#39.90 10/18/72

Memorandum 72-68

Subject: Study 39.90 - Claim and Delivery Statute

Attached to this memorandum is a tentative recommendation relating to claim and delivery. The staff has made a few editorial changes, but substantively the recommendation is identical to that sent out for comment. We have sent a copy of this recommendation to the Legislative Counsel and have asked him to review and revise it, if necessary, so that it will be in a form suitable for introduction to the 1973 Legislature. At the November meeting, we hope that the Commission will be able to review this recommendation in the light of the comments we have received and approve it, with any necessary revisions, for printing. We emphasize that, after the November meeting, we hope to be preparing a final recommendation for the printer, hence this is the best time to make any editorial revisions.

Also attached to this memorandum are the comments on the recommendation which we have received to date. The deadline we set for sending comments was October 15th; however, we will, of course, advise you of any further comments received. In this regard, we note that we have not yet received the response of the State Bar Committee. Several letters approve the entire tentative recommendation as drafted. See Exhibit I (Neville R. Lewis, Esq.); Exhibit III (Mr. D.S. Richmond, Credit Mgr., American Cement Corp.)(note this letter specifically approves the use of a TRO in exceptional circumstances); Exhibit IV (Richard H. Wolford, Esq., a former Commissioner).

One letter (Exhibit VIII) of particular interest was written by an attorney who was a law clerk for Mr. Justice Sullivan at the time Blair v. Pitchess was decided. Blair, in a decision written by Mr. Justice Sullivan, held the former claim and delivery statute unconstitutional. The essence

of this letter is that our recommendation does not go far enough in protecting the rights of the consumer defendant. One particular criticism is that the recommendation does not prevent private repossessions. This was a conscious choice. Indeed page 15 of the recommendation makes clear that "this recommendation does not attempt to state and is not intended to disturb the substantive law governing . . . the circumstances, if any, in which private, self-help repossession may properly be utilized." Although we suspect that private repossession will ultimately be proscribed by the courts, we did not want to influence this decision.

As a related matter, we note that one provision suggested by Assemblyman Waxman in a bill introduced (but not passed) in 1972 would have permitted a person in possession of property to agree to its repossession by another if the repossession takes place within 10 days of the execution of the agreement. If you wish, we could include such a consent to repossession in our recommendation. However, we believe that such a consent or knowing waiver given at or about the time of repossession would be given effect in any event with or without specific legislative authorization.

The comments with respect to specific sections we will take up below in a section-by-section analysis.

Section 511.050. Exhibit VIII (p.3, next to last paragraph) suggests that the definition of inventory be expanded to include raw materials, work in progress, and materials used or consumed in business. These items were deleted because they would not be sold in the ordinary course of business and hence do not need to be excepted from the operation of the TRO. See Comment to Section 511.050. See also Section 513.020(a). However, we have no serious objection to the suggestion since the TRO can always accomplish the same result.

Section 512.020. Exhibit VIII (page 3, last paragraph) suggests that the application required by this section be in the form of an affidavit and based on personal knowledge of the affiant. The section does now require that the application be executed under oath. We have not made personal knowledge a specific requirement because we sought to avoid some of the hypertechnical constructions that this phrase has produced in the summary judgment area. Note, however, that Section 516.030 does require the affidavit to show that the affiant, if sworn as a witness, can testify competently to the facts stated therein. We believe the section as written permits the court to determine whether an adequate showing is made by the plaintiff and provides adequate protection for the defendant. We note specifically that subdivision (d) does require the plaintiff to state as best he can where the property is located; we doubt that greater specificity can be reasonably achieved.

Section 512.030. This section does not contain specific time limits because, as the Comment makes clear, the rules relating to the time of service for motions generally should be applied. Ordinarily, therefore, the defendant will generally get at least 10 days notice. See Code Civ. Proc. § 1005. In exceptional circumstances, however, the plaintiff may apply for an order shortening time. This flexibility seems desirable and we do not want to complicate our statute with this procedural detail. Note, however, that both Exhibit V and Exhibit VIII comment on the absence of specific time limits.

Section 512.040. Please note the suggestion in Exhibit VIII (p.4, second paragraph) that the defendant be given the option of having the final merits of the case decided at the time of the hearing on the application for a writ. The idea is intriguing; however, we suspect that the option would rarely be exercised, and when exercised, would produce a motion for continuance by the plaintiff; in short, the procedure would probably prove to be generally unworkable.

