

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

THE CLAIM AND DELIVERY STATUTE

December 1972

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

CALIFORNIA LAW REVISION COMMISSION

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November 10, 1972

To: The Honorable Ronald Reagan
Governor of California and
The Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 27 of the Statutes of 1972 to study the law relating to attachment, garnishment, execution, repossession of property, civil arrest, confession of judgment procedures, default judgment procedures, and related matters. This recommendation deals with one aspect of this subject--the claim and delivery statute.

The Commission wishes to acknowledge the substantial contribution of its research consultants, Professor William D. Warren, School of Law, Stanford University, who provided the background study that served as the basis for this recommendation, and Professor Stefan A. Riesenfeld, Boalt Hall, University of California at Berkeley.

Respectfully submitted,

JOHN D. MILLER
Chairman

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE CLAIM AND DELIVERY STATUTE

BACKGROUND

The past few years have witnessed widespread assault in both state¹ and federal² courts on the constitutionality of a variety of prejudgment remedies. In California, one remedy which succumbed to such attack was that known as claim and delivery.³ This recommendation deals with the claim and delivery statute. It does not deal with and is not intended to disturb the substantive law governing (1) the circumstances under which a person is entitled to possession of personal property or (2) the circumstances, if any, in which private, self-help repossession may properly be utilized.

The Statutory Remedy Before 1971

Prior to 1971, a plaintiff entitled to the possession of personal property held by another could bring an action for specific recovery of that property and, if he so desired, invoke the provisional remedy of claim and delivery and thereby secure immediate possession of the property.⁴ The remedy was readily available in all state courts. The plaintiff, after filing

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1. See, e.g., *Blair v. Pitchess*, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); *Randone v. Appellate Department*, 5 Cal.3d 536, 488 P.2d 12, 96 Cal. Rptr. 709 (1971); *Damazo v. MacIntyre*, 26 Cal. App.3d 18, 102 Cal. Rptr. 609 (1972).
 2. See, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Adams v. Egley*, 338 F.Supp. 614 (S.D. Cal. 1972).
 3. The former claim and delivery statute was held unconstitutional in *Blair v. Pitchess*, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
 4. See former Code Civ. Proc. § 509 (1872). For a general discussion of these procedures, see 2 B. Witkin, *California Procedure Provisional Remedies* §§ 24-38 at 1480-1489 (2d ed. 1970); E. Jackson, *California Debt Collection Practice* §§ 10.1-10.35 at 229-245 (Cal. Cont. Ed. Bar 1968).

his action and having summons issued, simply provided the levying officer with an affidavit, a notice, and an undertaking together with copies of the complaint and the original and copies of the summons. The affidavit asserted that the plaintiff was the owner or entitled to the possession of the described property, that the defendant was wrongfully detaining the property and the reason for the detention, that the property had not been taken for a tax, assessment, or fine or seized under levy of attachment or execution, and finally the value of the property.⁵ The notice directed the levying officer to seize the property at a certain location or wherever found.⁶ The undertaking was in double the value of the property as stated in the affidavit and made the sureties liable for the return of the property and damages if the plaintiff failed to recover.⁷ It should be noted that there was no court order nor prior review by a judicial officer of either the merits of the claim or the availability of the remedy to the plaintiff.

The process was delivered by the plaintiff directly to the levying officer. Upon receipt of this process, the levying officer took custody of the property immediately, generally by outright seizure,⁸ and to accomplish this the officer was authorized to break into any building or enclosure.⁹ At the time of seizure, the defendant was served with copies of the plaintiff's affidavit, notice, and undertaking.¹⁰ If the defendant sought to retain

5. Former Code Civ. Proc. § 510 (1872).

6. Cal. Stats. 1933, Ch. 744, § 57 (former Code Civ. Proc. § 511).

7. Cal. Stats. 1965, Ch. 1973, § 1 (former Code Civ. Proc. § 512).

8. Ibid. Where the property was used as a dwelling--e.g., a housetrailer, mobile home, or boat--a keeper was placed in charge for two days, following which time the occupants were removed and the property taken into exclusive custody.

9. Cal. Stats. 1941, Ch. 229, § 1 (former Code Civ. Proc. § 517).

10. Cal. Stats. 1965, Ch. 1973, § 1 (former Code Civ. Proc. § 512).

possession of the property, he could either except to the plaintiff's sureties¹¹ or require the return of the property by filing a comparable undertaking with the sheriff.¹² There was, however, no procedure provided even after seizure for a preliminary determination of the merits or probable outcome of the action. The levying officer retained possession of the property for the period of time required to permit exception to and the justification of sureties and the filing of third-party claims¹³ and then delivered the property to either the plaintiff or the defendant or a third party as required.¹⁴

Constitutional Requirements for a Valid Prejudgment Judicial Repossession Procedure

The California Supreme Court, in Blair v. Pitchess,¹⁵ declared the claim and delivery procedure outlined above to be in violation of "the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and the parallel provisions of sections 13 and 19 of article I of the California Constitution." Blair was a logical extension of Sniadach v. Family Finance Corp.,¹⁶ in which the Supreme Court held that Wisconsin's statute permitting prejudgment garnishment of wages was unconstitutional because it authorized "a taking of property without that procedural due process that is required by the Fourteenth Amendment." This extension was confirmed in June 1972 when the United States Supreme Court in Fuentes v. Shevin¹⁷ invalidated the replevin

11. Cal. Stats. 1945, Ch. 487, § 1 (former Code Civ. Proc. § 513).

12. Cal. Stats. 1933, Ch. 744, § 60 (former Code Civ. Proc. § 514).

13. Cal. Stats. 1933, Ch. 744, § 64 (former Code Civ. Proc. § 519).

14. See Cal. Stats. 1933, Ch. 744, § 60 (former Code Civ. Proc. § 514); Cal. Stats. 1955, Ch. 156, § 1 (former Code Civ. Proc. § 515); Cal. Stats. 1933, Ch. 744, § 63 (former Code Civ. Proc. § 518).

15. 5 Cal.3d 258, 285, 486 P.2d 1242, 1261-1262, 96 Cal. Rptr. 42, 61-62 (1971).

16. 395 U.S. 337, 339 (1969).

17. 407 U.S. 67 (1972).

laws of Florida and Pennsylvania which also authorized the summary seizure of property without an opportunity for pre-seizure hearing.

Opportunity for pre-seizure hearing. In Fuentes,¹⁸ the Court said:

The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor Pennsylvania statute provides for notice or an opportunity to be heard before the seizure. The issue is whether the procedural due process in the context of these cases requires an opportunity for a hearing before the state authorizes its agents to seize property in the possession of a person upon the application of another.

Later in the opinion, the Court concluded:¹⁹

We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing.

Ex parte procedure in "extraordinary circumstances." The California Supreme Court in Blair²⁰ stated:

We recognize that in some instances a very real danger may exist that the debtor may abscond with the property or that the property will be destroyed. In such situations a summary procedure may be consonant with the constitutional principles.

18. Id. at 80.

19. Id. at 96.

20. 5 Cal.3d 258, 278, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971).

However, the United States Supreme Court in Fuentes was more restrictive.

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There, the Court said:

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. . . . These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure and to protect the public from misbranded drugs and contaminated food.

Were it only for these two cases, one might conclude that allowing a plaintiff claim and delivery upon a showing of special circumstances at an ex parte hearing would be constitutional provided that the circumstances shown were sufficiently extraordinary to satisfy the Fuentes standards. However, it is here that the California Supreme Court in Randone v. Appellate Department²² has posed serious problems, for the court in that case concluded with respect to attachment "that a creditor's interest, even in these 'special circumstances' [the Court had just quoted the passage from Blair quoted in the previous paragraph] is not sufficient to justify depriving a debtor of 'necessities of life' prior to a hearing on the merits of the creditor's claim."²³ The court went on to introduce the concept that property classified as a debtor's necessities of life is entitled to special protection, at least before judgment. The Court said:²⁴

21. 407 U.S. at 90-92.

