#39.90 8/14/72

Memorandum 72-56

Subject: Study 39.90 - Attachment, Garnishment, Execution (Judicial Repossession)

Attached to this memorandum are a tentative recommendation and a background study prepared by Professor Warren relating to judicial repossession (claim and delivery). It is our hope that the tentative recommendation can be approved with any necessary revisions for distribution for comment after the September 1972 meeting.

You will note that the tentative recommendation assumes that AB 1623 (Warren) will have been enacted by the time our recommendation is presented to the Legislature. As of July 25, 1972, AB 1623 in the form we have used had passed the Assembly and had been reported out by the Senate Judiciary Committee with a "do pass" recommendation. Our best guess is that AB 1623 will be enacted without further significant change. It should be noted, however, that the bill has an expiration date of December 31, 1975. This provision could be repealed by itself, leaving the other provisions intact; but at least some legislation relating to judicial repossession must be enacted before the end of 1975.

Included with the tentative recommendation is an appendix which sets forth the text of Chapter 2 (Claim and Delivery of Personal Property) as added by AB 1623 together with the disposition of its provisions in the tentative recommendation. The major change from AB 1623 is the elimination of repossession upon an ex parte application. This change and the reasons therefor are discussed at length in the background study and the preliminary

portion of the recommendation. The other changes are relatively minor and are discussed briefly in the Comments to each section. We have, however, eliminated one section (Section 520) without explanation. Section 520 provides:

> 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.

Our recollection is that in the past the Commission has looked with disfavor on comparable provisions which grant a preference to certain proceedings. Section 520 is a new provision added by AB 1623--that is, proceedings under the claim and delivery chapter were not accorded a preference prior to 1972. We have therefore eliminated the preference here; you may restore the AB 1623 provision if you wish.

With this exception, we believe the tentative recommendation is self-explanatory. We have sent you two copies so that you may mark any editorial revisions on one copy to be turned in to the staff at the September meeting.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

#39.90 August 15, 1972

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE
RECOMMENDATION
relating to

PREJUDGMENT REMEDIES

Judicial Repossession

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.

possession of the property.[4] The remedy was readily available in all state courts. The plaintiff, after filing 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 merely 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. 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 inclosure.[9] At the time of seizure, the defendant was

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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).

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).

served with copies of the plaintiff's affidavit, notice, and undertaking.[10] If the defendant sought to retain 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, 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."[15] Blair was a logical extension of Sniadach v. Family Finance Corp., 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."[16] This extension was

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

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).

confirmed in June 1972 when the United State Supreme Court in Fuentes v. Shevin[17] invalidated the replevin laws of Florida and Pennsylvania which also authorized the summary seizure of property without an opportunity for preseizure hearing. The Court said:[18]

> 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.

Blair also decided that proceedings under claim and delivery provisions raised Fourth Amendment problems and "that the official instrusions authorized by section 517 are unreasonable searches and seizures unless probable cause be first shown."[20] It would appear, therefore, that, in order to meet the constitutional test prescribed in these decisions, a claim and delivery

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

18. Id. at .

19. Id. at .

20. 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." n.32.

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 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.]

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

> 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. [5 Cal.3d at 273-274, 486 P.2d at , 96 Cal. Rptr. at 53.]

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.

Without an extended discussion of the point, it seems clear that, 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 seems to be what Fuentes is saying and is what is provided for by 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 certain described goods. No search or seizure problem is raised by such an order.

statute must deal with both the Fourth Amendment search and seizure issue raised by Blair and the prejudgment due process hearing prescribed in Fuentes and Blair.[21]

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21. Eight weeks after Blair was decided, the California Supreme Court invalidated portions of the California attachment statute in Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). In that decision, the court introduced the concept that property classified as a debtor's necessities of life is entitled to special protection, at least before judgment. The court said:

> 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 minimun, 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. [5 Cal.3d at 561-562, 488 P.2d at , 96 Cal. Rptr. at 726. Emphasis in original.]

The Commission believes that the claim and delivery procedure provided by this recommendation 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

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.[22] This legislation is operative only until December 31, 1975,[23] and attempts to provide a constitutional 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,[24] a plaintiff may make a showing to the court in

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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, 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 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 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.