Section 512.050. Two Exhibits (VII and VIII at page 4) are critical of the requirement that the defendant file affidavits in opposition to the application prior to the hearing. It should be noted that the defendant can be excused from this requirement by the trial court and nothing would prevent the defendant from asking for a continuance if necessary. The issue is simply whether we wish to encourage an early notice of opposition and framing of the issues or whether complete freedom should be extended to the defendant to show up for the first time at the hearing.

Section 512.070. This section was formerly subdivision (b) of Section 512.060. Exhibit VIII (p.4) suggests that the section should explain in more detail what kind of showing is required to obtain a turnover order. We do not believe more detail is needed; we believe that the court should be able to issue an order in any case and that the order itself will be limited to reasonable cooperation, thus precluding an invasion of the defendant's rights.

Section 513.010. We recommend no changes in this section; however, see Exhibits VI, VII, and VIII (at pages 4 and 5).

Section 513.020. The staff suggests that subdivision (a) be revised to read substantially as follows:

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

We believe that this tightening up of the treatment of proceeds would be desirable.

Section 514.010. Note the suggestion in Exhibit VIII (p.5). We think that the limitations on the levying officer's search are implicit but have no objection to stating such limitations either in the section or Comment. What is your desire? Also note the query by the Marshall's Office as to specific procedures where the property is in the hands of third persons. (Exhibit II.) We believe that these procedures can be developed administratively by the various levying officers in conjunction with the courts (Judicial Council).

Section 514.020. Exhibit II suggest that a requirement of posting be created where there is no one in possession of the property. This might not be feasible in some circumstances, and all things considered, we would as soon have the levying officer receive the complaint calls so that the person complaining can be informed as to just what has happened whenever possible.

Section 515.030. Exhibit VII suggests that the time limits set forth here are too short. We have already increased the limits under existing law and believe that these should be adequate.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

Memorandum 72-68

EXHIBIT I

LAW OFFICES
LEWIS, VARNI & GHIRARDELLI
501 SOUTH BRAND BOULEVARD
SAN FERNANDO, CALIFORNIA 91340

AREA CODE 213
TELEPHONE 361-1121

NEVILLE R. LEWIS
JOHN J. VARNI
A. J. GHIRARDELLI
KEVIN G. LYNCH
WILLIAM WALSH, III
JOHN A. LEWIS
CARL O. WAGGONER

October 2, 1972

IN REPLY REFER TO

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

I have just reviewed your tentative Recommendation Relating to the Claim and Delivery Statute, dated September 1972.

In my opinion it appears to be an excellent job of handling the problems created by the decisions of both the United States and State Supreme Courts.

Yours very truly,

Neville R. Lewis

NEVILLE R. LEWIS

NRL:ib

Memorandum 72-68

EXHIBIT II


**MARSHAL'S OFFICE**

COUNTY OF SACRAMENTO
ROOM 206, COUNTY COURT HOUSE
P.O. BOX 805
SACRAMENTO, CALIF. 95804

MYRLE E. MUNOZ
MARSHAL

GEORGE ALESSIO
ASSISTANT MARSHAL

TELEPHONE (916) 454-5551


Oct. 4, 1972

John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law-Stanford University
Stanford, Ca. 94305

Dear Mr. DeMoully:

I have reviewed the Tentative Recommendation relating to the Claim and Delivery Statute. This was done only with regard to effect on the levying officer.

There seems to be two problem areas. One concerns the lack of definitive procedures in the event that the listed property is in possession of a third party. This would be particularly questionable if forcible entry were required to obtain possession.

The second problem relates to the proposed section 514.020. I believe that if no one is in possession of the property at the time of levy, there should be a requirement to post a copy of the Writ and a notice that the property has been taken by the levying officer. Failure to do this would undoubtedly result in complaint calls reporting the property stolen or a burglary.

I trust the above will prove of some use and thank you for sending the recommendation for review.

Very truly yours,

Myrle E. Munoz

MYRLE E. MUNOZ
Marshal

MEM/phg

Memorandum 72-68

EXHIBIT III

RIVERSIDE DIVISION ≡ AMERICAN CEMENT CORPORATION, 2404 WILSHIRE BLVD., LOS ANGELES, CALIFORNIA 90057 • (213) 385-5471

October 11, 1972

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

Enclosed is the Questionnaire that you sent me for completion recently.