22. 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

23. 5 Cal.3d at 556 n.19, 488 P.2d at 27, 96 Cal. Rptr. at 723.

24. 5 Cal.3d at 561-562, 488 P.2d at 30, 96 Cal. Rptr. at 726. Emphasis in original.

The court in Sniadach recognized that a prejudgment remedy which permits a creditor to deprive a debtor of those necessities essential for ordinary day-to-day living gives the creditor "enormous" leverage over the debtor. . . . Because of the extreme hardships imposed by such deprivation, a debtor is under severe pressure to settle the creditor's claim quickly, whether or not the claim is valid. Thus sanction of such prenotice and prehearing attachments of necessities will in many cases effectively deprive the debtor of any hearing on the merits of the creditor's claim. Because, at a minimum, the Constitution requires that a defendant be afforded a meaningful opportunity to be heard on the merits of a plaintiff's claim . . . , the state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action, before an impartial confirmation of the actual, as opposed to the probable, validity of the creditor's claim after a hearing on that issue.

Although it is possible to distinguish attachment from claim and delivery with respect to treatment of necessities in a procedure allowing for a preliminary hearing on the probable validity of the plaintiff's claim,²⁵ it is

25. The claim and delivery situation is sufficiently distinguishable from the attachment procedure considered in Randone to avoid the requirement that necessities of life be immune from seizure until the actual rather than the probable validity of the plaintiff's claim is established. It might be noted that Blair, decided just two months before Randone, makes no reference to the necessities concept. Under the claim and delivery procedure, the plaintiff claims an interest in a specific article of property and the only issue to be decided in the action for possession is whether the plaintiff is entitled to that property as against the defendant. In attachment, on the other hand, the plaintiff has no preexisting claim to the property attached and the underlying action is generally on the question whether the defendant owes the plaintiff money in a transaction having nothing to do with the property. The court in Randone recognizes this distinction in referring to attachment in these terms:

Moreover, unlike the claim and delivery statute invalidated in Blair under which a creditor could only compel the seizure of property to which he claimed title, the instant provision initially grants unlimited discretion to the creditor to choose which property of the debtor he wishes to have attached. [5 Cal.3d at 561, 488 P.2d at 30, 96 Cal. Rptr. at 726.]

Accordingly, in claim and delivery proceedings in which a plaintiff establishes the probable validity of his claim to the property at a hearing at which the defendant is unable to show the probability that he has a defense to the action for possession, it seems inequitable to deny the plaintiff,

difficult to justify a different treatment of necessities as between attachment and claim and delivery with respect to a procedure which allows seizure of the defendant's property upon only an ex parte hearing. If an attaching creditor cannot take, in any circumstances, the necessities of a defendant until after a determination of the actual as distinguished from the probable validity of the plaintiff's claim, surely a plaintiff invoking claim and delivery cannot seize a defendant's necessities until the defendant is given at least a preliminary hearing on the probability of his having a defense.

Unreasonable searches and seizures. Blair also decided that proceedings under claim and delivery provisions raised Fourth Amendment problems and "that the official intrusions authorized by section 517 are unreasonable searches and seizures unless probable cause be first shown."²⁶ Something of the views

who has bonded the defendant against damage owing to loss of possession, the right of immediate possession merely because the defendant can show that the item claimed is a "necessity of life."

The appropriate manner in which to implement the Randone necessities of life doctrine in claim and delivery proceedings is not to leave the property claimed in the possession of the defendant who has no valid defense to the possession action upon his showing that it is a necessity; rather, it is to make sure that necessities are not taken from a defendant where the plaintiff is unable to show at a noticed hearing that there is a reasonable probability that he will ultimately prevail in the action. The greater the harm that would be done to a defendant by depriving him of property after a preliminary hearing, the more cautious a court should be in granting claim and delivery after such a hearing.

26. 5 Cal.3d 258, 272-273, 486 P.2d 1242, 1252, 96 Cal. Rptr. 42, 52 (1971).

The United States Supreme Court in Fuentes did not feel obliged to examine the appellants' Fourth Amendment challenges but did note that "once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated." [407 U.S. 67, 96 n.32 (1972).]

However, Blair states:

[W]e conclude that intrusions into private places in execution of claim and delivery process are searches and seizures within the meaning of the Fourth Amendment. . . . We also hold that such searches are unreasonable unless made upon probable cause. The only governmental interests which are furthered by the intrusions incident to execution of claim and delivery process are the promotion of commerce, particularly the extension of credit, and the assurance

of the California Supreme Court on the meaning of probable cause may be gleaned from the following paragraph from Blair:²⁷

Obviously, the affidavits customarily required of those initiating claim and delivery procedures do not satisfy the probable cause standard. Such affidavits need allege only that the plaintiff owns property which the defendant is wrongfully detaining. The affiants are not obliged to set forth facts showing probable cause to believe such allegations to be true, nor must they show probable cause to believe that the property is at the location specified in the process. Finally, such affidavits fail to comply with the probable cause standard because they are not passed upon by a magistrate, but are examined only by the clerical staff of the sheriff's or marshal's department, and then merely for their regularity in form.

It would seem from this statement that, in order to satisfy the Fourth Amendment, the plaintiff must show both probable cause to believe his claim to the property is valid as well as probable cause to believe that the property is at the location specified. Also, these issues must be passed on by a judicial officer rather than a clerk.

The 1972 Legislation

In response to the exigencies caused by the Blair decision, in 1972 the California Legislature repealed the procedures held invalid in Blair and added a new Chapter 2 (Sections 509 through 521) to the provisional remedies title of the Code of Civil Procedure.²⁸ This legislation is operative only until December 31, 1975,²⁹ and attempts to provide a constitutional

that valid debts will be paid. On the other hand, as already pointed out, the citizen's right to privacy is infringed almost as much by such civil intrusions as by searches in the traditional criminal context. Balancing these important individual rights against the less compelling state interests (which, as we note *infra*, are only slightly promoted by execution of claim and delivery process), we find that a search incident to the execution of claim and delivery process is unreasonable unless it is supported by a warrant issued by a magistrate upon a showing of probable cause. [5 Cal.3d at 273, 486 P.2d at 1252-1253, 96 Cal. Rptr. at 52-53.]

27. 5 Cal.3d at 273-274, 486 P.2d at 1253, 96 Cal. Rptr. at 53.

28. See Cal. Stats. 1972, Ch. 855.

29. Code Civ. Proc. § 521.

procedure permitting a plaintiff to secure the immediate possession of property while preserving as much of the former claim and delivery procedures as possible.

At any time after the commencement of an action to recover the possession of personal property,³⁰ a plaintiff may make a showing to the court in which the action is filed of his entitlement to the possession of such property. The showing may be made by verified complaint or affidavit and is comparable to that formerly required.³¹ The court reviews the showing and, if "satisfied" that a valid claim exists, issues an order to the defendant to show cause why the property should not be taken from him and given to the plaintiff.³² A date, time, and place is set for the hearing on the order, and the defendant is informed that he may either appear in his behalf at that time or file an undertaking to stay the delivery of the property.³³ At the hearing, the court is required to make a preliminary determination as to the party entitled to possession pending a final adjudication.³⁴ If the determination is in favor of the plaintiff, a writ of possession is issued³⁵ directing the levying officer to seize the property in question.³⁶ No writ of possession to enter the private premises of any person may be issued without a prior judicial determination that there is probable cause to believe the property is located there.³⁷ The provisions relating to the levy, the redelivery of the property to the defendant if he posts security, the

30. Code Civ. Proc. § 509.

31. Code Civ. Proc. § 510(a).

32. Code Civ. Proc. § 510(b).

33. Id.

34. Code Civ. Proc. § 510(e).

35. Id.

36. Code Civ. Proc. § 512.

37. Code Civ. Proc. § 511(a).

qualification and justification of sureties, the claims of third persons, and the delivery and possession of the property pending final adjudication are virtually identical to former law.³⁸

The statute also provides that the court--if it is "satisfied" that the plaintiff is entitled to possession--may issue a writ of possession without notice or a hearing.³⁹

if probable cause appears that . . . (1) The defendant gained possession of the property by theft . . . ; (2) The property consists of one or more negotiable instruments or credit cards; [or] (3) . . . the property is perishable, . . . or is in immediate danger of destruction, serious harm, concealment, or removal from this state, or of sale to an innocent purchaser, and that the holder of such property threatens to destroy, harm, conceal, remove it from the state, or sell it to an innocent purchaser.