22. See Cal. Stats. 1972, Ch. (AB 1623).

23. Code Civ. Proc. § 521.

24. Code Civ. Proc. § 509.

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.[25] 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.[26] 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.[27] At the hearing, the court is required to make a preliminary determination which party is entitled to possession pending a final adjudication.[28] If the determination is in favor of the plaintiff, a writ of possession is issued[29] directing the levying officer to seize the property in question.[30] No writ of possession to enter the private premises of any person may be issued without a prior judicial determination that there is probable cause to believe the property is located there.[31] The provisions relating to the levy, the redelivery of the property to the defendant if he posts security, the qualification and justification of sureties, the claims of third persons, and the delivery and possession of the property pending final adjudication

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25. Code Civ. Proc. § 510(a).

26. Code Civ. Proc. § 510(b).

27. Ibid.

28. Code Civ. Proc. § 510(e).

29. Ibid.

30. Code Civ. Proc. § 512.

31. Code Civ. Proc. § 511(a).

are virtually identical to former law.[32]

If the new statute did no more than is described above, there would be little room for criticism. However, the statute also provides that the court may issue a writ of possession without notice or a hearing:[33]

> 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 court must, in addition, be "satisfied" that the plaintiff is entitled to possession, but the fact remains that this procedure is entirely ex parte.

The California Supreme Court in Blair stated:[34]

> 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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32. 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

33. Code Civ. Proc. § 510(c).

34. 5 Cal.3d at 278, 486 P.2d at , 96 Cal. Rptr. .

However, the United States Supreme Court in Fuentes was more restrictive. There, the Court said:[35]

> 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 his showing special circumstances at an ex parte hearing might 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[36] has posed serious if not insurmountable 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."[37]

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,[38] it is

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35. 40 U.S.L.W. at .

36. 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

37. 5 Cal.3d at 556 n.19, 488 P.2d at , 96 Cal. Rptr. at 723.

38. See discussion in note 21 supra.

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. When a defendant has an opportunity to be heard before property in his possession is taken by one claiming an interest in it, he at least has a chance to show the probable existence of a defense and the courts can be expected to be circumspect in taking property away from a defendant which can be shown to be necessary for the support of him and his family when the defendant can show some probability that he has a defense. On the other hand, if the plaintiff is allowed to seize the defendant's necessities on claim and delivery after only an ex parte hearing, the defendant has no opportunity prior to seizure to raise either the issue of the status of the property as a necessity or the likelihood that he has a defense to the plaintiff's claim.

The Randone doctrine which prohibits an attaching plaintiff from seizing necessities upon an ex parte hearing would, therefore, seem to apply with equal validity to claim and delivery in this respect so as to prevent seizure upon an ex parte hearing of necessities even though extraordinary circumstances are shown. If an attaching creditor cannot take, upon a showing of special 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.

If this analysis of the applicability of the Randone necessities doctrine to claim and delivery is correct, one of two policy decisions must be made in preparing a statute. Either a claim and delivery law must 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, to prohibit the seizure of that property, even though special circumstances are shown, until the defendant can be given a hearing; or the statute must not allow for the seizure of any property on ex parte hearing but may give plaintiffs 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 Randone requires, to commercial necessities as well. Second, in each case in which a plaintiff attempted 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 ken--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 so formidable 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 turns out to be necessities, 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 he gets 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 near-insoluble 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. 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

issue of the plaintiff's right to repossess will only become another step in that process. A brief delay of a week or two will rarely 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, a restraining order punishable by contempt can be quickly 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.

PROPOSED LEGISLATION

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

An act to add Title 6.6 (commencing with Section 511.010) to Part 2 of, and to repeal Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of, the Code of Civil Procedure, relating to claim and delivery.

Section 1. Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of the Code of Civil Procedure is repealed.

Note. The text of the repealed sections and their present disposition is set out in the Appendix, infra at (pink).

Sec. . Title 6.6 (commencing with Section 511.010) is added to Part 2 of the Code of Civil Procedure, to read:

Title 6.6. Claim and Delivery of Personal Property

CHAPTER 1. WORDS AND PHRASES DEFINED

§ 511.010. Application of definitions

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

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

Additional definitions are found in the preliminary provisions of the Code of Civil Procedure. E.g., Section 17 provides "the singular number includes the plural and the plural the singular" and "the word 'sheriff' shall include 'constable' and 'marshal.'"

