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California's Writ of Immediate Possession: Landlords and the Courts v. The Indigent Tenant

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CALIFORNIA'S WRIT OF IMMEDIATE POSSESSION: LANDLORDS AND THE COURTS V. THE INDIGENT TENANT

The California State Legislature in August of 1969 amended section 1166(a)[1] of the California Code of Civil Procedure. A tenant is now permitted a court hearing before a writ of immediate possession may be issued for his eviction.[2] The statute, prior to the present amendment, permitted the landlord to have a tenant evicted by means of an *ex parte* proceeding. The landlord, in a verified complaint, was required to allege that the tenant was either insolvent, or did not have sufficient property subject to execution to satisfy the damages sought by the plaintiff, or was out of state or was evading service of process. If convinced by the complaint, the court would issue a writ of immediate possession without hearing testimony on behalf of the defendant.[3] The new statute requires, before a writ of

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1 Cal. Stats., 1969, ch. 903, § 1, at 1659-60 (1969), *amending*, Cal. Stats., 1951, ch. 1737, § 157, at 4140 (1951) (Codified at CAL. CODE CIV. PROC. § 1166(a) (West 1955)) [Hereinafter cited as CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969)]. "Upon filing the complaint the plaintiff may, upon motion, have immediate possession of the premises by a writ of possession issued by the court and directed to the sheriff of the county, or constable or marshal, for execution, where it appears to the satisfaction of the court, after a hearing on the motion, from the verified complaint and from any affidavits filed or oral testimony given by or on behalf of the parties, that the defendant is insolvent, or has no property that is subject to execution sufficient to satisfy the amount of damages sought to be recovered by the plaintiff, or resides out of the state, or has departed from the state, or cannot, after due diligence be found within the state, or conceals himself to avoid the service of summons. Written notice of the hearing on the motion must be served on the defendant by the plaintiff in accordance with the provisions of Section 1011, and must inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony on his behalf, that if he fails to appear the plaintiff will apply to the court for the writ of possession. The plaintiff shall file an undertaking with good and sufficient sureties, to be approved by the judge, in such sum as shall be fixed and determined by said judge, to the effect that if the plaintiff shall fail to recover judgment against the defendant for the possession of said premises, or if the suit be dismissed, that plaintiff will pay to defendant such damages, not to exceed the amount fixed in said undertaking, as may be sustained by the defendant by reason of such dispossession under said writ of possession. An action to recover such damages shall be commenced by the defendant in a court of competent jurisdiction within one year from the date of entry of dismissal or of final judgment in favor of the defendant."

2 *Id.*

3 Cal. Stats., 1951, ch. 1737, § 157, at 4140 (1951) (Codified at CAL. CODE CIV. PROC. § 1166(a) (West 1955)) *as amended*, Cal. Stats., 1969, ch. 903, § 1, at 1659-60 (1969). "Upon filing the complaint the plaintiff may have immediate possession of the premises by a writ of possession issued by the judge and directed to the sheriff of the county, or constable or marshal, for execution, where it appears to the satisfaction of the judge, from the verified complaint, or from an affidavit filed by or on behalf of the plaintiff, that the defendant is insolvent, or has no property that is

immediate possession may be issued, that there be an opportunity for a hearing attended by the defendant at which he may produce testimony and file affidavits on his behalf. The new statute appears to contain several procedural deficiencies which effectually vitiate its purpose. After a short background introduction, these deficiencies will be discussed in detail. As this statute has been used primarily to evict lower income tenants who have difficulty meeting their rental commitments, this comment is necessarily concerned throughout with the effects upon the indigent tenant.

SECTION 1166(a) BEFORE AMENDMENT

Under the old common law a landlord could either use self-help or force to evict a tenant who was wrongfully holding over. This rule, however, proved to be harsh, and most jurisdictions have ameliorated this process by enacting forcible entry and detainer statutes. These statutes force the landlord to bring an action in ejectment, thereby permitting the tenant to answer charges of unlawful detainer in a court of law. Later statutes gave the tenant a cause of action in the event the tenant was wrongfully evicted.[4] The California legislature enacted forcible entry and detainer statutes as early as 1872.[5] These California statutes provided for actions in unlawful detainer which take precedence over all other civil actions, "[E]xcept actions to which special precedence is given by law . . . ."[6] Moreover, the legislature elected in 1939 to give the landlord the legal power to have the tenant summarily evicted, under certain prescribed circumstances, without an opportunity for a hearing attended by the tenant. Evictions could be accomplished in as little as four days.[7] The objective of this statute must have been a belief

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subject to execution sufficient to satisfy the amount of damages sought to be recovered by the plaintiff, or resides out of the State, or has departed from the State, or cannot, after due diligence be found within the State, or conceals himself to avoid the service of summons. The plaintiff shall file an undertaking with good and sufficient sureties, to be approved by the judge, in such sum as shall be fixed and determined by said judge, to the effect that if the plaintiff shall fail to recover judgment against the defendant for the possession of said premises, or if the suit be dismissed, that plaintiff will pay to defendant such damages, not to exceed the amount fixed in said undertaking, as may be sustained by the defendant by reason of such dispossession under said writ of possession. An action to recover such damages shall be commenced by the defendant in a court of competent jurisdiction within one year from the date of entry of dismissal or of final judgment in favor of the defendant."