The statute further provides that the court may issue ex parte temporary restraining orders, directed to the defendant, "prohibiting such acts with respect to the property, as may appear to be necessary for the preservation of the rights of the parties and the status of the property."⁴⁰

38. The following table indicates the disposition of the former sections under the new statute:

Former Code of Civil Procedure	Present Code of Civil Procedure
§ 509	§ 509
§ 510	§ 510(a)
§ 511	Compare §§ 510(b), (c), (e); 511(a)
§ 512	§§ 511(b), 512, 513
§ 513	§ 515
§ 514	§ 514
§ 515	§ 515
§ 516	§ 515
§ 517	§ 513
§ 518	§ 516
§ 519	§ 517
§ 520	§ 518
§ 521	§ 519

39. Code Civ. Proc. § 510(c).

40. Code Civ. Proc. § 510(d). Such an order may be issued in any case where a writ of possession may be issued and may be issued in lieu of an ex parte writ in cases where an ex parte writ is authorized.

RECOMMENDATIONS

The Commission, having reviewed the 1972 claim and delivery statute, makes the following recommendations.

Ex Parte Issuance of Writ of Possession

The ex parte procedure for issuance of a writ of possession should be eliminated. This procedure, provided by Section 510 of the Code of Civil Procedure, authorizes the court to issue a writ of possession without notice and an opportunity for the defendant to be heard even in cases where the property to be seized is necessary for the support of the defendant and his family.

If the Commission's analysis⁴¹ of the applicability of the Randone necessities doctrine to claim and delivery is correct, one of two policy choices must be selected in drafting a claim and delivery statute: One, the statute may be drawn to direct a court to determine on ex parte hearing whether the property is likely to be a necessity of life of the defendant and, if so, prohibit the seizure of that property, even though special circumstances are shown, until the defendant can be given a hearing or two, the statute may not allow for the seizure of any property on ex parte hearing but may provide for injunctive relief against dealings with the property in a manner disadvantageous to the plaintiff pending the preliminary hearing.

There are major difficulties in following the first course of action. First, it would be necessary to draft a rather specific definition of necessities of life which would apply not only to consumer-type necessities but also, as Randone requires, to commercial necessities as well. Second, in

41. See discussion pp. 5-7 surpa.

each case in which a plaintiff attempts to seize property after an ex parte showing of special circumstances, it would be necessary to require the creditor to make a showing as to a fact not normally within his knowledge--that is, whether as to the particular defendant a specific piece of property is a necessity--and to require the court to make a finding on this fact without hearing the defendant's evidence. Third, it would be necessary to define with some specificity the circumstances which are sufficiently special or extraordinary to justify seizure upon ex parte hearing. Here the United States Supreme Court cases, Snidach and Fuentes, have been notably restrictive in their view of what would constitute sufficiently special circumstances. Blair has been less so. If only those circumstances mentioned by Fuentes qualify as special circumstances justifying seizure upon ex parte hearing, the statute need not make any provision for ex parte seizure because the plaintiff's interest in repossession property hardly serves an "important governmental or general public interest."

These difficulties are substantial enough that the Commission recommends that the second course of action be followed. This procedure will allow the plaintiff upon applying for a writ of possession to obtain a temporary restraining order by an ex parte showing of special circumstances which threaten to affect his ability to take possession of the property after the writ is issued. If the requisite circumstances are shown, the restraining order will be issued and will continue in effect until the property is seized or until the court decides at the preliminary hearing that the plaintiff is not entitled to the writ. The special or extraordinary circumstances justifying issuance of a restraining order are broadly drawn but do not run afoul of the Fuentes restrictions because no seizure is contemplated until the defendant

is given a hearing. If the property sought is a necessity--even though the order restrains the defendant from disposing of, concealing, or damaging it--Randone is not violated because the defendant still has the use and benefit of the property. The temporary restraining order procedure preserves the spirit of Randone in that it does not disturb the defendant's use of his necessities until after an opportunity for a hearing, but it gives the plaintiff a good measure of protection under the contempt power of the court and, as a practical matter, it avoids both cluttering up the statute with cumbersome provisions dealing with the difficult problem of how to deal with the necessities issue on ex parte hearing as well as filling court dockets with prolonged litigation on the scope of the special circumstances exception and tedious hearings on whether the items of property claimed are necessities of life as to the debtor.

Denying the plaintiff seeking claim and delivery immediate possession upon ex parte hearing is probably not a serious deprivation.⁴² As Blair points out with respect to the collection cases, claim and delivery is usually the last step in a series of moves intended to exert pressure on the defendant to make his payments. A notice that a hearing will be held on the

42. The ex parte writ may be obtained under existing law not only where the property is in immediate danger of destruction, concealment, or disposition but also where it has been stolen or is a credit card or negotiable instrument. The repossession of stolen property should, it seems, be treated generally as a matter of criminal process. The special treatment of credit cards and negotiable instruments is a 1972 innovation. Where such property has been stolen or forged, it can be dealt with in the same manner as stolen property generally. In other circumstances, a large measure of protection can be obtained through private, nonjudicial means, e.g., notification to retailers that a described card is not to be honored. See Penal Code § 484h. Nevertheless, a provision for the ex parte repossession of a credit card has been included in this recommendation. Such a provision seems constitutionally permissible, inasmuch as a credit card would not appear to be a "necessity" under any circumstances.

issue of the plaintiff's right to repossession will only become another step in that process. A brief delay of a week or two should seldom make any difference as to the plaintiff's eventual ability to retake the article; but, if the plaintiff can convince the court upon applying for the writ that there is cause for concern, an ex parte restraining order punishable by contempt can be issued which will assure the plaintiff of adequate protection in all but the rarest cases. This procedure will relieve the plaintiff of the onerous task of trying to comply with Randone by having to convince the courts in ex parte hearings (not only in consumer cases but also in commercial cases) that the goods sought are not necessities. Moreover, not allowing plaintiffs immediate possession at ex parte hearings upon a showing of extraordinary circumstances will make it impossible for overzealous plaintiffs to subvert the constitutional requirements by unsupported allegations of concealment or absconding.⁴³

Order to Show Cause Procedure

Section 510 presently requires an initial judicial review of the plaintiff's application for a writ of possession, followed by the issuance of an order directed to the defendant to show cause why a writ should not issue. In this context, the order to show cause procedure has the same purpose and

43. The Commission's recommendation also avoids any Fourth Amendment search and seizure problem. See discussion in text accompanying notes 26 and 27 *supra*. If, at a hearing at which the defendant has an opportunity to appear, the plaintiff can convince a court (1) of the probable validity of his claim and (2) of the likelihood that the specific property claimed is at a described location, then issuance of a writ of possession empowering an official of the court to enter the described private place to retake the property would be constitutional. This appears to be the holding of Fuentes. It is what is proposed in this recommendation. Under the Commission's recommendation, the only relief obtainable by a plaintiff upon ex parte proceedings is the issuance of a restraining order commanding the defendant not to dispose of, injure, or waste described goods. No search or seizure problem is raised by such an order.

effect as a noticed motion procedure. However, it seems both inefficient and unnecessary to require a judicial review at two stages in the proceedings, and the Commission accordingly recommends that the present procedure be replaced by a noticed motion procedure requiring only one hearing before the court.

