

Memorandum 71-35

Subject: Study 36.35 - Condemnation (Immediate Possession--Enforcement of Orders for Possession)

Summary

It appears that some problems have arisen because there is no statutory provision for writs of assistance in immediate possession cases. We have made such provision in our comprehensive statute. Is the problem one that requires legislation at the 1972 session?

Background

A court order for possession of property in a condemnation proceeding is not the equivalent of a "writ of possession" or "writ of assistance" regardless of whether the order is for immediate possession, for possession pending appeal, or for possession after final judgment. Although orders of possession entitle the condemnor to possession in accordance with their terms, they must be enforced by other process. Generally speaking, the writ of assistance is the remedy available to a condemnor entitled to possession under any order of the condemnation court although there is presently no express statutory codification of this principle. For discussion, see extract from California Remedies for Unsecured Creditors 140-141 (Cal. Cont. Ed. Bar 1957), attached as Exhibit III.

At least one court has refused to issue a writ of assistance to a condemnor on the ground that such a writ is not available to enforce a valid order for possession prior to final judgment. See Exhibits I and II attached. Such a decision, assuming the order for immediate possession was valid, is clearly wrong; if a condemnor is unable to enforce an order for immediate possession, the order is meaningless. If condemnors do in fact need immediate possession, then they must be able to enforce their right to possession.

Does this court decision necessitate any urgent changes in the law and does the Commission's tentative recommendation on immediate possession provide adequate authority to enforce orders for possession prior to judgment?

Need for Legislation in 1972

We have received several letters indicating that there should be a statutory provision directing the court to issue a writ of possession or assistance in immediate possession cases. The staff believes that it would not be desirable to recommend a separate bill on this subject at the 1972 session unless the need for legislation is urgent.

Immediate possession is a controversial matter. The order for possession can direct that the property owner be required to deliver possession in 20 days. There is no provision for relief in case of hardship, even in cases where possession is not needed for some time. We have some concern that there may be due process questions presented if the order for possession is issued ex parte as authorized under existing law. Our comprehensive statute would provide a procedure that gives considerably more protection to the property owner.

We suspect that the number of cases where a condemnor is forced to seek a writ of possession or assistance is small and that the number of cases where the writ is refused is smaller still. Moreover, we believe that an appellate court would require that the appropriate writ be issued if the refusal of the trial court were reviewed. We think, however, that there is a good chance that the Legislature would refuse to pass a separate bill requiring the issuance of the writ in immediate possession cases, primarily because procedural protections for the property owner under existing law are nonexistent,

Nevertheless, if the Commission concludes that the problem is one that needs immediate attention, we suggest that the following new section be added to the Code of Civil Procedure:

1265.1. The court in which a condemnation proceeding is brought has the power to enforce any of its orders for possession, whether prior to or following judgment, by appropriate process including, but not limited to, a writ of possession or assistance. The plaintiff is entitled to appropriate process to enforce an order for possession as a matter of right.

Comprehensive Statute

The Commission's tentative statute contains the following section in the chapter authorizing possession prior to judgment:

§ 1269.08. Court may enforce a right to possession

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

(a) Determine the right to possession of the property, as between the plaintiff and the defendants, in accordance with Title 7.1 (commencing with Section 1268.01).

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

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

The Comment indicates that this section codifies judicial decisions that hold that the court having jurisdiction of the eminent domain proceeding has the power to determine the respective rights of the parties to possession and to enforce its determination. The Comment further notes that the court may issue writs of possession and assistance in the exercise of its general jurisdiction as well as appropriate process to enforce orders for possession both prior to judgment and following judgment.

The authority granted by the statute standing alone is sufficiently broad to allow a writ of assistance to enforce an order for possession prior

to judgment. The Comment reinforces this authority. Nevertheless, to make the matter clear, subdivision (b) could be deleted and the substance of the provision recommended above added to the procedural portion of the comprehensive statute. The provision would then cover all orders for possession, whether before or after judgment. This would appear to be a desirable revision of the statute.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

County of Santa Clara
California

William M. Siegel, County Counsel

June 3, 1971

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Re: Writs of Assistance to enforce Orders of Immediate
Possession relating to possession prior to final
judgment

Dear Mr. DeMouilly:

I discussed with you at the meeting in Santa Barbara the problem that has arisen in Santa Clara County relating to the right of a condemning agency to secure a writ of assistance to obtain possession of property under an order of immediate possession.

