36 6/21/67

Revised Memorandum 67-34

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

This revised memorandum replaces Memorandum 67-34, sent May 29, 1967. The "Proposed Legislation" attached has not been changed since the earlier memorandum. The "Proposed Constitutional Amendment" has been changed, however, and this draft, rather than the earlier one, will be considered at the June meeting.

Background. A tentative recommendation on this subject was widely disseminated last fall. The response was not entirely adverse, but it was apparent that there was no great enthusiasm for the recommendation, either on the part of property owners or of the public agencies. (The responses are summarized in Memorandum 66-62, October 11, 1966.) Thereafter, the proposed legislation was liberally revised by the staff to incorporate various innovations that we thought might make the recommendation on the pivotal point of "immediate possession" more acceptable. That version was considered by the Commission at the Tahoe meeting, the last time this subject was considered. The revised draft of the proposed legislation that is attached (pink pages) makes the changes directed at the Tahoe meeting, with a single exception noted below.

Constitutional revision. The staff believes that the Commission has made a careful study of Section 14 of Article I, is aware of all major problems presented by "immediate possession" and related questions, and should therefore prepare a tentative recommendation indicating what we believe Section 14 should contain. The staff does not believe, however, that we should plan to propose and press for the adoption of a constitutional amendment. The practical problems connected with such an amendment have been considered by the Commission at several meetings. Rather the staff

recommends that we submit our tentative recommendation, when printed, to the Constitutional Revision Commission for consideration by that commission in the course of its study.

The attached yellow pages contain our suggested revision of Section 14 of Article I. Under the standards for inclusion and exclusion of matter followed by the Constitutional Revision Commission, we believe that it is unlikely that the existing particularized content of Section 14 will survive revision of Article I. Certainly, whatever assistance we can lend to the Constitutional Revision Commission in its consideration of Section 14 should be in the direction of eliminating the "self-executing" and detailed provisions now found in the section. We should recommend, and the attached draft provides, that Section 14 be reduced to four elements: (1) just compensation, (2) public use, (3) jury trial, and (4) an assurance of simultaneous payment that will permit any sensible form of immediate possession devised by the Legislature provided that the property owner receives substantial payment at the time possession is taken.

Accordingly, we suggest that the constitutinnal revision contained on the yellow pages be recommended by the Commission.

Statutory revision. At the Tahoe meeting, the Commission directed, in effect, that the draft legislation (1) not extend the right to immediate possession, (2) not change existing ex parte procedure in right of way and reservoir cases, and (3) extend the period of notice to the property owner from the existing 20 days to 60 days. As revised, Sections 1269.01 and 1269.04 do this, and the necessary parallel changes have been made throughout. The staff, however, has also included Section 1269.02 which would provide the "gentlest" form of an extension of possession prior to judgment that we have ever considered. Notice that it excludes private condemnors, requires a noticed motion, assures the property owner of 60

days' notice following the making of the order, and would preserve evidence of the existing condition of the property. The authorization could further be limited to cases where the property owner would not be required to relocate his home or business. The reasons of the staff for strongly suggesting inclusion of Section 1269.02 are simple: (1) The Commission should avoid any implication that it has explored this subject and has concluded that the existing, and rather peculiar, constitutional authorization has any intrinsic merit; (2) we should avoid any implication that we believe that the existing constitutional authorization precludes legislative experimentation in the preliminary exchange of approximate compensation and possession; (3) it would be desirable to afford the California Supreme Court an opportunity to declare that the existing contents of Section 14 are mere "for instances," which may be broadened (or curtailed) by the Legislature; and (4) if the Constitutional Revision Commission revises Section 14 to eliminate the detail on immediate possession, we will have appropriate implementing legislation.

Particular Changes Made in This Draft

Changes made in this draft to carry out the direction of the Commission at the Tahoe meeting are as follows:

Section 1247

Former drafts amended Code of Civil Procedure Section 1247 to codify case law that holds that the condemnation court has the exclusive power to determine and enforce the right to possession of the property, as between the plaintiff and the defendants, and to enforce all of its orders for possession. This draft deletes the amendment to Section 1247, but adds the same material as Section 1269.08. This change was directed at the Tahoe meeting to avoid any implication that we are making a substantial change in existing Section 1247.

Section 1249 (amended)

This section, which deals with the pecuniary effects of "pre-condemnation," has been further polished, but it retains the previous determinations of the Commission. This version states the curb upon pre-condemnation influences as refinements of the market value concept. This draft will not entirely please the public agencies because of their view that this restriction should be stated in terms of the admission or exclusion of evidence, and particularly of comparable sales. The Commission, however, has uniformly taken the view that the section should be stated as substantive law, operating both in the admission and exclusion of evidence and in instructions concerning "market value." The staff strongly recommends retention of this form.

Section 1249a (new section)

In this section, which specifies alternative dates of valuation, subdivisions (b), (c), and (d) continue existing law. Subdivision (e) reverses the result of the Murata decision in the case of new trials unless the condemnor deposits the amount of the verdict or judgment within a brief period. Subdivision (f) clarifies the date of valuation in cases of mistrial. One appellate decision holds that the abortive "trial" has no effect on the date of valuation and that the date may shift forward to the date of the "retrial" The public agencies would prefer the rule to be that a "retrial" is simply a continuation of the original trial proceedings. The staff, however, suggests that a rule analogous to the one governing new trials be made applicable. Accordingly, subdivision (f) provides that the date of valuation may, in effect, shift forward unless the condemnor deposits probable compensation within a specified time following the declaration of the mistrial. The deposit would, of course, be made under Chapter 1 (commencing with Section 1268.01) rather than Chapter 3 (commencing with Section 1270.01) because in the case of a mistrial no verdict or judgment is rendered.

Subdivision (g) is a better version of the former subdivision (b) that appeared in this section.

Section 1268.01 et seq. (New sections--Deposit of probable compensation)

The changes in this chapter, which permit the condemnor to deposit its estimate of the amount of probable compensation, subject to liberal provision for revision by the court, were approved by the Commission at the Tahoe meeting. On examination of the question, the staff has concluded that this change is permissible under the existing language of Section 14 of Article I of the California Constitution.

Section 1269.01 et seq. (New sections--Immediate possession)

Sections 1269.01 and 1269.04 state existing immediate possession practice, limited to right of way and reservoir cases, except that the period of notice to the property owner has been extended from 20 to 60 days. This restoration and change in the period of notice was directed at the Tahoe meeting.

Sections 1268.02 and 1268.03 are the staff's proposal, based on considerations outlined in the preliminary portion of this memorandum. The reason for permitting an appeal from an order for "immediate possession" obtained by noticed motion (Section 1268.03) is that any review of a "right to take" question by an appellate court in connection with immediate possession concludes that question on trial of the eminent domain proceeding itself. We think, therefore, that as a record has been made on hearing of the motion, appeal rather than writ would be a better procedure for presenting the right to take question to the appellate court.