Other Recommended Changes

In addition to the changes discussed above, the Commission recommends other technical and relatively minor changes in existing legislation. These changes are indicated in the Comments to the proposed statutory provisions that follow.

PROPOSED LEGISLATION

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

An act to add Section 1747.95 to the Civil Code, to add Chapter 2 (commencing with Section 511.010) to Title 7 of Part 2 of, and to repeal Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of, the Code of Civil Procedure, relating to claim and delivery.

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

Section 1. Section 1747.95 is added to the Civil Code, to read:

1747.95. In an action to recover possession of a credit card, the judicial officer may issue ex parte a writ of possession under Chapter 2 (commencing with Section 511.010) of Title 7 of Part 2 of the Code of Civil Procedure if the requirements for issuance of a temporary restraining order under Section 513.010 of the Code of Civil Procedure are satisfied.

Comment. Section 1747.95 preserves the substance of subdivision (c) of former Section 510 of the Code of Civil Procedure insofar as it provided an ex parte procedure for the repossession of credit cards. See Cal. Stats. 1972, Ch. 855. This ex parte procedure seems constitutionally permissible inasmuch as the property dealt with here would not appear to be a "necessity." See Recommendation Relating to the Claim and Delivery Statute, 11 Cal. L. Revision Comm'n Reports 301, 300 (1972).

Sec. 2. Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of the Code of Civil Procedure is repealed.

Note. The text of the repealed sections and their present disposition is set out in the Appendix (pp. 300-300).

CHAPTER 2. CLAIM AND DELIVERY OF
PERSONAL PROPERTY

Sec. 3. Chapter 2 (commencing with Section 511.010) is added to Title 7 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CLAIM AND DELIVERY OF
PERSONAL PROPERTY

Article 1. Words and Phrases Defined

§ 511.010. Application of definitions

511.010. Unless the provision or context otherwise requires, these definitions govern the construction of this chapter.

Comment. Section 511.010 is a standard provision found in the definitional portion of recently enacted California codes. See, e.g., Evid. Code § 100; Veh. Code § 100.

Additional definitions are found in the preliminary provisions of the Code of Civil Procedure. E.g., Section 17 provides "the singular number includes the plural and the plural the singular."

§ 511.020. Complaint

511.020. "Complaint" includes cross-complaint.

§ 511.030. Defendant

511.030. "Defendant" includes a cross-defendant.

§ 511.040. Farm products

511.040. "Farm products" means crops or livestock or supplies used or produced in farming operations or products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, honey, milk, and eggs), while in the possession of a defendant engaged in raising, fattening, grazing, or other farming operations. If tangible personal property is a farm product, it is not inventory.

Comment. Section 511.040 is based on the definition of "farm products" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple sirup, honey, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory

Inventory is defined by Section 511.050. A definition of "equipment" is unnecessary. Farm products and inventory are defined only because the terms are used in connection with provisions which permit sale of such property in the ordinary course of business despite the issuance of a temporary restraining order. See Section 513.020. Equipment would not by its nature be sold in the ordinary course of business and is not, therefore, included in the exception permitting transfer.

§ 511.050. Inventory

511.050. "Inventory" means tangible personal property in the possession of a defendant who holds it for sale or lease or to be furnished under contracts of service.

Comment. Section 511.050 is based on the definition of "inventory" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has leased or so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

The phrase "or if he has leased or so furnished them" has been deleted to make clear that inventory under this title is limited to property in the possession of the defendant. See also Comment to Section 511.040. The phrase "raw materials, work in process, or materials used or consumed in" the defendant's business has also been deleted. This property would not be sold in the ordinary course of business anyway; hence, it does not need to be included in the exception permitting transfer. See Sections 511.040 and 513.020 and Comments thereto.

§ 511.060. Judicial officer

511.060. "Judicial officer" means any judge or any commissioner or other officer appointed by the trial court to perform the duties required by this chapter.

Comment. Section 511.060 defines "judicial officer" as the term is used in this chapter. Notwithstanding Section 259 of this code, a commissioner appointed by the trial court may perform any of the judicial duties required by this chapter. See, e.g., Sections 512.070 (issuance of order directing transfer), 513.010 (issuance of temporary restraining order).

§ 511.070. Levying officer

511.070. "Levying officer" means the sheriff, constable, or marshal who is directed to execute a writ of possession issued under this chapter.

§ 511.080. Person

511.080. "Person" includes an individual, a corporation, a partnership or other unincorporated association, and a public entity.

§ 511.090. Plaintiff

511.090. "Plaintiff" means a person who files a complaint or cross-complaint.

§ 511.100. Probable validity

511.100. A claim has "probable validity" where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

Comment. Section 511.100 requires that, at the hearing on the application for a writ, the plaintiff must at least establish a prima facie case and the judicial officer must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.

§ 511.110. Public entity

511.110. "Public entity" includes the state, the Regents of the University of California, a county, a city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. Section 511.110 adopts the language of the definition found in Section 811.2 of the Government Code.

Article 2. Writ of Possession

§ 512.010. Application for writ of possession

512.010. (a) Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this chapter for a writ of possession by filing a written application for the writ with the court in which the action is brought.

(b) The application shall be executed under oath and shall include all of the following:

(1) A showing that the plaintiff is entitled to possession of the property claimed and of the basis of the plaintiff's claim. If the basis

of the plaintiff's claim is a written instrument, a copy of the instrument shall be attached.

(2) A showing that the property is wrongfully detained by the defendant, of the manner in which the defendant came into possession of the property, and, according to the best knowledge, information, and belief of the plaintiff, of the reason for the detention.

(3) A particular description of the property and a statement of its value.

(4) A statement, according to the best knowledge, information, and belief of the plaintiff, of the location of the property and, if the property, or some part of it, is within a private place which may have to be entered to take possession, a showing that there is probable cause to believe that such property is located there.

(5) A statement that the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.

(c) The requirements of subdivision (b) may be satisfied by one or more affidavits filed with the application.

Comment. Subdivision (a) of Section 512.010 is based on former Section 509. However, subdivision (a) enlarges slightly the period during which the plaintiff may claim the delivery of property and removes the ambiguous reference to "before trial." After judgment, the plaintiff will, if necessary, enforce his judgment by writ of execution. See Section 684.

Subdivision (b) of Section 512.010 requires the plaintiff to file a separate application for claim and delivery supported by affidavit or verified complaint. Under former law, this was not clear and it appeared that a claim could be made by verified complaint alone. See former Section 510.

Subdivision (b) is based on subdivision (a) of former Section 510. Paragraph (1) of subdivision (b) eliminates as a separate ground for repossession a showing of ownership. Compare paragraph (1) of subdivision (a) of Section 510. A plaintiff could be an "owner" in the broad sense of the word and not be entitled to possession. For example, a lessor of personal property where there has been no default by the lessee could be considered the "owner" of the property but not be entitled to possession. Paragraph (1) focuses simply on the ultimate issue of the right to possession.

Paragraph (2) of subdivision (b) continues without substantive change the provisions of paragraph (2) of subdivision (a) of former Section 510.

Paragraphs (3) and (4) of subdivision (b) are based on the provisions of paragraph (3) of subdivision (a) of former Section 510. Paragraph (4), however, adds the requirement that, where the property is in a "private place," the plaintiff establish that there is probable cause to believe that the property is located there. See Section 512.060(b). The term "private place" is that used by the California Supreme Court in Blair v. Pitchess, 5 Cal.3d 258, 270-276, 486 P.2d 1242, 1250-1255, 96 Cal. Rptr. 42, 50-55 (1971). Such showing may be based on information and belief, but the judicial officer must be presented with facts sufficient to show that the information and the informant are credible and reliable. See Aguilar v. Texas, 378 U.S. 108 (1964). See also Comment to Section 516.030.

