

Memorandum 69-93

Subject: Study 65.20 - Inverse Condemnation (Right to Enter, Survey, and Examine Property)

You will recall that--at the June 26-28, 1969, meeting--the Commission considered the tentative recommendation relating to the right to enter and survey property, the comments received pertaining to that recommendation, and the views of a number of the observers present at that meeting. That tentative recommendation recommends revision or addition of three sections. A copy of the tentative recommendation (with minor technical changes) is attached. Section 1242 would authorize entry and any studies, tests, or similar activities reasonably related to the exercise of the power of eminent domain. Section 1242.5 would provide a notice and deposit procedure applicable to all condemners to secure an entry order where substantial damage is anticipated. Section 815.8 would be added to ensure that an entity is liable for all substantial damage caused by the entry and related activities.

After some discussion and criticism that Section 1242.5 would be both cumbersome and unnecessary, the Commission decided to delete that section. The staff suggests that the Commission reconsider this decision. Our request is based essentially on a reexamination of the Jacobsen case, a copy of which is attached (Exhibit I--pink sheets). You may also recall that, at the June meeting, the staff expressed concern that deletion of Section 1242.5 would cause possible serious constitutional problems or alternatively could produce an

unduly restrictive interpretation and application of Section 1242. The argument advanced was that the California Constitution provides that property must not be taken or damaged without compensation first being made. In the absence of a prior payment or deposit provision, it could be asserted that the statutory scheme provided is unconstitutional or alternatively that Section 1242 must be construed as authorizing only activities that will not result in substantial damage. The argument or analysis suggested then is precisely that adopted by the California Supreme Court in the Jacobsen case, where the Court held:

[I]t is clear that whatever entry upon or examination of private lands is permitted by the terms of this section [CCP § 1242] cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property. Any other interpretation would . . . render the section void as violative . . . of both the state and the federal constitution.

The court further added that preliminary possession or activities involving substantial damage "cannot be authorized until the damages resulting therefrom . . . [have] been judicially determined and the amount has been paid or tendered to the owner."

In short, in view of the Jacobsen decision, it seems clear that, without a procedure substantially similar to that provided by Section 1242.5, entries and activities causing substantial damage are not authorized by Section 1242 and will not, or at least should not, be permitted. We are told that condemnors have been able to live without such authority (except apparently in reservoir cases). One suspects that this is due largely to the relatively small number of occasions when it is necessary to damage property in advance of

acquisition and the still smaller number of occasions when the voluntary cooperation of the owner cannot be obtained, and is perhaps sometimes due to the coercive effect of an existing court order obtained ex parte, coupled with the landowners' attitude of "you can't fight city hall." In addition, where the right to immediate possession exists, the condemnor can condemn a temporary easement or other interest and obtain an order for immediate possession.

(With respect to the validity of an ex parte order, Jacobsen makes clear that such an order cannot sanction a "taking or damaging." A similar position was recently taken by the U.S. Supreme Court in Sniadach v. Family Finance Corp. (Exhibit II--yellow pages), involving the more emotional area of garnishments. A revival of judicial interest in the due process deficiencies of an ex parte order may further diminish the enthusiasm for this procedure.)

Curiously, Section 1242.5 was intended as much, if not more, for the benefit of condemnors as for condemnees. If they are truly aware of the limitations of Section 1242 without Section 1242.5, and still resist inclusion of the latter, perhaps it would be best simply to await the expression of a need for the additional procedure, but the staff believes that the Commission should be fully aware of the implications of the step being taken and the difficulties in framing a persuasive recommendation that adopts such a position. We suggest you read the attached tentative recommendation prior to the meeting for additional background information.

Respectfully submitted,

Jack I. Horton
Associate Counsel

BRIEF MISSING

[S. F. No. 10771. In Bank.—October 30, 1923.]

ALBERT H. JACOBSEN et al., Petitioners, v. **SUPERIOR COURT OF THE COUNTY OF SONOMA et al.,** Respondents.

- [1] **CONSTITUTIONAL LAW—ENTRY AND OCCUPATION OF PRIVATE LANDS BY WATER DISTRICT—ABSENCE OF CONDEMNATION PROCEEDING.**—The acts of a municipal water district in entering upon private lands, in advance or absence of any condemnation proceeding, with a force of employees and with mechanical structures and appliances for the purpose of making a number of test borings and excavations upon said lands to ascertain the rock and soil formations, in occupying so much of said lands as shall be needed for ingress and egress, in trampling down and destroying the growing grain of the land owners, and in building fences around such test holes and excavations for the better protection thereof pending the operations, constitute an unlawful invasion of the property rights of such land owners under both section 13 of article I of the constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law," and section 14 of article I of the constitution, which prohibits the taking or damaging of private property for public use without just compensation having first been made to the owner.
- [2] **Id.—SECTION 1242, CODE OF CIVIL PROCEDURE.**—The entry and occupation of private lands by a municipal water district, in advance or absence of any condemnation proceeding, for the purpose of making test borings and excavations thereon, are not permitted under section 1242 of the Code of Civil Procedure, which provides that in all cases where land is required for public use, the state or its agents may survey and locate the same, and may enter upon the land and make examinations, surveys, and maps thereof.
- [3] **CONDEMNATION OF LAND—CHARACTER OF ENTRY OR EXAMINATION PERMITTED BY SECTION 1242, CODE OF CIVIL PROCEDURE.**—Whatever entry upon or examination of private lands is permitted by the terms of section 1242 of the Code of Civil Procedure cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property.
- [4] **PROHIBITION—ENTRY AND OCCUPATION OF PRIVATE LANDS BY MUNICIPAL WATER DISTRICT—INJUNCTION—APPEAL.**—Whether or not the operation and effect of a temporary injunction restraining land owners from preventing a municipal water district from entering and occupying their lands for the purpose of making

test borings and excavations thereon would be stayed upon appeal from the order granting the injunction or would require the issuance of a *supercedas* in order to have that effect is immaterial in considering whether prohibition to restrain the lower court from proceeding with the action and from enforcing the temporary injunction is a proper remedy, where such appeal would not be as to such land owners a plain, speedy, or adequate remedy, because the effect of said order by virtue of its very existence pending any appeal which the land owners might take therefrom is to cast a shadow over their right to the full and exclusive use, enjoyment, and disposition of their lands which no mere stay in the operation and enforcement of the order could remove.

- [5] CONDEMNATION OF LAND—PROCEDURE—CONSTITUTIONAL LAW.—The only legal procedure provided by the constitution and statutes of this state for the taking of private property for a public use is that of a condemnation suit which the constitution expressly provides must first be brought before private property can be taken or damaged for a public use.
- [6] IN.—TAKING OR DAMAGING OF PRIVATE PROPERTY FOR PUBLIC USE—ORDER IN SUCH OTHER THAN CONDEMNATION PROCEEDING AUTHORIZED.—An attempt by a superior court in a proceeding other than a condemnation suit to order the taking or damaging of private property for a public use amounts to more than mere error.
- [7] PROHIBITION—CONSTITUTIONAL LAW—APPEAL—REMEDIES.—Where the entry and occupation of private lands by a municipal water district under an injunction order permitting such entry and occupation given in an action other than a condemnation proceeding amount to a taking and damaging of such lands within the meaning of section 14 of article 1 of the constitution, and the land owners have no plain, speedy, or adequate remedy in the ordinary course of law, prohibition to prevent further proceedings in such action and the enforcement of such order is a proper and appropriate remedy.

PROCEEDING in Prohibition to prevent the Superior Court of Sonoma County from proceeding with the trial of a certain action. R. L. Thompson, Judge. Writ granted.

The facts are stated in the opinion of the court.

J. R. Leppo for Petitioners.

Frank J. Burke and Robert M. Searls for Respondents.