Section 1269.05 has been revised as directed at the Tahoe meeting to permit the property owner to specify the date on which he desires the deposit to be made. If the deposit is made on or before this date, 30 days thereafter is given to the property owner in which to vacate the

property. Of course, as in earlier drafts, the only sanction in the section is the accrual of interest from the date specified by the property owner if the deposit is not made.

Section 1269.08 continues an amendment that, in former drafts, was made to Code of Civil Procedure Section 1247.

General Revision

Throughout, this draft has been polished considerably, without the making of substantive changes.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel

Revised 6/20/67

EXHIBIT II

Proposed Constitutional Amendment

SEC. 14. (a)

Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner; ~~and no right-of-way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law, provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of com-~~

~~petent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings.~~

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

(b) *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.*

(c) The Legislature may provide for the taking of possession of property and the devoting of such property to public use following commencement of, and prior to final judgment in, eminent domain proceedings. For this purpose, the Legislature may classify condemnors and public uses or purposes, and may prescribe the manner in and the time at which possession may be taken. However, before possession is taken, the probable amount of compensation to be made for the property and any damage incident to the taking shall be paid into court for the owner. The amount paid or to be paid into court shall be subject to determination or redetermination by the court on motion of any interested person. The total amount paid into court shall be available immediately to the persons the court determines to be entitled thereto and may be withdrawn in accordance with such procedure as the Legislature may prescribe.

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

Subdivision (a). No change is made in existing constitutional law respecting "public use," "just compensation,""inverse condemnation," or the general requirement that property not be taken or damaged until compensation is made to or paid into court for the owner. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), and City and County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955)(public use); Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 107 P.2d 618 (1940), and Sacramento etc. R.R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979 (1909)(just compensation); Bauer v. Ventura County, 45 Cal.2d 276, 289 P.2d 1 (1955), and Rose v. State of California, 19 Cal.2d 713, 213 P.2d 505 (1942)(inverse condemnation proceedings); Heilbron v. Superior Court, 151 Cal. 271, 90 Pac. 706 (1907), and McCauley v. Weller, 12 Cal. 500 (1859)(pre-payment or payment into court.)

Subdivision (b). This subdivision states the established judicial construction of the deleted language requiring that "compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." See City of Los Angeles v. Zeller, 176 Cal. 194, 167 Pac. 849 (1917). With respect to the requirement that the power of eminent domain be exercised through judicial proceedings, see Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750 (1911); and Weber v. Board of Suprs. Santa Clara Co., 59 Cal. 265 (1881). Regarding the assurance of trial by jury in condemnation and inverse condemnation proceedings, see Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238 (1915), and Highland Realty Co. v. San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956). The purpose of making this subdivision "subject to the provisions of Section 23a of Article XII" is to prevent any implication that Section 23a is superseded by the readoption of this section. Section 23a empowers the Legislature to authorize the Public Utilities Commission to determine the compensation to

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

Subdivision (c). This subdivision is new. It 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 Practice, 7 SANTA CLARA LAWYER 37, 56-74 (1966).

Subdivision (c) also makes explicit the requirement that, before possession of property is taken, the probable amount of compensation that eventually will be awarded in the proceeding be paid into court for the owner. The subdivision also adds a requirement, not heretofore imposed by this section, that the funds paid into court be available to the property owner prior to termination of the proceeding. The subdivision thus accords with decisions of the California Supreme Court holding that, before property is taken, compensation must be paid into court for the owner. See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). The subdivision permits the Legislature to specify whether the amount paid into court is determined initially by the plaintiff, by the court, or in some other manner, but requires that such amount be subject to determination by the

court on motion of an interested person.

Language deleted. In deleting the second portion of the first sentence of this section, this revision eliminates language prohibiting "appropriation" of property in certain cases, "until full compensation therefor be first made in money or ascertained and paid into court for the owner." This language adds nothing to the meaning of subdivision (a)(1). See Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629 (1902). A more explicit requirement is imposed by new subdivision (c).

Also deleted is the language requiring that, in certain cases, compensation be made "irrespective of any benefits from any improvement proposed." This requirement respecting the offsetting benefits has been held inoperative because of its conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902); People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 (1939). In deleting the language, this amendment clarifies the power of the Legislature to deal with the offsetting of benefits in eminent domain proceedings. The subject is now governed by Section 1248 of the Code of Civil Procedure.

The proviso to the first sentence of this section, and the next following sentence, dealing with "immediate possession" in right of way and reservoir cases are superseded by subdivision (c).

In deleting the last sentence of this section, this amendment eliminates the provision that, in effect, property may be taken by eminent domain for certain logging or lumbering railroads, and that such taking constitutes the taker a common carrier. This provision, added in 1911, has never been construed or applied by the California appellate courts. Takings for the purposes mentioned in the sentence are authorized by Section 1238 of the Code of Civil Procedure and Section 1001 of the Civil Code. The portion

of the sentence making the taker a common carrier is merely an instance of a broader proposition inherent in the nature of the power of eminent domain. See Traber v. Railroad Commission, 183 Cal. 304, 191 Pac. 366 (1920); Western Canal Co. v. Railroad Commission, 216 Cal. 639, 15 P.2d 853 (1932). Deletion of the sentence is intended to clarify, rather than change, existing law.

REVISED 5/28/67

§ 1243.4

PROPOSED LEGISLATION

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

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

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

Section 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:

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

Section 1243.6 (repealed)

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

~~1243.6. When money is required to be deposited as provided by Section 1243.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.~~

Comment. Section 1243.6 is superseded by Section 1268.10.

Section 1243.7 (repealed)

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

~~1243.7. (a) At any time after money has been deposited as provided in Section 1243.5, 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.

Section 1243.7	Recommended Legislation (Code of Civil Procedure)
Subdivision (a)	1268.04, 1268.05
Subdivision (b)	1268.06
Subdivision (c)	1268.04, 1268.05
Subdivision (d)	1268.05
Subdivision (e)	1268.05
Subdivision (f)	1268.05
Subdivision (g)	1268.07
Subdivision (h)	1268.08

Section 1249 (amended)

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

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

(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 determined under Section 1249a* ~~at that date~~ shall be the measure of compensation for ~~all~~ property ~~to be~~ actually taken; and the basis of damages to property not ~~actually~~ taken but injuriously affected; in ~~all~~ cases where such damages are allowed ~~as provided in~~ *under Section 1248*; ~~provided that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.~~

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

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

In San Diego Land and Town Company v. Neale, 78 Cal. 63, 20 Pac. 372 (1888), and subsequent decisions, the courts have held that any increase in the market value of the property to be taken that results directly from the proposed public improvement is to be deducted, in effect, in arriving at the compensable market value. See U.S. v. Miller, 317 U.S. 369 (1943); City of San Diego v. Boggeln, 164 Cal. App.2d 1, 330 P.2d 74 (1958); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). This subdivision is intended to codify the results of these and similar decisions.