Paragraph (5) of subdivision (b) continues without substantive change the provisions of paragraph (4) of subdivision (a) of former Section 510.

Subdivision (c) makes clear that the application required by this section may be supported by a separate affidavit or affidavits or by a verified complaint; this is not required, however, if the application itself satisfies the requirements of this chapter. For the general requirements of an affidavit, see Section 516.030.

For additional requirements where the plaintiff also seeks a temporary restraining order in connection with the application for writ of possession, see Section 513.010.

§ 512.020. Hearing required for issuance of writ

512.020. No writ shall be issued under this chapter except after a hearing by a judicial officer.

Comment. Section 512.020, together with Sections 512.030 and 512.040, replaces subdivision (b) of former Section 510. Section 510 required an initial judicial review of the plaintiff's application for a writ of possession, followed by the issuance of an order directed to the defendant to show cause why a writ should not issue. This procedure was both inefficient and unnecessary and has been replaced here by a noticed motion procedure.

§ 512.030. Notice to defendant

512.030. Prior to the hearing required by Section 512.020, the defendant shall be served with all of the following:

- (a) A copy of the summons and complaint.
- (b) A Notice of Application and Hearing.
- (c) A copy of the application and any affidavit in support thereof.

Comment. Section 512.030 replaces a portion of former Section 510. The rules governing the time for service and the manner of service are the same as for motions generally. See Chapters 4 (commencing with Section 1003) and 5 (commencing with Section 1010) of Title 14 of this part. The contents of the Notice of Application and Hearing are prescribed by Section 512.040.

§ 512.040. Contents of Notice of Application and Hearing

512.040. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) A hearing will be held by a judicial officer at a place and at a time, to be specified in the notice, on plaintiff's application for a writ of possession.

(b) The writ will be issued if the judicial officer finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. The hearing is not for the purpose of determining whether the claim is actually valid; the determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decision of the judicial officer at the hearing on the application for the writ.

(c) If the defendant desires to oppose the issuance of the writ, he must file with the court either an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or an undertaking to stay the delivery of the property in accordance with Section 515.020.

(d) The notice shall contain the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing."

Comment. Section 512.040 is based on a portion of subdivision (b) of former Section 510. Under the former procedure, the order to show cause informed the defendant of the time and place of the hearing and the defendant's right to appear and oppose the issuance of the writ or to file an undertaking. Section 512.040 requires the notice to do these things as well as inform the defendant of the purpose of the hearing and the need for prompt action in response to the notice.

§ 512.050. Service of affidavits prior to hearing

512.050. Each party shall file with the court and serve upon the other party within the time prescribed by rule any affidavits and points and authorities intended to be relied upon at the hearing. At the hearing, the judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record; but, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

Comment. Section 512.050 is new. Subdivision (b) of former Section 510 apparently permitted the defendant to delay indicating his opposition to issuance of a writ until his appearance at the hearing. Section 512.050 is intended to encourage an earlier framing of the parties' contentions and an exchange of support therefor. The time limit for filing is left to rules adopted by the Judicial Council, but the trial court may grant relief from such limits upon a showing of good cause.

§ 512.060. Issuance of the writ of possession

512.060. (a) At the hearing, the judicial officer shall issue a writ of possession if he finds both of the following:

(1) The plaintiff has established the probable validity of his claim to possession of the property.

(2) The plaintiff has provided an undertaking as required by Section 515.010.

(b) No writ directing the levying officer to enter a private place to take possession of any property shall be issued unless the plaintiff has established that there is probable cause to believe that such property is located there.

Comment. Section 512.060 is based on subdivision (e) of former Section 510 and former Section 511. The term "probable validity" used in paragraph (1) of subdivision (a) is defined in Section 511.100. The burden of proof rests on the plaintiff to establish the probable validity of his claim. He will, of course, fail to satisfy this requirement if the defendant shows that there is a reasonable probability that he can assert a successful defense to the action. It might be noted that the provisions of this title are basically procedural. No attempt has been made to state the substantive law governing the circumstances under which a person is entitled to possession of personal property.

Paragraph (2) of subdivision (a) simply requires the plaintiff to file an undertaking as provided by Section 515.010. The detail provided by subdivision (b) of former Section 511 is now provided by Section 515.010.

Subdivision (b) makes clear that no writ permitting a levying officer to enter a private place may be issued unless there is probable cause to believe that the property claimed is located there. See also Comment to Section 512.010(b)(4).

§ 512.070. Issuance of order directing transfer

512.070. If a writ of possession is issued, the judicial officer may also issue an order directing the defendant to transfer possession of the property to the plaintiff.

Comment. Section 512.070 is new. It makes clear that the court has power to issue a "turnover" order directing the defendant to cooperate in transferring possession. Such order is not issued in lieu of a writ but rather in addition to or in aid of a writ, permitting the plaintiff to select a more informal and less expensive means of securing possession.

§ 512.080. Writ of possession

512.080. The writ of possession shall:

(a) Be directed to the levying officer within whose jurisdiction the property is located.

(b) Describe the specific property to be seized.

(c) Specify any private place that may be entered to take possession of the property or some part of it.

(d) Direct the levying officer to levy on the property pursuant to Section 514.010 if found and to retain it in his custody until released or sold pursuant to Section 514.030.

(e) Inform the defendant that he has the right to except to the sureties upon the plaintiff's undertaking, a copy of which shall be attached to the writ, or to obtain redelivery of the property by filing an undertaking as prescribed by Section 515.020.

Comment. Section 512.080 is substantively the same as subdivision (a) of former Section 512.

§ 512.090. Indorsement of writ

512.090. (a) The plaintiff may apply ex parte in writing to the court in which the action was brought for an indorsement on the writ directing the levying officer to seize the property at a private place not specified in the writ.

(b) The judicial officer shall make the indorsement if the plaintiff establishes by affidavit that there is probable cause to believe that the property or some part of it may be found at that place.

Comment. Section 512.090 is based on subdivision (b) of former Section 512.

§ 512.100. Defendant's defense to action on claim not affected

512.100. Neither the failure of the defendant to oppose the issuance of a writ of possession under this chapter nor his failure to rebut any evidence produced by the plaintiff in connection with proceedings under this chapter shall constitute a waiver of any defense to plaintiff's claim in the action or any other action or have any effect on the right of the defendant to produce or exclude evidence at the trial of any such action.

§ 512.110. Effect of determinations of judicial officer

512.110. The determinations of the judicial officer under this chapter shall have no effect on the determination of any issues in the action, other than the issues relevant to proceedings under this chapter, nor shall they affect the rights of any party in any other action arising out of the same claim. The determinations of the judicial officer under this chapter shall not be given in evidence nor referred to in the trial of any such action.

Comment. Section 512.110 makes clear that the determinations of the judicial officer under this article have no effect on the determination of the validity of the plaintiff's claim in the action he has brought against the defendant nor do they affect the rights of any party in any other action. Section 512.110 does not, however, make inadmissible any affidavit filed under this chapter. The admissibility of such an affidavit is determined by rules of evidence otherwise applicable.

Article 3. Temporary Restraining Order

§ 513.010. Issuance of temporary restraining order

513.010. (a) Except as otherwise provided by this chapter, the provisions of Chapter 3 (commencing with Section 525) of this title relating to the issuance of a temporary restraining order apply. At or after the time he files his application for writ of possession, the plaintiff may apply for a temporary restraining order by setting forth in the application a statement of grounds justifying the issuance of such order.