[4] 1 AMERICAN LAW OF PROPERTY §§ 3.1-3.55 (A.J. Casner ed. 1952). For an excellent historical analysis of England's forcible entry and detainer statutes, see City of Chicago v. Chicago Steamship Lines, 328 Ill. 309, 159 N.E. 301 (1927).

[5] CAL. CODE CIV. PROC. §§ 1159-60 (West 1955).

[6] *Id.* § 1179(a).

[7] *Id.* §§ 1161, 1166 & 1167.

that the landlord needed more protection than was provided by unlawful detainer actions.[8] The legislature undoubtedly meant well, but the effect was a vast over-protection of the landlord vis-à-vis the tenant. This was especially true in relation to the indigent tenant, who soon bore the brunt of the 1939 statute. The issue of the under-protected tenant has become one of first magnitude in the United States, especially since in most urban areas there is a housing shortage.[9]

Statutory over-protection of landlords was recently commented upon by United States Supreme Court Justice William O. Douglas in a stinging criticism of the failure of the courts and legislatures to realize and act upon this widespread problem.[10] The Georgia statute, on which Justice Douglas commented, required a tenant to post a bond before there could be a hearing on the merits of the eviction proceedings.[11] This requirement is literally impossible for the indigent tenant to meet. He is thus deprived of his place of residence without due process of law, and is deprived of equal protection under the law.[12]

The 1939 California statute is analagous to the Georgia statute in that under California law the tenant may be evicted without a hearing. Clearly, the statute violated the constitutional guarantee of

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8 "This section undoubtedly resulted from the rather widespread feeling in the State that the ordinary means of obtaining such possession by an unlawful detainer action often was inadequate and permitted a tenant who was insolvent nevertheless to retain possession of the premises for an unreasonable time. . . ." Howell, *The Work of the 1937 California Legislature,* 11 S. CAL. L. REV. 30, 31 (1937) [Hereinafter cited as 11 S. CAL. L. REV. 30 (1937)].

9 Telephone interview with Ray R. Davis, Occupancy Analyst, Santa Clara County Housing Authority, Nov. 5, 1969. Mr. Davis stated that there was a waiting list of over nine hundred persons seeking housing through their organization as of the date of the interview.

Telephone interview with Jack Bell, Area Representative, California Department of Housing and Community Development, Nov. 13, 1969. Mr. Bell informed the author that there is a statewide study under way at this time regarding housing shortages in California. From the information thus far gathered the opinion of Mr. Bell is that there is a tremendous housing shortage for all lower income groups in California, especially in highly urbanized areas.

10 Williams v. Shaffer, 385 U.S. 1037 (1967), *denying cert. to* 222 Ga. 334, 149 S.E.2d 668 (1966). A tenant brought a suit to enjoin his eviction, alleging a violation of due process of law and a denial of equal protection under the law. GA. CODE ANN. tit. 61, § 303 (1966) requires a posting of a bond to contest eviction proceedings. The state courts upheld the statute, but the Supreme Court refused to grant a hearing. Since the tenant had already been evicted, the question was moot. Justice Douglas dissented vigorously. *See* text accompanying note 77 *infra.*

11 GA. CODE ANN. tit. 61, § 303 (1966).

12 *See* Recent Developments, 20 STAN. L. REV. 766 (1968).

due process of law,[13] and was, in fact, held unconstitutional by two California Municipal Courts.[14]

The right to be heard prior to court action is not absolute in all cases. When public necessity requires, action may precede a hearing on the merits.[15] For example, the Insurance Commissioner may seize insurance company assets if he believes a hazardous condition exists which jeopardizes the future of the company and the seizure is necessary for the benefit of the public.[16] Also, action may precede a hearing where there is a clear necessity to act immediately for the benefit of the community at large. A public official may be justified in destroying a private citizen's property if a clear necessity exists,[17] such as to stop a raging fire from spreading for the benefit of the public at large. It must be understood, however, that the cases of public necessity are exceptions rather than the rule.