I trust that the information that I have given will be of some help in this study. I have spent some time reviewing the Tentative Recommendation relating to the Claim and Delivery Statute and find the study provides some meaningful recommendations. I fully agree with the course of action as stated in the final paragraph on page 12 and am following with interest all findings and rulings concerning this area of the law.

Hopefully we in this state will achieve some semblance of rationality and not be swayed by singularly directed groups. If I can be of further assistance, please let me know.

Very truly yours,

RIVERSIDE CEMENT COMPANY

D. S. Richmond

D. S. Richmond
Manager, Credit & Financial Services

DSR;ms

EXHIBIT IV



GIBSON, DUNN & CRUTCHER
LAWYERS
515 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071

AREA CODE 213
TELEPHONE 620-9300
TELEX: 67-4930
CABLE ADDRESS: GIBSTRASK



October 12, 1972

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

Re: The Claim and Delivery Statute

Dear John:

I reviewed with interest the Commission's tentative recommendation relating to the Claim and Delivery statute. I think the tentative recommendation is an excellent one and that it accomplishes the restoration of a much needed remedy in a form which avoids the abuses that resulted in the Courts declaring the prior legislation unconstitutional.

As you know, the theoretical right to take possession by self-help without a breach of peace was written out of the statute by the various Court holdings that, (a) entering the premises, even though peacefully, after being told not to enter, constitutes a breach of peace; (b) having a peace officer accompanying the claimant to the premises to insure that there is no alternation also constitutes a breach of peace; and (c) breaking a lock or picking a lock to obtain access to the premises constitutes a breach of the peace.

These decisions, together with the outlawing of Claim and Delivery, simply mean that the creditor and lien holder has nothing but an illusory right under the UCC, except in the rare (if ever) situation where the inventory or equipment of a debtor in financial trouble remains in tact on the premises until the conclusion of trial and judgment, perhaps a year or two after the event.

As you can see, I endorse the proposed new statute as remedying what is presently an unconceivable lack of any effective commercial remedy in situations where an effective remedy is needed.

With kindest regards.

Sincerely,

Richard H. Wolford

RHW:ndb

Memorandum 72-68

EXHIBIT V

# CALIFORNIA STATE LEGISLATIVE COMMITTEE
# CREDIT MANAGERS ASSOCIATIONS

BOARD OF TRADE OF SAN FRANCISCO
San Francisco, California
Paul Ryan, Exec. Vice-Pres. & Secretary

CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA
Los Angeles, California
Lee J. Fortner, Exec. Vice-Pres.

NATIONAL ASSOCIATION OF CREDIT MANAGEMENT
Northern & Central California
San Francisco, Fresno, Stockton, Sacramento, San Jose, California
Carroll Swanson, Exec. Vice-Pres.-Secretary

SAN DIEGO WHOLESALE CREDIT MEN'S ASSOCIATION
San Diego, California
Larry Holzman, Exec. Sec.-Mgr.

WHOLESALERS CREDIT ASSOCIATION
Oakland, California
Henry J. Salvo, Secretary-Manager

PLEASE REPLY TO

1581 Mission Street
San Francisco, Ca 94103

October 13, 1972

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

Dear John:

The questionnaire and tentative claim and delivery statute attached to the letter of transmittal of September 20th seemed quite complex.

My copy of the questionnaire which is filled in as accurately as possible is enclosed.

It would seem that many business firms would find it impossible to complete the questionnaire because their past due accounts are usually turned over to a collection agency which takes care of the legal aspects of suit, attachment, execution etc. It would also follow that unless said business firm knew the present law on claim and delivery and was also aware of AB 1623 it would be almost impossible for him to make much of a recommendation. I would say that AB 1623 is too limited in scope and would hope that your statute would be much broader.

It is not clear to me how much time would be involved between the filing of the complaint and the issuance of the writ, or possession of the property by the sheriff. The time element could be very important. Additionally in reading your definitions, "equipment, machinery and vehicles" are conspicuous by their absence, but perhaps covered by other sections of 511.010 or the references.