(b) The judicial officer may issue a temporary restraining order if he determines that plaintiff's application for writ of possession shows the probability that there is an immediate danger that the property claimed may become unavailable to levy by reason of being transferred, concealed, or removed or may become substantially impaired in value.

(c) If at the hearing on issuance of the writ of possession the judicial officer determines that the plaintiff is not entitled to a writ of possession,

the judicial officer shall dissolve any temporary restraining order; otherwise, he may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ of possession.

Comment. Section 513.010 replaces subdivisions (c) and (d) of former Section 510. In contrast to prior law, Section 513.010 and the other provisions of this title do not generally permit the seizure of property upon an ex parte application but merely authorize the issuance of a temporary restraining order. But see Civil Code § 1747.95 (ex parte repossession of a credit card). The order, directed to the defendant, prohibits him from taking action with respect to the property which would be detrimental to the plaintiff. The grounds for issuance of a temporary restraining order stated in subdivision (b) are substantively similar to those provided in paragraph (3) of subdivision (c) of former Section 510.

The former special provisions for shortening the time for a hearing after seizure under a writ issued ex parte have been eliminated. However, except where a specific provision of this chapter applies (e.g., Sections 515.010 (undertaking required), 516.030 (form of affidavits)), the provisions of Chapter 3 (commencing with Section 525) relating to injunctive relief generally are applicable. Hence, the defendant may obtain relief from an order pursuant to Section 532. Moreover, although this section (and chapter) does not provide for injunctive relief generally, the claim and delivery remedy is not an exclusive one, and the plaintiff may apply for injunctive relief under the other provisions of this code. The denial of a writ of possession, where denial was due to a close factual case on liability, should not prejudice such an application where an injunction will provide relief less drastic than repossession.

§ 513.020. Provisions of temporary restraining order

513.020. In the discretion of the judicial officer, the temporary restraining order may prohibit the defendant from any or all of the following:

(a) Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering, the property.

If the property is farm products held for sale or lease or is inventory, the order may not prohibit the defendant from transferring the property in the ordinary course of business, but the order may impose appropriate restrictions on the disposition of the proceeds from such transfer.

(b) Concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer.

(c) Impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner.

Comment. Section 513.020 provides some specificity with respect to the nature of the temporary restraining order authorized by Section 513.010. Compare subdivision (d) of former Section 510. The judicial officer, in his discretion, may generally prohibit transfers of the property in question. This should not, however, cause interference with a manufacturer's processing of raw materials or work in process. Moreover, where the property is farm goods or inventory (defined in Sections 511.040 and 511.050, respectively), subdivision (a) requires that such property be permitted to be sold in the ordinary course of business, subject to limitations on the disposition of the proceeds from sale.

The rare case in which the property will perish if not refrigerated or, in the case of animals, if not cared for properly, is taken care of in subdivision (c) under which the defendant can be ordered to take whatever precautions are necessary to preserve the property until the time of the hearing.

Article 4. Levy and Custody

§ 514.010. Levy

514.010. (a) Except as otherwise provided in this section, upon receipt of the writ of possession the levying officer shall search for and take custody of the specified property, if it be in the possession of the defendant or his agent, either by removing the property to a place of safekeeping or, upon order of the judicial officer, by installing a keeper.

(b) If the specified property is used as a dwelling, such as a house-trailer, mobilehome, or boat, levy shall be made by placing a keeper in charge of the property for two days, at the plaintiff's expense, after which period the levying officer shall remove the occupants and any contents not specified in the writ and shall take exclusive possession of the property.

(c) If the specified property or any part of it is in a private place, the levying officer shall at the time he demands possession of the property

announce his identity, purpose, and authority. If the property is not voluntarily delivered, the levying officer may cause any building or enclosure where the property may be located to be broken open in such a manner as he reasonably believes will cause the least damage and may call upon the power of the county to aid and protect him, but, if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property and shall promptly make a return to the court from which the writ issued setting forth the reasons for his belief that the risk exists. In such case, the judicial officer shall make such orders as may be appropriate.

(d) Nothing in this section authorizes the levying officer to enter or search any private place not specified in the writ of possession or other order of the judicial officer.

Comment. Section 514.010 is substantively the same as the first two paragraphs of former Section 513.

§ 514.020. Service of writ of possession

514.020. (a) At the time of levy, the levying officer shall deliver to the person in possession of the property a copy of the writ of possession with a copy of the plaintiff's undertaking attached.

(b) If no one is in possession of the property at the time of levy, the levying officer shall subsequently serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part. If the defendant has not appeared in the action, service shall be accomplished in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part.

Comment. Section 514.020 is similar in effect to the last paragraph of former Section 513. Section 514.020 does not require a second service of the summons and complaint and application for writ of possession. That has presumably been accomplished pursuant to Section 512.030. Moreover, Section 514.020 requires service of the writ of possession on the defendant only if he is the person in possession or no one is in possession of the property at the time of levy. Service is in no event a condition to levy. Levy is accomplished by taking the property into custody.

§ 514.030. Custody of levying officer

514.030. (a) After the levying officer takes possession pursuant to a writ of possession, he shall keep the property in a secure place. Except as otherwise provided by Section 514.050:

(1) If an undertaking for redelivery is not filed and plaintiff's sureties are not excepted to, the sheriff shall deliver the property to plaintiff 10 days after levy of the writ of possession, upon receiving his fees for taking and necessary expenses for keeping the property.

(2) If an undertaking for redelivery is filed within 10 days after levy of the writ of possession and defendant's sureties are not excepted to, the sheriff shall redeliver the property to defendant upon expiration of the time to so except, upon receiving his fees for taking and necessary expenses for keeping the property not already paid or advanced by the plaintiff.

(3) If the plaintiff's sureties are excepted to, or if an undertaking for redelivery is filed within 10 days after levy of the writ of possession and defendant's sureties are excepted to, the sheriff shall not deliver or redeliver the property until the time provided in Section 515.030.

(b) Notwithstanding subdivision (a), where not otherwise provided by contract, upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason that the interests of the parties will be best served thereby, the judicial officer may order that the property be sold and the proceeds deposited in the court to abide the judgment in the action.

Comment. Subdivision (a) of Section 514.030 is based on former Section 516. The former reference to an order staying delivery has been deleted. Under the procedures provided under this title, the defendant will always have had an opportunity to be heard prior to being deprived of possession, hence a post-seizure stay is unnecessary.

Subdivision (b) is new. Traditionally, the plaintiff, upon gaining possession of the property, has been required to keep and preserve it so that it may be returned to the defendant if the latter ultimately prevails. See 2 B. Witkin, California Procedure Provisional Remedies § 34 at 1486-1487. It is apparent that, in some circumstances, this would be undesirable. Apparently the former law relied on the parties to agree voluntarily to a disposition that would be to their mutual benefit. Subdivision (b) also permits the parties to provide by contract for an appropriate disposition but, where not otherwise provided by contract, subdivision (b) authorizes either party to apply for an order requiring the sale of property where necessary to preserve its value pending the final outcome of the case.

§ 514.040. Return

514.040. The levying officer shall return the writ of possession, with his proceedings thereon, to the court in which the action is pending within 30 days after levy but in no event more than 60 days after the writ is issued.

Comment. Section 514.040 is substantively similar to former Section 518. Section 514.040 has, however, been revised to provide a date certain for the return of all writs--even those under which the sheriff has not been able to levy.

§ 514.050. Third-party claims

514.050. Where the property taken is claimed by one other than the defendant or his agent, the rules and proceedings applicable in cases of third-party claims after levy under execution shall apply.

Comment. Section 514.050 is substantively identical to former Section 517.