RICHARDS, J., *pro tem.*—The petitioners herein apply for a writ of prohibition directed to the Superior Court of

the County of Sonoma and to Honorable R. L. Thompson, one of the judges thereof, prohibiting the said court and the judge thereof from proceeding to try a certain action pending in said court and from rendering any final judgment therein and from enforcing a temporary injunction heretofore issued therein and from making and entering any further order or issuing any further writ or other process having the effect of restraining these petitioners from preventing the plaintiff in said action from entering upon the petitioners' said lands or from doing the things proposed by said plaintiff to be done upon their said lands and premises without their consent. The respondents herein rest their objection to the issuance of said writ upon their demurrer to the petition upon the ground that it does not state facts sufficient to constitute grounds for the issuance of the writ. The facts which are set forth in the petition as forming the basis for the petitioners' prayer that the writ should issue and which are thus admitted to be true may be briefly summarized as follows:

The Petaluma Municipal Water District is a public corporation organized in the year 1922 under the provisions of the act of 1911 (Stats. 1911, p. 1290), entitled "An Act to Provide for the Incorporation and Organization and Management of Municipal Water Districts," with its later amendments, which public corporation comprises territorially the city of Petaluma and has for its purpose the supplying with water the inhabitants thereof. The petitioners herein are the owners in severalty of two considerable tracts of land adjacent to each other lying about six and one-half miles from the said city of Petaluma upon which they respectively reside with their families and which they devote to the cultivation of hay, grain, and other crops, each maintaining a dairy upon his own tract of land. Shortly after its organization in 1922 the said municipal water district began exploring the region around the said city of Petaluma for the purpose of locating sources of water supply for the uses of said city and its inhabitants, in the course of which the officials of said water district applied to the petitioners herein for permission to make certain surface surveys and examinations of the petitioners' lands for the purpose of determining their availability for reservoir sites. It was granted such permission and going upon said lands

made certain examinations, maps, surveys, and so forth within the terms of their said permission so to do; and when these were completed the officials of said water district requested of said petitioners permission to go upon their said lands with well-boring outfits, tools, machinery, and appliances for the purpose of boring holes and making excavations for the avowed object of ascertaining whether or not there was underneath the surface of petitioners' said lands rock strata or other formations suitable or necessary for the construction of dams and building of reservoirs for the impounding of water for the uses of said water district. The petitioners declined to grant such permission upon the ground that the doing of the things which the water district thus proposed to do would result in substantial and irreparable injury to the petitioners' lands and crops and would be an invasion of their private property rights in their respective holdings. Thereupon the municipal water district commenced an action in the superior court of the county of Sonoma against these petitioners for the purpose of obtaining an injunction against them, and each of them, enjoining them from preventing the officers or agents of said water district from entering upon or occupying the petitioners' said lands for the purpose of making the excavations, borings, and subsoil examinations set forth in detail in its complaint and in the exhibit attached thereto, which consists of a blue-print plan of the petitioners' lands showing the location of the test holes and test pits proposed to be sunk or excavated thereon. The complaint alleges that the boring of the said test holes will involve the installation of a boring rig at the indicated points upon the petitioners' lands operated by gasoline or steam-engine motors, and that the test holes sunk by the use thereof will be from three to eight inches in diameter and of the depth of 150 feet or more; and that the test pits proposed to be excavated would be of the dimensions of about four by six feet and of a depth not to exceed fifteen feet. The complaint further alleges that in order to accomplish said work it would be necessary to employ and use four men upon said premises for a period of about sixty days with occasional visits from the officials of plaintiff in the course of inspection of the said work. It further alleges that at some of the places which the plaintiff thus proposes to enter for the doing of

said work there are growing crops of hay and grain which will to some extent be trampled down and damaged or destroyed during the course thereof. The complaint further proceeds to allege that if a suitable foundation for a dam and reservoir is found to exist through the aforesaid operations upon the petitioners' said lands the use of the same for such dam and reservoir purposes would be a public use, and if said lands were found suitable for such purposes the plaintiff would proceed to acquire the same by purchase or through the exercise of eminent domain, but that as yet no proceedings looking to the acquisition of the said lands by either method has been initiated or determined upon. The complaint finally alleged that upon the completion of the examination of the premises by the means thus detailed, the plaintiff would restore the lands of plaintiff to their original condition by filling in said test holes and excavations and by removing their appliances from said lands. Upon the filing of the said complaint the plaintiff applied for a temporary restraining order after notice and an order to show cause was issued thereon upon the return day of which the defendants in that action who are the petitioners herein were present in court; and the matter being called for hearing the defendants by way of demurrer to the complaint objected to the jurisdiction of the court over the subject matter of the action; and upon the overruling of said demurrer presented their answer, which while general in its terms was by stipulation of the parties treated as a specific denial of the averments of the complaint. The matter being submitted, an order and temporary injunction was made by the court wherein it was recited that the substantial averments of the complaint were true and wherein the court permitted the plaintiff to enter upon the lands of defendants for the purpose of conducting thereon their operations set forth in its said complaint. The court expressly found and recited in the body of its said order that no resolution, ordinance, or other order had ever been passed or adopted by the plaintiff or by its board of directors authorizing condemnation proceedings or other steps for the acquisition of the lands of the defendants or that the same were required for public use; and that no proceedings for the condemnation of the defendants' said lands had been commenced or authorized, and that the reason why no such condemnation

proceedings had been authorized or instituted was that the plaintiff was unable to institute such proceeding or to submit to the voters in said water district the proposition to authorize by bond issue or tax levy the collection of the necessary funds to purchase so much of said property as might be required for such public use until by the making of such subsoil examination of the said premises it could be determined that the same were suitable for such use. The court in its order for the issuance of the temporary injunction provided that the plaintiff should deposit with the clerk of the court the sum of \$1,000 in cash as security for any damages which might be caused to the property of the defendants in the course of the execution of the work provided for in said order. The court, while thus making its said order for a temporary injunction, suspended the operation thereof for a brief period in order to enable the defendants to make application for a writ of prohibition to this court, and within the period thus permitted the present application was filed. The foregoing constitutes the essential facts presented to this court upon the hearing of this application.

It is conceded by the respondents in their briefs presented herein that if the entry upon and examination of the lands of the petitioners herein, as applied for and permitted in the above-mentioned action, would amount to the taking or damaging of petitioners' property within the meaning of section 14 of article I of the state constitution, the said order of the court would be violative of that provision of the constitution. It is, however, insisted by the respondents herein that the acts of entry and examination and excavation as proposed by the municipal water district and permitted by the court in said action would not amount to such a taking or damaging of petitioners' said properties as to come within the inhibition of said clause of the constitution, but that they were such acts as were expressly permitted by the provisions of section 1242 of the Code of Civil Procedure. We are unable to give our assent to either of these propositions. The petitioners herein are the sole owners of each of their respective properties and as such hold their rights to be protected in the exclusive enjoyment of every portion thereof under the express guaranty of both the state and federal constitutions, which declare that "no person shall be deprived of life, liberty or property without due