Cordially

Bill Kumli

W. J. Kumli
Chairman

Memorandum 72-68

EXHIBIT VI

LAW OFFICES
STYSKAL, WIESE & MELCHIONE
[illegible] VENTURA BOULEVARD
NORTH HOLLYWOOD, CALIFORNIA 91606
877 0960 760 4205

ALVIN O. WIESE, JR.
EDGAR J. MELCHIONE
JACK N. ROFF
ROBERT A. CUNCO
BERNARD L. WEINER

L. J. STYSKAL (OF COUNSEL)

October 3, 1972

* * * * *

Question 37. While this question is simply too broad to comment upon all of the aspects, rights and needs of parties and plaintiffs, having in mind the most efficient judicial system conceivable, there is one point I wish to emphasize relating to the Law Revision Commission's suggestion that AB 1623 (Chapter 855) be modified to substitute only a temporary restraining order in place of the right to an ex parte order for immediate possession upon a proper showing by a plaintiff in an action for possession. In the ordinary case where immediate possession is demanded by a plaintiff, it is our experience that the type of debtor and the circumstances involved in the claim would completely defeat the purpose of the plaintiff's action if a prior hearing were necessary in all cases. To say it otherwise a temporary restraining order to the type of debtor I have in mind would be meaningless despite the court's contempt power. I think the classic case in illustration of my point is the debtor with an automobile, of recent vintage, who in the first place requires skip tracing to locate. If a court were simply to issue a temporary restraining order instead of authorizing the immediate seizure of the vehicle, the vehicle in 90% of the cases would be unavailable after the hearing which the defendant would default. This week we had one such situation involving a $4,000.00 camper and truck where the court refused to issue an order for immediate possession, and 3 days later the camper and truck were located in Arizona, abandoned, with the motor removed from the truck. This is not an unusual situation. It is a recurrent one. To simply pass legislation providing for orders without commensurate rights or means to enforce them, ignores the real problems and would be ineffectual.

I am sure the Commission recognizes that the classic issues of due process, "color of state law", and jurisdiction, and the rights of creditors versus the obligation to debtors will be totally reviewed by the Circuit Court of Appeals in the self help repossession case of Adams vs Egley. Perhaps it is this case that will give the Commission and all counsel involved in these thought provoking problems the real measuring stick by which to test legislative direction.

STYSKAL, WIESE & MELCHIONE

Alvin O. Wiese, Jr.

Memorandum 72-68

EXHIBIT VII

Michael R. Palley, Attorney, General Practitioner

Excerpt From Questionnaire--Comments Relating to Claim and Delivery Statute

Outstanding--very well thought out. I think immediate possession plus sale in the case of immediately perishable property should be continued § 510(c)(3).

I would delete the requirement of filing affidavit from § 512.040(c) in consumer cases & allow him to appear and state his case orally (under oath perhaps). Affidavits should be allowed, perhaps encouraged, but not required.

I see no necessity for 10-day time limit in § 515.020(b). The defendant should be able to post bond & regain possession at any time.

The time limits in § 515.030(a) & (b) are too short--defendant may not see attorney that soon--at least 20 days for each.

Memorandum 72-68

EXHIBIT VIII

Jan T. Chilton
2611 Woolsey Street
Berkeley, Calif. 94705

October 15, 1972

California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Re: Proposed Claim and Delivery Statute

Dear Sirs:

It is a pleasure to be able to comment upon your proposed revision of the California Claim and Delivery Statute. I have had a particular interest in this area of the law since I was a law clerk for Justice Sullivan of the California Supreme Court at the time the decision in Blair v. Pitchess was announced. Also, in my present position as staff attorney for the National Housing and Economic Development Law Project, I am in close contact with the many Legal Services attorneys who deal with repossession of consumer goods on a daily basis.

Before considering the particular provisions of your draft statute, I shall offer several more general comments. At page 6, footnote 25 of the background statement prepared by the Commission, it is suggested that the portions of Randone holding that necessities of life may never be seized prior to a hearing are not applicable to claim and delivery. Blair did not discuss the question of necessities because it was a taxpayer's suit and presented the court with no facts which would suggest the special hardships inherent in the pre-hearing seizure of necessities. That case considered only the constitutionality of the claim and delivery law on its face. Thus, its failure to discuss necessities cannot be seen as a conscious effort to treat claim and delivery differently from attachment.

Nor does the quoted statement from Randone establish the point. The reasoning of Randone is that pre-hearing seizure of necessities places such a burden on the debtor that he is effectively denied any hearing at all. That conclusion applies as well to seizures under claim and delivery as to takings under attachment. While the Randone statement shows that there is even less justification for imposing this hardship in attachment proceedings, the basic hardship exists in all pre-hearing seizures; hence, the Randone rationale extends to claim and delivery.