Article 5. Undertakings

§ 515.010. Plaintiff's undertaking

515.010. (a) The judicial officer shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court a written undertaking that, if the plaintiff fails to recover judgment in the action, the plaintiff shall return the property to the defendant, if return thereof be ordered, and shall pay all costs that may be awarded to the defendant and all damages referred to in subdivision (b), not exceeding the amount of the undertaking. The undertaking shall be executed by two or more sufficient sureties in an amount not less than twice the value of the property as determined by the judicial officer.

(b) The damages referred to in subdivision (a) are all damages sustained by the defendant which are proximately caused by operation of the temporary restraining order and preliminary injunction, if any, the levy of the writ of possession, and the loss of possession of the property pursuant to levy of the writ of possession or in compliance with an order issued under Section 512.070.

Comment. Section 515.010 is substantively similar to subdivision (b) of former Section 511. Subdivision (a) requires the plaintiff to file an undertaking to secure a temporary restraining order as well as a writ of possession. See Comment to Section 513.010.

§ 515.020. Defendant's undertaking

515.020. (a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought a written undertaking executed by two or more sufficient sureties in an amount equal to either the amount of the plaintiff's undertaking required by Section 515.010 or, if there has been no judicial determination, the value of the

property stated in the plaintiff's application for a writ of possession. The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property, not exceeding the amount of the undertaking. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

(b) The defendant's undertaking may be filed at any time ^{before or} after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer and to the plaintiff. An affidavit stating that such copies have been mailed shall be filed with the court at the time the undertaking is filed.

(c) The defendant's undertaking shall state the address to which a copy of the notice of exception to sureties may be sent.

(d) If an undertaking for redelivery is filed and defendant's sureties are not excepted to, the levying officer shall deliver the property to the defendant, or, if the plaintiff has previously been given possession of the property, the plaintiff shall deliver such property to the defendant. If an undertaking for redelivery is filed and defendant's sureties are excepted to, the provisions of Section 515.030 shall apply.

Comment. Section 515.020 is substantively similar to former Section 514. However, Section 515.020 eliminates the time limit for the filing of an undertaking and permits such filing at any time. Accordingly, this section also provides for redelivery by the plaintiff where he has previously been given possession. Subdivision (d). See also Section 515.030(f). Section 515.020 has also been revised to reflect the fact that possession upon ex parte application is no longer permitted.

§ 515.030. Exception to sureties

515.030. (a) The defendant may except to the plaintiff's sureties not later than 10 days after levy of the writ of possession by filing with the court in which the action was brought a notice of exception to sureties and mailing a copy of the notice to the levying officer and to the plaintiff. An affidavit stating that such copies have been mailed shall be filed with the court at the time the notice is filed.

(b) The plaintiff may except to the defendant's sureties not later than 10 days after the defendant's undertaking is filed by filing with the court in which the action was brought a notice of exception to sureties and mailing a copy of the notice to the levying officer and to the defendant at the address set out in his undertaking. An affidavit stating that such copies have been mailed shall be filed with the court at the time the notice is filed.

(c) If the plaintiff or defendant does not except to the sureties of the other as provided in this section, he waives all objection to them.

(d) When excepted to, the sureties shall justify before a judicial officer of the court in which the action was brought at a time specified by the excepting party in the manner provided in Chapter 7 (commencing with Section 830) of Title 10 of this part.

(e) If the plaintiff's sureties, or others in their place, fail to justify at the time and place appointed or do not qualify, the judicial officer shall vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession and, if levy has occurred, order the levying officer to return the property to the defendant. If the plaintiff's sureties do qualify, the judicial officer shall order the levying officer to deliver the property to the plaintiff.

(f) If the defendant's sureties, or others in their place, fail to justify at the time and place appointed or do not qualify, the judicial officer shall order the levying officer to deliver the property to the plaintiff, or, if the plaintiff has previously been given possession of the property, he shall retain such possession. If the defendant's sureties do qualify, the judicial officer shall order the levying officer or the plaintiff to deliver the property to the defendant.

Comment. Section 515.030 is substantively similar to former Section 515. Section 515.030 makes minor changes in the time limits formerly provided and incorporates the procedures for the justification of sureties from Sections 830 through 835 (actions for libel and slander) of this code. These provisions are comparable to those relating to bail on arrest; the latter have been recommended for repeal. See Recommendation and Study Relating to Civil Arrest, 11 Cal. L. Revision Comm'n Reports 1 (1973). Because the time limit for the defendant's filing of a redelivery bond has been eliminated (see Section 515.020(b)), subdivision (f) provides for redelivery by the plaintiff where he has previously been given possession of the property.

Article 6. Rules; Forms; Affidavits

§ 516.010. Rules for practice and procedure

516.010. The Judicial Council may provide by rule for the practice and procedure in proceedings under this chapter.

§ 516.020. Forms

516.020. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this chapter.

Comment. Section 516.020 requires the Judicial Council to prescribe the forms necessary for the purposes of this chapter. The Judicial Council has authority to adopt and revise forms as necessary but must act in a manner consistent with the provisions of this chapter.

§ 516.030. General requirements for affidavits

516.030. The facts stated in each affidavit filed pursuant to this title shall be set forth with particularity. Each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. The affiant may be a party to the action or any other person having knowledge of the facts.

Comment. Section 516.030 provides standards for affidavits filed pursuant to this title. These standards are comparable to but not as restrictive as those provided for affidavits filed in support of or in opposition to a motion for summary judgment. Compare Section 437c. A verified complaint that satisfies the requirements of this section may be used in lieu of or in addition to an ordinary affidavit. It should be noted that under Section 512.020 certain matters may be shown to the best of the plaintiff's knowledge, information, and belief. In such situations, the facts stated in the affidavit will be the facts on which his belief is based and may include the nature of his information and the reliability of his informant.

Sec. 4. (a) This act becomes operative on July 1, 1974.

(b) Except as otherwise provided by rules adopted by the Judicial Council effective on or after July 1, 1974, this act shall not apply to any writ of possession issued prior to July 1, 1974, and such writs of possession shall continue to be governed in all respects by the provisions of Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of the Code of Civil Procedure in effect on June 30, 1974.

A P P E N D I X

CODE OF CIVIL PROCEDURE SECTIONS 509-521
[as added by Cal. Stats. 1972, Ch. 855 (AB 1623)]

**CHAPTER 2. CLAIM AND DELIVERY OF
PERSONAL PROPERTY**

509. The plaintiff in an action to recover the possession of personal property may, at the time of issuance of summons, or at any time before trial, claim the delivery of such property to him as provided in this chapter. } § 512.010(a)

510. (a) Where a delivery is claimed, the plaintiff, by verified complaint or by an affidavit or declaration under penalty of perjury made by plaintiff, or by someone on his behalf, filed with the court, shall show: } § 512.010

(1) That the plaintiff is the owner of the property claimed or is entitled to the possession thereof, and the source of such title or right; and if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached; } § 512.010(b)(1)

(2) That the property is wrongfully detained by the defendant, the means by which the defendant came into possession thereof, and the cause of such detention according to his best knowledge, information, and belief; } § 512.010(b)(2)

(3) A particular description of the property, a statement of its actual value, and a statement to his best knowledge, information, and belief concerning the location of the property and of the residence and business address, if any, of the defendant; } § 512.010(b)(3)

(4) That the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure. } § 512.010(b)(5)

(b) The court shall, without delay, examine the complaint and affidavit or declaration, and if it is satisfied that they meet the requirements of subdivision (a), he shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff. Such order shall fix the date and time for the hearing thereon, which shall be no sooner than 10 days from the issuance thereof, and shall direct the time within which service thereof shall be made upon the defendant. Such order shall inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony on his behalf at the time of such hearing, or that he may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of Section 514, and that, if he fails to appear, plaintiff will apply to the court for a writ of possession. Such order shall fix the manner in which service thereof shall be made, which shall be by personal service, or in accordance with the provisions of Section 1011, or in such manner as the judge may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the complaint and affidavit or declaration.

not continued. See § 512.020 and Comment thereto.