process of law." (Const., sec. 13, art. I; U. S. Const., art. V, Amendments.) These constitutional guaranties are among the most sacred inheritances of the American people, derived as they are from those earlier English constitutions going back to Magna Carta and being reaffirmed in those succeeding petitions, declarations, and bills of right which form the fundamental background of the British constitution. These rights which the petitioners herein thus had to the undisturbed possession and use of their respective holdings, they held, of course, subject to the superior right of eminent domain existing in the state or its representatives to take their property, or so much thereof as was necessary for public uses. This public right, however, has always and everywhere been limited and safeguarded by express provisions of the constitutions and statutes of the several states and it has been uniformly held that being *in invitum* and in derogation of the common right, its exercise is strictly defined and limited by the express terms of the constitution or statute creating it. (10 R. C. L. 196; 10 Cal. Jur., p. 290, and cases cited; *Danrell v. San Joaquin County Supervisors*, 40 Cal. 151, 158; *Lindsay, etc., v. Mehricus*, 97 Cal. 678 [32 Pac. 802].) The first constitution of the state of California contained the provision reading "nor shall private property be taken for public use without just compensation." This clause in the original constitution was variously interpreted during the thirty years that it remained the organic law of the state, but was generally construed as providing for a proceeding in court in the nature of a condemnation suit wherein the necessity for the taking of the property for the alleged public use could first be litigated and determined and wherein also the damages resultant upon such taking could be ascertained and provided for. (*Weber v. County of Santa Clara*, 59 Cal. 266.) In the early case of *Nox v. Western Pac. R. R. Co.*, 31 Cal. 538, this court in construing the Railroad Act of April 27, 1863 (Stats. 1863, p. 610), permitting the trial court in a condemnation proceeding to make an order giving railroad corporations the right to enter upon private lands and to proceed with the survey and construction of its road thereon pending proceedings for the condemnation of the same, held this not to be violative of the foregoing provision of the constitution. But the court receded from this posi-

tion in the later cases of *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517, *San Mateo Water Works v. Sharpstein*, 50 Cal. 284, *Sanborn v. Belden*, 51 Cal. 266, and *Vilhac v. Stockton & I. R. R. Co.*, 53 Cal. 208, in the first of which cases last above cited the court held that the statute which permitted the quasi-public corporation to deprive the owner of the use and enjoyment of his lands for an indefinite period while condemnation proceedings were pending amounted to a taking of the lands of such private person without compensation and was for that reason violative of said constitutional provision. The court did not in that case determine whether a statutory provision for a bond to be given for the payment of damages incident upon such taking would suffice to satisfy the constitutional requirement as to compensation; but the court, in the later case of *San Mateo Water Works v. Sharpstein*, 50 Cal. 284, held that an order of the trial court permitting the plaintiff water corporation, in a condemnation proceeding, to take possession of and use the lands of a private owner during the pendency of the proceeding upon executing a bond in a stated sum for the payment of the compensation or damages thereafter to be ascertained was void as in excess of the jurisdiction of the court and as violative of the foregoing provision of the state constitution, which required simultaneous compensation upon the taking of private property for a public use. In the constitution of 1879 the foregoing constitutional provision was further amplified and limited by the adoption of the provision in section 14 of article 1 thereof reading, "Private property shall not be taken or damaged for public use without compensation having first been made to or paid into court for the owner thereof." In the case of *Steinhart v. Superior Court*, 137 Cal. 575 [92 Am. St. Rep. 183, 59 L. R. A. 401, 70 Pac. 629], the question arose as to the power of the trial court in condemnation proceedings to make an order permitting the plaintiff, a railroad corporation, in such suit to enter upon certain lands of a private owner, the defendant therein, during the pendency of the proceedings and before the value of the land to be taken had been ascertained. Such order was sought to be justified under the provisions of section 1254 of the Code of Civil Procedure as it then read, permitting such a procedure. In holding that such order would be void as violative of the

constitutional provision last above quoted, the court again reviewed the earlier cases above referred to and in so doing made use of the following significant language:

"At the time the present constitution was adopted (in 1879), the law as declared by the supreme court was as follows: The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking within the meaning of the constitution, but the requirement of the former constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: 'Private property shall not be taken *or damaged* for public use without just compensation *having been first made to or paid into court for the owner.*'"

"The purpose of the amendment is perfectly obvious. If the preliminary possession during the pendency of the proceeding is a taking within the meaning of the constitution, it cannot be authorized until the damages resulting therefrom has been judicially determined and the amount has been paid or tendered to the owner. . . ."

"To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding and before the amount of compensation has been determined and paid to the owner or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so."

In view of the foregoing decisions of this court it must be held that if the acts of the Petaluma Municipal Water District proposed to be done upon and in relation to the lands of these petitioners as detailed in its complaint in said action for an injunction and as recited by the trial court and the judge thereof in the order for the issuance of a temporary injunction made therein amount *pro tanto* to a taking of the lands of these petitioners, or of so much thereof as is proposed to be occupied by the said water district in

the doing of such acts, then such taking and the order of the said court permitting the same must be held to be violative of both of the provisions of the constitution above referred to and to amount to a deprivation of these petitioners of their property without due process of law. [1] As to this branch of the case we entertain no doubt that the proposed acts of said public corporation sought to be done and sanctioned under the order of the respondents herein amount to an invasion of the petitioners' property rights under both of said provisions of the constitution. The said corporation proposes to enter upon the petitioners' private lands, in advance or absence of any condemnation proceeding, with a force of employees and with mechanical structures operated by steam or gasoline enginery and with other appliances and implements suited to the execution of its intended purpose, which is that of making a number of test borings from three to eight inches in diameter and of a depth of 150 feet or more at various points upon petitioners' said lands, and also of making at other places thereon excavations of an area of four by six feet and of a depth of fifteen feet, and of occupying so much of said lands as shall be needed for ingress and egress and for the accomplishment of the foregoing purposes, and of trampling down and destroying the growing grain of the petitioners over the area to be occupied during such operations, and of building fences around such test holes and excavations for the better protection thereof pending such operations. It is idle to attempt to argue that such entry, occupation, disturbance, and destruction of the properties of these petitioners would not constitute such an interference with their exclusive rights to the possession, occupation, use, and enjoyment of their respective holdings as would amount to a taking and a damaging thereof to the extent and during the period of such entry upon said lands and of the operations of the corporation thereon.

[2] The respondents herein attempt to justify their claim of right to such entry and occupation and to uphold the court's order permitting the same under the provisions of section 1242 of the Code of Civil Procedure, which reads as follows: "In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the man-

ner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice." To give to the foregoing section of the code the interpretation which the respondents would have us place upon it would be to render it clearly violative of the constitutional provisions above referred to under the authorities above cited construing the same. We are not required either by the terms of said code provision nor by the exigencies of this case to go so far. This section of the code is to be found under title I of part III thereof which treats of the subject of "eminent domain" and deals with proceedings for the condemnation of private property for public use. The opening sentence of the section apparently contemplates the existence and pendency of such proceedings as a basis for whatever entry upon or examination of the lands of private owners affected thereby is permitted by the succeeding clauses of the section. [3] But however this may be, it is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property. Any other interpretation would, as we have seen, render the section void as violative of the foregoing provisions of both the state and the federal constitution.

The respondents finally contend that prohibition is not the proper remedy, for the reason, first, that the trial court as a court of equity had jurisdiction to make said order, and, second, that its action in so doing was merely error against which the petitioners herein had a plain, speedy and adequate remedy by appeal. It will be conceded that the statute confers the right of appeal from an order granting an injunction. (Code Civ. Proc., sec. 963.) If the order herein from which such appeal might have been taken is to be treated as a merely prohibitive order it has been decided in numerous

