

Comment. Section 1235.120 continues the substance of the second sentence of former Section 1264.7. Unlike the former section, Section 1235.120 makes clear that the motion to vacate must be one made under Section 663, thus excluding, for example, a motion for relief from a default under Section 473. This clarification is consistent with the construction given the language of the former section by the courts. E.g., Southern Pac. Util. Dist. v. Silva, 47 Cal.2d 163, 301 P.2d 841 (1956).

EMINENT DOMAIN LAW § 1235.130

Tentatively approved June 1973
Renumbered July 1973

§ 1235.130. Judgment

1235.130. "Judgment" means the judgment determining the right to take the property by eminent domain and fixing the amount of compensation to be paid by the plaintiff.

Comment. Section 1235.130 continues the substance of the first sentence of former Section 1264.7.

CHAPTER 11. POSTJUDGMENT PROCEDURE

Article 1. Payment of Judgment; Final Order of Condemnation

§ 1268.010. Payment of judgment

1268.010. (a) Not later than 30 days after final judgment, the plaintiff shall pay the full amount required by the judgment.

(b) Payment shall be made by either or both of the following methods:

(1) Payment of money directly to the defendant. Any amount which the defendant has previously withdrawn pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6 shall be credited as a payment to him on the judgment.

(2) Deposit of money in court pursuant to Section 1268.110. Upon entry of judgment, a deposit made pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 is deemed to be a deposit made pursuant to Section 1268.110.

Comment. Section 1268.010 retains the rule under former Section 1251 that the plaintiff must pay the full amount of the judgment not later than 30 days after final judgment. See Section 1235.120 (defining "final judgment"). See also Section 1268.110 (deposit of full amount of award, together with interest then due thereon, less amounts previously paid or deposited). Section 1258.010 omits the provision of former Section 1251 that extended the 30-day time by one year where necessary to permit bonds to be issued and sold.

Subdivision (b) of Section 1268.010 specifies the manner in which payment may be made. The payment can be made directly to the defendant or defendants, or the plaintiff may pay the money into court as provided in Article 2 (commencing with Section 1268.110). See the Comment to Section 1268.110.

§ 1268.020. Remedies of defendant if judgment not paid

1268.020. (a) If the plaintiff fails to pay the full amount required by the judgment within the time specified in Section 1268.010, the defendant may have execution as in a civil case.

(b) Upon motion of the defendant, the court shall enter judgment dismissing the eminent domain proceeding if all of the following are established:

(1) The plaintiff failed to pay the full amount required by the judgment within the time specified in Section 1268.010.

(2) The defendant has filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure to pay the full amount required by the judgment within the time specified in Section 1268.010.

(3) The plaintiff has failed for 20 days after service of the notice under paragraph (3) to pay the full amount required by the judgment as provided in subdivision (b) of Section 1268.010.

(c) The defendant may elect to exercise the remedy provided by subdivision (b) without attempting to use the remedy provided by subdivision (a).

Comment. Section 1268.020, which generally continues the substance of portions of former Sections 1252 and 1255a, provides remedies for the defendant if the plaintiff does not pay the judgment as required; the defendant may enforce the plaintiff's obligation to pay by execution or, at the defendant's election, may obtain a dismissal of the proceeding with its attendant recoverable costs, expenses, and disbursements. See Section 1268.610. Under former Section 1252, these remedies were provided, but the section required that the defendant resort first to execution and, if unsuccessful, he could have the proceeding dismissed. However, former Section 1255a, a later enactment, provided that failure to pay the judgment within the required time constituted an implied abandonment of the proceeding. The two sections were

EMINENT DOMAIN LAW § 1268.020

Staff recommendation July 1973

construed together to give the defendant the option of resorting to execution or to having the proceeding dismissed as impliedly abandoned. See, e.g., County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963). Under the former law, it was possible that an inadvertent failure to pay the judgment within the time specified might result in an implied abandonment even though the plaintiff did not intend to abandon the proceeding. See, e.g., County of Los Angeles v. Bartlett, supra. To protect the plaintiff against this possibility, Section 1268.020 requires that notice of the failure to pay the judgment within the time specified be given to the plaintiff and that he be given 20 days to pay the judgment before the proceeding can be dismissed upon motion of the defendant.