In most instances due process requires a hearing on the merits before the court is allowed to act regarding the conflicting interests of the parties. In *Ownbey v. Morgan*,[18] the defendant was indebted to the plaintiff in an amount exceeding $50.00. Defendant resided out of the state but owned some stock which was located in the plaintiff's state of domicile. The plaintiff initiated proceedings to collect the debt and had this stock attached. According to Delaware law the out-of-state defendant had to post a $200,000 bond before he was entitled to answer the complaint.[19] The defendant answered the complaint and alleged that it was impossible to post such a bond as all of his assets were under attachment. The Delaware courts upheld the state law and disallowed defendant's answer. Defendant's stock was taken without the defendant having had a chance to

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[13] *Cf.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). "The fundamental requisite of due process of law is the opportunity to be heard. . . . This 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." *Id.* at 314. *See also*, 11 S. CAL. L. REV. 30 (1937); Recent Developments, *supra* note 12.

[14] Dillon v. Cockrell, No. 109588 (San Francisco Municipal Court, Sept. 1937); Housing Authority v. Salas, No. 117629 (San Jose Municipal Court, Oct. 1969); Interviews with Steve Manley, Chief Counsel, East San Jose Legal Aid Society, at San Jose, California, Sept. 22, 1969; Oct. 2, 1969; Oct. 27, 1969. Mr. Manley represented defendant Salas in the above action.

[15] Financial Indemnity Co. v. Superior Court, 45 Cal. 2d 395, 289 P.2d 233 (1955); *see also* Rhode Island Ins. Co. v. Downey, 95 Cal. App. 2d 220, 212 P.2d 965 (1949).

[16] *Id.*

[17] Surocco v. Geary, 3 Cal. 69 (1853).

[18] 256 U.S. 94 (1921).

[19] DEL. REV. CODE § 4123(b) (1915), *as amended*, 10 DEL. CODE ANN. § 3515 (1953), *repealed*, 52 DEL. LAWS, ch. 341, § 1 (1960).

answer the complaint. The United States Supreme Court held this state practice unconstitutional and laid the groundwork for requiring a hearing before court action in order to preserve the parties' rights under the due process clause.[20] The California Supreme Court has recognized that an action in unlawful detainer is not the type of public necessity which requires court action followed by a hearing. In *Mendoza v. Small Claims Court*,[21] the court said:

> Public necessity does not demand action before hearing in this proceeding by a landlord to regain possession of leased premises. *Nor can there be any doubt that possession of a tenant is a substantial right.* The right to retain property already in possession is as sacred as the right to recover it, when dispossessed.[22]

The United States Supreme Court has recently acted to declare a prejudgment attachment of a portion of one's earnings to be a violation of due process of law and therefore unconstitutional.[23] If it is a violation of due process to take a portion of one's earnings without a hearing, it should follow logically that one's place of residence cannot be taken without a hearing.[24] The family dwelling, more than anything else, is what holds the family unit together.[25] This principle has long been recognized by other jurisdictions.[26]

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[20] Ownbey v. Morgan, 256 U.S. 94, 110, 111 (1921). "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice. . . . It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings."

[21] 49 Cal. 2d 668, 321 P.2d 9 (1958).

[22] *Id.* at 672, 321 P.2d at 12 (emphasis added).

[23] Sniadach v. Family Finance Corp., 89 S. Ct. 1820 (1969). *See also* Comment, *Due Process and Prejudgment Attachment in California*, 10 SANTA CLARA LAW. 99 (1969).

[24] Letter from California Assemblyman James A. Hayes to California Governor Ronald Reagan, July 31, 1969. "The existing law on this subject is clearly defective and would likely be stricken down by the United States Supreme Court as unconstitutional because it provides for the obtaining of such a writ of possession before a hearing on the matter."

[25] Interview with Martin H. LeFevre, Captain Santa Clara County Sheriff's Department, Civil Division, at San Jose, Oct. 23, 1969. Captain LeFevre indicated to the author that the Sheriff's Department has long been aware of the tremendous hardship imposed upon indigent tenants who are evicted. The Santa Clara County Sheriff's Department feels that if it can help these families find suitable housing and keep the family unit together the ultimate job of the enforcement officials will become easier. As a result, the Sheriff's Department has a Community Relations Department which helps evicted tenants, as well as other persons who come into contact with the Department, in any way in which it can. The Sheriff's Department cannot help these evicted persons directly, as it is its job to evict them, but it can, and does, help them indirectly by referring the tenants to the Community Relations Department. Captain LeFevre feels that if this type of organization will help make the populace more aware of the role and duties of the Sheriff's Department, then the Department's work can be carried out more smoothly.