Notwithstanding the rule as to enhancement in value, the California decisions are uncertain respecting any decrease in value due to such factors as general knowledge of the pendency of the public project. Several decisions seem to indicate that the rules respecting enhancement and diminution are not parallel, and that value is to be determined as of the date of valuation notwithstanding that such value reflects a decrease due to general knowledge of the pendency of the public project. See City of Oakland v. Partridge, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); People v. Lucas, 155 Cal. App.2d 1, 317 P.2d 104 (1957); and Atchison, Topeka and Santa Fe Railroad Co. v. Southern Pacific, 13 Cal. App.2d 505, 57 P.2d 575 (1936). Seemingly

to the contrary are Redevelopment Agency of the City of Santa Monica v. Zwerman, 240 A.C.A. 70 (1966); People v. Lillard, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1963); Buena Park School Dist. v. Metrim Corp., 176 Cal. App.2d 255, 1 Cal. Rptr. 250 (1959); and County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 291 P.2d 98 (1955). Subdivision (a) is intended to make the rules respecting appreciation and depreciation parallel.

Under subdivision (b) of this section, the market value of the property on the date of valuation is the "measure of compensation" for property actually taken and the "basis of damages" to property not taken but injuriously affected. Subdivision (a), however, requires that the influence, if any, of the mentioned factors upon market value be considered in determining compensable market value on the date of valuation. Thus, with respect to property taken, disallowance of the effect, if any, of the factors has a direct bearing upon the compensation to be awarded. In cases of partial takings, however, the market value of the property is merely the "basis of damages" to property not taken but injuriously affected. Thus, the effect, if any, of the factors is to be eliminated in determining value in the so-called "before condition" of the property for the purpose of assessing severance damages and special benefits under Code of Civil Procedure Section 1248. The nature of the public improvement is taken into account, of course, in determining the value of the property injuriously affected in the "after condition" for purposes of assessing severance damages and special benefits. See People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

The purpose of the first exclusion listed in subdivision (a) is to codify the general proposition that the use which the condemnor is to make of the property cannot properly be considered to have increased or decreased

its market value. See City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 31 P.2d 463 (1934). If, however, the condemnor's proposed use is one of the highest and best uses of the property, the adaptability of the property for that purpose may be shown by the property owner. See San Diego Land and Town Co. v. Neale, supra.

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

As to changes in the market value of the property to be taken due to the imminence of the eminent domain proceeding itself, or to any action on the part of the condemnor preliminary to the proceeding, see Buena Park School Dist. v. Metrim Corp., supra. Subdivision (a) codifies the view expressed in the Metrim and similar decisions.

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

No change is made in existing rules as to persons entitled to participate in the award of compensation or damages (see People v. City of Los Angeles,

179 Cal. App.2d 558, 4 Cal. Rptr. 531 (1960); People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641 (1944)). Further, no change is made in the effect of a lis pendens (see Lansburgh v. Market St. Ry., 98 Cal. App.2d 426, 220 P.2d 423 (1950) or in the rule that, as against intervening rights of persons having actual or constructive notice of the proceeding, the title of the plaintiff relates back to the commencement of the proceeding (see East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240, 278 Pac. 476 (1929).

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

Decisions construing Code of Civil Procedure Section 1249 held that its provisions governing the date of valuation and the making of subsequent improvements do not apply in proceedings by political subdivisions to take the property of public utilities under the provisions of the Public Utilities Code and Section 23a of Article XII of the California Constitution. Citizen's Util. Co. v. Superior Court, 59 Cal.2d 805, 31 Cal. Rptr. 316, 382 P.2d 356 (1963); Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 Pac. 469 (1918). This construction is continued under this section and Sections 1249a and 1249.1(b).

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 and the delay is not caused by the defendant, the date of valuation is the date of the commencement of the trial.

(d) If the issue of compensation is not brought to trial within one year after the filing of the complaint and the delay is caused by the defendant, the date of valuation is the date of the filing of the complaint.

(e) If a new trial is ordered by the trial or appellate court and the new trial is not commenced within one year after the filing of the complaint, the date of valuation is the date of the commencement of such new trial, except that the date of valuation in the new trial shall be the same date as the date of valuation in the previous trial if (within 30 days after the entry of judgment or, if a motion for new trial or to vacate or set aside the judgment has been made, within 10 days after disposition of such motion) the plaintiff has deposited:

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

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

(f) 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.

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

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

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

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

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

Subdivisions (c) and (d) continue in effect a proviso formerly contained in Section 1249. Subdivision (d) 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 (e) or (f) rather than under subdivision (b), (c), or (d). However, if the new trial or retrial is commenced within one year after the filing of the complaint, the date of valuation is determined by subdivision (b).

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

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

Under subdivision (e), 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 (g).

Subdivision (f). Under the language formerly contained in Section 1249 the effect, if any, of a mistrial upon the date of valuation was uncertain. Subdivision (f) adopts the same principle as that established by subdivision

(e) which governs the date of valuation when a new trial is ordered. See the Comment to subdivision (e).

For the purpose of subdivision (f), 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 (f) and the Comment to that subdivision. As to the distinction, see Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928 (1946); WITKIN, 3 CALIFORNIA PROCEDURE 2072, § 24 (1954).

Subdivision (g). This subdivision permits the plaintiff, by depositing probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the amount of the judgment pursuant to Chapter 3 (commencing with Section 1270.01) of Title 7.1 of the Code of Civil Procedure, to establish the date of valuation as of a date no later than the date the deposit is made. The rule under the language formerly contained in Section 1249 was to the contrary; neither the depositing of probable just compensation nor the taking of possession had any bearing on the date of valuation. See City of Los Angeles v. Tower, 90 Cal. App.2d 869, 204 P.2d 395 (1949). The date of valuation may be earlier than the date of the deposit, and subsequent events may cause such an earlier date of valuation to shift to the date of deposit. But a date of valuation established by a deposit cannot be shifted to a later date by any of the circumstances mentioned in the preceding subdivisions.

Section 1249.1 (amended)

7 SEC. 8. Section 1249.1 of the Code of Civil Procedure is amended to read:

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

~~(a)~~

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

~~(b)~~

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

~~(c)~~

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

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

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

Section 1252 (amended)

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

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited ~~in Court for the defendants, and be distributed to those entitled thereto~~ *as provided in Chapter 3 (commencing with Section 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.