cases that the operation of such order would not be stayed by such appeal. (*Merced Co. v. Fremont*, 7 Cal. 130; *Swift v. Shepard*, 64 Cal. 423 [1 Pac. 493]; *Dewey v. Superior Court*, 81 Cal. 64 [22 Pac. 333]; *Stewart v. Superior Court*, 100 Cal. 543 [35 Pac. 156, 563]; *Rogers v. Superior Court*, 126 Cal. 183 [58 Pac. 452]; *Clute v. Superior Court*, 155 Cal. 15 [132 Am. St. Rep. 51, 99 Pac. 362]; *Hulbert v. California etc. Co.*, 161 Cal. 239 [38 L. R. A. (N. S.) 436, 118 Pac 928]; *United Railroads v. Superior Court*, 172 Cal. 80 [155 Pac. 463].) In a number of the cases above cited a distinction is drawn between a prohibitive and a mandatory injunction, in that regard it being held that in case of the former, application must be made for a writ of *superseas* to the appellate tribunal, but that in case the injunction is mandatory it will be stayed as to its operation by the appeal. (*Clute v. Superior Court, supra.*) [4] But whether or not the operation and effect of the temporary injunction issued in the instant case would be stayed upon appeal or would require the issuance of a *superseas* in order to have that effect is to our minds immaterial, since it seems clear to us that such appeal would not be as to these petitioners a plain, speedy, or adequate remedy for the invasion of their property rights which is accomplished by the order assailed herein. The effect of said order by virtue of its very existence pending any appeal which the petitioners herein might take therefrom is to cast a shadow over the petitioner's right to the full and exclusive use, enjoyment, and disposition of their said properties which no mere stay in the operation and enforcement of the order could remove. That their property is less valuable, less usable, less leasable, less salable with the shadow of this impending injunction and threatened taking or damage hanging over it would seem to be beyond dispute or question, and to that extent their constitutional rights in and to their respective properties would have been invaded notwithstanding said appeal. Their remedy by that method is neither plain, speedy, nor adequate, and to the extent that it is not this case is to be regarded as though they had no such right of appeal. This brings us to the first of the respondents' above contentions, viz., that the trial court, a court of equity, having had jurisdiction to make said order, it had jurisdiction to err in making it and hence that prohibition

will not lie. The Petaluma Municipal Water District is a public corporation organized solely to serve a public use. The only purpose for which it can acquire, hold, and use property is for such public use. The only means by which it can acquire such property without the owner's consent is through the exercise of the right of eminent domain. [5] The only legal procedure provided by the constitution and statutes of this state for the taking of private property for a public use is that of a condemnation suit which the constitution expressly provides must *first* be brought before private property can be taken or damaged for a public use. (Const., art. I, sec. 14.) Said section of the constitution as amended in 1918 does provide that the state or certain specified political subdivisions thereof may take immediate possession and use of rights of way when required for a public use "upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct . . . to secure the owner of the property sought to be taken immediate payment of just compensation for such taking." This exception only serves to emphasize the otherwise general rule that no court in any other action or proceeding than an action in eminent domain has jurisdiction to order the taking or damage of private property for a public use. This court in the cases above referred to and in the very recent case of *Weller v. Superior Court*, 188 Cal. 729 [207 Pac. 247], has held upon application for writs of *certiorari* that the superior court has no jurisdiction in a condemnation suit to order the invasion of private property for a public use until just compensation has first been made therefor in such proceedings. It would seem to follow irresistibly that a superior court has no jurisdiction to make such an order in any other action or proceeding than the one to which it is limited in its power to make any order or decree at all directing the taking or damage of private property for a public use. [6] Such an attempt on the part of the superior court amounts to more than mere error. As was well said by this court in the case of *McClatchy v. Superior Court*, 119 Cal. 413 [39 L. R. A. 691, 51 Pac. 696], in which another fundamental right of the citizen was attempted to be denied him and in which it was urged that

the action of the court in so doing was merely error and hence not reviewable upon *certiorari*: "It was error certainly but was more than that; it was a transgression of a fundamental right guaranteed to every citizen charged with an offense or whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure which has the effect to deprive one of a constitutional right is as much an excess of jurisdiction as where there exists an inceptive lack of power. 'The substance and not the shadow determines the validity of the exercise of the power.'" (Citing *Postal Tel. etc. Co. v. Adams*, 155 U. S. 689, 698 [39 L. Ed. 311, 15 Sup. Ct. Rep. 268, 360, see, also, Rose's U. S. Notes].) [7] The facts in this case being admitted and the respondent herein having conceded that if its entry and operations upon the lands of the petitioner amounts to a taking and damaging thereof within the meaning of section 14 of article I of the constitution the order of the court assailed herein would be violative of that constitutional provision, it would seem that the writ of prohibition is a proper and appropriate remedy where, as in this case, the petitioners have no plain, speedy, or adequate remedy in the ordinary course of law.

Let the writ issue as prayed for.

Wilbur, C. J., Waste, J., Lawlor, J., Seawell, J., and Kerrigan, J., concurred.

SUPREME COURT OF THE UNITED STATES

No. 130.—OCTOBER TERM, 1968.

Christine Sniadach, Petitioner,
v.
Family Finance Corporation of
Bay View et al. } On Writ of Certiorari to
the Supreme Court of
Wisconsin.

[June 9, 1969.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent instituted a garnishment action against petitioner as defendant and Miller Harris Instrument Co., as her employer, as garnishee. The complaint alleged a claim of \$420 on a promisory note. The garnishee filed its answer stating it had wages of \$63.18 under its control earned by petitioner and unpaid, and that it would pay one-half to petitioner as a subsistence allowance¹ and hold the other half subject to the order of the court.

Petitioner moved that the garnishment proceedings be dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. The Wisconsin Supreme Court sustained the lower state court in approving the procedure. 37 Wis. 2d 163, 154 N. W. 2d 259. The case is here on a petition for a writ of certiorari. 393 U. S. 1078.

¹ Wis. Stat. § 267.18 (2) (a) provides:

"When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of \$25 in the case of an individual without dependents or \$40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

2 SNIADACH v. FAMILY FINANCE CORP.

The Wisconsin statute gives a plaintiff 10 days in which to serve the summons and complaint on the defendant after service on the garnishee.² In this case petitioner was served the same day as the garnishee. She nonetheless claims that the Wisconsin garnishment procedure violates that due process required by the Fourteenth Amendment, in that notice and an opportunity to be heard are not given before the *in rem* seizure of the wages. What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen.³ They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.

Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey v. Mallonee*, 332 U. S. 245, 253-254; *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594, 598-600; *Ownbery v. Morgan*, 256 U. S. 94, 110-112; *Coffin Bros. v. Bennett*, 277 U. S. 29, 31. But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable.

The question is not whether the Wisconsin law is a wise law or unwise law. Our concern is not what phi-

² Wis. Stat. § 267.07 (1).

³ Wis. Stat. § 267.04 (1).

SNIADACH v. FAMILY FINANCE CORP. 3

osophy Wisconsin should or should not embrace. See *Green v. Frazier*, 253 U. S. 233. We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, 371 U. S. 208, 212) within the meaning of procedural due process. See *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 314. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U. S., at 314. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInness*, 279 U. S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. Until a recent Act of Congress,* § 304 of which forbids discharge of employees on the ground that their wages have been garnished, garnishment often meant the loss of a job. Over and

* 82 Stat. 146, Act of May 29, 1968.

4 SNIADACH v. FAMILY FINANCE CORP.

beyond that was the great drain on family income. As stated by Congressman Reuss:⁵

"The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."

Recent investigations of the problem have disclosed the grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking. Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs who held extensive hearings on this and related problems stated:

"What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides." 114 Cong. Rec. p. H 688 (1968).

The leverage of the creditor on the wage earner is enormous. The creditor tenders not only the original debt but the "collection fees" incurred by its attorneys in the garnishment proceedings:

"The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract of 'pay-

⁵ 114 Cong. Rec., p. H 688 (1968).

SNIADACH v. FAMILY FINANCE CORP. 5

ment schedule' which incorporates these additional charges."⁶

Apart from those collateral consequences, it appears that in Wisconsin the statutory exemption granted the wage earner⁷ is "generally insufficient to support the debtor for any one week."⁸

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall.⁹ Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Reversed.

⁶ Comment, Wage Garnishment in Washington—an Empirical Study, 43 Wash. L. Rev. 742, 753 (1968). And see comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759.

⁷ See n. 1, *supra*.

⁸ Comment, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759, 767.

⁹ "For a poor man—and whoever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy, and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense in such a process?" Congressman Gonzales, 114 Cong. Rec., p. H 690 (1968). For the impact of garnishment on personal bankruptcies see H. R. Rep. No. 1040, 90th Cong., 1st Sess., pp. 20-21.

SUPREME COURT OF THE UNITED STATES

No. 130.—OCTOBER TERM, 1968.