§ 1268.030. Final order of condemnation

1268.030. (a) Upon application of any party, the court shall make a final order of condemnation if the court finds both of the following:

(1) The judgment authorizing the taking of the property is a final judgment.

(2) The full amount of the judgment has been paid as required by Section 1268.010.

(b) The final order of condemnation shall describe the property taken and identify the judgment authorizing the taking.

(c) The party upon whose application the order was made shall serve notice of the making of the order on all other parties affected thereby. Any party affected by the order may thereafter record a certified copy of the order in the office of the recorder of the county in which the property is located and shall serve notice of recordation upon all other parties affected thereby. Title to the property vests in the plaintiff upon the date of recordation.

Comment. Section 1268.030 supersedes former Section 1253. Unlike the former provision, Section 1268.030 permits any interested party to obtain and record a final order of condemnation and requires that affected parties be given notice of the making and of the recording of the order. The requirement that the judgment be final before the final order of condemnation may be issued appears to codify prior law. See Arechiga v. Housing Authority, 183 Cal. App.2d 835, 7 Cal. Rptr. 338 (1960); People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958).

Article 2. Deposit and Withdrawal of Award

§ 1268.110. Deposit after judgment

1268.110. (a) Except as provided in subdivision (b), the plaintiff may, at any time after entry of judgment, deposit for the persons entitled thereto the full amount of the award, together with interest then due thereon, less any amounts previously paid directly to the defendants or deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

(b) A deposit may be made under this section notwithstanding an appeal, a motion for a new trial, or a motion to vacate or set aside the judgment but may not be made after the judgment has been reversed, vacated, or set aside.

(c) Any amount deposited pursuant to this article on a judgment that is later reversed, vacated, or set aside shall be deemed to be an amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6.

Comment. This article (commencing with Section 1268.110) provides generally for postjudgment deposits, combining portions of former Sections 1245.3, 1252, and 1254.

Subdivision (a) of Section 1268.110 is similar to subdivision (a) of former Section 1254. However, the deposit provided for in this subdivision is in only the amount of the judgment and accrued interest (less amounts previously deposited or paid to defendants); the former provision for an additional sum to secure payment of further compensation and costs is contained in Section 1268.130. In addition, a deposit may be made under this section without regard to whether an order for possession is sought.

EMINENT DOMAIN LAW § 1268.110

Tentatively approved September 1970

Revised April 1973

Staff revision July 1973

In case the judgment is reversed, vacated, or set aside, there is no longer a judgment for deposit and possession purposes; subsequent proceedings are under the provisions relating to deposit and possession prior to judgment. See Chapter 6 (commencing with Section 1255.010). Any amount deposited under Section 1268.110 or Section 1268.130 is deemed to be an amount deposited under Chapter 6 if the judgment is reversed, vacated, or set aside; after the judgment is reversed, vacated, or set aside, the procedure for increasing or decreasing the amount of the deposit and withdrawal of the deposit is governed by the provisions of Chapter 6. See subdivision (c) and Section 1268.140(c).

EMINENT DOMAIN LAW § 1268.120

Tentatively approved September 1970

Revised April 1973

Renumbered July 1973

§ 1268.120. Notice of deposit

1268.120. If the deposit is made under Section 1268.110 prior to apportionment of the award, the plaintiff shall serve a notice that the deposit has been made on all of the parties to the proceeding who claim an interest in the property taken. If the deposit is made after apportionment of the award, the plaintiff shall serve a notice that the deposit has been made on all of the parties to the proceeding determined by the order apportioning the award to have an interest in the money deposited. Service of the notice shall be made in the manner provided in Section 1268.220 for the service of an order for possession. Service of an order for possession under Section 1268.220 is sufficient compliance with this section.

Comment. Section 1268.120 is new. In requiring that notice of the deposit be given, it parallels Section 1255.020 which requires that notice of a prejudgment deposit be sent to the parties having an interest in the property for which the deposit is made. Under former Section 1254, the defendant received notice that the deposit had been made only when served with an order for possession.