In its review of the Blair decision, the Commission also fails to mention the court's obvious concern with the practicalities of consumer collection practices. The court went out of

its way to state that the ordinary form agreements,which purport to waive the debtor's rights against unreasonable searches and against takings without due process, are void as adhesion contracts. This part of the opinion is an important reminder that the Sniadach line of cases, to which Blair and Randone belong, are primarily concerned with affording consumers, and particularly low- and moderate-income debtors, a meaningful opportunity to present any claims and defenses they may have against their creditors.

This concern for the downtrodden consumer has been totally overlooked by the Commission. Not only is the point never raised in the background statement, but the spirit of these decisions is absent from the substantive provisions of the draft statute.

Most importantly, the draft law does nothing to prevent private repossessions. Such seizures obviously impose upon debtors even greater hardships than takings under claim and delivery. If his goods are repossessed privately the debtor suffers the same deprivation, but he is afforded no hearing at all unless he files an affirmative action. Yet, as courts and the Commission make the claim and delivery route more difficult for creditors, they are making all the more attractive to creditors the private alternative. So long as creditors may thus circumvent due process protections, a carefully drawn claim and delivery statute offers debtors only illusory protections. The precedents for abolition of private repossessions are close at hand. In Adams v. Eagley, ___F.Supp.___,(S.D.Cal. 1972), the court held that such self-help replevin violates due process, finding state action in the provisions of the Commercial Code which authorize such seizures. Similarly, in Jordan v. Talbot (1961) 55 Cal.2d 597, the California Supreme Court held that a landlord could not use self-help to evict a tenant but must rely upon the statutory unlawful detainer procedure.

The carefully balanced provisions of the draft claim and delivery statute also ignore the commercial reality of consumer collections - the field in which claim and delivery is, and will be, most often used. In the typical consumer transaction, the creditor invoking claim and delivery will have legal assistance and will have developed form applications or affidavits to meet the requirements of the statute. By contrast, most consumers will be unknowledgeable of the law and unable to afford to hire an attorney (and ineligible for Legal Services).

Experience with other parts of the debt collection picture demonstrate that unless the requirements for initiating claim and delivery process are strict, it will often be abused by unscrupulous creditors. For example, when a debtor files a claim of exemption to dissolve a garnishment of his wages, creditors now routinely file affidavits on information and belief asserting that the debtor does not need all his wages. Clearly, the creditor does not have the faintest idea whether his allegations are true (although he could find out by using the examination of debtor procedure), but he can use such improper affidavits because he knows that most debtors are

too unsophisticated in the law to fight back. For this reason, the requirements for initiating claim and delivery process should be tightened, and penalties for misuse of the procedure ought to be specified.

On the other hand, the draft statute makes the mistake of requiring debtors to comply with various technical provisions which depend upon a legal knowledge not available to most consumers. For example, under Section 512.040(c) of the proposed law, a debtors can oppose issuance of a writ of possession only by filing an affidavit or a bond. Few debtors will be able to afford a bond, and even fewer will have the skill or legal assistance necessary to file an appropriate affidavit. There seems little reason for imposing this burden on debtors. Why could they not be permitted to oppose issuance of the writ by oral testimony at the hearing? So long as the claim and delivery law contains such difficult requirements for debtors, few debtors will be able have the due process hearing guaranteed by Blair.

The draft statute should recognize the unequal positions of creditors and debtors and impose greater burdens on the former than on the latter; otherwise it will continue to give creditors the whip hand just as did the statutes struck down in Blair, Randone and Sniadach.

The suggestion to eliminate ex parte issuance of writs of possession is a good one. Ex parte writs would be difficult to administer in light of Randone, may be unconstitutional under Fuentes, and would be a means for unscrupulous creditors to circumvent the requirements of due process. Deletion of the order to show cause procedure is also wise.

Turning to the specific provisions of the proposed statute, I suggest that the definition of inventory (Section 511.050) be expanded to include raw materials, work in progress and materials used or consumed in business. Such a broadening of the definition is necessary to assure that the temporary restraining order authorized by Section 513.020 does not require manufacturing or processing concerns to interrupt their ordinary course of business.

The application required by Section 512.020 should be in the form of an affidavit, based on personal knowledge of the affiant, except for the portions dealing with the reason the defendant retains the property and with the location of the property. If the affidavits are not based on personal information, they present a wide opportunity for abuse. Furthermore, the application must set forth specific facts which indicate the location of the claimed item. Otherwise, if the defendant fails to appear at the hearing, there will not have been a sufficient showing of probable cause to permit a search in connection with execution of the writ.

As set forth above, the statute should provide adequate civil penalties for improper invokation of claim and delivery to deter overzealous creditors.