[26] Hall v. Byrne, 63 N.Y.S.2d 763 (1946). The court stated that the equities

Enlightened jurisdictions such as New York and Illinois both require a final judgment before a warrant for eviction may be issued, and Illinois specifically gives the tenant a right to a jury trial.[27] The California courts allow criminals, both suspected and convicted, more legal protection of their property than the indigent tenant has heretofore received regarding his leasehold interest.[28]

SECTION 1166(a) AS AMENDED

After thirty years, the California State Legislature has finally realized that allowing writs of immediate possession without a hearing attended by the defendant would be grossly unfair to the evicted tenant. On August 27, 1969, the legislature amended the statute to provide for a hearing prior to issuance of the writ.[29]

Legislative Intent

The amendment was proposed by the Apartment House Association of California.[30] The Association felt that the unamended statute raised serious constitutional questions. The Association also felt that if the old statute was used by attorneys representing landlords, this might later leave the landlord open to possible suits for damages from tenants evicted pursuant to the writ of immediate possession. The fear was heightened by the possibility of Legal Aid and Poverty Program attorneys challenging the original statute on constitutional grounds. In a recent letter, the attorney for the Apartment House Association of California stated:

> There has recently been a meeting before the presiding judge of the Municipal Court in San Francisco in which the Legal Aid and Poverty

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actually required the issuance of an order of possession by the landlord, but there was no housing readily available to the tenant. The court gave the tenant an extension until housing could be located, saying in part: "The States' chief business is or should be the preservation of the family for without the family there can be no state. The family has a right to existence as a unit. Every effort should be made to facilitate the realization of that primary right." *Id.* at 763.

[27] N.Y. REAL PROPERTY ACTIONS AND PROCEDURE § 749 (McKinney 1966). ILL. STAT. ANN. ch. 57, §§ 1-22 (Smith-Hurd 1951). *See also* Greenberg v. Cagle, 212 N.Y.S.2d 767 (1961). "A warrant issued in a summary proceeding without a final order first having been made in favor of the landlord is a nullity." *Id.* at 769.

[28] People v. Lawrence, 140 Cal. App. 2d 133, 295 P.2d 4 (1956); Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 P. 56 (1910). *See also* Recent Developments, *supra* note 12.

[29] CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra*.

[30] Form letter from James A. Hayes to Jeffrey Green, Oct. 12, 1969. Explanation of Assembly Bill #1862, which California Assemblyman Hayes introduced. "Under existing law a landlord may by affidavit obtain an ex parte order granting him a writ of possession. . . . To correct this, the Apartment House Association of California is supporting this bill."

> Program lawyers have claimed they are going to challenge the constitutionality of this section. . . . In view of the prevailing judicial temperament on all matters of constitutional or civil rights . . . we might be wise to seek an amendment of this statute. . . . *I find that they* [*attorneys for landlords*] . . . *very seldom use this statute* . . . because of course if you put the man out with a writ on filing the complaint and he later prevails you have certainly opened the landlord up to a pretty nasty suit for damages.[31]

The writ of possession appears to be used more often than is indicated by the Apartment House Association of California, at least in the Santa Clara Valley. The Santa Clara County Sheriff's Department served well over six hundred eviction notices during the year 1968.[32] The writ of immediate possession accounted for approximately seven percent of that total.[33] While the number evicted by the writ was small in proportion to the total number evicted, the process nevertheless imposes an extreme hardship on those evicted and should not be considered lightly. Using the writ only once would be once too often.

As an example of sentiment in the community regarding the use of the writ of immediate possession the San Jose Housing Authority, upon a motion by board member Walter Rector, severely criticized its attorney for using this method to attempt the eviction of a tenant renting from the Housing Authority.[34] Walter Rector, who is also a landlord, proposed the motion to censure the attorney, objecting to the writ on the grounds that it was both morally reprehensible and diametrically opposed to all standards of fair play.[35]

The Apartment House Association of California is convinced that section 1166(a) as amended will increase the use of the writ as a means of eviction.[36] Members of the state assembly also support this view.[37] The consensus of opinion during the committee hearings

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31 Letter from Orville C. Pratt IV, attorney for Apartment House Association of California, to Tes L. Giammugnani, Legislative Counsel for California Assemblyman James A. Hayes, July 23, 1968 (emphasis added).

32 Interview, note 25 *supra*.

33 This information is kept on special charts on a quarterly basis by the Civil Division of the Santa Clara County Sheriff's Department. *Id.*

34 East San Jose Sun, Oct. 29, 1969, at 6, cols. 4-8.

35 Telephone interview with Walter Rector, Board member, San Jose Housing Authority, Oct. 31, 1969.

36 Letter, note 31 *supra*. "It would seem to me such an amendment would satisfy due process under our constitutional guarantees by allowing such a motion to be heard after notice and an opportunity to the tenants had been given, say, within five days and in effect possibly improve all our situations on unlawful detainers because if the motion were granted it would probably be unnecessary to proceed to trial and get a judgment we wouldn't collect anyway. . . ."

37 Telephone interview with Herb Nobriga, Legislative Assistant to California Assemblyman James A. Hayes, at San Jose, Oct. 22, 1969.

on the proposed legislation was that with the removal of the fear of unconstitutionality, this process of eviction would come into common use.[38] One of the primary goals of the legislature in passing the amendment was to reduce the number of unlawful detainer actions in the already congested courts by a simple motion for a hearing and writ of immediate possession. Whether the new statute will achieve this goal is doubtful, for it contains some serious procedural defects which may defeat its intended purpose. If these procedural problems are not rectified it may take as long, if not longer, to obtain a writ of immediate possession than to obtain a final judgment in an unlawful detainer action.