EMINENT DOMAIN LAW § 1268.130

Tentatively approved September 1970
Renumbered July 1973

§ 1268.130. Increase or decrease in amount of deposit

1268.130. At any time after the plaintiff has made a deposit upon the award pursuant to Section 1268.110, 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 1268.130 supersedes subdivision (d) of former Section 1254. The additional amount referred to in Section 1268.130 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 award itself after entry of judgment is provided for by Section 1268.110.

Former Section 1254 was construed to make the amount, if any, to be deposited in addition to the award 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 1268.130.

Tentatively approved September 1970
Revised May 1973
Renumbered July 1973

§ 1268.140. Withdrawal of deposit

1268.140. (a) After entry of judgment, any defendant who has an interest in the property for which a deposit has been made may demand and receive the amount to which he is entitled upon obtaining an order from the court. Upon application by such defendant, the court shall order that such money be paid to him upon his filing (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

(b) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to file an undertaking in the same manner and upon the conditions described in Section 1255.240 for withdrawal of a deposit prior to entry of judgment.

(c) If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only pursuant to Article 2 (commencing with Section 1255.210) of Chapter 6.

Comment. Section 1268.140 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); San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows, Inc., 20 Cal. App.3d 797, 97 Cal. Rptr. 898 (1971). That construction is continued in effect by Section 1268.140. Inferentially, former 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.

EMINENT DOMAIN LAW § 1268.140

Tentatively approved September 1970

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Renumbered July 1973

For purposes of withdrawal of deposits, a judgment that is reversed, vacated, or set aside has no effect; withdrawal may be made only under the procedures provided for withdrawing deposits prior to entry of judgment. This is made clear by subdivision (c) of Section 1268.140.

Under Section 1268.140, the defendant may retain his right to appeal or to request a new trial upon the issue of compensation 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).

EMINENT DOMAIN LAW § 1268.150

Tentatively approved May 1973

Revised May 1973

Renumbered July 1973

§ 1268.150. Deposit in State Treasury unless otherwise required

1268.150. (a) Except as provided in subdivisions (b) and (c), when money is deposited as provided in this article, 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 the money is deposited in the State Treasury pursuant to this subdivision, it shall be held, invested, deposited, and disbursed in the manner specified in Article 10 (commencing with Section 16429.1) 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. As between the parties to the proceeding, money deposited pursuant to this subdivision shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court or paid over to the county clerk pursuant to a court order made under subdivision (b).

(b) In the case of any amount awarded by a final judgment to a person sued as a person unknown or a person who it is alleged is dead or believed by the plaintiff to be dead whose interest or claim appears of record or is known to plaintiff, unless such person or a duly qualified and acting executor or administrator of the estate of such person appears in the eminent domain proceeding, the court shall order such amount to be paid to the county clerk from the money deposited pursuant to this article. The county clerk shall hold such amount for the account of the person entitled thereto as determined in the final judgment.

EMINENT DOMAIN LAW § 1268.150

Tentatively approved May 1973

Revised May 1973

Renumbered July 1973

(c) If after entry of judgment but prior to apportionment of the award the defendants are unable to agree as to the withdrawal of all or a portion of any amount deposited, the court shall upon motion of any defendant order that the amount deposited be invested in secure, interest-bearing accounts for the benefit of the defendants who shall be entitled to the interest earned on the accounts in proportion to the amount of the award they receive when the award is apportioned.

Comment. Subdivision (a) of Section 1268.150 is the same in substance as former Section 1243.6 and a portion of subdivision (h) of former Section 1254.

Subdivision (b) continues the substance of the first sentence of the second paragraph of former Section 1245.3.

Subdivision (c) is new. It provides a means whereby a defendant may have interest continue to accrue on amounts held on deposit pending resolution of an apportionment dispute. Cf. Section 1268.320 (interest ceases to accrue on judgment upon deposit). Subdivision (c) does not preclude a voluntary agreement among all defendants to draw down the award and place it in an interest-bearing trust fund pending resolution of apportionment issues.

EMINENT DOMAIN LAW § 1268.160

Tentatively approved September 1970
Renumbered July 1973

§ 1268.160. Repayment of excess withdrawal

1268.160. When money is withdrawn pursuant to this article, any amount withdrawn by a person in excess of the amount to which he is entitled as finally determined in the proceeding shall be paid without interest to the plaintiff or other party entitled thereto, and the court shall enter judgment accordingly.