Section 512.030 ought to specify that the three documents be served upon the defendant at least ten days prior to the hearing. Otherwise, the quite commendable provisions advising the defendant to seek legal advice will be rendered impractical by last minute service of process.

Section 512.040(b) requires the ndice to the defendant to state that the final merits of the case will be decided at a time other than the haring on the application for issuance of the writ. It seems to me that the defendant should be left the option to consolidate the hearing on the application for the writ with a full trial on the merits. Not only will such a combined hearing promote judicial efficiency, but it will also reduce the legal costs of the defendant. However, the option should be left to the defendant to prevent his being forced to proceed without proper preparation. Also, the court should be permitted to make appropriate protective orders as the price of combining the hearings.

Section 512.040(c) has been discussed above; it should be changed to permit the defendant to present his opposition orally at the hearing. Undue surprise to the creditor could be avoided by continuing the hearing with an appropriate protective order.

For the reasons mentioned in connection with section 512.040(c), the provisions of section 512.050 should be amended to permit introduction of oral testimony at the hearing.

Section 512.060(b) should explain in more detail what kind of showing is required to obtain an order directing the defendant to turn over the property. Otherwise, judges are likely to give such orders in all claim and delivery cases. Unless there is some special reason for such an order, it should not be issued since it entails a much greater invasion of the defendant'srights.

The affidavit required by section 512.080(b) should be contrasted with the less formal requirements of the application for the writ (Section 512.020(c)). Both documents should be sworn statements indicating particular facts within the personal knowledge (and not information and belief) of the declarant which indicate that the goods to be seized are at the location specified. Any lesser requirement would not meet the Fourth Amendment standards applied to claim and delivery by Blair.

Sections 512.090 and 512.100 should be changed to permit a combined hearing on issuance of the writ and on the merits of the case. If the defendant opts for such a combined hearing, obviously his defenses will be affected and the determination of the judicial officer will have the full effect of a judgment on the merits.

Again, in connection with the temporary restraining order, the requirements governing the form of the application should be strengthened. The application should be made under oath on the personal knowledge (not information and belief) of the plaintiff or other declarant and should show specific facts which indicate the immediate danger. The mere fact that the defendant has

refused to pay the debt or turn over the goods should not be sufficient to justify issuance of a TRO. Nor should the mere fact that the property is capable of being damaged - such as a car - be enough. The section should set forth certain examples of what is an insufficient showing to give some guidance to the lower courts.

Section 513.020 should specify that the TRO should not have the effect of interrupting the defendants' ordinary course of business. See comment to section 511.050.

Section 514.010(a) appears to give the levying officer an unconstitutional power to search for the specified property. His power to search should be explicitly limited to the place set forth in the writ and within that place only in locations likely to contain the property. For example, if the property is a refrigerator the section should forbid the levying officer from looking through cabinet drawers for it.

In the same manner, section 514.010(c) should specifically limit the levying officer's right to enter to the location specified in the writ.

Section 516.030 should conform to the stricter requirements of a summary judgment affidavit.

Aside from the comments made, the draft claim and delivery law appears to be a well formulated draft. Basically, all it needs is more attention to the effect it will have in the typical consumer collection case. If the statute is to comport with the spirit as well as the letter of the Blair decision, it should assure that the debtor in such cases is given a practical opportunity to present his side of the story at a hearing prior to the seizure of the property. For the reasons stated above, I feel that the draft has not as yet gone far enought in this direction.

Sincerely yours,

Jan T. Chilton

Revised 10/17/72

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE
RECOMMENDATION
*relating to*

THE CLAIM AND DELIVERY STATUTE

October 1972

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

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

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

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE

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 state[1] and federal[2] 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]

### 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 13, 96 Cal. Rptr. 709 (1971); Damazo v. MacIntyre, 26 Cal. App.3d 18, Cal. Rptr. (1972).

2. See, e.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 40 U.S.L.W. 4692 (U.S. Sup. Ct., June 12, 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

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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 sureties[11] 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 claims[13] 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. Shevin[17] invalidated the replevin

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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, , 96 Cal. Rptr. 42, 61-62 (1971).

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

17. 40 U.S.L.W. 4692 (U.S. Sup. Ct., June 12, 1972).

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

Opportunity for preseizure 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 Blair[20] 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.

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18. Id. at .

19. Id. at .

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

However, the United States Supreme Court in Fuentes was more restrictive. There, the Court said:[21]

> 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 Department[22] 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]

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21. 40 U.S.L.W. at

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 , 96 Cal. Rptr. at 723.