§ 511.020. Complaint

511.020. "Complaint" includes cross-complaint.

§ 511.030. Defendant

511.030. "Defendant" includes a cross-defendant.

§ 511.040. Farm products

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

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

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

Inventory is defined by Section 511.050. A definition of "equipment" is unnecessary. Farm products and inventory are defined only because the terms are used in connection with provisions which permit sale of such property in the ordinary course of business despite the issuance of a temporary restraining order. See Section 514.020. 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 [or if it is raw materials, work in process, or materials used or consumed in his business].

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.

Note. The staff suggests that we also delete "raw materials, work in process, or materials used or consumed in" the defendant's business. This property would also 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 514.020 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 title.

§ 511.070. Person

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

§ 511.080. Plaintiff

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

§ 511.090. Probable validity

511.090. 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.

§ 511.100. Public entity

511.100. "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 511.100 adopts the language of the definition found in Section 811.2 of the Government Code.

CHAPTER 2. GENERAL PROVISIONS

§ 512.010. Exclusive procedure for claim and delivery of personal property

512.010. The plaintiff in an action to recover the possession of personal property may claim the delivery of such property only as provided in this title.

Comment.

Note. Is this section advisable? Does it put a cloud on self-help? Does it conflict with any other special provisions?

§ 512.020. Rules for practice and procedure

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

Comment. Section 512.020 is the same as Civil Code Section 4001 (The Family Law Act).

§ 512.030. Forms

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

Comment. Section 512.030 requires the Judicial Council to prescribe the forms necessary for the purposes of this title. 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.

§ 512.040. General requirements for affidavits

512.040. 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 knowlege of the facts.

Comment. Section 512.040 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 Section 512.040 may be used in lieu of or in addition to an ordinary affidavit.

CHAPTER 3. NOTICED HEARING PROCEDURE FOR OBTAINING WRIT OF POSSESSION

§ 513.010. Application for writ of possession

513.010. 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 an application for such writ with the court in which the action is brought.

Comment. Section 513.010 is based on former Section 509. Section 509 provided:

> 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.

Section 513.010 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, of course, enforce his judgment by writ of execution. See Section 684.

Section 513.010 requires the plaintiff to file a separate application for claim and delivery supported by affidavit or verified complaint. See Sections 513.020 and 513.030. Under former law, this was not clear and it appeared that a claim could be made by verified complaint alone. See former Section 510.

§ 513.020. Contents of application

513.020. 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 actual value; 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.

(d) 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.

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

Comment. Section 513.020 is based on subdivision (a) of former Section 510. That subdivision provided:

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; and 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 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;

(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.

* * * *

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.

Subdivision (c) continues without substantive change the provisions of paragraph (3) of subdivision (a) of former Section 510 and 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, 96 Cal. Rptr. 42, , 486 P.2d 1242, (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 513.050(c).

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

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

The application required by Section 513.020 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 514.010.

Note. Should we require a memorandum of points and authorities? Compare Section 527 (preliminary injunction).

§ 513.030. Order to show cause

513.030. (a) A judicial officer shall, without delay, examine the application for writ of possession and, if satisfied that the application meets the requirements of Section 513.020 and that the action is one in which claim and delivery is authorized under the provisions of this title, shall issue an order directed to the defendant to show cause why a writ of possession should not be issued.

(b) The order shall set the date and time for a hearing on the application which shall be no sooner than ten (10) days from the issuance of the order and shall direct the time within which service of the order shall be made on the defendant. The 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 judicial officer may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the pleadings and other papers on file in the action. The order shall be accompanied by a copy of the application for hearing, a copy of any affidavits filed in support thereof, and, if not previously served, a copy of the summons and complaint.

(c) The order shall inform the defendant that, if he wishes to oppose issuance of the writ of possession, he may either (1) file an affidavit with the court providing evidence sufficient to defeat the plaintiff's right to issuance of the writ, (2) appear at the hearing in person or through his attorney and present oral or documentary evidence in his behalf, or (3) file with the court an undertaking to stay the delivery of the property in accordance with Section 516.020. [Each

party shall serve upon the other at least twenty-four (24) hours before the hearing 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.]

(d) The order 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."

