36.35 8/10/70

Third Supplement to Memorandum 70-59

Subject: Study 36.35 - Condemnation (Possession Prior to Final Judgment and Related Problems)

The attached material was provided by Mr. Kanner. It concerns the problem of whether an order of immediate possession constitutionally can be made on an ex parte motion.

Respectfully submitted,

John H. DeMoully
Executive Secretary

FADEM AND KANNER
ATTORNEYS AT LAW
8605 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90048
TELEPHONE (213) 651-3372

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXTEND TIME WHEN POSSESSION MAY BE TAKEN OR IN THE ALTERNATIVE TO VACATE THE ORDER OF IMMEDIATE POSSESSION

INTRODUCTION

The home in which Mr. and Mrs. Esquivel live is being taken for a freeway. Thus, under the Constitution of the state of California the State has a right to take possession of the Esquivel home before judgment in the main case.

The dislocation, inconvience and difficulty that are necessarily attendant upon such an unexpected uprooting cannot be measured or compensated for. Thus the procedure whereby the State may take sudden possession should be carefully scrutinized to the end that needless discommodation be avoided whenever possible.

In the case at bar, the Esquivels have been diligent (if not hasty) */ in seeking other accommodations.

They are not in an economic position to sustain the double blow of moving twice in a short period of time. Thus, they ask that the Court permit them to live in their present home until they can move into the one they are buying. They expect to be able to move by September 15, 1969. The request seems not reasonable in light of the information obtained from the State's own demolition inspector that the street on which the Esquivels live is not to be demolished until October, 1969.

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*/ The Esquivels have made an offer to purchase replacement housing at the seller's listing price.

There is no question that the Court has the inherent power to order such an extension. The subject of the court's power in that regard has been previously briefed in the Points and Authorities in support of the ex parte order made moved by this Court on July 29, 1969. The same Points and Authorities are included herein for the convenience of the Court. **/

Further, in light of the most recent expression of the U. S. Supreme Court in Sniadich v. Family Finance Corp. (1969) ___US___, 23 L Ed 2d 348, it is apparent that the entire procedure used by the State to obtain the Order of Immediate Possession in the case at bar is an unconstitutional taking of property. Due process has been offended by the lack of notice and hearing. The Order of Possession is therefore void.

**/ We also rely upon and incorporate herein by reference the declarations of Irwin M. Friedman and Belen M. Esquivel.

THE COURT HAS INHERENT POWER TO PREVENT INJUSTICE

C.C.P. §187 provides:

"When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

In Hays v. Superior Court (1940) 16 C2 260, 264, the Supreme Court held:

"There is nothing novel in the concept that a trial court has the power to exercise a reasonable control over all proceedings connected with the litigation before it. Such power necessarily exists as one of the inherent powers of the court and such power should be exercised by the courts in order to insure the orderly administration of justice." (Emphasis added.)

In Neal v. Bank of America (1949, 93 CA2 678, 682 the court said:

> "However, the courts have inherent power by summary means, to prevent frustration, abuse or disregard of their processes." (Emphasis added.)

And see also U. S. v. Certain Land in Borough of Manhattan (1964) 332 F2d 679 where the Federal Court held that even under the Declaration of Taking Act, 40 USC §258a */ the court has the inherent power to delay the taking of possession.

It is thus evident that this Court may exercise its inherent power to prevent a manifest injustice.

It is respectfully requested that the Court extend the time when possession may be taken until the Esquivels have a reasonable opportunity to move from their home into another home.

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*/ The declaration of Taking Act is far more favorable to the government that the California Possession Statute. Compare 40 USC §258a and C.C.P. §1243.5 et seq.

THE ORDER FOR IMMEDIATE POSSESSION HEREIN IS A DEPRIVATION OF DUE PROCESS OF LAW

California Constitution, Article I, §14 provides: "Private property shall not be taken or damaged for public use without just compensation having first been made, or paid into court. . .provided that in any proceeding in eminent domain brought by. . .a municipal corporation. . .[it]. . .may take immediate possession and use of any right of way. . .upon first commencing eminent domain proceedings <u>according to law</u> in a court of competent jurisdiction and thereupon giving such security. . . as the court may direct. . ..including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law." (Emphasis added.)

CCP §1243.5 provides that in any eminent domain action where the plaintiff is authorized to take immediate possession of the property sought to be condemned, plaintiff condemnor may, after issuance of summons but prior to entry of judgment, apply

ex parte to the court for an order determining the amount of security. The court shall determine the probable amount of compensation and the right to take immediate possession. After depositing the security, the plaintiff may apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property. Plaintiff can then serve on defendants a fait accompli in the form of 20 days notice to vacate.