24. 5 Cal.3d at 561-562, 488 P.2d at , 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

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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 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

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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 a preliminary hearing.

26. 5 Cal.3d 258, 272-273, 486 P.2d 1242, , 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." [40 U.S.L.W. 4692, 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. Of course, 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

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> 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 96 Cal. Rptr. at 52-53.]

27. 5 Cal.3d at 273-274, 486 P.2d at , 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 which party is entitled to possession pending a final adjudication.[34] If the determination is in favor of the plaintiff, a writ of possession is issued[35] directing the levying officer to seize the property in question.[36] No writ of possession to enter the private permises 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. Ibid.

34. Code Civ. Proc. § 510(e).

35. Ibid.

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]

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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 analysis[41] 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, a claim and delivery law 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 give the plaintiff injunctive relief against the defendant's dealing 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, a rather specific definition of necessities of life would have to be drafted which would apply not only to consumer-type necessities but also, as

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41. See discussion pp. 5-7 supra.

Randone requires, to commercial necessities as well. Second, in each case in which a plaintiff attempts to seize property after an ex parte showing of special circumstances, the creditor would have to be required to make a showing on a fact not normally within his knowledge--that is, whether as to the particular defendant a specific piece of property is a necessity--and the court would have to make a finding on this fact without the views of the defendant being heard. Third, the statute would have to state with some specificity what circumstances are sufficiently special or extraordinary to justify seizure upon ex parte hearing. Here the United States Supreme Court cases, Sniadach 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 repossessing 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

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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, forged, or revoked, 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. The Commission accordingly recommends that these types of property not be given special treatment under the claim and delivery statute.

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

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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. On the other hand, this recommendation does not attempt to state 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.

§ 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.

§ 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 also would not be sold in the ordinary course of business; hence, it does not need to be excepted from the operation of the temporary restraining order. 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.

§ 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.

§ 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. 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.

Comment. Section 512.010 is based on former Section 509. However, Section 512.010 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.

Section 512.010 requires the plaintiff to file a separate application for claim and delivery supported by affidavit or verified complaint. See Section 512.020. Under former law, this was not clear and it appeared that a claim could be made by verified complaint alone. See former Section 510.

### § 512.020. Contents of application

512.020. The application shall be executed under oath and shall include all of the following:

(a) 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.

(b) 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.

(c) A particular description of the property; a statement of its value.

(d) A statement, according to the best knowledge, information, and belief of the plaintiff, of the location of the property, whether the property is within a private place which may have to be entered to take possession, and of the addresses of defendant's residence and place of business, if any.

(e) 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.

(f) The name and address of the person designated by the plaintiff to accept service by mail of papers relating to the action.

Comment. Section 512.020 is based on subdivision (a) of former Section 510. Subdivision (a) 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. Subdivision (a) focuses simply on the ultimate issue of the right to possession.

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

Subdivisions (c) and (d) continue without substantive change the provisions of paragraph (3) of subdivision (a) of former Section 510. Subdivision (d) also adds the requirement that the plaintiff state whether the property is in a "private place." 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, , 96 Cal. Rptr. 42, (1971), to designate those places which may be entered only after the plaintiff has established before a judicial officer that there is probable cause to believe that the property which is the subject of the claim and delivery procedure is located at the place to be entered and that the plaintiff has the right to immediate possession. See Section 512.060(b).

Subdivision (e) continues without substantive change the provisions of paragraph (4) of subdivision (a) of former Section 510.

Subdivision (f) is new and requires the plaintiff to state the address at which the defendant may accomplish service by mail.

The application required by Section 512.020 may, of course, 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 additional requirements where the plaintiff also seeks a temporary restraining order in connection with the application for writ of possession, see Section 513.010.

§ 512.030. Notice to defendant

512.030. No writ shall be issued under this chapter unless, prior to the hearing, the defendant has been 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, together with Section 512.040, replace 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. 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. 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."

(d) The name and address of the person designated by the plaintiff to accept service by mail of papers relating to the action.

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 serve upon the other within the time prescribed by rule any affidavits intended to be introduced at the hearing unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served.

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. At the hearing, the judicial officer shall consider the showing made by the parties appearing and shall issue a writ of possession if he finds all of the following:

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

(b) If the property claimed is within a private place which must be entered to take possession, the plaintiff has established that there is probable cause to believe that the property or some part of it is located there.