Christine Sniadach, Petitioner, }
v. } On Writ of Certiorari to
Family Finance Corporation of } the Supreme Court of
Bay View et al. } Wisconsin.

[June 9, 1969.]

MR. JUSTICE HARLAN, concurring.

Particularly in light of my Brother BLACK's dissent, I think it not amiss for me to make explicit the precise basis on which I join the Court's opinion. The "property" of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing.

The rejoinder which this statement of position has drawn from my Brother BLACK prompts an additional word. His and my divergence in this case rests, I think, upon a basic difference over whether the Due Process Clause of the Fourteenth Amendment limits state action by norms of "fundamental fairness" whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage—not, as my Brother BLACK continues to insist, from the mere predilections of individual judges.

From my standpoint, I do not consider that the requirements of "notice" and "hearing" are satisfied by the

2 SNIADACH v. FAMILY FINANCE CORP.

fact that the petitioner was advised of the garnishment simultaneously with the garnishce, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. Compare the majority and dissenting opinions in the Wisconsin Supreme Court, 37 Wis. 2d 163, 178, 154 N. W. 2d 259, 267 (1967). Apart from special situations, some of which are referred to in this Court's opinion, see *ante*, at 2, I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. See, *e. g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950); *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 152-153 (1941); *United States v. Illinois Cent. R. Co.*, 291 U. S. 457, 463 (1934); *Londoner v. City & County of Denver*, 210 U. S. 373, 385-386 (1908).^{*} And I am quite unwilling to take the unexplicated *per curiam* in *McKay v. McInnes*, 279 U. S. 820 (1928), as vitiating or diluting these essential elements of due process.

^{*}There are other decisions to the effect that one may be deprived of property by summary administrative action taken before hearing when such action is essential to protect a vital governmental interest. See, *e. g.*, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *Fahey v. Mallonee*, 332 U. S. 245 (1947); *Bowles v. Willingham*, 321 U. S. 503 (1944); *North Amer. Cold Storage Co. v. City of Chicago*, 211 U. S. 306 (1908). However, no such justification has been advanced in behalf of Wisconsin's garnishment law.

SUPREME COURT OF THE UNITED STATES

No. 130.—OCTOBER TERM, 1968.

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[June 9, 1969.]

MR. JUSTICE BLACK, dissenting.

The Court here holds unconstitutional a Wisconsin statute permitting garnishment before a judgment has been obtained against the principal debtor. The law, however, requires that notice be given to the principal debtor and authorizes him to present all of his legal defenses at the regular hearing and trial of the case. The Wisconsin law is said to violate the "fundamental principles of due process." Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, shows why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make. The Court shows it believes the garnishment policy to be a "most inhumane doctrine"; that it "compels the wage earner, trying to keep his family together, to be driven below the poverty level"; that "in a vast number of cases the debt is a fraudulent one, saddled on a poor, ignorant person who is trapped in any easy credit nightmare in which he is charged double for something he could not pay for, even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides."

2 SNIADACH v. FAMILY FINANCE CORP.

The foregoing emotional rhetoric might be very appropriate for Congressmen to make against some phases of garnishment laws. Indeed, the quoted statements were made by Congressmen during a debate over a proposed federal garnishment law. The arguments would also be appropriate for Wisconsin's legislators to make against that State's garnishment laws. But made in a Court opinion, holding Wisconsin's law unconstitutional, they amount to what I believe to be a plain, judicial usurpation of state legislative power to decide what the State's laws shall be. There is not one word in our Federal Constitution or of any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority thus to try to supplement or strike down the State's selection of its own policies. The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such a decision, I think, should be made by state and federal legislators, and not by this Court.

This brings me to the short concurring opinion of my Brother HARLAN, which makes "explicit the precise basis" on which he joins the Court's opinion. That basis is:

"The 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requests of procedural due process: notice and a prior hearing."

SNIADACH v. FAMILY FINANCE CORP. 3

Every argument implicit in this summary statement of my Brother HARLAN's views has been, in my judgment, satisfactorily answered in the opinion of the Supreme Court of Wisconsin in this case--an outstanding opinion on constitutional law. 37 Wis. 2d 163, 154 N. W. 2d 259. That opinion shows that petitioner was not required to wait until the "culmination of the main suit," that is, the suit between the creditor and the petitioner. In fact the case now before us was not a final determination of the merits of that controversy but was, in accordance with well-established state court procedure, the result of a motion made by the petitioner to dismiss the garnishment proceedings. With reference to my Brother HARLAN's statement that petitioner's deprivation could not be characterized as *de minimis*, it is pertinent to note that the garnishment was served on her and her employer on the same day, November 21, 1966, that she, without waiting for a trial on the merits, filed a motion to dismiss the garnishment on December 23, 1966, which motion was denied by the Circuit Court on April 18, 1967, and it is that judgment which is before us today. The amount of her wages held up by the garnishment was \$31.59. The amount of interest on the wages withheld even if computed at 10% annually would have been less than \$3. Whether that would be classified as *de minimus* I do not know and in fact it is not material to know for the decision of this case.

In the motion to dismiss, petitioner, according to the Supreme Court of Wisconsin, asserted a "number of grounds based on injuries and deprivations which have been or are likely to be suffered by others but which she has not personally experienced." 37 Wis. 2d 163, 154 N. W. 2d 159. The court went further and pointed out that under Wisconsin law the court would not strike down a law as unconstitutional on the ground that some

4 SNIADACH v. FAMILY FINANCE CORP.

person other than the challenger of that law might in the future be injured by its unconstitutional part. It would seem, therefore, that the great number of our cases holding that we do not determine the constitutionality of state statutes where the judgment on them was based on state law would prevent our passing on this case at all.

The indebtedness of petitioner was evidenced by a promissory note, but petitioner's affidavit in support of the motion to dismiss, according to the Wisconsin Supreme Court contained no allegation that she is not indebted thereon to the plaintiff. Of course if it had alleged that, or if it had shown in some other way that this was not a good-faith lawsuit against her, the Wisconsin opinion shows that this could have disposed of the whole case on the summary motion.

Another ground of unconstitutionality, according to the state court, was that the Act permitted a defendant to post a bond and secure the release of garnished property and that this provision denied equal protection of the law "to persons of low income." With reference to this ground, the Wisconsin court said:

"Appellant has made no showing that she is a person of low income and unable to post a bond." 37 Wis. 2d, at 167, 154 N. W. 2d, at 261.

Another ground of unconstitutionality urged was that since many employers discharged garnished employees for being unreliable, the law threatened the gainful employment of many wageearners. This contention the Supreme Court of Wisconsin satisfactorily answered by saying that appellant had "made no showing that her own employer reacted in this manner."

Another ground challenging the state act was that it affords 10 days' time to a plaintiff to serve the garnishee summons and complaint on the defendant after service of the summons on the garnishee. This, of course, she

SNIADACH v. FAMILY FINANCE CORP. 5

could not raise. The Court's answer to this was that appellant was served on the same day as the garnishee.

The state court then pointed out that the garnishment proceedings did not involve "any final determination of the title to a defendant's property but merely reserved the status quo thereof pending determination of the principal action." 37 Wis. 2d, at 169, 154 N. W. 2d, at 262. The court then relied on *McInnes v. McKay*, 127 Me. 110. That suit related to a Maine attachment law which, of course, is governed by the same rule as garnishment law. See "garnishment," Bouvier's Law Dictionary; see also *Pennoyer v. Neff*, 95 U. S. 714. The Maine law was subjected to practically the same challenges that Brother HARLAN and the Court raise against this Wisconsin law. About that law the Supreme Court of Maine said:

"But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied." 127 Me. 110, 116.

This Court did not even consider the challenge to the Maine law worthy of a Court opinion but affirmed it in a *per curiam* opinion, 279 U. S. 830, on the authority of two prior decisions of this Court. See also *Standard Oil Co. v. Superior Court of New Castle County*, 44 Del.