Comment. Section 1252 is amended in order to eliminate any distinction between the kinds of deposits that may be made after entry of judgment. Statements have appeared in cases indicating that the defendant's withdrawal of a deposit made under Section 1252 waives the defendant's right of appeal while withdrawal of a deposit made under Section 1254 does not. See People v. Neider, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961); People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962), has cast doubt on the validity of such statements by holding that a defendant may withdraw a deposit made under Section 1252 without waiving his right to a new trial on the issue of compensation by filing the receipt and waiver of claims and defenses, except the claim for greater compensation, provided in Section 1254 (recodified in Section 1270.05).

This amendment of Section 1252 and enactment of Sections 1270.01-1270.07 makes it clear that withdrawal of any deposit does not result in a waiver of appeal or a right to new trial on the issue of compensation if that issue is preserved in accordance with Section 1270.05.

Section 1253 (amended)

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

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned, the estate or interest acquired therein, the purposes of such condemnation, and if possession is taken pursuant to ~~Section 1243.5 or 1254~~ *Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1* prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

Comment. Section 1253 is amended to change the references to the appropriate statutory provisions.

Section 1254 (repealed)

10 SEC. [illegible]. 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 remain until the amount~~

~~of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the 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 [illegible] or 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.

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

Section 1255a (amended)

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

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

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

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements; ~~which~~. *Recoverable costs and disbursements* ~~shall~~ include *(1)* all necessary expenses incurred in preparing for trial and during trial, and *(2)* reasonable attorney *and appraisal* fees *actually* and reasonably incurred as a result of the proceeding *to take the property, whether such fees were incurred for services rendered before or after the proceeding was commenced*. These costs and disbursements, including expenses and ~~attorney~~ fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions ~~, provided, however, that~~ Upon judgment of dismissal on motion of *the* plaintiff, *the* ~~defendants, and each of them may file a~~ cost bill *shall be filed* within 30 days after notice of entry of such judgment ~~, that said costs and disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 30 days or more prior to the time set for the pretrial conference 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 out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

Comment. The purpose and effect of subdivision (c) of Section 1255a is to recompense the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry an eminent domain proceeding through to conclusion. Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965); Oak Grove School Dist. v. City Title Ins. Co., 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963); Kern County v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). Under prior law, reasonable attorney's fees actually incurred were recoverable irrespective of the time when the legal services were rendered. Decoto School Dist. v. M. & S. Tile Co., 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964). This construction is continued and extended to include appraisal fees. Under prior law, all other necessary expenses in preparing for trial and during trial were subject to a proviso precluding their recovery if the action was dismissed 40 days or more prior to pre-trial or trial. La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal.2d 309, 19 Cal. Rptr. 479, 369 P.2d 7 (1962). This subdivision provides that such expenses may be recovered without regard to the date that the proceeding was abandoned or dismissed.

Subdivision (c) provides for the recovery of attorney and appraisal fees if they are actually incurred, are reasonable in amount, and are reasonably incurred as a result of the plaintiff's determination to take the property. If they are so incurred, they may be recovered although the services are rendered before the filing of the complaint in the eminent domain proceeding. Subdivision (c), of course, provides for the recovery of such fees and other expenses only if a complaint is filed and the proceeding is abandoned or dismissed. The subdivision has no application if the efforts or resolution of the plaintiff to acquire the property do not culminate in the filing of a complaint.

Section 1255b (amended)

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

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

(1) The date of the entry of judgment.

(2) The date that ~~the~~ possession of the property ~~sought to be condemned~~ is taken or the damage thereto occurs.

(3) The date after which the plaintiff may take possession of the property as stated in an order ~~authorizing the plaintiff to take~~ *for* possession.

(4) If the amount determined to be probable just compensation on motion of a defendant made under Section 1269.05 is not deposited ~~*before such date, the 31st day following the date of the order determining such amount.*~~ 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 and profits~~. *This subdivision shall not apply to interest accrued under Section 1269.05.*

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

~~(c)~~

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

(1) As to any amount deposited pursuant to *Chapter 1 (commencing with* Section ~~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 entered*. thereafter

(2) As to any amount deposited pursuant to Section 1269.05, the date ~~*of such deposit.*~~ for such deposit specified by the moving party.

~~(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 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 throughoug Title 7.1 (commencing with Section 1268.01). Paragraph (4) has been added to reflect the effect of Section 1269.05.

Subdivision (b). This subdivision has been revised to clarify the meaning of the former language. Under the subdivision, the plaintiff is entitled to offset against interest (1) the value of possession and (2) the net amount of rents or other income received, if such rents or income are attributable to the period after the date interest begins to accrue. The last sentence of the subdivision has been added to conform to Section 1269.05.

Subdivision (c). This subdivision has been added to codify existing law by specifying that the court, rather than the jury, assesses interest, including interest constitutionally required as compensation for possession or damaging of property prior to conclusion of the eminent domain proceeding. The subdivision also codifies existing law by specifying that the amount of the offset against interest provided by subdivision (b) is assessed by the court and to provide, in effect, that any evidence on that issue is to be heard by the court, rather than the jury. See People v. Giumarra Vineyards Corp., 245 Cal. App.2d ___, 53 Cal. Rptr. 902 (1966).

Subdivision (d). In subdivision (d), paragraph (1) has been revised to make reference to the appropriate statutory provisions and provide that interest terminates, on entry of judgment, upon an amount deposited before judgment pursuant to Chapter 1 (commencing with Section 1268.01) of Title 7.1.

After entry of judgment, such a deposit may be withdrawn pursuant to Section 1270.05. See the Comment to that section. Judicial decisions are uncertain as to the time interest ceases on a deposit made prior to entry of judgment if the amount is not withdrawn. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958); compare People v. Neider, 55 Cal.2d 832, 13 Cal. Rptr. 196, 361 P.2d 916 (1961). Under paragraph (1) interest on the amount on deposit terminates on entry of judgment even though the amount is less than the award. If the amount on deposit is less than the amount of the award, the deposit must be increased, on motion of the defendant, under Section 1268.03. See Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934).

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

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

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

Section 1257 (amended)

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

1257. *(a)* The provisions of Part II of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title ~~, provided, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession) as provided in section twelve hundred and fifty-four, and devote the same to the public use in question, and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff~~.

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

Comment. Section 1257 formerly contained an elaborate proviso that related to possession pending appeal or new trial. That proviso was added in 1877 in connection with related changes to Code of Civil Procedure Section 1254, which dealt with possession after entry of judgment. See Code Am. 1877-78, Ch. 651, p. 109, §§ 1-2. Several subsequent changes to former Section 1254 deprived the proviso of any effect. See Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468 (1941). Accordingly, the proviso has been eliminated. Possession pending appeal or new trial is now provided for by Chapter 3 (commencing with Section 1270.01) of Title 7.1.