The Statute

The new statute, unlike the old, provides the tenant with an opportunity to have a hearing before the writ of immediate possession will issue.[39] Plaintiff must serve notice of the impending hearing upon defendant. If the defendant should default at this hearing the plaintiff may then apply for the writ.[40] The new statute requires the plaintiff to give the defendant notice of the hearing[41] but is silent as to the length of time between the delivery of notice and the hearing.

The old statute permitted the landlord to file a verified complaint alleging that the tenant was insolvent. The amendment allows the tenant a hearing to determine whether he is solvent, but it is vague as to the degree of solvency the tenant must establish. It is not clear whether the tenant must show solvency for the entire amount of damages the landlord prays for, or if the measure of solvency is merely the amount of rent due the landlord. Previous California law disallowed counterclaims and cross-complaints in unlawful detainer actions.[42] The amendment, while providing for a hearing, does not address itself to whether the tenant can raise issues to mitigate his debt to the landlord.

Under both the old and the new statute, the landlord must

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38 *Id.*

39 CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra.*

40 *Id.*

41 *Id.*

42 *See* Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424 (1915), where the court said, "It appears to be thoroughly established . . . that neither a counterclaim nor cross-complaint of any kind is permissible in an action in unlawful detainer . . . . There is no distinction in the authorities between cases where the subject-matter of the attempted counterclaim or cross-complaint arises out of a violation of the terms of the lease upon which the action is brought, and other cases. . . ." *See also,* Telegraph Avenue Corp. v. Raentsch, 205 Cal. 93, 269 P. 1109 (1928); Knight v. Black, 19 Cal. App. 518, 126 P. 512 (1912).

post a bond to cover any damages the tenant would suffer should the tenant prevail in a later proceeding. With a hearing now required the tenant may be entitled to produce evidence to prove his damages should he be wrongfully evicted.

In unlawful detainer actions the judge may, at his discretion, stay the proceedings pending an appeal.[43] If the judge should decide to stay the proceedings after this hearing until a final determination is made in the unlawful detainer action then the defendant *must* post a bond.[44] If the indigent tenant cannot post such a bond, he is denied this stay. This denial would raise the constitutional issue of whether the defendant was afforded equal protection under the law. Defendant could not directly appeal the decision of the judge at the hearing because it is not a final determination of the matter.[45] The question then arises whether a writ of prohibition would lie to stay the proceedings, as defendant could not post a bond and there would be no adequate remedy at law.

PROCEDURAL ISSUES

Notice of Hearing

Generally, the only justification for a writ of immediate possession is that it gives the landlord an opportunity to regain his premises without undue delay, that is, before he can obtain possession by a final judgment in an unlawful detainer action. If this prime ingredient of promptness is vitiated, then the statute is meaningless. Section 1166(a) as amended requires the plaintiff to serve notice of the impending hearing on defendant[46] in conformance with section 1011 of the California Code of Civil Procedure.[47] However, section 1011 merely recites the physical requirements of delivery of notice but is silent as to the time required between delivery of notice and the hearing.[48]

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43 CAL. CODE CIV. PROC. § 1176 (West 1955).

44 *Id.* § 917.4.

45 *Id.* § 904.1-904.3.

46 CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra.*

47 *Id.*

48 CAL. CODE CIV. PROC. § 1011 (West 1955). "The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows: . . . . 2. If upon a party, it shall be made in the manner specifically provided in particular cases, or, if no specific provision is made, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of not less than 18 years of age; if at the time of attempted service between the said hours no such person can be found at his residence, the same may be served by mail; and, if his residence is not known, then by delivering the same to the clerk of the court or the judge, if there be no clerk, for such party."

Since the new statute does not prescribe a length of time for notice, California Code of Civil Procedure section 1005, a general notice statute for motions, should govern.[49] According to section 1005, when a written notice of a motion is required, as under section 1166(a), at least ten days must elapse before the proposed hearing is to take place. However, the judge has the discretion to shorten this period.[50] In some instances the courts allow a shortening of the notice period required by giving that particular cause of action precedence over other types of litigation. For example, eminent domain proceedings often receive precedence over other matters in civil litigation.[51] The rationale is that eminent domain proceedings are instituted for the benefit of the public, and that issues which affect the public at large should be adjudicated without undue delay. Proceedings in unlawful detainer actions also take precedence over other civil actions.[52] Here the rationale is that a landlord should have a speedy remedy available to him in order to regain his premises from one wrongfully holding over. A survey taken of the Los Angeles, Sacramento and San Jose Municipal Courts indicates that the average time which elapses between the filing of defendant's answer and the trial date in unlawful detainer actions is seven days.[53] The average time to trial date appears to be approximately thirteen days from service of the notice to pay or quit.