(e) The order shall inform the defendant of the name and address of the person designated by the plaintiff to accept service by mail of papers relating to the action.

Comment. Section 513.030 is based on subdivision (b) of former Section 510. That subdivision provided:

> 510. . . .(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.

Subdivision (a) of Section 513.030 is substantively the same as the first sentence of subdivision (b) of former Section 510. The order to show cause in this context has the same purpose and effect as a notice of motion. See 4 B. Witkin, California Procedure, Proceedings Without Trial § 30 at pages 2697-2698. Where the defendant has appeared in the action, the order may accordingly be served upon his attorney.

Subdivision (b) of Section 513.020 is substantively the same as the second and fourth sentences of subdivision (b) of former Section 510.

Subdivision (c) is substantively the same as the third sentence of subdivision (b) of former Section 510.

Subdivisions (d) and (e) are new.

Note. To what extent should we attempt to limit opposition by the defendant? Should we impose a prerequisite of counteraffidavits? Is the 24-hour service of affidavits requirement set out in brackets in subdivision (c) realistic in view of the short period? Presumably the court would be tolerant of debtor affidavits introduced at the hearing; hence, the principal function of the 24-hour requirement would be merely to push the parties toward getting their affidavits in a little ahead of the hearing rather than actually keeping much of anything out. If this is so, is this provision which is taken from S.B. 1048 worth keeping? Certainly in the ordinary repossession of consumer goods affidavits are less likely to be used than in commercial attachment cases.

Subdivision (d) is perhaps superfluous. A similar statement is included in the summons which will either have been served earlier or contemporaneously with this order.

§ 513.040. Hearing

513.040. At the hearing on the order to show cause, the judicial officer shall determine whether the plaintiff is entitled to a writ of possession. His determination shall be made on the basis of the pleadings and other papers on file in the action, and any additional evidence, oral or documentary, produced at the hearing. If the judicial officer finds that it would be inequitable to determine the issue on the basis of this evidence, he shall continue the hearing for the production of additional evidence, oral or documentary, or the filing of other affidavits or counteraffidavits. In this case, he shall hear and determine the issue at the earliest possible time.

Comment. There is no precise counterpart to Section 513.040 under former law. Its directions were implicit, however, in subdivision (e) of former Section 510 and subdivision (a) of former Section 511. See Comment to Section 513.050.

§ 513.050. Issuance of the writ of possession

513.050. The judicial officer shall issue a writ of possession if he finds all of the following:

(a) The action is one in which claim and delivery is authorized;

(b) The plaintiff has established the probable validity of his claim;

(c) 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; and

(d) The plaintiff has provided an undertaking as required by Section 516.010.

Comment. Section 513.050 is based on subdivision (e) of former Section 510 and former Section 511. Those sections provided:

> 510. . . . (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.
>
> 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 ordered, and for the payment to him of any sum as may from any cause be recovered against the plaintiff.

The term "probable validity" used in subdivision (b) is defined in Section 511.090. The burden of proof lies 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.

Subdivision (d) simply requires the plaintiff to file an undertaking as provided by Section 516.010. The detail provided by subdivision (b) of former Section 511 is now provided by Section 516.010.

Note. The thrust of this section (and the entire title) is that the plaintiff is entitled to a writ of possession as a matter of right if he establishes the probable validity of his claim. The Commission might consider introducing equitable concepts into this procedure where there is no threat of loss or depreciation in value other than that caused by the passage of time. The staff (and Professor Warren) does not believe that the issue of necessities is a viable one here. That is, the mere fact that the property is a "necessity of life" does not entitle the defendant to keep it where probable validity is established. Pending a final determination, the plaintiff (who has shown probable validity and who must post a bond) has at least as much right to possession as the defendant. Nevertheless, where necessities are involved, the statute might authorize the judicial officer to apply some sort of balancing test, weigh the respective hardships to both sides, and so on.

§ 513.060. Writ of possession

513.060. The writ of possession shall

(a) Be directed to the sheriff 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 sheriff to levy on the property pursuant to Section 515.010 if found and to retain it in his custody;

(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 516.020; and

(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 513.060 is substantively the same as subdivision (a) of former Section 512. That subdivision provided:

> 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.