Subdivision (b) is the same as and supersedes subdivision (k) of former Section 1254 of the Code of Civil Procedure. With respect to the construction and constitutionality of the provision, see Los Angeles, P. & G. Ry. Co. v. Rump, 104 Cal. 20, 37 Pac. 859 (1894).

Title 7.1 (added)

SEC. ~~15.~~ 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

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 it estimates to be the compensation to be made for the taking of the property (including any damage incident to the taking) at any time after filing the complaint and prior to the entry of judgment. A deposit may also be made under this chapter after the original entry of a judgment in the proceeding if that judgment has been reversed, vacated, or set aside by the trial or appellate courts. The deposit may be made whether or not possession of the property is to be taken. This deposit serves several purposes: First, it is a condition to obtaining an order for possession under Chapter 2 (commencing with Section 1269.01). Second, in some cases, it fixes the date of valuation. See Section 1249a. Third, if the deposit is withdrawn, interest ceases on the amount withdrawn on the date of withdrawal, and interest ceases in any event on the amount deposited upon entry of judgment. See Section 1255b. Fourth, if the deposit is withdrawn, the withdrawal entitles the plaintiff to an order of possession prior to judgment. See Section 1269.06.

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

1268.01. Deposit by the plaintiff

1268.01. (a) In any proceeding in eminent domain, the plaintiff may, at any time after filing the complaint and prior to entry of judgment, deposit with the court the amount it estimates to be the probable compensation that will be made for the taking of any parcel of property included in the complaint. Such deposit may also be made after entry of judgment in the proceeding if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The deposit may be made whether or not the plaintiff applies for, or intends to apply for, an order for possession.

(b) Before making a deposit pursuant to subdivision (a) the plaintiff shall cause at least one appraisal to be made of the property for which the deposit is to be made. The appraisal report or reports shall indicate separately:

(1) The value of the property.

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the benefit, if any, to the remainder of the larger parcel from which such property is taken.

Comment. Section 1268.01 is new. In contrast with former practice, the deposit may be made without obtaining the court's order therefor and without regard to an order for possession. 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 the 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.

Subdivision (b) contemplates that the required appraisal be made either by the condemnor's appraisal staff or by an independent appraiser. The appraisal is necessary to enable the plaintiff to comply with Section 1268.02 which requires the notice of deposit to be accompanied by or to refer to the appraisal report upon which the amount of the deposit is based.

1268.02. Service of notice of deposit; explanation of amount of deposit

1268.02. (a) On making a deposit pursuant to this chapter, ~~1268.02. If the plaintiff deposits the amount determined by the court,~~ the plaintiff shall serve a notice that the deposit has been made on all of the other parties to the proceeding who have an interest in the property for which the deposit was made. Service of such notice shall be made in the manner provided in Section 1269.04 for service of an order for possession. ~~Service of an order for possession that recites the amount deposited pursuant to this chapter is sufficient compliance with the requirement of this section.~~

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

(c) If the amount deposited is not the same as the total amount of compensation indicated by at least one appraisal report accompanying or referred to in the notice, the notice shall contain an explanation of the plaintiff's estimate of the probable amount of compensation and an explanation of the variance between the amount of that estimate and the amount indicated by the appraisal report or reports.

Comment. Section 1268.02 is new. It requires that notice of the deposit be given in all cases to facilitate motions to change the amount of the deposit (Section 1268.03) or applications to withdraw the funds deposited (Sections 1268.04 and 1268.05).

Subdivision (c) does not require that the amount deposited coincide with the total amount of compensation indicated by the appraisal report or reports. However, if the amounts differ the subdivision does require that the notice contain an itemization of the elements of compensation as estimated by the plaintiff and an indication of the reasons for not adopting the itemization and amounts indicated by the report or reports.

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. In such cases the court may stay its redetermination until after a motion for a new trial has been determined.

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

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

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

just compensation." As to the duty of the plaintiff and the powers of the court to maintain the deposit in an adequate amount, see G. H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934); Marblehead Land Co. v. Superior Court, 60 Cal. App. 644, 213 Pac. 718 (1923).

Under subdivision (g) of Code of Civil Procedure Section 1249a the making of a deposit under this chapter establishes the date of valuation unless an earlier date is applicable. The second sentence of subdivision (c) of Section 1268.03 denies that effect to the making of a deposit if the amount deposited is determined by the court to be inadequate and is not increased in keeping with the determination.

Section 1268.08 provides for recovery of any excessive withdrawal after final determination of amounts in the eminent domain proceeding. No provision is made for recovery, prior to such final determination, of any amount withdrawn. Accordingly, subdivision (d) prevents determination or redetermination of the amount of probable compensation to be less than the total sum withdrawn.

1268.04. Application for withdrawal of deposit

1268.04. (a) Except as provided in subdivision (b), ~~after the plaintiff has deposited the amount determined by the court,~~ any defendant who has an interest in the property for which ~~the deposit was~~ a deposit has been made may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

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

Comment. Section 1268.04 is derived from Section 1243.7(a), (c). After entry of judgment, providing the judgment entered has not then been reversed, vacated, or set aside, application for withdrawal is made under Section 1270.05, rather than under this section.

1268.05. Withdrawal of deposit; conflicting claims to deposit

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

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

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

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

(c) If an objection is filed on the ground that other parties are known or believed to have interests in the property, the plaintiff shall serve or attempt to serve on such other parties a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn. The notice shall be served in the manner provided in subdivision (c) of Section 1269.04 for service of an order for possession. The plaintiff shall report to the court (1) the names of parties served and the dates of service, and (2) the names and last known addresses of parties who have neither appeared in the proceeding nor been served with process and whom the plaintiff was unable to serve personally. The applicant may serve parties whom the plaintiff has been unable to serve. Parties served in the manner provided in subdivision (c) of Section 1269.04 shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable to parties having an interest of record who are not so served, but if such liability is enforced the plaintiff shall be subrogated to the rights of such parties under Section 1268.08.

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

(e) If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant, before withdrawing such portion, to file an undertaking. The undertaking shall secure payment to such party or person any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. If withdrawal is permitted notwithstanding the lack of personal service of the application for withdrawal upon any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under subdivision (c). The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant or appearing to belong to another person. ~~If~~ The undertaking may be ~~is~~ 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. Hogarr, 181 Cal. App.2d 312, 5 Cal. Rptr. 247 (1960).

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

1268.06. (a) If the amount originally deposited is increased pursuant to Section ~~1268.02~~ 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. ~~If executed by two or more sufficient sureties approved by the court,~~ The undertaking may be and in such case the undertaking shall be in double such amount.

(b) If there are two or more applicants, the applicants, in lieu of filing separate undertakings, may jointly file a single undertaking in the amount required by subdivision (a).