Comment. Section 1268.160 is the same in substance as subdivision (g) of former Section 1254.

EMINENT DOMAIN LAW § 1268.170

Tentatively approved September 1970
Renumbered July 1973

§ 1268.170. Making deposit does not affect right to appeal

1268.170. The plaintiff does not abandon or waive the right to appeal from the judgment or the right to request a new trial by depositing the amount of the award pursuant to this article.

Comment. Section 1268.170 is the same in substance as a portion of subdivision (e) of former Section 1254. For a comparable provision permitting the defendant to withdraw the deposit without waiving his right to appeal or request a new trial on the issue of compensation, see Section 1268.140(a).

Article 3. Possession After Judgment

§ 1268.210. Order for possession

1268.210. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, 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 award, together with the interest then due thereon, in accordance with Section 1268.110 or Article 1 (commencing with Section 1255.010) of Chapter 6.

(b) The court's order shall state the date after which the plaintiff is authorized to take possession of the property.

(c) Where the judgment is reversed, vacated, or set aside, the plaintiff may obtain possession of the property only pursuant to Article 3 (commencing with Section 1255.410) of Chapter 6.

Comment. Section 1268.210 restates the substance of a portion of subdivision (b) of former Section 1254 except that the time for possession is lengthened from 10 to 30 days after the order for possession where the property is occupied. See Section 1268.220. For purposes of possession, a judgment that is reversed, vacated, or set aside has no effect; the plaintiff must utilize procedures for obtaining possession prior to entry of judgment.

EMINENT DOMAIN LAW § 1268.220

Tentatively approved September 1970

Revised May 1973

Renumbered July 1973

§ 1268.220. Service of order

1268.220. (a) The plaintiff shall serve a copy of the order for possession upon each of the defendants and their attorneys, either personally or by mail:

(1) At least 30 days prior to the date possession is to be taken of property lawfully occupied by a person dwelling thereon or by a farm or business operation.

(2) At least 10 days prior to the date possession is to be taken in any case not covered by paragraph (1).

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

Comment. Section 1268.220 is the same in substance as subdivision (c) of former Section 1254 except that the 10-day notice period is lengthened to 30 days where the property is occupied. With respect to subdivision (b), see the Comment to Section 1255.450.

EMINENT DOMAIN LAW § 1268.230

Tentatively approved September 1970
Renumbered July 1973

§ 1268.230. Taking possession does not waive right of appeal

1268.230. The plaintiff does not abandon or waive the right to appeal from the judgment or the right to request a new trial by taking possession pursuant to this article.

Comment. Section 1268.230 is the same in substance as a portion of subdivision (e) of former Section 1254.

EMINENT DOMAIN LAW § 1268.240

Tentatively approved May 1973
Renumbered July 1973

§ 1268.240. Police power not affected

1268.240. Nothing in this article limits the right of a public entity to exercise its police power in emergency situations.

Comment. Section 1268.240 is new. It makes clear that the requirements of this article--such as obtaining and serving an order for possession--do not limit the exercise of the police power. See Surocco v. Geary, 3 Cal. 69 (1853). See generally Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617 (1968), reprinted in Van Alstyne, California Inverse Condemnation Law, 10 Cal. L. Revision Comm'n Reports 111 (1971). See also Section 1255.480.

Article 4. Interest

§ 1268.310. Date interest commences to accrue

1268.310. The compensation awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

- (a) The date of entry of judgment.
- (b) The date the plaintiff takes possession of the property or the damage to the property occurs.
- (c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession.

Comment. Section 1268.310 is the same in substance as subdivision (a) of former Section 1255b. For an exception to the rules stated in Section 1268.310, see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

EMINENT DOMAIN LAW § 1268.320

Tentatively approved April 1973

Revised May 1973

Renumbered July 1973

§ 1268.320. Date interest ceases to accrue

1268.320. The compensation awarded in an eminent domain proceeding shall cease to draw interest at the earliest of the following dates:

(a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6, the date such amount is withdrawn by the person entitled thereto.