§ 513.070. Indorsement of writ

513.070. (a) The plaintiff may apply ex parte to the court in which the action was brought for an indorsement on the writ directing the sheriff 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 that there is probable cause to believe that the property may be found at that location.

Comment. Section 513.070 is based on subdivision (b) of former Section 512. That subdivision provided:

> 512. . . . (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.

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

513.080. Neither the failure of the defendant to oppose the issuance of a right to attach order under this chapter nor the defendant's 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.

§ 513.090. Effect of determinations of judicial officer

513.090. 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 title, nor shall they affect the parties' rights in any other action arising out of the same claim. The determinations of the judicial officer under this article shall not be given in evidence nor referred to in the trial of any such action.

Comment. Section 513.090 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 parties' rights in any other actions. Section 513.090 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.

CHAPTER 4. ISSUANCE OF TEMPORARY RESTRAINING ORDER

§ 514.010. Issuance of temporary restraining order

514.010. (a) A plaintiff may apply for a temporary restraining order by setting forth in the application for writ of possession a statement of grounds justifying the order.

(b) The judicial officer who issues the order to show cause shall issue a temporary restraining order pursuant to this chapter 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) The temporary restraining order shall be served on the defendant with the order to show cause as prescribed in subdivision (b) of Section 513.030.

(d) If at the hearing on issuance of the writ of possession the court determines that the plaintiff is not entitled to a writ of possession, it shall dissolve any temporary restraining order; otherwise, the order shall remain in effect until the property claimed is seized pursuant to the writ of possession.

Comment. Section 514.010 replaces subdivisions (c) and (d) of former Section 510. Those subdivisions provided:

> 510. . . .(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 (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.

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.

(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.

* * * * *

In contrast to prior law, Section 514.010 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 subdivision (c) of former Section 510. However, the specific grounds formerly stated in paragraphs (1) and (2) seem unnecessary and have been deleted.

Because the limitations imposed on the defendant by the order (see Section 514.020) are substantially less drastic than outright seizure, the former special provisions for shortening the time for a hearing have been eliminated.

Note. The staff directs your attention to two issues in particular. As the Comment above notes, the ability of the plaintiff to repossess upon an ex parte application has been eliminated completely regardless of the circumstances. Professor Warren has recommended this approach in order to keep the statutory procedures simple and immune from constitutional attack. Whether this approach will be accepted by the creditors is problematical; however, if the approach recommends itself to the Commission, it does seem desirable to present it in the tentative recommendation and invite comment on this issue.

In place of outright seizure, the statute authorizes issuance of an ex parte temporary restraining order. In general, the order prohibits transfers of the property in question but, where the property is farm goods or inventory, the defendant is permitted to sell the property in the ordinary course of business. See Section 514.020(a). It can be argued that, where the property is inventory, the plaintiff has placed the property in the defendant's hands with the expectation, indeed with the desire, that it will be sold. Therefore, if the property is sold in the ordinary course of business, he should not be heard to complain. The question, however, is whether the situation is sufficiently altered where the defendant is allegedly in default. In this situation, is the plaintiff adequately protected by the order and his rights in the proceeds? Again, we can present this issue in the tentative recommendation and invite comment, but the staff has some concern with the liberality of this provision.

§ 514.020. Provisions of temporary restraining order

514.020. In the discretion of the court, the temporary restraining order may prohibit the defendant from:

(a) Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of the property; provided, however, if the property is inventory or farm products held for sale or lease, the order shall not prohibit the defendant from dealing with the property in the ordinary course of business; without limiting the generality of the phrase "ordinary course of business," the sale of inventory or farm products for antecedent consideration shall not be considered to be in the ordinary course of business within the meaning of this subdivision;

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

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

Comment. Section 514.020 provides some specificity with respect to the nature of the temporary restraining order authorized by Section 514.010. Compare subdivision (d) of former Section 510 set forth in the Comment to Section 514.010. 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.

CHAPTER 5. LEVY AND CUSTODY

§ 515.010. Levy

515.010. (a) Except as otherwise provided in this section, upon issuance of the writ of possession the sheriff shall search for and take custody of the specified property either by removing the property to a place of safekeeping or, upon good cause shown, 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 sheriff shall remove the occupants and contents and shall take exclusive possession of the property.