Recently, the City of San Jose filed a noticed motion to obtain a writ of assistance to enforce the provisions of an order of immediate possession. Possession was necessary for a road improvement project. There was no opposition to the motion, although the owner was represented by an attorney. The attorney for the owner told the attorney for the City of San Jose that he would not make an appearance as he felt the City was entitled to the writ of assistance as a matter of right.

Despite the lack of opposition, the Presiding Judge denied the motion on the basis that a condemning agency is not entitled to a writ of assistance prior to judgment. He also indicated that his ruling would be the same whether it was the state, county or city involved.

Until this ruling was made, we have experienced little difficulty in obtaining a writ of assistance, either ex parte or on a noticed motion. In checking with the Division of Highways in Los Angeles County, it appears that they have had little difficulty in that county in obtaining writs of assistance.

I believe that this does point out a problem which

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the Law Revision Commission should consider in making its provisions relating to possession prior to final judgment. There should be a provision made in the statutory law that a writ of assistance is a proper remedy to enforce an order of immediate possession. If this remedy is not available, it creates a serious problem in attempting to enforce an order of immediate possession to obtain possession of the property for a project.

In September 1967, the Commission published a tentative recommendation relating to possession prior to final judgment and related problems. (Number 1). At page 1221, the statement is made that "the writ of assistance is the remedy available to a condemnor entitled to possession under any order of the condemnation court." The cited authority for this statement was Marblehead Land Co. v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921). In this case there was a final judgment when the County of Los Angeles applied for a writ of assistance. It did not involve the use of the writ of assistance to enforce an order of immediate possession prior to judgment.

Also at page 1221 of the tentative recommendation, it is stated, "The writ is, however, obtainable as a matter of right, and mandamus will issue to require its issuance and execution." The cited authority for this was Rafferty v. Kirkpatrick, 29 Cal. App. 2d 503, 88 P. 2d 147 (1938). This case involved the foreclosure of a mortgage and application for a writ of assistance after judgment.

Section 1254 of the Code of Civil Procedure formerly made provision for writs of assistance in condemnation proceedings. (Cal. Stat. 1897, Ch. 127, §1, p. 186). These provisions were deleted for some reason in 1903. (Cal. Stat. 1903, Ch. 98, §1, p. 109). It is not clear whether these provisions in 1254 related to writs of possession before judgment, or only after judgment. It would appear that they would only apply to after judgment situations.

At page 1159 of the tentative recommendation, under Section 1269.08(b) it gives the court the power to "enforce any of its orders by appropriate process." In the comment it is indicated that the court may issue a writ of assistance or a writ of possession in exercise of its general jurisdiction. The Marblehead case is again cited, which is an after judgment

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situation. The overall comment under this section would seem to indicate that a writ of assistance may be available to gain possession under an order of immediate possession prior to judgment. It is my personal belief that neither the section 1269.08, nor the comment under that section, makes it clear that these writs are available to enforce an order of immediate possession prior to judgment.

While the necessity to apply for a writ of assistance is rare, there is a need for statutory authority to make a writ of assistance available to enforce an order of immediate possession prior to final judgment.

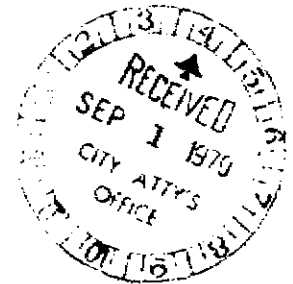
I would appreciate the consideration of the Commission and your staff on this problem.