CCP §1243.5 does not supply authority to take nor to take immediate possession; rather, where such right exists under Article I, §14, it permits ex parte application and determination of those rights and the amount of security for such immediate taking. Nothing in Article I, §14 authorizes ex parte taking.

The owners do not challenge here the right to take immediate possession by appropriate proceedings: it is strongly urged, however, that in the absence of a showing of emergency or special need for haste, an order for immediate possession may not validly issue ex parte, without notice or adversary hearing, notwithstanding CCP §1243.5 which is repugnant to the concept of due process as embodied in the Constitutions of California and of the United States. California Constitution Article I, §13, U.S. Constitution, Fifth and Fourteenth Amendments.

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be pre-

ceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co. (1950) 339 US 306 at 313, 94 L ED 865 at 872.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections." Ib.339 US at 314.

"Whatever the character of the proceeding by which one is deprived of his property, and whether it takes the property directly or creates a change or liability which may be the basis of taking it, the law directing the proceeding must provide for notice, and opportunity to be heard, or the proceeding will want the essential ingredient of due process of law." Hugony v. La Guardia (1952) 110 CA 2d 433, 435.

No man's property may be taken by judicial process without affording him the right of showing, if he can, that the

pretext for doing it is unfounded. Ray v. Norseworthy (1875), 23 Wall 128, 23 L Ed 110, 118. No judgment or order of a court is due process if rendered without notice to the party to be affected. Scott v. McNeal (1894) 154 US 34, 46, 38 L Ed 896, 901. Everyone is entitled to an opportunity to defend his rights before a judgment is pronounced against him. Smith v. McCann (1861) 24 How. 398, 16 L Ed 714, 717.

It follows that no court may determine the rights of parties without giving them a right to appear and be heard, such opportunity being the fundamental requisite of due process in judicial proceedings. Baker v. Baker, Eccles & Co. (1917), 242 US 394, 403, 61 L Ed 386, 392.

The authority of the condemning authority to acquire land for public use is not the point of challenge. Nor is a realistic recognition that cases requiring speedy acquisition can and do arise denied. What owners do suggest is that a routine resort to secret, unnoticed proceedings, where no need or reason exists for more than normal speed, by which the State imposes, at any time of its choosing, 20 days notice to relinquish possession is improper.

This ex parte aspect of CCP §1243.5 is not only unwise, unfair and potentially abusive; it is unconstitutional. The procedure is not a simple ex parte maintaining of the status quo until a noticed hearing can be had. There is no similarity to temporary restraining orders, claim and delivery, or the like.

First, the OIP proceeds to disturb the status quo, not maintain it. Second, there is no return, nor hearing after notice for the order to become permanent. Owners are not even afforded the service of an O.S.C. why the ex parte application should not become final. Once obtained ex parte, nothing further need be done to finalize the order. If something further is to be done, the owner must become the moving party and seek the court's aid. No appeal can be taken from the order of immediate possession.

According to CCP §1243.5, the court must determine that the State is entitled to take by eminent domain and to take immediate possession, and moreover fix the probable amount of compensation and damages. There are essential determinations. Yet, the owner has no opportunity to be heard on these matters, and no further hearing need be had before possession is taken under §1243.5.

Due process requires at a minimum that a deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co. (1950) 339 US 306, 94 L Ed 865; Armstrong v. Manzo (1964) 380 US 545, 14 L Ed 2d 62.

The hearing which must precede the taking of property is not a mere form, but the owner must have the right to secure and present evidence material to the issue under investigation; he must be given the opportunity by proof and argument to controvert the claim asserted against him before a tribunal bound not only to listen but to give legal effect to what may be established. Washington ex rel. Oregon R. & Nav. Co. v. Fairchild (1912)

224 US 510, 524; 56 L Ed 863, 868. There is no hearing when the adverse party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. Interstate Commerce Com. v. Louisville & N. R. Co. (1913) 227 US 88, 91; 57 L Ed 431, 433.

An opportunity for hearing must be granted at a meaningful time and manner. If feasible, notice must be reasonably calculated to inform parties of proceedings which may directly affect their rights. Walker v. Hutchinson (1956) 352 US 112, 1 L Ed 2d 178.

By any of the above tests, the procedure herein challenged fails dismally. The deprivation is preceded by 20 days' notice of a fait accompli. As will be shown below, those few procedural devices available to owners are not adequate to support the myth that an opportunity for a hearing really exists. Owners cannot meaningfully controvert and rebut evidence and arguments urged to the court in their absence. Owners have limited knowledge of what persuaded the court in the ex parte determination of the three crucial elements, above discussed: the right to take, to take immediately, and the value to be deposited. Notice of the OIP hearing is not merely feasible, but would be almost effortless. See Schroeder v. City of New York (1962) 371 US 208, 9 L Ed 2d 255.