(c) If the specified property or any part of it is in a private place, the sheriff shall at the time he demands possession of the property announce his identity, purpose, and authority. If the property is not voluntarily delivered, the sheriff 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; provided, that 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 immediately make a return to the court from which the writ issued setting forth the reasons for his belief that the risk exists. In this case, the court shall make such orders and decrees as may be appropriate.

Comment. Section 515.010 is substantively the same as the first two paragraphs of former Section 513. Those paragraphs provided:

> 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.
>
> 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.

§ 515.020. Service of writ of possession

515.020. At the time of levy, the sheriff 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 sheriff 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 515.020 is similar in effect to the last paragraph of former Section 513. That paragraph provided:

> 513. . . .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.

Section 515.020 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 513.030. Section 515.020 does require service of the writ of possession on the defendant in the manner provided by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part.

Note. If, as seems likely, claim and delivery comes to be the only method by which a creditor can repossess without the consent of a debtor in California, the procedure should be made as simple as possible. Maybe it is better in theory to say that if the person in possession isn't either the debtor or one authorized by him to have possession the plaintiff should serve a copy of the writ on the defendant instead of serving the possessor of the property, but this would get complicated in practice because the levying officer would never be sure who the person in possession is and what his relationship to the plaintiff is. Less attractive in theory but more simple is a procedure by which the levying officer can always serve the writ on the person in possession and if no one is in possession then he can serve the defendant. After all the defendant has presumably already received the complaint and notice of hearing and has had an opportunity to be heard; if his property is in the hands of someone else when it is taken this person is very likely to give defendant the writ or that the defendant will ask for it.

§ 515.030. Custody of levying officer

515.030. After the sheriff 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 Chapter 6 (commencing with Section 516.010). 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.

Comment. Section 515.030 is based on former Section 516. Section 516 provided:

> 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.

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

§ 515.040. Return

515.040. The sheriff shall return the writ of possession, with his proceedings thereon, to the court in which the action is pending within twenty (20) days after levy but in no event more than sixty (60) days after the writ is issued.

Comment. Section 515.040 is substantively similar to former Section 518. Section 518 provided:

> 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.

Section 515.040 has 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.

Note. The staff has revised Section 515.040 to cure an apparent defect in the law. The present attachment statute accomplishes the same result in the following manner.

> 559. . . . The writ of attachment must be returned forthwith after levy . . . , but in no event later than 30 days after its receipt [by the sheriff] . . . .

§ 515.050. Third-party claims

515.050. 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 515.050 is substantively identical to former Section 517. Section 517 provided:

> 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.

§ 515.060. Order protecting possession

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

Comment. Section 515.060 is identical to former Section 519. See also Phillips Aviation Co. v. Superior Court, 246 Cal. App.2d 46, 54 Cal. Rptr. 415 (1966).

CHAPTER 6. UNDERTAKINGS

§ 516.010. Plaintiff's undertaking

516.010. (a) The court shall not issue a writ of possession until the plaintiff has filed with the court a written undertaking executed by two or more sufficient sureties in an amount no less that twice the value of the property as determined by the court which states 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 which he may sustain by reason of the restraining order or loss of possession of the property not exceeding the amount of the undertaking.

(b) The damages recoverable by the defendant pursuant to this section shall include all damages proximately caused by operation of the restraining order or levy of the writ of possession.

Comment. Section 516.010 is substantively similar to subdivision (b) of former Section 511. Subdivision (b) provided:

> 511. . . . (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.

See also Comment to Section 513.050.

§ 516.020. Defendant's undertaking

516.020. (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 the amount of the plaintiff's undertaking required by Section 516.010 which states 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 ten (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 516.020 is substantively similar to former Section 514. However, Section 516.020 has been revised to reflect the fact that possession upon ex parte application is no longer permitted. Section 514 provided:

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

Note. The staff has not attempted to make any substantial revisions in the undertaking provisions. The Commission might, however, consider whether both parties might be compelled to have all matters related to undertakings be combined with the order to show cause. That is, the plaintiff in all cases and the defendant, if he chooses to post an undertaking at all, could be required to post the same a sufficient period of time before the hearing to permit exceptions to be made and heard at that hearing. If the exceptions were sustained, new sureties would have to be submitted at a later time, but we suspect that this is a rather rare occurrence. There are problems in such an approach. For one, the time interval is so short that the defendant might be hard pressed to meet the

requirement. Moreover, the filing of an undertaking by the defendant would, as a practical matter, probably prejudice the rulings on his objections, if any, to the plaintiff's claim and even to the exceptions to the plaintiff's sureties. The basic question is whether the possible savings in judicial administration is worth the probable detriment to the defendant's rights.