§ 512.040. See also § 512.050.

not continued. See § 512.030 and Comment thereto.

(c) Upon examination of the complaint and affidavit or declaration and such other evidence or testimony as the judge may, thereupon, require, a writ of possession may be issued prior to hearing, if probable cause appears that any of the following exist:

not continued. See Note to § 513.010.

(1) The defendant gained possession of the property by theft, as defined by any section of Title 13 (commencing with Section 459 447) of Part 1 of the Penal Code;

(2) The property consists of one or more negotiable instruments or credit cards;

Civil Code § 1747.95

(3) By reason of specific, competent evidence shown, by testimony within the personal knowledge of an affiant or witness, the property is perishable, and will perish before any noticed hearing can be had, or is in immediate danger of destruction, serious harm, concealment, or removal from this state, or of sale to an innocent purchaser, and that the holder of such property threatens to destroy, harm, conceal, remove it from the state, or sell it to an innocent purchaser.

not continued. Compare § 513.010(b)

Where a writ of possession has been issued prior to hearing under the provisions of this section, the defendant or other person from whom possession of ~~said~~ *such* property has been taken may apply to the court for an order shortening the time for hearing on the order to show cause, and the court may, upon such application, shorten the time for such hearing, and direct that the matter shall be heard on not less than 48 hours' notice to the plaintiff.

not continued. But cf.
Comment to § 513.010.

(d) Under any of the circumstances described in subdivision (a), or in lieu of the immediate issuance of a writ of possession under any of the circumstances described in subdivision (c), the judge may, in addition to the issuance of an order to show cause, issue such temporary restraining orders, directed to the defendant, prohibiting such acts with respect to the property, as may appear to be necessary for the preservation of rights of the parties and the status of the property.

§§ 513.010, 513.020

(e) Upon the hearing on the order to show cause, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination, which party, with reasonable probability, is entitled to possession, use, and disposition of the property, pending final adjudication of the claims of the parties. If the court determines that the action is one in which a prejudgment writ of possession should issue, it shall direct the issuance of such writ.

§ 512.060(a)(1)

511. (a) A writ of possession shall not issue to enter the private premises of any person for the purpose of seizure of property, unless the court shall determine from competent evidence that there is probable cause to believe that the property or some part thereof is located therein.

§ 512.060(b)

(b) A writ of possession shall not issue until plaintiff has filed with the court a written undertaking executed by two or more sufficient sureties, approved by the court, to the effect that they are bound to the defendant in double the value of the property, as determined by the court, for the return of the property to the defendant, if return thereof be ordered, and for the payment to him of any sum as may from any cause be recovered against the plaintiff.

§§ 512.060(a)(2),
515.010

512. (a) The writ of possession shall be directed to the sheriff, constable, or marshal, within whose jurisdiction the property is located. It shall describe the specific property to be seized, and shall specify the location or locations where, as determined by the court from all the evidence, there is probable cause to believe the property or some part thereof will be found. It shall direct the levying officer to seize the same if it is found, and to retain it in his custody. There shall be attached to such writ a copy of the written undertaking filed by the plaintiff, and such writ shall inform the defendant that he has the right to except to the sureties upon such undertaking or to file a written undertaking for the redelivery of such property, as provided in Section 514.

§ 512.080(a)

§ 512.080(b)(c)

§ 512.080(d)

§ 512.080(e)

(b) Upon probable cause shown by further affidavit or declaration by plaintiff or someone on his behalf, filed with the court, a writ of possession may be endorsed by the court, without further notice, to direct the levying officer to search for the property at another location or locations and to seize the same, if found.

§ 512.090

513. The levying officer ~~must~~ shall forthwith take the property, if it be in the possession of the defendant or his agent, and retain it in his custody, *either by removing the property to a place of safekeeping or, upon good cause shown, by installing a keeper*, provided that, when the property is used as a dwelling, such as a housetrailer, mobilehome, or boat, the same shall be taken by placing a keeper in charge of the property, at plaintiff's expense, for two days. At the expiration of such period, the officer shall remove its occupants and take the property into his immediate custody.

§ 514.010(a)

§ 514.010(b)

If the property or any part thereof is in a building or enclosure, the levying officer ~~must~~ shall demand its delivery, announcing his identity, purpose, and the authority under which he acts. If it is not voluntarily delivered, he shall cause the building or enclosure to be broken open in such manner as he reasonably believes will cause the least damage to the building or enclosure, and take the property into his possession. He may call upon the power of the county to aid and protect him, but if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property, and shall forthwith make a return before the court from which the writ issued, setting forth the reasons for his belief that such risk exists. The court shall make such orders and decrees as may be appropriate.

§ 514.010(c)

The levying officer ~~must~~ shall, without delay, serve upon the defendant a copy of the writ of possession and written undertaking, the complaint and affidavit or declaration, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or, if neither have any known place of abode, by mailing them to their last known address.

§ 514.020

514. At any time prior to the hearing of the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking executed by two or more sufficient sureties, approved by the court, to the effect that they are bound in double value of the property, as stated in the verified complaint, affidavit, or declaration of the plaintiff, or as determined by the court for the delivery thereof to the plaintiff, if such delivery be ordered, and for the payment to him of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or his attorney, in the manner provided by Section 1011, a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing of the order to show cause, proceedings thereunder shall terminate, unless exception is taken to such sureties. If, at the time of filing of such undertaking, the property shall be in the custody of the levying officer, such property shall be redelivered to the defendant five days after service of notice of filing such undertaking upon the plaintiff or his attorney.

Compare § 515.020(a)

§ 515.020(b)

§ 515.030(c), (f).
See also § 514.030.

515. The qualification of sureties under any written undertaking referred to in this chapter shall be such as are prescribed by this code, in respect to bail upon an order of civil arrest. Either party may, within two days after service of an undertaking or notice of filing an undertaking under the provisions of this chapter, give written notice to the court and the other party that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When a party excepts, the other party's sureties ~~must~~ shall justify on notice within not less than two, nor more than five, days, in like manner as upon bail on civil arrest.

§ 515.030(a)

§ 515.030(a), (b)

§ 515.030(c)

§ 515.030(a)

If the property be in the custody of the levying officer, he shall retain custody thereof until the justification is completed or waived or fails. If the sureties fail to justify, the levying officer shall proceed as if no such undertaking had been filed. If the sureties justify or the exception is waived, he shall deliver the property to the party filing such undertaking.

§ 515.030(e), (f)

516. When the levying officer has taken property as provided in this chapter, he ~~must~~ shall keep it in a secure place and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same, after expiration of the time for filing of an undertaking for redelivery and for exception to the sureties upon any undertaking, unless the court shall by order stay such delivery.

§§ 514.030, 515.020, 515.030

517. In cases where the property taken is claimed by any person other than the defendant or his agent, the rules and proceedings applicable in cases of third party claims after levy under execution or attachment shall apply.

§ 514.050

518. The levying officer ~~must~~ shall return the writ of possession, with his proceedings thereon, to the court in which the action is pending, within 20 days after taking the property mentioned therein.

§ 514.040

519. After the property has been delivered to a party or the value thereof secured by an undertaking as provided in this chapter, the court shall, by appropriate order, protect that party in the possession of such property until the final determination of the action.

Not continued. Compare §§ 515.020(d), 515.030(f)

520. In all proceedings brought to recover the possession of personal property, all courts, in which such actions are pending, shall, upon request of any party thereto, give such actions precedence over all other civil actions, except actions to which special precedence is otherwise given by law, in the matter of the setting of the same for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.

not continued

521. This chapter shall be operative only until December 31, 1975, and on and after that date shall have no force or effect.

Compare Sec. 4 (effective date 7/1/74)