The question raised by the statute's failure to express a length of time for notice is whether the landlord will be able to obtain his premises any sooner under the new statute than he could by a final judgment in an unlawful detainer action. Under the new statute the plaintiff must give the defendant a three-day notice to pay the overdue rent or quit the premises.[54] Additionally, at the end of the three-day notice the plaintiff may, after filing a complaint in unlawful detainer, request a hearing to obtain the writ of immediate possession.[55] Since a written notice of a motion must be given at least ten days before the proposed hearing is to take place,[56] the period

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[49] *Id.* § 1005. "When a written notice of a motion is necessary, it must be given at least 10 days before the time appointed for the hearing. The court, or a judge thereof, may prescribe a shorter time."

[50] *Id.*

[51] Swartzman v. Superior Court, 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (1965). The courts give eminent domain actions preference over all other civil actions in the matter of setting for trial and hearing.

[52] CAL. CODE CIV. PROC. § 1179(a) (West 1955).

[53] Telephone interviews with Arthur McCarty, Assistant Chief Clerk, Los Angeles Municipal Court, Civil Division, Oct. 29, 1969; Carol Wiedman, Supervisor, Civil Division, Sacramento Municipal Court, Oct. 30, 1969; Patricia Pritchett, Deputy Court Clerk, San Jose Municipal Court, Civil Division, Oct. 30, 1969.

[54] CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra.*

[55] *Id.*

[56] *Id.* § 1005 note 49 *supra.*

must be shortened if the landlord is to have a speedy remedy. If the court is to use its discretionary power to shorten the notice to defendant, how much shorter can this notice be? Assume it is cut in half, that is, the defendant is given five days rather than ten to appear and show cause why the writ should not issue; that is still a total of eight days from the first notice by the plaintiff until possession is regained. In some California jurisdictions a landlord can have a final judgment in an unlawful detainer action in approximately thirteen days.[57] Under this hypothetical five-day notice, the hearing on the issuance of the writ would take place only five days before trial in most California jurisdictions. Any shorter notice than five days seems totally unrealistic. This type of summary eviction of a tenant, undoubtedly an indigent, is far too harsh a remedy to justify giving the landlord possession five or six days earlier than would be granted by a final judgment on the merits. The new statute is silent as to how much notice the defendant must have prior to the hearing. This is a serious procedural defect, and should have been expressly provided for by the legislature.

Scope of the Hearing

A. *Solvency.* The next procedural problem which the new statute raises is the scope of the hearing. Is the hearing merely to establish the defendant's solvency, or may he raise collateral issues? Under the new statute defendant must establish that he has either sufficient funds, or sufficient property that is subject to execution, "[T]o satisfy the amount of damages sought to be recovered by the plaintiff."[58] But does this include treble damages, damages to the premises, and/or the actual rent owing? Landlords in unlawful detainer actions usually pray for the allowed treble damages where the tenant is wilfully holding over.[59] If there is physical damage to the premises caused by the tenant he may be liable to the landlord in an amount sufficient to recompense him. While the statute requires a showing of solvency it does not state whether the extent of the tenant's solvency should include all possible elements of liability. A statute should be clear and definite enough for a man of average intelligence to know both his rights and liabilities.[60] This statute fails to meet that fundamental test.

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57 Telephone interviews, Oct. 29-30, 1969 note 53 *supra.*

58 CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra.*

59 *Id.* § 1174 (West 1955).

60 Fleuti v. Rosenberg, 302 F.2d 652, 655 (9th Cir. 1962). "The question of whether a statute is void for vagueness most frequently arises in criminal proceedings. In such cases the underlying principle is said to be that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. . . . But the Supreme Court has also applied this principle in civil proceedings,

The statute also states that the defendant "[M]ay file affidavits on his behalf . . . and may appear and present testimony on his behalf. . . ."[61] Are these affidavits and testimony restricted to the issue of solvency, or may the defendant use these devices to establish the actual amount owing? For example, may defendant show that an agreement existed between plaintiff and defendant to the effect that if defendant made certain repairs to the premises the next rental installment would be offset by this amount? The defendant may not raise counterclaims or cross-complaints in unlawful detainer actions as a defense.[62] If he may raise such a collateral issue at the hearing as an offset in rent, which will serve the same purpose as a counterclaim or cross-complaint, this would be an exception to the rule. Logically the defendant should be able to raise such issues at the hearing; otherwise the plaintiff could pray for damages so high that defendant's showing of solvency would be impossible. For a tenant who has difficulty meeting his monthly rental obligation, the slightest increase would be fatal to his ability to establish solvency for the purposes of the hearing. If the indigent tenant must establish that he is solvent either to the extent of treble rent or physical damages to the premises, then the hearing is meaningless. The amended statute is so vague and indefinite regarding the degree of solvency a defendant must establish that he cannot fully understand his liabilities under the statute.