(c) The plaintiff may waive the undertaking required by this section or may consent to an undertaking that is less than the amount stated by this section.

(d) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking may recover the premium paid for the undertaking, but not to exceed two percent of the face value if 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.

1268.07. Withdrawal waives all defenses except claim to greater compensation

1268.07. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

Comment. Section 1268.07 restates the substance of subdivision (g) of former Section 1243.7. In addition to waiving claims and defenses other than the claim to greater compensation, withdrawal of the deposit also entitles the plaintiff to an order for possession. See Section 1269.06. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

1268.08. Repayment of amount of excess withdrawal

1268.08. Any amount withdrawn by a party in excess of the amount to ~~when~~ which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled to such amount, together with legal interest from the date of its withdrawal. The court in which the eminent domain proceeding is pending shall enter judgment accordingly. If the judgment is not paid within 30 days after its entry, the court may, on motion, enter judgment against the sureties, if any, for such amount and interest.

Comment. Section 1268.08 restates the substance of subdivision (h) of former Section 1243.7.

§ 1268.09. Amount of deposit or withdrawal inadmissible in evidence

1268.09. (a) Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall be given in evidence or referred to in the trial of the issue of compensation.

(b) In the trial of the issue of compensation, no reference shall be made to reports, statements, or explanations made in connection with a deposit pursuant to this chapter nor to the fact that a party has or has not offered evidence or any particular evidence in connection with a deposit or withdrawal pursuant to this chapter.

Comment. Subdivision (a) of Section 1268.09 restates the substance of subdivision (e) of former Section 1243.5. Subdivision (b) is new. The principal purpose of this subdivision is to preclude impeachment of a witness at the trial by reference to appraisal reports, statements, or explanations made in connection with (1) a deposit and notice thereof under Sections 1268,01 and 1268.02, or (2) proceedings to determine or redetermine probable just compensation under Section 1268.03, or (3) an application to withdraw any amount deposited as probable compensation under Section 1268.04 or Section 1268.05.

1268.10. Deposit in State Treasury unless otherwise required

1268.10. (a) When money is deposited as provided in this chapter, the court shall order the money to be deposited in the State Treasury or, upon written request of the plaintiff filed with the deposit, in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article.

(b) As between the parties to the proceeding, money deposited pursuant to this chapter shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Comment. Subdivision (a) of Section 1268.10 is the same in substance as former Section 1243.6. Subdivision (b) is based on the first two sentences of subdivision (h) of former Section 1254.

Title 7.1--Chapter 2

CHAPTER 2. POSSESSION PRIOR TO JUDGMENT

1269.01 Possession by public entity for right of way or reservoir

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

(1) Is entitled to take the property by eminent domain; ~~and~~

(2) Is entitled to take possession prior to judgment under subdivision (a); and

(3) ~~(2)~~ Has deposited ~~probable just compensation~~ its estimate of the amount of compensation to be made for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01).

(c) The order for possession shall:

~~(1) Recite that it has been made under this section and Article 1, Section 14 of the Constitution of California.~~

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

(2) ~~(3)~~ State the purpose of the condemnation.

~~(4) State the amount deposited as probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).~~

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

Comment. This chapter provides for orders for possession prior to judgment, and supersedes Code of Civil Procedure Sections 1243.4 and 1243.5. Orders for possession subsequent to judgment are governed by Chapter 3 (commencing with Section 1270.1). Subdivision (a) of Section 1269.01 restates the substance of Code of Civil Procedure Section 1243.4. The words "the State or a county, city, district, or other public entity" have been substituted for the words "the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation." See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950). The new language encompasses all proceedings by governmental entities, agencies, or officers to acquire rights of way or lands for reservoir purposes, whether the interest to be acquired is a fee, easement, or other interest.

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

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

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

1269.02. Possession in other cases

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

(b) At any time after filing the complaint and prior to the entry of judgment, the plaintiff may apply to the court for an order for possession. Such application also may be made after entry of judgment if that judgment has been reversed, vacated, or set aside and no other judgment has been entered. The application shall be made by noticed motion, and the notice of motion shall be served in the same manner as an order for possession is served under Section 1269.04.

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

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

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

(3) The plaintiff has deposited ~~probable just compensation~~ its estimate of the amount of compensation to be made for the taking of the property in accordance with Chapter 1 (commencing with Section 1268.01) ~~and~~.

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

(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.

(f) If the property of which possession is sought to be taken under this section includes any substantial building, structure, or other improvement, and if construction of the public improvement in the manner proposed by the plaintiff entails destruction, removal, relocation, or alteration of such building, structure, or improvement, the court shall, on request of any person having an interest in the property, make the following determinations and orders as a condition to granting an order for possession:

(1) If the court determines that appraisals, descriptions, photographs, and other exhibits supplied by the plaintiff are sufficient to enable the court or jury to assess separately the value of the buildings, structures, or other improvements after their destruction or removal, the court shall order that such materials be preserved and that they, or any portion of them, be made available to the defendants for use as evidence in the proceeding.

(2) If the court determines that the materials supplied by the plaintiff are not sufficient to comply with paragraph (1), the court shall make its order fixing an amount that may be expended by the defendants to supply sufficient materials and specifying that such expenses are recoverable as costs in the proceeding.

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.

Subdivisions (b) and (c). Subdivisions (b) and (c) are patterned after provisions in other states which provide for obtaining possession prior to judgment by noticed motion procedure and which require the plaintiff to show a need for such possession. See, e.g., ILL. REV. STAT. 1957, Ch. 47, § 2.1; Dept. of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958). These subdivisions provide for determination of the motion in keeping with motion practice generally.

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.

Subdivision (f). The procedure provided by this subdivision is new. It is derived from provisions in other states that establish procedures designed to assure that destruction or removal of improvements prior to trial of the issue of compensation do not substantially handicap the court or jury in assessing the value of such improvements or result in unfairness to the defendants in the presentation of evidence respecting such value. See, e.g., OHIO REV. CODE § 163.06. The subdivision requires that the defendants' request be made before the court's disposition of the motion for an order for possession.

1269.03. Appeals

1269.03. (a) Neither an order for possession under Section 1269.01 nor the denial of such an order is appealable.

(b) Any aggrieved party may appeal from an order granting or denying an application for possession under Section 1269.02. An appeal from an order for possession does not stay the order or its enforcement, but the trial or appellate court may, in its discretion, stay such order pending review on appeal or for such other period as may be appropriate.

Comment. Section 1269.03 is new.

Judicial decisions have held that an appeal may not be taken from an ex parte order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari are the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an ex parte order for possession following entry of judgment is an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954); Housing Authority v. Forbes, 47 Cal. App.2d 358, 117 P.2d 722 (1941). These rules are continued in connection with orders made under Section 1269.01 or Chapter 3 of this title.