6 SNIADACH v. FAMILY FINANCE CORP.

538, 62 A. 2d 454, appeal dismissed, 336 U. S. 930; *Harris v. Balk*, 198 U. S. 215, 222, 227-228.

The Supreme Court of Wisconsin, in upholding the constitutionality of its law also cited a statement of our Court made in *Rothschild v. Knight*, 184 U. S. 334, 341, stating:

"[T]o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide"

Accord, *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U. S. 183, 193.

The Supreme Court of Wisconsin properly pointed out:

"The ability to place a lien upon a man's property such as to temporarily deprive him of its beneficial use without judicial determination of proper cause dates back not only to medieval England but also to Roman times." 37 Wis. 2d, at 171, 154 N. W. 2d, at 264.

The State Supreme Court then went on to point out a statement made by Mr. Justice Holmes in *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31:

"The Fourteenth Amendment, itself a historical product, did not destroy for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a stronger case for the Fourteenth Amendment to effect it, as is well illustrated by *Ownbey v. Morgan*, 256 U. S. 94, 104, 112."

The *Ownbey* case was one of the two cited by this Court in its *per curiam* opinion affirmance of *McInnes v. McKay*, *supra*, sustaining the constitutionality of a Delaware attachment law. And see *Byrd v. Rector*, 112 W. Va. 192, 163 S. E. 845.

SNIADACH v. FAMILY FINANCE CORP. 7

I can only conclude that the Court is today overruling a number of its own decisions and abandoning the legal customs and practices in this country with reference to attachments and garnishments wholly on the ground that the garnishment laws of this kind are based on unwise policies of government which might some time in the future do injury to some individuals. In the first sentence of the argument in her brief, petitioner urges that this Wisconsin law "is contrary to public policy"; the Court apparently finds that a sufficient basis for holding it unconstitutional. This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision. See my dissent in *Adamson v. California*, 332 U. S. 46, 68.

ADDENDUM.

The latest statement by my Brother HARLAN on the power of this Court under the Due Process Clause to hold laws unconstitutional on the ground of the Justices' view of "fundamental fairness" makes it necessary for me to add a few words in order that the differences between us be made absolutely clear. He now says that the Court's idea of "fundamental fairness" is derived "not alone . . . from the specifics of the Constitution, but also . . . from concepts which are part of the Anglo-American legal heritage." This view is consistent with that expressed by Mr. Justice Frankfurter in *Rochin v. California* that due process was to be determined by "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." 342 U. S. 165, 169. In any event, my Brother HARLAN's "Anglo-American legal heritage" is no more definite than the "notions of justice of English-speaking peoples" or the shock-the-conscience test. All of these so-called tests represent nothing more nor less than an implicit adop-

8 SNIADACH *v.* FAMILY FINANCE CORP.

tion of a Natural Law concept which under our system leaves to judges alone the power to decide what the Natural Law means. These so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional. On the contrary, these tests leave them wholly free to decide what they are convinced is right and fair. If the judges, in deciding whether laws are constitutional, are to be left only to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION
TENTATIVE RECOMMENDATION

relating to

INVERSE CONDEMNATION

The Privilege to Enter, Survey, and

Examine Property

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

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

LETTER OF TRANSMITTAL

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

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to make studies: to determine (1) "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects," and (2) "whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings."

The Commission herewith submits a preliminary report containing its tentative recommendation relating to one aspect of these two studies-- the privilege to enter, survey, and examine property. A background research study that included consideration of this subject was prepared for the Commission by Professor Arvo Van Alstyne and is separately published. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 483-485, 509-511 (1969).

This report is one of a series of reports being prepared by the Commission, each report covering a different aspect of condemnation law and procedure or inverse condemnation. The report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and to give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications concerning the tentative recommendation should be addressed to the California Law Revision Commission, School of Law, Stanford, California 94305.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

INVERSE CONDEMNATION

THE PRIVILEGE TO ENTER, SURVEY, AND

EXAMINE PROPERTY

BACKGROUND

Since adoption of the Code of Civil Procedure in 1872, Section 1242 has authorized any condemnor¹ to enter land it is contemplating acquiring and to "make examinations, surveys, and maps thereof." The obvious purpose of this longstanding privilege is to enable the acquiring agency to determine the suitability of the property for public use. Section 1242 does not require any formalities such as notice to the property owner or a preliminary court order. Although the question appears never to have reached the appellate courts, presumably the condemnor could invoke the superior court's aid by way of a writ of assistance or other appropriate process.

In early appellate court decisions, the privilege conferred by Section 1242 was justified as a means of obtaining the property descriptions and other data necessary for the condemnation proceeding²

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1. Although Code of Civil Procedure Section 1242 refers only to "the State, or its agents, " Civil Code Section 1001 provides that "any person seeking to acquire property for any of the uses mentioned in . . . [Code of Civil Procedure Section 1238] is an agent of the State"
 2. See San Francisco & San Joaquin Valley Ry. v. Gould, 122 Cal. 601, 55 P. 411 (1898).

and of complying with the statutory admonition that any public improvement "be located in the manner which will be most compatible with the greatest public good and the least private injury."³ These justifications, however, are insufficient in cases where the entry and activities would be considered a "taking" or "damaging" of property within the meaning of Section 14 of Article I of the California Constitution. Even though the condemnor may contemplate the total restoration of the property or the payment of damages, no condemnation proceeding has been commenced and compensation has not been "first made to or paid into court for the owner" as required by that section.

This problem was dealt with definitively in the leading case of Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923). The entry in the Jacobsen case involved occupation of the owner's property for some two months by a municipal water district and the use of power machinery to make borings and other tests to determine its suitability for use as a reservoir. The court held that the entry should be enjoined and that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not, in the nature of things, seriously impinge on or impair the rights of the owner to the use and enjoyment of his property."

The holding in the Jacobsen case has been partially overcome by a special statutory procedure, provided in 1959, by enactment of Section 1242.5 of the Code of Civil Procedure. Section 1242.5 is limited to public entities that have the power to condemn land "for reservoir purposes." The section is also limited to cases in which the public

3. See Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891)...

entity "desires to survey and explore certain property to determine its suitability for such purposes." In these cases, if the public agency cannot obtain the consent of the property owner, the agency may petition the superior court for an order permitting an exploratory survey. The order, however, must be conditioned upon deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorney's fees incurred by the owner. The section seems to authorize recovery by the property owner for "any damage caused by the [public entity] while engaged in survey and exploration on his property."⁴

In addition to Sections 1242 and 1242.5 of the Code of Civil Procedure, many California statutes authorize public officials to enter private property to conduct inspections, investigations, examinations, or similar activities. Most of these statutes have nothing to do with a proposed acquisition of the property for public use or the location or construction of public improvements. Moreover, most of them do not contemplate the kind of entry or type of investigatory activities that would, in any likelihood, cause appreciable damage to property or significant interference with the owner's use and possession. Typical provisions of this type are contained in the Agricultural Code, the Business and Professions Code, and the Health and Safety Code, and authorize the entry of public officers to inspect for health and safety

4. The procedure authorized by Section 1242.5 appears to have been considered by the appellate courts in only one instance. In Los Angeles v. Schweitzer, 200 Cal. App.2d. 448, 19 Cal. Rptr. 429 (1962), the court held the order authorizing entry, survey, and exploration to be nonappealable. The decision, however, discusses the application of the section and the right of the property owner to recover damages.

menaces or for violations of regulatory legislation. These statutes were catalogued and considered by the Law Revision Commission in its study of governmental tort liability.⁵

Other statutes appear to contemplate a substantial amount of activity upon the property to which entry is privileged. For example, special district laws, especially those creating or authorizing the creation of water districts, irrigation districts, and flood control districts, typically authorize the district ". . . to carry on technical and other investigations of all kinds, make measurements, collect data, and make analyses, studies, and inspections, and for such purposes to have the right of access through its authorized representatives to all properties within the district."⁶ These district laws also typically repeat the authorization conferred by Code of Civil Procedure Section, 1242 to enter, survey, and examine property being considered for acquisition.