§ 516.030. Exception to sureties

516.030. (a) The defendant may except to the plaintiff's sureties not later than five (5) 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 ten (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 [or clerk] 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 writ of possession and, if levy has occurred, order the sheriff 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 sheriff to deliver the property to the plaintiff.

Comment. Section 516.030 is substantively similar to former Section 515. Section 515 provided:

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

Section 516.030 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).

Sec. . (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 its effective date, 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 January 1, 1974.

APPENDIX

CODE OF CIVIL PROCEDURE SECTIONS 509-521
(as proposed by 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. § 513.010

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: § 513.020

(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; § 513.020(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; § 513.020(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; § 513.020(c)

(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. § 513.020(d)

(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.

§ 513.030(a)

§ 513.030(b)

§ 513.030(c)

§ 513.030(b)

(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

(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 § 514.010(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.

§§ 514.010, 514.020

(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.

§§ 513.040; 513.050(a), (b)

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.

§ 513.050(c)

(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.

§§ 513.050(d), 516.010

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.

§ 513.060(a)

§ 513.060(b)

§ 513.060(c)

§ 513.060(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.

§ 513.070

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.

§ 515.010(a)

§ 515.010(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.

§ 515.010(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. § 515.020

514. At any time prior to the hearing of the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking executed by two or more sufficient sureties, approved by the court, to the effect that they are bound in double value of the property, as stated in the verified complaint, affidavit, or declaration of the plaintiff, or as determined by the court for the delivery thereof to the plaintiff, if such delivery be ordered, and for the payment to him of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or his attorney, in the manner provided by Section 1011, a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing of the order to show cause, proceedings thereunder shall terminate, unless exception is taken to such sureties. If, at the time of filing of such undertaking, the property shall be in the custody of the levying officer, such property shall be redelivered to the defendant five days after service of notice of filing such undertaking upon the plaintiff or his attorney. § 516.020(a)

§ 516.020(b)

§ 516.030(c), (e). See also § 515.030.

515. The qualification of sureties under any written undertaking referred to in this chapter shall be such as are prescribed by this code, in respect to bail upon an order of civil arrest. Either party may, within two days after service of an undertaking or notice of filing an undertaking under the provisions of this chapter, give written notice to the court and the other party that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. § 516.030(d)

§ 516.030(a), (b)

§ 516.030(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. 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. § 516.030(d) § 516.030(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. § 515.030

517. In cases where the property taken is claimed by any person other than the defendant or his agent, the rules and proceedings applicable in cases of third party claims after levy under execution or attachment shall apply. § 515.050

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. § 515.040

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. § 515.060

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 7/1/74)

#39.90 July 31, 1972

BACKGROUND STUDY

relating to

JUDICIAL REPOSSESSION

Prepared for

California Law Revision Commission

by

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A PROPOSED CLAIM AND DELIVERY STATUTE

A Proposed Claim and Delivery Statute

I. Introduction

In Blair v. Pitchess, 96 Cal. Rptr. 42 (1971), the California Supreme Court declared the claim and delivery provisions of CCP sections 509 et seq. 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." 96 Cal. Rptr. at 61-62. Blair was a logical extension of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), 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." 395 U.S. at 339. Furthermore, Blair decided that proceedings under claim and delivery provisions raised Fourth Amendment problems and "that the official instrusions authorized by section 517 are unreasonable searches and seizures unless probable cause be first shown." 96 Cal. Rptr. at 52.

A few weeks after Blair came down, the California Supreme Court invalidated portions of the attachment law in a far-reaching opinion, Randone v. Superior Court of Sacramento County, 96 Cal. Rptr. 709 (1971). In that landmark decision the court introduced the concept that property classified as

necessities of life for the debtor is entitled to special protection, at least before judgment. The court said:

> "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." 96 Cal. Rptr. at 726. [Emphasis in original.]