Subdivision (b) distinguishes between the ex parte orders made under Section 1269.01 and those made on noticed motion under Section 1269.02. As to the latter an appeal by either party is authorized. Such authorization

does not imply that, in any particular proceeding, an appeal is a sufficient remedy to preclude mandamus, prohibition or other writ procedure. In general, see 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-7, B-14 (1961); Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 SANTA CLARA LAWYER 37, 84-86 (1966).

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 [redacted] days prior to the time possession is taken pursuant to an order for possession ~~obtained pursuant to this chapter~~ 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. ~~If the order was obtained under Section 1269.01 or 1269.02~~ The court may, for good cause shown on ex parte application, shorten the time specified in this subdivision to a period of not less than three days.

(d) [redacted] Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding. If the person has appeared or been served with the summons, service of the order for possession may be made by mail upon such person and his attorney of record, if any.

(e) [redacted] If a person required to be personally served resides out of the state, or has departed from the state or cannot with due diligence be found within the state, the plaintiff may, in lieu of such personal service, send a copy of the order by registered or certified mail addressed to such person at his last known address.

(f) [redacted] The court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

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

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

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

1269.05. Deposit and possession on motion of certain defendants

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

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

(c) If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding in the manner provided for the recovery of other costs and disbursements on

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

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

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

Comment. Section 1269.05 is new. Except as provided in this section, the depositing of probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the taking of possession pursuant to this chapter is optional with the plaintiff. If a deposit is not made and possession is not taken, a defendant is not entitled to be paid until 30 days after final judgment. Code of Civil Procedure Sections 1251 and 1268. Section 1269.05 makes available to homeowners a procedure by which probable just compensation may be determined, deposited and withdrawn within a relatively brief period after the beginning of the proceeding. For a comparable provision applicable to all eminent domain proceedings, see PENN. EMINENT DOMAIN CODE § 407(b).

Although Section 1269.05 does not require the plaintiff to deposit the amount determined, if no deposit is made interest on the eventual award begins to accrue. See Section 1255b(a)(4). If the proceeding is abandoned or dismissed, the interest is computed on the amount determined by the court to be probable just compensation. This section apart, interest would not begin to accrue until entry of judgment. See Section 1255b(a)(1). Interest does not accrue on any amount deposited under this section if the deposit is made on or before the date specified by the moving party. See Section 1255b(d)(2).

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

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

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

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

(1) Vacates the property; or

(2) Withdraws any portion of the deposit.

(b) The plaintiff may apply ex parte to the court for an order for possession. The court shall authorize the plaintiff to take possession of the property if the court determines that the plaintiff has deposited probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) and that each of the defendants entitled to possession have:

(1) Vacated the property; or

(2) Withdrawn any portion of the deposit.

(c) The order for possession shall:

(1) Recite that it has been made under this section.

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

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

subdivision (b) of

Comment. Section 1269.06 is new. Chapter 1 (commencing with Section 1268.01) permits the plaintiff to deposit probable just compensation whether or not it obtains an order for possession. This section makes applicable to withdrawal of a deposit made prior to judgment the analogous rule that applies when a deposit made after judgment is withdrawn. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962). It also permits the plaintiff to take possession of the property after it has been vacated by all the persons who are entitled to possession. Service of the order for possession is required by subdivision (b) of Section 1269.04. The time limits for service of the order for possession on the record owner and occupants are the same as for an order for possession made under Section 1269.01.

1269.07. Taking possession does not waive right of appeal

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

Comment. Section 1269.07 is the same in substance as former Section 1243.5(f). The language has been changed to preclude implied waiver of appeal or right to new trial by taking possession pursuant to any order obtained under this chapter, including orders under Section 1269.05. Under Section 1268.07, the defendant also retains his right to appeal or to request a new trial upon the issue of compensation even though he withdraws the deposit made by the plaintiff. However, such withdrawal does waive all claims and defenses other than the claim to compensation.

1269.08. Court may enforce right to possession

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

(1) 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).

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

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

Comment. Section 1269.08 is new. The third subparagraph is derived from a sentence formerly contained in Code of Civil Procedure Section 1254. In general, the section codifies judicial decisions which hold that after an eminent domain proceeding is begun the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. See Marblehead Land Co. v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921); Montgomery v. Tutt, 11 Cal. 190 (1858); Sullivan v. Superior Court, 185 Cal. 133, 195 Pac. 161 (1921); Rafftery v. Kirkpatrick, 29 Cal. App.2d 503, 88 P.2d 147 (1938)(placing the plaintiff in possession); Neale v. Superior Court, 77 Cal. 28, 18 Pac. 790 (1888); In re Bryan, 65 Cal. 375, 4 Pac. 304 (1884)(preventing the plaintiff from taking possession or restoring the defendant to possession). In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see the decisions cited supra), orders for possession contemplated by the section include those made under Chapter 2 (commencing with Section 1269.01) of Title 7.1, Chapter 3 (commencing with Section 1270.01) of Title 7.1, and Section 125[illegible] of Title 7.

Title 7.1--Chapter 3

CHAPTER 3. DEPOSITS AND POSSESSION AFTER JUDGMENT

1270.01. Deposit after judgment

1270.01. (a) If the plaintiff is not in possession of the property to be taken, the plaintiff may, at any time after entry of judgment, deposit for the defendants the amount of the judgment together with the interest then due thereon, but a deposit may not be made under this section after the judgment entered has been reversed, vacated, or set aside and no other judgment has been entered.

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

Comment. This chapter relates to deposits that may be made and orders for possession that may be obtained after entry of the "interlocutory judgment" in condemnation. The procedures of the chapter apply notwithstanding the pendency of an appeal from the judgment or a motion to vacate or set aside the judgment. However, after the "interlocutory judgment" has been reversed, vacated, or set aside, deposit and possession procedures are governed by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01), rather than this chapter. See Sections 1268.01 and 1269.01. The chapter supersedes former Section 1254 and eliminates whatever distinction there may have been between deposits made under Section 1252 and Section 1254. Under this chapter, there is but one uniform post-judgment deposit procedure. As to the distinction between the "judgment" and the "final judgment" in eminent domain proceedings, see Section 1264.7 and Bellflower City School Dist. v. Skaggs, 52 Cal.2d 278, 339 P.2d 848 (1959).

Subdivision (a) is similar to subdivision (a) of former Section 1254. However, the deposit required here is merely the amount of the judgment and accrued interest. The provision for an additional sum to secure payment of further compensation and costs is contained in Section 1270.04. In addition, the deposit may be made under this section without regard to an order for possession. This section thus supersedes the deposit procedures formerly provided by Sections 1252 and 1254.