The maxim "audi alteram partem" - hear the other side - is a command spoken with the voice of due process. No other reason exists or can be urged why a hearing with notice before an order of immediate possession is granted should not be required where no emergency exists.

The only authority under California case law is Marblehead Land Co. v. Superior Court (1923) 62 CA 408. The court analogized the OIP procedure to attachment.

In Marblehead the court concluded (at p. 412) that due process was not offended by an ex parte OIP with the following rationale:

> "Counsel for petitioners have not referred to any case, and we are aware of none, in which the federal supreme court has held a procedure like that described in the 1918 amendement. . . is in violation of the 'due process of law' clause of the Federal Constitution." */

In June, 1969, the U.S. Supreme Court provided such a case: Sniadach vs. Family Finance Corp. (1969) _____ US _____, 23 L Ed 2d 348.

In Sniadach the supreme court held that an in rem seizure of the defendant's property (a wage attachment) without prior notice or hearing deprived the defendant of her constitutional right to due process of law.

*/ Since Marblehead three state supreme courts struck down ex parte issuance of orders for possession as unconstitutional: State v. Yelle (1955) 46 Wash 2d 166, 279 P 2d 645; Yellowstone Pipeline Co. v. Drummond (1955) 77 Idaho 36, 287 P 2d 288; State v. Phares (1963) 245 La 534, 159 So 2d 144. Where immediate possession procedure has been upheld, it was procedure calling for notice and hearing to the affected owner. See e.g., Desert Waters Inc. v. Superior Court (1962) 91 Ariz 163, 370 P 2d 652.

"Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and hearing (cf. Coe v. Armour Ferilizer Works, 237 US 413, 423, 59 L Ed 1027, 1031, 35 S Ct 625) this prejudgment garnishment procedure violates the fundamental principles of due process." Sniadach at 23 L Ed 354.

Mr. Justice Harlan in a concurring opinion said:

"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." Sniadach at 23 L Ed 354 (emphasis in the original).

Thus, the Marblehead rationale fails, and with it the only law in California upholding the OIP procedure.

In the case at bar the Esquivels are being deprived of their home without notice or prior hearing.

The statute which purports to permit that is not only procedurally lacking in due process but is unreasonable on its face.

The statute permits the State with the assistance of the sheriff to evict one from his home on 20-days notice. The court may take judicial notice that it is virtually impossible to locate substitute housing, obtain financing*/, open and close an escrow **/ and move within 20 days. ***/

In addition to the evident unreasonableness in ejecting a party on such short notice, the statute runs afoul of the California Supreme Court's command in Steinhart v. Superior Court (1902) 137 C. 575, 579.

In Steinhart the court held that possession could not be taken unless the condemnee was first compensated. Although the statute provides that one may be dispossessed on twenty days' notice, the statute builds in what are possibly interminable delays before a defendant may withdraw his security:

Procedure Under CCP §1243.7	Elapsed Time
Application for Withdrawal of Depposit	20 days
State Objections to Withdrawal	10 days
Objections by Others to Withdrawal	10 days
Hearing on Objections to Withdrawal	?

*/ In the prevailing "tight money" market this is an even greater problem than in times of normalcy.

**/ The "normal" escrow in Southern California is 30 days. Even if the Esquivels were to rent, it would probably be 30 days before they could relocate.

***/ Indeed, at certain times of the year, as when school vacations begin and again just before they end, one is often not able to obtain moving service on 20-days notice.

Certified Copy of Order of Withdrawal to State Treasurer */ ?

TOTAL ELAPSED TIME 40 DAYS + ? + ?

Thus, even assuming an immediate hearing on the objections to withdrawal, one is dispossessed by the statute before the security deposit is available.

In the express terms of Steinhart:

"It [the security deposit] is not paid into court for him until he can take it."

Thus, the California statute fails to meet the fundamental notice and hearing requirements of due process, is unreasonable on its face, and fails to meet the constitutional requirements set forth in Steinhart.

Thus, owners conclude and urge the Court to hold that insofar as Code of Civil Procedure, Sec. 1243.5 authorizes the issuance of an order for immediate possession ex parte, it is violative of California Constitution, Article 1, Sec. 12, cl.6, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

IRWIN M. FRIEDMAN
for
FADEM AND KANNER

Attorneys for Defendants

*/ It is the practice of the State Treasurer to ignore the court's order of withdrawal until he gets a letter from the Division of Highways concurring in the court's order.