Very truly yours,

WILLIAM M. SIEGEL
County Counsel

By *Gerald J. Thompson*
Gerald J. Thompson
Assistant County Counsel

GJT:bc

CITY OF FULLERTON

TO D. Reginald Gustaveson DEPT. Legal
FROM Hugh L. Berry DEPT. Public Works
SUBJECT Eminent Domain Statute DATE August 31, 1970

This proposal provides the statutes for what we have been doing over the past years. We support this proposal.

Two other areas need attention, and you might forward these to the Commission.

1. Constitutional amendment broadening power of use of immediate possession, especially for public parking lots.
2. Statutory provision for issuance of writ of assistance where occupant refuses to vacate premises.

A handwritten signature in dark ink, appearing to be 'H. Berry', written over a horizontal line.

HLB:eg

EXTRACT from California Remedies for Unsecured Creditors 140-41
(Cal. Cont. Ed. Bar 1957)

III. WRIT OF ASSISTANCE

A. [§16] NATURE AND USE OF WRIT

A judgment for possession of real or personal property is enforced by a writ which is usually labeled a writ of possession or assistance.

"The writ of assistance is incident to the execution of the judgment and is issued as a matter of right where a defendant, or one claiming under him, refuses to surrender possession after the execution of the deed to the purchaser at the foreclosure sale." *Rafferty v. Kirkpatrick*, (1938) 29 C.A.2d 503, 505, 85 P.2d 147, 149. The use of a writ of possession, however, is not limited to a foreclosure proceeding and is available in any action determining title to real estate after a judgment declaring such right. *Taylor v. Ellenberger*, (1901) 134 C. 31, 66 P. 4.

The procedure for obtaining a writ of possession cannot be utilized to try title but only to determine the right of possession. *Rafferty v. Kirkpatrick*, *supra*.

A writ of possession is sometimes called a writ of assistance. The two writs have been distinguished on the grounds that the writ of possession is the proper remedy in legal actions, and the writ of assistance is the remedy in equitable actions. The distinction, however, seems merely a matter of what label is to be affixed to the writ. Section 684 simply provides that if the judgment is for the possession of real or personal property, it may be enforced by a writ of execution.

The application for the writ of possession generally requires (1) a showing of disobedience to the decree (*Montgomery v. Tutt*, (1858) 11 C. 190), and (2) a demand on the person in possession (*Montgomery v. Middlemiss*, (1862) 21 C. 103), although the judgment may provide that the writ may issue without further notice. *Sichler v. Look*, (1892) 93 C. 600, 29 P. 220.

The writ of assistance dates back to and depends upon the rights which have been determined by the judgment. Where new and independent rights are acquired after the judgment, a prima facie showing of the new right prevents the issuing of the writ. *Pacific States Savings Etc. Co. v. Harwell*, (1928) 204 C. 370, 268 P. 341.

If the judgment does not provide for a writ issuing without further

notice, application should be made to the court for an order directing issuance of the writ. This can be accomplished by filing an affidavit setting forth the facts justifying issuance of the writ and giving notice of the application. See *Sullivan v. Superior Court*, (1921) 185 C. 133, 195 P. 1061.

B. [§17] STATUTORY PROVISION

Section 682 provides that a writ of execution for the delivery of the possession of real or personal property:

... must require such officer to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require such officer to satisfy any costs, damages, rents or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Section 380 provides for joinder of adverse claimants and persons in possession in an action brought by one out of possession and it provides also that a successful plaintiff in the action "may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed."

Additional statutory authority for the issuance of a writ of possession is found in §§1210 and 1254. The former section deals with a contempt consisting of unlawful re-entry on property from which one has been ejected by the judgment or process of a court and it provides for "an alias process... to restore such possession to the party entitled..." Section 1254 permits a court order authorizing a public body to take or keep possession of real property which it seeks to condemn. An order authorizing a judgment debtor or redemptioner to enter premises to be redeemed is provided for in §702.

The term "writ of possession" is also used to describe the method by which possession of premises in a forcible or unlawful detainer action can be delivered immediately under certain circumstances. (§1166a.) See also §1174, providing for enforcement of a judgment in forcible or unlawful detainer and "for the possession of the premises."