The law applicable to any damages that may result from these official entries and investigatory activities was partially clarified by the governmental tort liability provisions added to the Government Code in 1963. Section 821.8 provides that:

A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

That section, however, also states that:

Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

5. See Van Alstyne, A Study Relating to Sovereign Immunity, 5 Cal. L. Revision Comm'n Reports 1, 110-119 (1963).

6. Most of the statutes are cited at page 11 of the study cited in note 5.

The public entity or agency itself gains a parallel immunity through Government Code Section 815.2(b), which provides that:

Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

This statutory immunity of both the public officer and the public entity from tort liability, however, does not absolve the public entity from "inverse condemnation" liability for substantial damage. Statutes authorizing privileged trespasses on private property have been held valid,⁷ but these holdings have been based upon the premise that the interference with property rights that they authorize ordinarily is slight in extent, temporary in duration, and de minimis as to the amount of actual damages.⁸ Thus, under existing law, while it is clear that the entry itself under Section 1242 of the Code of Civil Procedure or one of the other statutes authorizing entry for investigatory purposes is privileged and therefore nontortious, it remains for the decisional law to declare the quantum of damage or interference that may result without giving rise to the right to injunctive relief or to recovery in an "inverse condemnation" proceeding.

There are many types of entries and investigations that can be made, and should be made, without any significant interference with the property or the owner's rights. In these cases, to require a preliminary court order or to provide a system for assuring and assessing

7. See Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County, 62 Cal. App.2d 378, 144 P.2d 857 (1944); Annot., 29 A.L.R. 1409 (1924).

8. See Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923), approved in this connection in People ex rel. Dept. of Pub. Works v. Ayon, 54 Cal.2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960), and Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947).

compensation would be unduly burdensome as well as constitutionally unnecessary. Thus, in connection with Section 1242 of the Code of Civil Procedure, it seems reasonable to permit condemnors, without formalities, to enter and survey property contemplated for public acquisition, so long as the entry involves no likelihood of significant damages to the property or interference with the rights of the owner. Representatives of public agencies have advised the Commission that those agencies seldom have difficulty in obtaining the consent of property owners for the great bulk of the routine survey work accomplished by them.⁹

In other cases, however, it may not be possible to obtain the owner's consent through negotiation and the necessary exploration may involve activities that present the likelihood of compensable damage, including the digging of excavations, drilling of test holes or borings, cutting of trees, clearing of land areas, moving of earth, use of explosives, or employment of vehicles or mechanized equipment. Representatives of local public entities have suggested that the deposit-and-court-order system provided by Section 1242.5 be extended to all types of condemnors without limitation as to the purpose of the contemplated acquisition and that the section as thus broadened should be limited to

9. Section 53069 was added to the Government Code by Chapter 491 of the statutes of 1968 to specify that any local public entity may agree to repair or pay for any damage incident to a right of entry or similar privilege obtained by the entity. In his background report prepared for the Commission, the Commission's research consultant had suggested that such a statute be enacted to facilitate the obtaining of property owners' consent to entries, surveys, and the like. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 510 (1969).

situations in which there is a reasonable likelihood of compensable damage to the property or a compensable interference with the rights of the owner.

The foregoing distinction between situations in which the condemnor would be permitted to enter property under the simple privilege conferred by Section 1242 and those in which resort must be had to the formal procedure of revised Section 1242.5 suggests the need for a statutory statement of the rule of liability that governs the condemnor's entry and activities. The governmental liability provisions of the Government Code should be revised to recognize liability on the part of the public entity for actual damage to private property and substantial interference with its use or possession. Such a provision, which would codify the "rule of reason" formulated in judicial decisions (and particularly in the Jacobsen case), would provide an explicit statement of the condemnor's liability incident to an entry under either Section 1242 or 1242.5 and would permit as precise a distinction as seems possible between cases in which entry may be made under Section 1242 and those in which resort must be made to Section 1242.5.

RECOMMENDATIONS

The Commission makes the following recommendations concerning Sections 1242 and 1242.5 of the Code of Civil Procedure and the problem of inverse condemnation liability in connection with privileged official entries upon private property:

1. Section 1242 should be revised to make clear that it does not immunize entries or activities that result in compensable damage to property or compensable interference with property rights, and should provide that any such entries or activities be made or conducted pursuant to a revised Section 1242.5. As to any damage that might arise from entry and activities under Section 1242, the revised section should provide that the liability of a public entity is governed by Section 815.8 of the Government Code (to be added) and that liability of any condemnor other than a public entity is the same as that of a public entity. The provision with regard to the location of the public improvement should be moved to another appropriate place in the Code.¹⁰

2. Section 1242.5 should be expanded to cover entries for any purpose for which land may be acquired by condemnation. The revised section, however, should apply only where the entry and investigation is likely to cause compensable damage. Also, the procedure provided

10. This requirement of proper location, as stated in Section 1242, is now considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn. See Code of Civil Procedure Section 1241(2) and Sparrow, Public Use and Necessity, California Condemnation Practice (Cal. Cont. Ed. Bar 1960) 133, 150. This fragment of Section 1242 should, therefore, be removed to paragraph 2 of Section 1241.

by the revised section should be available only where the owner's consent cannot be obtained. The order authorizing entry should be made only after such notice to the owner as the court deems appropriate. The court should fix a deposit in the amount of the estimated damage and the owner should be permitted to have the deposit increased where it appears that the deposit has become inadequate. Further, the court should be authorized to consider the techniques of exploration and survey that are contemplated and to impose appropriate limitations. However, the provision for the payment of attorney's fees should be eliminated. It is no more necessary or desirable that attorney's fees be paid in this situation than in any other action or proceeding and such payment can only serve to stimulate unnecessary litigation. The section should provide a summary procedure for disposing of the deposit and compensating the owner, but should not foreclose his resort to any other civil remedies available to him.

3. A new Section 815.8 should be added to the Government Code providing that, in connection with any entry upon private property to conduct surveys, explorations, or similar activities, a public entity is liable for "actual damage" to property or for "substantial interference" with the owner's use or possession. The Comment to the section should make clear, however, that, where the entry and activities are authorized by law, there is no liability for (1) the entry itself or examinations, testings, measurements, or markings of property that are superficial in nature, (2) trivial injuries or inconsequential damages such as superficial disturbance of grass or other vegetation, or the taking of minor samples, or the placing of markers as is done in connection with aerial surveys, or (3) slight, transient interference

with the owner's use and possession of the property that is reasonable under the circumstances of the particular case.

RECOMMENDED LEGISLATION

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

I

An act to amend Sections 1242 and 1242.5 of the Code of Civil Procedure, relating to eminent domain.

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

Section 1242 (amended)

Section 1. Section 1242 of the Code of Civil Procedure is amended to read:

~~1242. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of Section 1247. The State, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof.~~

(a) Subject to Section 1242.5, a person having the power of eminent domain may enter upon property to and make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to the purpose for which the power may be exercised.

(b) The liability, if any, of a public entity for damages that arise from the entry and activities mentioned in subdivision (a) is determined by Section 815.8 of the Government Code.

(c) Any person that has the power of eminent domain, other than a public entity, is liable for damages that arise from the entry and activities mentioned in subdivision (a) to the same extent that a public entity is liable for such damages under Section 815.8 of the Government Code.

(d) As used in this section, "public entity" means a public entity as defined in Section 811.2 of the Government Code.

Comment. Section 1242 has been amended to modernize its language and to make clear that the condemnor's liability for any damage that may result from an entry and activities under the privilege conferred by the section is governed by Section 815.8 of the Government Code.