B. *Landlord's Bond.* The new statute requires the landlord to post a bond in the event the tenant should prevail at either the hearing or in later proceedings.[63] This bond is to cover "[S]uch damages . . . as may be sustained by the defendant by reason of such dispossession."[64] The statute is unclear as to whether he may present evidence to show what his damages will be if he is evicted under this statute. For example, the tenant may be able to show either that to obtain other housing would mean a large increase in rental outlay, or that there is no other housing available. If plaintiff must post a bond to cover the defendant's possible damages, then the statute should provide a method for ascertaining these damages. This is especially true here, where the defendant cannot collect any damages over and above the amount of the bond actually posted by the plaintiff.

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and in doing so has expressly ruled that a criminal penalty need not be involved." *See also In re* Newbern, 53 Cal. 2d 786, 3 Cal. Rptr. 364, 350 P.2d 116 (1960); Connally v. General Const. Co., 269 U.S. 385 (1926).

61 CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra.*

62 Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423 (1915) note 42 *supra.*

63 CAL. CODE CIV. PROC. § 1166(a) (West Cal. Leg. Serv. 1969) note 1 *supra.*

64 *Id.*

Stay and Bond: Equal Protection?

California Code of Civil Procedure section 1176 permits a stay of proceedings pending appeal in unlawful detainer actions.[65] This stay is discretionary with the court hearing the case.[66] If a stay is granted, it will preserve the status quo until there is a final determination of the matter. Since section 1166(a) is a summary proceeding action, it is possible that section 1176 will apply if the writ issues. That is, the right to the writ may not be absolute when the plaintiff prevails.

If the court can stay the proceedings subsequent to the section 1166(a) hearing until final judgment in the unlawful detainer action is rendered, then the tenant *must* post a bond to cover any loss which the landlord may sustain.[67] The posting of this bond is not discretionary with the court.[68] It is virtually impossible for the indigent tenant to post such a bond.

The United States Supreme Court has held that a state cannot deny a convicted felon the right of appeal simply because he cannot afford transcripts on which to base his bill of exceptions.[69] The basis of this decision is that one should not be deprived of the right to appeal merely because of indigency.[70] To so deprive an indigent defendant of the remedies available to the affluent is a violation of the fundamental right of the equal protection clause of the fourteenth amendment.

This bond requirement means that the defendant's remedy is determined not by the merits of his case, but by the depth of his pocket-book. Therefore, the affluent defendant is entitled to appeal, while the indigent defendant is denied this privilege. Indigents are entitled to equal protection of the law in civil proceedings as well as in criminal proceedings. California is denying the indigent tenant

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65 *Id.* § 1176 (West 1955). "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge before whom the same was rendered so directs."

66 *See* Plummer v. Agoure, 20 Cal. App. 319, 322, 128 P. 1014, 1016 (1912), in which the court said that a stay of proceedings in unlawful detainer "[P]ending an appeal . . . is not a matter of right . . . but one in the determination of which the court exercises large discretionary powers. . . ."

67 CAL. CODE CIV. PROC. § 917.4 (West 1955).

68 In Woods-Drury Inc. v. Superior Court, 18 Cal. App. 2d 340, 349, 63 P.2d 1184, 1189 (1936), the court said, "As to an appeal it is discretionary with the trial court whether a stay should be granted or refused. . . . Even if the trial court granted a stay it would be in duty bound to require a statutory bond."

69 Griffin v. Illinois, 351 U.S. 12 (1956). *Cf.*, Douglas v. California, 372 U.S. 353 (1963).

70 Griffin v. Illinois, 351 U.S. 12, 19 (1956). "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

this protection by making the posting of a bond a requirement to appeal in summary proceeding actions.[71]

Direct Appeal

The new statute also raises the question, what procedural remedies, if any, are available to the defendant if the court allows the issuance of the writ. An adverse decision in a motion to show cause is not directly appealable as it is not a judgment or a final determination of the matter.[72] By analogy, the decision in a writ of possession hearing may not be appealable until there is a final adjudication in the unlawful detainer trial. However, for the indigent tenant the issuance of the writ of possession is basically the same as a final judgment on the matter. It is highly unlikely that a defendant will contest the unlawful detainer complaint. Once a defendant is evicted, his primary concern is new housing. Locating new living quarters in an urban area where there is already a housing shortage[73] must take precedence over contesting an eviction. Therefore, if the decision at the hearing required under the new statute may not be appealed and the defendant is evicted, then the decision will actually be the same as a final determination of the matter. It is questionable whether this was the intent of the legislature in passing the new statute.