(b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110), the date of such deposit.

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

Comment. Section 1268.320 continues the substance of subdivision (c) of former Section 1255b. For an exception to the rule stated in subdivision (a), see Section 1255.040 (deposit for relocation purposes on motion of certain defendants). Subdivision (b) of Section 1268.320 supersedes paragraphs (2) and (4) of subdivision (c) of former Section 1255b. Unlike the former law, there is now only one procedure for payments into court after entry of judgment. See Section 1268.110 and Comment thereto.

EMINENT DOMAIN LAW § 1268.330

Tentatively approved April 1973
Renumbered July 1973

§ 1268.330. Offsets against interest

1268.330. If, after the date that interest begins to accrue, the defendant:

(a) Continues in actual possession of the property, the value of such possession shall be offset against the interest.

(b) Receives rents or other income from the property attributable to the period after interest begins to accrue, the net amount of such rents and other income shall be offset against the interest.

Comment. Section 1268.330 supersedes subdivision (b) of former Section 1255b. Revisions have been made to clarify the meaning of the former language. See also Govt. Code § 7267.4 ("If the public entity permits an owner or tenant to occupy the real property acquired on a rental basis for a short term, or for a period subject to termination by the public entity on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier."). For an exception to the rule stated in Section 1268.330, see Section 1255.040 (deposit for relocation purposes on motion of certain defendants).

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§ 1268.340. Interest to be assessed by court

1268.340. Interest, including interest accrued due to possession of or damage to property by the plaintiff prior to the final order in condemnation, and any offset against interest as provided in Section 1268.330, shall be assessed by the court rather than by jury.

Comment. Section 1268.340 is new. It clarifies former law by specifying that the court, rather than the jury, shall assess interest, including interest required to satisfy the defendant's constitutional right 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). Section 1268.340 also resolves a further uncertainty by specifying that the amount of the offset against interest provided by Section 1268.330 is likewise assessed by the court, thus requiring that any evidence on that issue is to be heard by the court rather than the jury. Compare People v. McCoy, 248 Cal. App.2d 27, 56 Cal. Rptr. 352 (1967), and People v. Giumarra Vineyards Corp., 245 Cal. App.2d 309, 53 Cal. Rptr. 902 (1966), with City of North Sacramento v. Citizens Util. Co., supra.

Article 5. Proration of Property Taxes

§ 1268.410. Liability for taxes

1268.410. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties, and costs upon property acquired by eminent domain that would be subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a public entity and if such taxes, penalties, and costs had not been paid, whether or not the plaintiff is a public entity.

Comment. Section 1268.410 is the same in substance as the first paragraph of former Section 1252.1.

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§ 1268.420. Application for separate valuation of property

1268.420. If property acquired by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of such property in accordance with Article 3 (commencing with Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in such article to the contrary.

Comment. Section 1268.420 is the same in substance as former Section 1252.2.

§ 1268.430. Reimbursement for taxes

1268.430. (a) If the defendant has paid any amount for which, as between the plaintiff and defendant, the plaintiff is liable under this article, the plaintiff shall pay to the defendant a sum equal to such amount.

(b) The amount the defendant is entitled to be paid under this section shall be claimed in the manner provided for claiming costs and at the following times:

(1) If the plaintiff took possession of the property prior to judgment, at the time provided for claiming costs.

(2) If the plaintiff did not take possession of the property prior to judgment, not later than 30 days after the plaintiff took title to the property.

Comment. Section 1268.430 is the same in substance as the final two paragraphs of former Section 1252.1.

Article 6. Abandonment

§ 1268.510. Abandonment

1268.510. (a) At any time after the filing of the complaint and before the expiration of 30 days after final judgment, the plaintiff may wholly or partially abandon the proceeding by serving on the defendant and filing in court a written notice of such abandonment.

(b) The court may, upon motion made within 30 days after the filing of such notice, set the abandonment aside 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 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, the court shall, on motion of any party, enter judgment wholly or partially dismissing the proceeding.