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

1270.02. Order for possession

1270.02. If the judgment determines that the plaintiff is entitled to take the property and the plaintiff has made the deposit provided in Section 1270.01, the court, upon ex parte application of the plaintiff, shall authorize the plaintiff to take possession of the property pending conclusion of the litigation. The court's order shall state the date after which the plaintiff is authorized to take possession of the property. Unless the plaintiff requests a later date, such date shall be 10 days after the date the order is made.

Comment. Section 1270.02 restates the substance of a portion of subdivision (b) of former Section 1254.

1270.03 Service of order

1270.03. At least 10 days prior to the date possession is to be taken, the plaintiff shall serve a copy of the order for possession upon the defendants and their attorneys, either personally or by mail. A single service upon or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1270.03 is the same in substance as subdivision (c) of former Section 1254. With respect to the last sentence, see the Comment to Section 1269.04.

1270.04. Increase or decrease in amount of deposit

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

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

Decisions under Section 14 of Article I of the California Constitution and Code of Civil Procedure Section 1254 have held that, where the plaintiff has taken possession prior to judgment, and judgment is entered for an amount in excess of the amount deposited, the defendant is entitled to have the deposit increased to the amount of the judgment. See, G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934). That rule is continued in existence, but the motion to obtain the increase is made under Section 1268.03, rather than under this section.

The additional amount referred to in this section is the amount determined by the court to be necessary, in addition to the amount of the judgment, to secure payment of any further compensation, costs, or interest that may be recovered in the proceeding. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958); City of Los Angeles v. Oliver, 110 Cal. App. 248, 294 Pac. 760 (1930). Deposit of the amount of the judgment itself is required by Sections 1270.01 and 1270.02.

Code of Civil Procedure Section 1254 was construed to make the amount, if any, to be deposited in addition to the judgment to be discretionary with the trial court. Orange County Water Dist. v. Bennett, 156 Cal. App.2d 745, 320 P.2d 536 (1958). This construction is continued under this section.

1270.05. Withdrawal of deposit

1270.05. (a) Subject to subdivision (c), any defendant for whom an amount has been deposited upon the judgment, or any defendant determined by the judgment to be entitled to an amount deposited prior to entry of that judgment, is entitled to demand and receive the amount to which he is entitled under the judgment upon obtaining an order from the court. Upon application by such defendant, the court shall order that such money be paid to him upon his filing (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all claims and defenses except his claim to greater compensation.

(b) Upon objection to such withdrawal made by any party to the proceeding, the court, in its discretion, may require the defendant to file an undertaking in the manner and upon the conditions specified in Sections 1268.05 and 1268.06 for withdrawal of a deposit prior to judgment.

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

Comment. Section 1270.5 is based on subdivision (f) of former Section 1254. For the parallel provisions for withdrawal of a deposit prior to judgment, see Sections 1268.05 and 1268.06.

Decisions under Section 14 of Article I of the California Constitution and Code of Civil Procedure Section 1254 held that, where a deposit was made to obtain possession prior to judgment, the defendant was nonetheless entitled to proceed under the provisions of Section 1254 after the entry of judgment. People v. Dittmer, 193 Cal. App.2d 681, 14 Cal. Rptr. 560 (1961). See also People v. Neider, 55 Cal.2d 832, 361 P.2d 916 (1961). Compare G.H. Deacon Inv. Co. v. Superior Court, 220 Cal. 392, 31 P.2d 372 (1934)(practice before any provision existed for withdrawal of a deposit made before judgment). The language of this section has been changed to incorporate this construction. The section also has been changed to permit the court to require security as a condition to withdrawal in appropriate cases.

Code of Civil Procedure Section 1254 was construed to permit the defendant to withdraw any amount paid into court upon the judgment, whether or not the plaintiff applied for or obtained an order for possession. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 701 (1962). That construction is continued in effect. Inferentially, Section 1254 permitted withdrawal only of the amount deposited upon the judgment and not the additional amount, if any, deposited as security. See People v. Loop, 161 Cal. App.2d 466, 326 P.2d 902 (1958). That construction also is continued in effect.

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

1270.06. Repayment of amount of excess withdrawal

1270.06. When money is withdrawn pursuant to this chapter, any amount withdrawn by a person in excess of the amount to which he is entitled as finally determined in the proceeding shall be paid without interest to the plaintiff or other party entitled thereto, and the court shall enter the judgment accordingly.

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

1270.07. Taking possession does not waive right of appeal

1270.07. The plaintiff does not abandon or waive the right to appeal from the judgment or request a new trial by depositing the amount of the judgment or taking possession pursuant to this chapter.

Comment. Section 1270.07 is the same in substance as subdivision (e) of former Section 1254. Under Section 1270.05, the defendant may also retain his right to appeal or to request a new trial upon the issue of compensation only even though he withdraws the deposit. This may be accomplished by filing a receipt and waiver of all claims and defenses except the claim to greater compensation. Cf. People v. Gutierrez, 207 Cal. App.2d 759, 24 Cal. Rptr. 781 (1962).

1270.08. Deposit in State Treasury unless otherwise required

1270.08. Money deposited as provided in this chapter shall be deposited in accordance with Section 1268.10 and the provisions of that section are applicable to the money so deposited.

Comment. Section 1270.08, which incorporates by reference Section 1268.10, supersedes the first three sentences of subdivision (b) of former Section 1254.

16425. Condemnation Deposits Fund

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

Article 9. Condemnation Deposits Fund

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

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

16426. Investment of fund

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

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

Comment. See the Comment to Section 16425.

16427. Apportionment and disbursement of fund

16427. Interest earned and other increment derived from investments or deposits made pursuant to this article, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the State Treasurer in taking and making delivery of bonds or other securities under this article, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

Comment. See the Comment to Section 16425.

Government Code § 38090 (amended)

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

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

of the commencement of the

Comment. This section of the Park and Playground Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). It has not been amended previously to conform to the various changes that have been made over the years in the Code of Civil Procedure. The section is amended to conform, as near as may be, to the Code of Civil Procedure. See new Code of Civil Procedure Section 1249a.

Government Code § 38091 (amended)

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

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

Comment. This section of the Parks and Playgrounds Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). With respect to the construction of this section and related sections, see City of Los Angeles v. Classell, 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 § 4203 (amended)

18 SEC. 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 (Stats. 1909, Ch. 404, p. 1038, § 5). The section is intended to accord, as near as may be, with provisions of Code of Civil Procedure Section 1249a that specify the date of valuation for condemnation proceedings generally. See City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1929); City of Los Angeles v. Morris, 74 Cal. App. 473, 241 Pac. 469 (1925). The section is amended to accord with Code of Civil Procedure Section 1249a.

Streets and Highways Code § 4204 (amended)

19 Sec. [redacted]. 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.