Writ of Prohibition

If the court should allow a stay of the proceedings and the defendant cannot post the bond required is there any other remedy available to him? Even if the defendant could show that to post such a bond would create an enormous burden on him he would

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[71] *See* West Haven Housing Auth. v. Simmons, 5 Conn. Cir. R. 282, 250 A.2d 527 (1968), *cert. granted*, 38 U.S.L.W. 3160 (Sept. 23, 1969). The defendant was behind in his rent and the plaintiff brought action to recover possession of the premises. There was a hearing on the merits and the plaintiff received a judgment for the restoration of the premises. CONN. GEN. STATS. ANN. § 52-542 (1960) requires appellant to post a bond before the right to appeal in summary proceedings will attach. The defendant filed an application for waiver of the security bond on grounds of indigency, and attached affidavits to show his financial condition. The Connecticut courts denied this request on the grounds that defendant was merely prosecuting delaying tactics. The courts went on to say that an appeal is a statutory privilege, not a right, and as such it is a proper function of the legislature to regulate. Defendants contend that requiring an indigent to post a bond before appeal will be granted is a violation of the equal protection clause of the fourteenth amendment. The defendants cited Justice Douglas' dissent to the denial of certiorari, Williams v. Shaffer, 385 U.S. 1037 (1967). *See* text accompanying note 77 *infra*. The Supreme Court feels that this question should be settled and has therefore granted certiorari in the *West Haven Housing Auth.* case.

[72] CAL. CODE CIV. PROC. § 904.1-904.3 (West 1955).

[73] Telephone interviews, Nov. 5, 1969; Nov. 13, 1969 note 9 *supra*.

still have no adequate remedy at law.[74] Then the defendant might be able to obtain a writ of prohibition, which would prohibit the court from taking any further action and would therefore stop the issuance of the writ of possession. The courts hold that one of the grounds for the issuance of a writ of prohibition is lack of an adequate remedy at law.[75] Assuming a writ would issue, a serious question might arise as to whether it could be obtained rapidly enough to be an effective remedy.

CONCLUSION

Many times in the past landlords' rights have been imposed upon by tenants who either refused to pay rent or avoided service of process in unlawful detainer actions. This will undoubtedly continue in the future. While the summary unlawful detainer proceedings allow the landlord an expedient means to regain his premises when a tenant is wrongfully holding over, the writ of immediate possession is far too harsh a remedy because it denies the tenant certain basic rights.

The legislature has failed to include in the statute the notice period that the plaintiff must give the defendant prior to the hearing. The legislature has also failed to define the scope of the hearing; it is not clear whether the hearing is merely to determine the defendant's solvency vis-à-vis the damages prayed for by the plaintiff, or whether the defendant may raise collateral issues to reduce this amount. The new statute does not prescribe a method to determine the extent of the defendant's damages should he be unjustly evicted, in order that plaintiff may post an adequate bond. If the hearing only covers the defendant's solvency vis-à-vis the damages prayed for by the plaintiff, then the defendant receives no genuine hearing and is still denied due process of law. Assuming that a stay of proceedings is allowed under this statute, the defendant must post a bond; this the indigent tenant cannot do. He would thus be deprived of his fourteenth amendment right to equal protection under the law. There is nothing in the statute which permits the defendant to prosecute a direct appeal, and it is questionable whether a writ of prohibition would lie to prevent further action. If a direct appeal, a stay of the proceedings and a writ of prohibition are not available to the tenant, his only course of action will be to

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[74] Woods-Drury Inc. v. Superior Court, 18 Cal. App. 2d 340, 63 P.2d 1184 (1936), note 68 *supra*.

[75] *See* Kennaley v. Superior Court, 43 Cal. 2d 512, 275 P.2d 1 (1955); Gorbacheff v. Justice's Court of Alameda County, 31 Cal. 2d 178, 187 P.2d 407 (1948).

defend the unlawful detainer suit and appeal any adverse judgment. Tenants evicted pursuant to the writ of immediate possession do not usually defend at the trial, as the indigent tenant does not possess the requisite resources necessary to pursue such a course of action.

American jurisprudence is replete with instances where the indigent is denied adequate protection under the law. California's statute on immediate possession is but one example. It appears that our "sophisticated" legal system, when applied to the indigent tenant, has not progressed very far from the old common law where the tenant had no legal rights vis-à-vis the landlord. The time is far overdue for the indigent tenant to be given equal protection under the law.

United States Supreme Court Justice William O. Douglas, dissenting to a denial of certiorari in *Williams v. Shaffer*,[76] has struck a blow for the indigent tenant in America.

> The problem of housing for the poor is one of the most acute facing the Nation. The poor are relegated to ghettos and are beset by substandard housing at exorbitant rents. Because of their lack of bargaining power, the poor are made to accept onerous lease terms. . . . Default judgments in eviction proceedings are obtained with machine-gun rapidity, since the indigent cannot afford counsel to defend.[77]

It is dismaying and highly disappointing to find this progressive view in a dissent. Let us hope that Justice Douglas' voice is the voice of the future. This statute should not have been amended, but should have been abolished.

Jeffrey G. Green

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[76] 385 U.S. 1037 (1967).
[77] *Id.* at 1040.