As to the extent of the "examinations" authorized by Section 1242, see Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923), holding that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examinations as would suffice for the making of surveys or maps and as would not, in the nature of things, seriously impinge on or impair the rights of the owner to the use and enjoyment of his property." See also the discussion supra in this Recommendation. The statutory procedure for entries that will result in compensable damage (under Government Code Section 815.8) is provided by Section 1242.5. Even where no damage is contemplated from the entry, the entity will ordinarily obtain the voluntary consent of the owner to enter.

The requirement of proper location, formerly stated in Section 1242, has been deleted and should be combined with paragraph 2 of Section 1241 in

any revision of the eminent domain laws. This requirement is now considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn.

Section 1242.5 (amended)

Sec. 2. Section 1242.5 of the Code of Civil Procedure is amended to read:

1242.5. In any case in which the State, a county, city, public district, or other public agency in this State has the power to condemn land for reservoir purposes, and desires to survey and explore certain property to determine its suitability for such purposes, and in the event such agency is unable by negotiations to obtain the consent of the owner to enter upon his land for such purposes, the agency may undertake such survey and exploration by complying with the requirements of this section:--it shall petition the superior court for permission to undertake such survey and exploration.--The court shall ascertain whether petitioner in good faith desires to enter the land for this purpose; and, if it determines this issue in the affirmative, shall require that petitioner deposit with the court cash security in an amount sufficient to compensate the landowner for any damage resulting from the entry, survey, and exploration:--Upon deposit of such security, the court shall issue its order granting permission for such entry, survey, and exploration:

The court shall retain such cash security for a period of 90 days following the termination of the entry, survey, and exploration activities or until the end of any litigation commenced during that period relating to such entry, survey and exploration activities and shall award to the landowner out of the cash security on deposit an amount equal to that necessary to compensate him for any damage caused by the State, county, city, public district, or other public agency

while engaged in survey and exploration on his property as well as for any costs of court and reasonable attorney fees, to be fixed by the court, incurred in the proceeding before the court. Any suit for damages by a landowner under this section shall be governed by the applicable provisions of Part 2 of the Code of Civil Procedure. Such cash security shall be held, invested, deposited, and disbursed in the manner specified in Section 1254 of the Code of Civil Procedure, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

(a) In any case in which the entry and activities mentioned in subdivision (a) of Section 1242 will subject the person having the power of eminent domain to liability under Section 815.8 of the Government Code, before making such entry and undertaking such activities, the person shall secure:

(1) The written consent of the owner to enter upon his property and to undertake such activities; or

(2) An order for entry from the superior court in accordance with subdivision (b) of this section.

(b) Upon the petition of the person seeking to enter upon property and, upon such notice to the owner of the property as the court determines is appropriate, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. After such determination the court

may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation.

(c) At any time after an order has been made pursuant to subdivision (b), either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

(d) The court shall retain the amount deposited under this section for a period of six months following the termination of the entry. Such amount shall be held, invested, deposited, and disbursed in accordance with Section 1254.

(e) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this section. Where a deposit has been made pursuant to this section, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this subdivision. Thereupon, the court shall determine such amount and

award it to the owner and the money on deposit shall be available for the payment of such amount. Nothing in this subdivision affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1242.5 has been amended to make the procedure it provides available in all proposed acquisitions for public use, rather than only to acquisitions for reservoir purposes.

Subdivision (a) requires a person desiring to make an entry upon property to secure either the permission of the landowner or an order of the court before making an entry that would subject it to liability under Section 815.8 of the Government Code. In many cases the entry and activities upon the property will involve no more than trivial injuries to the property and inconsequential interference with the owner's possession and use. In such cases, neither the owner's permission nor the court order is required. However, where there is a likelihood of compensable damage, subdivision (a) is applicable.

Under subdivision (b), the court should examine the purpose of the entry and determine the nature and scope of the activities reasonably necessary to accomplish such purpose. Its order should provide suitable limitations by way of time, area, and type of activity to strike the best possible balance between the needs of the condemning agency and the interests of the property owner. The order also must require the condemning agency to deposit an amount sufficient to reimburse the owner for the probable damage to his property and interference with its use.

Under subdivision (c), if, after an entry has been made and activities commenced, it appears either that the activities must be extended to

accomplish the purpose or curtailed to prevent unwarranted damage or interference or that greater or lesser damage to the property will occur, the owner or the entity may apply to the court for a redetermination and appropriate changes in the previous order.

Subdivision (d) continues the former requirement that deposits are to be held, invested, and disbursed in the same manner or as deposits made after judgment and pending appeal and also specifies the period the deposit is to be retained on deposit.

Subdivision (e) provides a simplified procedure for determining the amount to which the owner is entitled. In the usual case, the deposit will be held for six months after the agency has finished its survey and investigation, during which time the owner, after notice to the agency, will apply to the court for the amount necessary to fully compensate him. This amount will include court costs in addition to damages for the entry. It is contemplated that the owner will be paid out of the amount on deposit, but this does not preclude an award greater than the deposit, if this is necessary to fully compensate him. An award under this section will, however, be finally determinative of the owner's right to compensation. It should be noted that the six-month period is in effect a statute of limitations for recovery utilizing the procedure provided by this section. However, the property owner is not foreclosed, either before or after expiration of the six-month period, from pursuing any other civil remedy available to him.

II

An act to add Section 815.8 to the Government Code, relating to the liability of public entities:

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

Section 1. Section 815.8 is added to the Government Code, to read:

815.8. Notwithstanding Section 821.8, a public entity is liable for actual damage to property or for substantial interference with the possession or use of property where such damage or interference arises from an entry upon the property by the public entity to make studies, surveys, examinations, tests, soundings or appraisals or to engage in similar activities.

Comment. Section 815.8 is added to clarify the application of Division 3.6 (Sections 810-996.6) to claims for damages that may arise from privileged entries upon private property to conduct surveys, examinations, explorations, and similar activities. In general, this section codifies the decisional law that gives content, as to these entries and activities, to the assurance of Section 14 of Article I of the California Constitution that compensation will be made for the "taking" or "damaging" of property. See Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923).

This section does not authorize any entry upon property or the conducting of investigatory activities. Rather, the section provides a "rule of reason" to govern the liability of the public entity where such entries and activities are authorized by other statutory provisions. As to entries upon private property to determine its suitability for acquisition by eminent domain proceedings, see Sections 1242 and 1242.5 of the Code of Civil Procedure.

In cases where a condemnation proceeding eventually is filed to take the property, or a portion of it, the damages mentioned in this section may be recovered by cross-complaint in the condemnation proceeding. Cf. People ex rel. Dept. of Pub. Wks. v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967).

In imposing liability for "actual" damage to property and for "substantial" interference with possession and use of the property, this section provides only a general standard that must be applied with common sense to the facts of the particular case. The term "actual damage" is commonly used in similar statutory provisions in other states. See, e.g., Kans. Stat. Ann. § 68-2005 (1964); Mass. Laws Ann. c. 81, § 7F (1964); Ohio Rev. Code Ann. § 163.03 (Supp. 1966); Okla. Stat. Ann. tit. 69 §§ 46.1, 46.2 (Supp. 1966); Pa. Stat. Ann. tit. 26 § 1-409 (Supp. 1966). Judicial decisions from other states have also given sensible applications to the phrase. See, e.g., Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So.2d 546 (1962). A specific consequence of the use of the term "actual" is to preclude recovery of the purely "nominal" or "constructive" damages that are presumed in tort law to flow from any intentional tort.

Use of the term "substantial interference" recognizes that any entry upon private property causes at least a minimal "interference" with the owner's use, possession, and enjoyment of that property. The very presence upon property of uninvited "guests" would be deemed by some property owners to be an interference with their property rights. The phrase "substantial," however, is intended to exclude liability for entries and activities that,

to quote the leading California decision (Jacobsen v. Superior Court, supra), "would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property."