Comment. Section 1268.510 is the same in substance as portions of former Section 1255a: subdivision (a) is the same in substance as the first sentence of former Section 1255a; subdivision (b) is the same in substance as subdivision (b) of former Section 1255a; subdivision (c) is the same in substance as the first sentence of subdivision (c) of former Section 1255a. For recovery of costs, expenses, and damages on dismissal, see Sections 1268.610 and 1268.620.

Article 7. Expenses and Damages Upon Dismissal
or Judgment That No Right to Take

§ 1268.610. Reimbursement of defendant upon dismissal or judgment that
no right to take

1268.610. The court shall award the defendant his recoverable costs and disbursements when:

(1) An eminent domain proceeding is wholly or partially dismissed for any reason; or

(2) Final judgment in the eminent domain proceeding is that the plaintiff cannot acquire property it sought to acquire in the proceeding.

(b) Recoverable costs and disbursements shall be claimed in and by a cost bill to be prepared, served, filed, and taxed as in a civil action. If the proceeding is dismissed upon motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(c) Except as provided in subdivision (d), for the purposes of this section, recoverable costs and disbursements include both of the following:

(1) All expenses reasonably and necessarily incurred in preparing for the trial, during trial, and in any subsequent judicial proceedings, in the eminent domain proceeding.

(2) 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 defendant's interests in preparing for the trial, and in any subsequent judicial proceedings, in the eminent domain proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint.

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(d) Where there is a partial dismissal or a final judgment that the plaintiff cannot acquire a portion of the property originally sought to be acquired, recoverable costs and disbursements include only those recoverable costs and disbursements, or portions thereof, that would not have been incurred had the property sought to be acquired following the dismissal or judgment been the property originally sought to be acquired.

Comment. Section 1268.610 deals with the recoverable costs, expenses, and disbursements that a defendant may recover when an eminent domain proceeding is dismissed for any reason or there is a final judgment that the plaintiff does not have the right to take. The section is based primarily on former Section 1255a but expands the scope of protection afforded the defendant to cover dismissal for any reason. Compare Alta Bates Hosp. v. Mertle, 31 Cal. App.3d 349, ___ Cal. Rptr. ___ (1973).

Subdivision (a). To a large extent Section 1268.610 continues provisions of former Section 1255a. Thus, as formerly was the rule under Section 1255a, the plaintiff must reimburse the defendant:

(1) When the plaintiff voluntarily abandons the proceeding. See also Section 1268.510.

(2) When there is an implied abandonment of the proceeding, such as abandonment, resulting from failure to pay the judgment. See Section 1268.020. See County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963); Capistrano Union High School Dist. v. Capistrano Beach Acreage Co., 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961).

(3) When the plaintiff amends the complaint to significantly reduce the property or property interest being taken, amounting to a "partial abandonment" of the proceeding (see Section 1250.380). (Reimbursement of defendant's costs, disbursements, and expenses when the complaint is amended to add additional property is not covered by Section 1258.610; this is covered by Section 1250.380.)

Section 1268.610 also continues the rule under former Section 1246.4 that the plaintiff must reimburse the defendant when there is a final judg-

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ment that the plaintiff does not have a right to take the property sought to be acquired. See also federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) § 304.

In one respect, Section 1268.610 changes prior law; the section requires reimbursement of the defendant where the eminent domain proceeding is dismissed for failure to prosecute it. Under prior law, the defendant was not entitled to be reimbursed when the action was dismissed for failure to prosecute it. See City of Industry v. Gordon, 29 Cal. App.3d 90, ___ Cal. Rptr. ___ (1972); Bell v. American States Water Service Co., 10 Cal. App.2d 604, 52 P.2d 503 (1935). But see Alta Bates Hosp. v. Mertle, supra.

Subdivisions (b), (c), and (d). Subdivision (b) is the same in substance as the fourth and fifth sentences of former Section 1255a(c). Subdivision (c) is the same in substance as the second sentence of former Section 1255a(c).

Subdivision (d) is the same in substance as the third sentence of former Section 1255a(c). Recoverable costs and disbursements do not include any items that would have been incurred notwithstanding the "partial abandonment." County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). See also Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, ___ P.2d ___, ___ Cal. Rptr. ___ (1971); Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965). The same rule applies where a final judgment determines that the plaintiff does not have the right to take a portion of the property it originally sought to acquire in the eminent domain proceeding.

