#39 2/7/72

First Supplement to Memorandum 72-11

Subject: Study 39 - Attachment, Garnishment, Execution (The Claim and Delivery Statute)

About a week ago, I received a telephone call from Mr. Allen M. Garfield concerning the claim and delivery statute. Mr. Garfield reported that he had discussed the need for a claim and delivery statute with Assemblyman Warren. Assemblyman Warren had indicated that he "wanted to see the recommendation of the Law Revision Commission" before he makes any decisions on a claim and delivery statute.

Mr. Garfield has written the attached letter. The letter outlines the procedure now being used, a procedure that, in his opinion, is both ineffective and expensive in terms of time to the courts and parties. Mr. Garfield has attached a proposed claim and delivery statute to his letter. He and other groups hope to get this statute enacted at the current legislative session.

Mr. Garfield wants to have clarified exactly what the Commission is undertaking for the 1972 Legislature and for subsequent sessions. He needs this information so he will not have his proposed legislation rejected--as was the claim and delivery revision last session--on the ground that the Law Revision Commission has the general area under study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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TELEPHONE
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February 2, 1972

California Law Revision Commission
School of Law
Stanford University
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Attention: John DeMoully, Secretary

RE: REVISION OF CLAIM AND DELIVERY STATUTE

Dear Sir:

Mr. Wallace O'Connell, attorney for the Automobile Dealers of Northern California, and I as attorney for the Automotive Leasing Association, have drafted a claim and delivery statute for submission to the Legislature this year. This is to replace C.C.P. 509-521 which was declared unconstitutional by the California Supreme Court in Blair vs. Pitchess. I enclose a copy of this Bill which sets forth the procedure that we are now following in Court under the general equity powers of the court, as there is no statute covering this requirement for claim and delivery.

In California, there are over ten million vehicles registered. Of these, some 5 percent are registered in the names of leasing and rental companies. Under a lease, of course, the leasing or rental company is the registered owner and the lessee or rentee has the right of possession, generally under a written agreement only so long as he pays his rent. In case of default, since an automobile or truck or trailer is a rapidly depreciating piece of personal property, the lessor desires to get his security back at once, and if it is under a conditional sales contract, under the Rees-Levering Act, sell it and hold the buyer for a deficiency. Under a lease the lessor wants to recover the property as quickly as he can and relet it or sell it to mitigate damages.

Since Blair vs. Pitchess, sophisticated lessees, knowing that there is no procedure to secure the property without a court hearing, have locked up the cars in their garage and on private property and tell the repossessor or an agent of the owner or seller to "go jump in the lake".

In order to secure the property, I have innovated a procedure whereby under the general equity

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powers of the courts, a complaint is filed which would be substantially similar to the old complaint and declaration for claim and delivery whereby the plaintiff outlines his right to possession, the written agreement, the default of buyer or lessee, the fact that the buyer or the lessee refuses to surrender the property, and that it is on private property where it cannot be repossessed.

The complaint asks for a preliminary mandatory injunction to issue requiring the buyer or lessee to appear in court on a date specified and show cause if any he has why he should not be ordered to deliver up the car or other personal property to the seller or lessor forthwith. Since there is no law, we have to rely upon the maxim "There is no law without a remedy". Since this is a new procedure, I can tell you thatif it is opposed, we have to show the court that this is the hearing before a seizure can be directed which will comply with Blair vs. Pitchess, being a prejudgment hearing or pre seizure hearing. In San Francisco and Los Angeles and Placer Counties, judges have agreed that this is a procedure which meets the constitutional objections and have been willing to issue a preliminary mandatory injunction if they are satisfied that the defendant is in default and that he has no reason to withhold possession of the car and that under the contract, the vendor or lessor is entitled to possession.

If a preliminary mandatory injunction is issued, then usually the court requires a bond to be filed equal to or in some cases double the value of the property which is to be seized and orders the buyer on being served to forthwith deliver the personal property to plaintiff who is either the seller or lessor.

Even assuming that you get such a preliminary mandatory injunction and you serve it upon the defendant, if he does not comply, the next step is to get an order to show cause re contempt for the defendant to show cause, if any he has, why he should not be held in contempt for failing to obey the order of the court to deliver the property forthwith to the plaintiff. This may, and usually does produce the property, but

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if the defendant, of course, is willing to subject himself to contempt proceedings, this may not regain the property for the plaintiff.

I outline the foregoing to show how cumbersome this procedure is, that you have to have three personal services, (1) of the complaint and order to show cause; (2) of a certified copy of the preliminary mandatory injunction; and (3) an order to show cause. If you cannot serve the defendant, you are just stuck and cannot regain possession of quite often this rapidly depreciating property.

The entire field of commerce and commercial transactions in this state, aside from consumer transactions, depends upon claim and delivery. Purveyors of restaurant equipment, tank cars, tractors, trailers, portable grain storage silos, all types of equipment are sold on either conditional sales or leased whereby the vendor-lessor retains title. In the event of default, the lesser-vendor looks to the security and wants to get his security back to mitigate damages. Without a statute, judges, when faced with a new procedure, have to have presented to them cogent arguments that it is within their general equity powers that the procedure thatI have outlined above is the pre-seizure hearing set forth as a constitutional requirement of Blair vs. Pitchess and that there are adequate safeguards for the rights of the defendant.