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

Comment. Section 512.060 is based on subdivision (e) of former Section 510 and former Section 511. The term "probable validity" used in 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.

Subdivision (c) 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.

§ 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 and specify the location where the property or some part of it may be found.

(c) 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.

(d) 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.

(e) State the name and address of the person designated by the plaintiff to accept service by mail of papers relating to the action.

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 location other than that 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 location.

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) At 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 shall 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 permit the seizure of property upon an ex parte application but merely authorize the issuance of a temporary restraining order. 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, 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.

Note. The ability of the plaintiff to repossess upon an ex parte application has been eliminated in this tentative recommendation in order to keep the statutory procedures as simple as possible and perhaps immune from constitutional attack. See preliminary portion of recommendation. The former provisions for ex parte relief where stolen property is involved seemed to be unnecessary; such property can be either seized under criminal process or dealt with under this provision. The special treatment of credit cards is a 1972 innovation; the Commission queries whether such treatment is justified. Cards which have been stolen, forged, or revoked can, it seems, be dealt with in the same manner as stolen property generally. The Commission does, however, solicit your comments and suggestions concerning the approach taken by this section and the desirability or need for any changes in this approach.

§ 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 the property; but, if the

property is farm products held for sale or lease or is inventory, the order may not prohibit the defendant from dealing with the property in the ordinary course of business.

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

(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. Generally, the temporary restraining order will prohibit transfers of the property in question. However, where the property is farm goods or inventory (defined in Sections 511.040 and 511.050, respectively), the property may be sold in the ordinary course of business. See subdivision (a).

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 issuance of the writ of possession the levying officer shall search for and take custody of the specified property 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 housetrailer, mobilehome, or boat, levy shall be made by placing a keeper in charge of the property, at the plaintiff's expense, for two days after which 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 shall cause any building or enclosure where the property is 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.

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. 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. If no one is in possession of the property at the time of levy, the levying officer shall serve the writ and attached undertaking on the defendant in the manner provided for in this code for the service of summons and complaint.

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.

§ 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 until expiration of the time for filing an undertaking for redelivery and for exception to the

sureties as prescribed in Article 6 (commencing with Section 515.010). He shall then deliver the property to the party entitled to possession upon receiving his fees for taking and his necessary expenses for keeping the property.

(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 in 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 20 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. When 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.

§ 514.060. Order protecting possession

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

Comment. Section 514.060 is identical to former Section 519. See also Phillips Aviation Co. v. Superior Court, 246 Cal. App.2d 46, 54 Cal. Rptr. 415 (1966).

## 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 will 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 no 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.

§ 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 will 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 shall be filed no later than 10 days after levy of the writ of possession. A copy of the undertaking shall be mailed to the plaintiff at his address set out in the order to show cause or writ of possession and an affidavit stating that such copy has 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.

Comment. Section 515.020 is substantively similar to former Section 514. However, Section 515.020 has 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 five 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 plaintiff at his address set out in the order to show cause or writ of possession. An affidavit stating that such copy has 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 defendant at his address set out in the defendant's undertaking. An affidavit stating that such copy has 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 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.

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 201 (1973).

Article 6. Rules; Forms; Affidavits

§ 516.010. Rules for practice and procedure

516.010. Notwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under this chapter.

Comment. Section 516.010 is the same as Civil Code Section 4001 (The Family Law Act).

§ 516.020. Forms

516.020. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this chapter. Any such form prescribed by the Judicial Council is deemed to comply with this chapter.

Comment. Section 516.020 requires the Judicial Council to prescribed the forms necessary for the purposes of this chapter. Various sections prescribe information to be contained in the forms, but the Judicial Council has complete authority to adopt and revise forms as necessary and may require additional information in the forms or may omit information from the forms that it determines is unnecessary.

§ 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.

Sec. 3. (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.

# APPENDIX

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

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; 512.020

(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; § 512.020(a)

(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; § 512.020(b)

(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; § 512.020(c) § 512.020(d)

(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. § 512.020(e)

(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 § 512.030 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;

(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.

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

(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

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(c), 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)

§ 512.080(c)

§ 512.080(d)

(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. — § 515.020(a)

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. — § 515.020(b)

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. — § 515.030(c), (e). 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. — § 515.030(d)

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. — § 515.030(a), (b)

If he fails to do so, he is deemed to have waived all objections to them. — § 515.030(c)

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(d)

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)

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

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.

§ 514.060

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. 3 (effective date 7/1/74)