§ 1268.620. Damages caused by possession

1268.620. If, after the defendant moves from property in compliance with an order for possession, the proceeding is dismissed with regard to the property for any reason or there is a final judgment that the plaintiff cannot acquire the property, the court shall:

(a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and

(b) Make such provision as shall be just for the payment of (1) damages arising out of the plaintiff's taking and use of the property and (2) damages for any loss or impairment of value suffered by the land and improvements. Such damages shall be measured from the time the plaintiff took possession of or the defendant moved from the property in compliance with an order for possession, whichever is earlier.

Comment. Section 1268.620 provides for restoration of possession of the property and damages where the plaintiff took possession of property prior to a dismissal or a final judgment that the plaintiff cannot acquire the property.

The provision on restoration of possession of the property supersedes the final portion of the second sentence of former Section 1252 and a portion of subdivision (d) of former Section 1255a. Whereas the prior provisions required possession to be restored to the defendants when the plaintiff failed to deposit the award in a condemnation proceeding, abandoned the proceeding, or because the right to take was defeated, Section 1268.530 requires restoration in any case where the proceeding is dismissed or there is a final judgment that the plaintiff cannot take the property, thus covering, for example, a case where the proceeding is dismissed for delay in bringing it to trial.

The provision relating to the payment of damages supersedes subdivision (d) of former Section 1255a. Whereas the prior provision required payment of

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damages when the plaintiff abandoned or the right to take was defeated, subdivision (b) makes clear that this rule applies as well where the proceeding is dismissed, e.g., because the plaintiff fails to prosecute or because the plaintiff fails to deposit the award in a condemnation proceeding.

Article 8. Costs

§ 1268.710. Court costs

1268.710. (a) Except as provided in subdivisions (b) and (c), the defendant in an eminent domain proceeding shall be allowed his costs.

(b) The costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1265.010 shall be allowed to the defendants except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

(c) Where a new trial is granted upon the application of the defendant and he fails 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.

(d) Costs may be claimed in and by a cost bill to be prepared, served, filed, and taxed as in civil actions generally.

Comment. Section 1268.710 restates prior law relating to the allowance of costs in the trial court. See Section 1268.720 for costs on appeal and Section 1268.610 (costs on dismissal). Former Section 1255 provided that, in eminent domain proceedings, "costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." See also Section 1032. However, very early, the California Supreme Court held that the power provided by Section 1255 "must be limited by section 14 of article I of the constitution, which provides that '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.' . . . To require the defendants in [an eminent domain] case to

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pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs." City & County of San Francisco v. Collins, 98 Cal. 259, 262, 33 P. 56, ___ (1893). Accordingly, the defendant in an eminent domain proceeding has as a rule been allowed his ordinary court costs. This rule is subject to the limitation that defendants with a single, unified interest may be allowed only a single cost bill. See City of Downey v. Gonzales, 262 Cal. App.2d 563, 69 Cal. Rptr. 34 (1968). Moreover, the costs of determining title as between two or more defendants has been borne by such defendants. See former Section 1246.1. See also Housing Authority v. Pirrone, 68 Cal. App.2d 30, 156 P.2d 39 (1945). This rule is continued in subdivision (b). In addition, subdivision (k) of former Section 1255 provided that, where a defendant obtained a new trial, he had to be successful in increasing the amount originally awarded or the cost of the new trial would be taxed against him. Los Angeles, Pasadena & Glendale Ry. v. Rumpp, 104 Cal. 20, 37 P. 859 (1894). Subdivision (c) of Section 1268.710 continues this additional exception.

Subdivision (d) merely makes clear that the procedures for applying for and taxing costs in an eminent domain proceeding are the same as in civil actions generally. See Section 1230.040 (rules of practice in eminent domain proceedings).