The requirements of security agreements under the Commercial Code, in particular, Section 9503 allowing the secured party to take possession on default is meaningless if there is no remedy which allows him to do so, where the debtor or lessee refuses to surrender possession.

Not having a statute of uniform application in this state requires the plaintiff's attorney in each case to convince the court that this is a valid procedure, that it complies with Blair vs. Pitchess, that it gives the procedural due process to the debtor or lessee, and even assuming that all that can be done, the order to show cause in the procedure which

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is enforceable by contempt may not, in the case of a recalcitrant debtor or lessee, recover the security for the creditor. Needless to say, those of us who are engaged in commercial law keenly miss having a statute that we can refer to and that we can refer the courts to when this situation arises.

You were kind enough to inform me in my telephone call to you that presently the California Law Revision Commission is not contemplating a revision of the Claim and Delivery Statute C.C.P. 509-521. If this be the intention as determined at your meeting this month, I would appreciate a letter from you to this effect.

Yours very truly,

ALLEN M. GARFIELD

AMG/es

cc: Wallace O'Connell

Allen M. Garfield
Jan. 18, 1972

PROPOSED AMENDMENTS TO TITLE VII, CHAPTER 2, OF THE CODE OF CIVIL PROCEDURE

CHAPTER 2
CLAIM AND DELIVERY - PRE-JUDGMENT REPLEVIN

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

§ 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:

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. If plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached;
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;

3. A particular description of the property, a statement of its actual value, and a statement of his best knowledge, information, and belief concerning the location of the property and of the residence and business address, if any, of the defendant;

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

(b) The judge of the court shall, without delay, examine the complaint and affidavit or declaration, and if he is satisfied that the same meet the requirements of § 510 (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 thereof, which shall be no earlier than ten 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 § 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 of the same shall be accomplished, which shall be by personal service, or in accordance with the provisions of § 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.

(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:

1. The defendant gained possession of the property by theft, as defined by any section of Title 13, of Part I, of the Penal Code, commencing with § 459;
2. The property is one or more negotiable instruments or credit cards;
3. The defendant is not a resident of this

state and the jurisdiction of the courts of this state rests solely on the location of the property within this state;

4. By reason of specific competent evidence shown, the property is perishable or is in immediate danger of destruction, serious harm, concealment, or removal from this state, or sale to an innocent purchaser.

In such case, the writ of possession shall direct the levying officer to retain possession of the property until further order of the court after hearing of the order to show cause. If the property is perishable, the levying officer must sell the same in the manner in which such property is sold on execution.

(d) Upon hearing the order to show cause, the court shall consider the showing made by the parties appearing, and shall make preliminary determination whether the action is one in which a pre-judgment writ of possession should issue. If it so determines, it shall direct the issuance of such writ.

(e) Upon hearing of the order to show cause, in lieu of issuance of a writ of possession, the court may make such protective or other orders, including the

appointment of a receiver, the issue of injunctive orders to either party, or the requirement of a written undertaking as a condition of stay of issuance of such writ, or may otherwise condition the issuance of such writ upon the performance of such acts by either party as it may determine to be just in the circumstances of the case, provided that all such judicial action shall be preliminary to the final determination at trial of the rights of the parties to the property.

§ 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.

(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 adjudged, and for the payment to him of any sum as may from any cause be recovered against the plaintiff.

§ 512. 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 competent 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 § 514.

Upon probable cause shown by further affidavit or declaration by plaintiff or someone on his behalf, filed with the court, or by other evidence, a writ of possession theretofore issued 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.

§ 513. The levying officer must forthwith take the property, if it be in the possession of the defendant or his agent, and retain it in his custody, provided that, when the property is used as a dwelling, such as a house trailer, mobile-home, or boat, the same shall be taken by placing a keeper in charge of the property, at plaintiff's expense, for at least two days. At the expiration of said period, the officer shall remove its occupants and take the property into his immediate custody.

If the property or any part thereof is in a building or enclosure, the levying officer must publicly 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 his 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.

The levying officer must, 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 putting them in the post office directed to the defendant.

§ 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 adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or his attorney, in the manner provided by § 1011, a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing of the order to show cause, proceedings thereunder shall terminate, unless exception is taken to such sureties. If, at the time of filing of such undertaking, the property shall be in the custody of the levying officer, such property shall be redelivered to the defendant two days after service of notice of filing such undertaking upon the plaintiff or his attorney.

§ 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 arrest. Either party may, within two days after service of an undertaking or notice of filing an undertaking under the provisions of this chapter, give written notice to the court and the other party that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When a party excepts, the other party's sureties must justify on notice within not less than two, nor more than five days, in like manner as upon bail on arrest. 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.

§ 516. When the levying officer has taken property as in this chapter provided, he must 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.

§ 517. In cases where the property taken is

claimed by any other person 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.

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

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

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