Section 1268.710 does not attempt to define recoverable "costs." The issue of what costs are recoverable is left to court rule and decision. In the past, "costs" have included:

- (1) Filing and process fees (City & County of San Francisco v. Collins, supra; see Govt. Code §§ 26720-26749, 26820-26859);
- (2) Notary fees (City & County of San Francisco v. Collins, supra; see Govt. Code § 8211);
- (3) Cost of depositions (Section 1032a);
- (4) Ordinary witness fees, including mileage (City & County of San Francisco v. Collins, supra; see Govt. Code § 68093);

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(5) Jury fees, including mileage (City & County of San Francisco v. Collins, supra; see Sections 196 (fee schedule), 1032.5. See also Section 631.5 (plaintiff in eminent domain proceeding required to deposit jury fees));

(6) Fees for official reporting of the proceeding (Govt. Code § 69953). However, such fees have not included the cost of preparing a daily transcript. Id. See Regents of Univ. of Cal. v. Morris, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970).

Fees of the defendant's attorney and appraiser and other experts have not generally been recoverable. County of Los Angeles v. Ortiz, 6 Cal.3d 141, 490 P.2d 1142, 98 Cal. Rptr. 454 (1971). But see Section 1268.610 (costs on dismissal).

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§ 1268.720. Costs on appeal

1268.720. (a) Except as provided in subdivision (b), the defendant in an eminent domain proceeding shall be allowed his costs on appeal whether or not he is the prevailing party.

(b) The Judicial Council may provide by court rule that, where the defendant appeals, the reviewing court may impose upon him penalties, including the withholding or imposing of costs, in such circumstances as it deems appropriate.

Comment. Section 1268.720 states the rules governing costs on appeal in an eminent domain case. Under prior law, eminent domain cases were an exception to the rule that the prevailing party is entitled to his costs on appeal. Compare Cal. Rules of Ct. 26 (costs on appeal). Based upon the general constitutional principle that "just compensation" requires that the plaintiff-condemnor bear the costs of all parties to the action, it was held that, where the plaintiff was the appellant, the defendant was entitled to costs on appeal even if the plaintiff prevailed. Sacramento & San Joaquin Drainage Dist. v. Reed, 217 Cal. App.2d 611, 31 Cal. Rptr. 754 (1963). See San Joaquin etc. Irr. Co. v. Stevinson, 165 Cal. 540, 132 P. 1021 (1913). But see Yolo Water & Power Co. v. Edmands, 188 Cal. 344, 205 P. 445 (1922) (plaintiff forced to appeal to secure right to partially abandon).

Where the defendant is the appellant and he prevails, he is, of course, entitled to costs under the general rule. See Regents of Univ. of Cal. v. Morris, 12 Cal. App.3d 679, 90 Cal. Rptr. 816 (1970). Where the defendant is the appellant and loses, the former law was not clear. The trend in recent years was to award the defendant-appellant his costs whether or not he prevailed. See City of Baldwin Park v. Stoskus, 8 Cal.3d 563, 743a, ___ P.2d ___, ___ Cal. Rptr. ___ (1972); Klopping v. City of Whittier, 8 Cal.3d 39, 59, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___ (1972); People v. International Tel. & Tel. Corp., 26 Cal. App.3d 549, 103 Cal. Rptr. 63 (1972).

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See also In re Redev. Plan for Bunker Hill, 61 Cal.2d 21, 68-71, ___ P.2d ___, ___-___, 37 Cal. Rptr. 74, ___-106 (1964). However, such action apparently was discretionary with the reviewing court. See City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 P. 468 (1916) (not unconstitutional to award costs to plaintiff-respondent where he is the prevailing party; distinguishing Stevinson where plaintiff was the appellant). See also Stafford v. County of Los Angeles, 219 Cal. App.2d 770, 33 Cal. Rptr. 475 (1963) (plaintiff in inverse condemnation case taxed costs for frivolous appeal). Moreover, the defendant was not entitled to costs where the issue involved title as between two or more defendants. See former Code Civ. Proc. § 1246.1; Section 1268.710(b) and Comment thereto.

Section 1268.720 preserves the substance of these rules. Subdivision (a) states the general principle that the defendant is entitled to costs on appeal whether or not he is the appellant and whether or not he prevails. Subdivision (b) authorizes the Judicial Council to deviate from this principle by court rule where the defendant is the appellant and the circumstances warrant the imposition of costs upon him. See Cal. Rules of Ct. 26(a) (frivolous appeal; unreasonable infraction of the rules governing appeal).