In June, 1972, the United States Supreme Court in Fuentes v. Shevin, invalidated the replevin laws of Florida and

Pennsylvania which authorized the summary seizure of property without an opportunity for preseizure hearing. 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:

> "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."

It would appear that in order to meet the constitutional test prescribed in these decisions, a claim and delivery statute must not only deal with the Fourth Amendment search and seizure issue raised by Blair and with the prejudgment due process hearing prescribed in Fuentes and Blair but also it must assure debtors adequate protection of their necessities of life as required by Randone.

II. Due Process Hearing

A. The Necessities Problem

Does Randone require that a claim and delivery statute bar prejudgment seizure of property classified as necessities of life until actual rather than probable validity of the plaintiff's claim is established? The claim and delivery process is sufficiently distinguishable from the attachment procedure considered in Randone to justify a negative reply to this question.

Blair, decided two months before Randone, makes no reference to the necessities concept in holding the California claim

and delivery statute unconstitutional. Fuentes speaks of necessities of life, but it decides an issue different from that asked in the prior paragraph in that it puts to rest a narrow interpretation of Sniadach which would restrict the ambit of that case to requiring preseizure hearings only for property classified as "absolute necessities of life" like wages. The Court said in Fuentes:

> "Nevertheless, the district courts rejected the appellants' constitutional claim on the ground that the goods seized from them--a stove, a stereo, a table, a bed, and so forth--were not deserving of due process protection, since they were not absolute necessities of life. The courts based this holding on a very narrow reading of Sniadach v. Family Finance Corp., supra, and Goldberg v. Kelly, supra, in which this Court held that the Constitution requires a hearing before prejudgment wage garnishment and before the termination of certain welfare benefits. They reasoned that Sniadach and Goldberg, as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically 'necessary' items as wages and welfare benefits.
>
> "This reading of Sniadach and Goldberg reflects the premise that those cases marked a radical

departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect. E.g., Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153; United States v. Illinois Cent. R. Co., 291 U.S. 457, 463; Southern Ry. Co. v. Virginia, 290 U.S. 190; Londoner v. City & County of Denver, 210 U.S. 373; Central of Georgia v. Wright, 307 U.S. 127; Security Trust Co. v. Lexington, 203 U.S. 323; Hibben v. Smith, 191 U.S. 310; Glidden v. Harrington, 189 U.S. 255. In none of those cases did the Court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine."

But in holding that due process requires a hearing on the issue of the probable validity of the plaintiff's claim before seizure, whatever the nature of the property, the Court is not necessarily contradicting the Randone interpretation of the California due

process clause which is held to set higher standards of procedural safeguards in proceedings affecting necessities. In fact, Fuentes cites Randone favorably in footnote 19.

Though Randone concerned attachment, Justice Tobriner's necessities doctrine is broadly stated and must be faced in dealing with any prejudgment seizure remedy. At least with respect to attachment, as previously stated, this doctrine dictates that the plaintiff must leave in the defendant's possession property necessary to allow the defendant to support himself and his family until the actual as opposed to the probable validity of creditor's claim is established. This language virtually requires a trial on the merits of the plaintiff's claim before he can attach necessities. Presumably, the necessities doctrine would be applied by the California Supreme Court to claim and delivery as well unless there is some demonstrable functional distinction between attachment and claim and delivery.

Take three kinds of cases in which claim and delivery is commonly used. In each case assume that defendant uses a moderately priced refrigerator in his home and that a court would classify the refrigerator as a necessity of life in Randone terms.

Case 1. Plaintiff, an appliance dealer, sold the refrigerator to the defendant on instalment contract, reserving a perfected security interest for the unpaid balance of the price.

Defendant is clearly in default on three monthly payments and plaintiff concludes that defendant will not be able to complete his contract and that he must repossess the goods by the use of claim and delivery.

Case 2. Plaintiff, a small loan company, made a $400 loan to defendant and took a perfected security interest in all of defendant's household goods, including the refrigerator. Defendant is clearly in default on his loan and plaintiff concludes that he must realize on his security by repossessing some of defendant's property including the refrigerator by the use of claim and delivery.

Case 3. Plaintiff and defendant are children of testator who bequeathed the refrigerator to plaintiff. Defendant, who was living with testator at the time of her death, retained possession of the appliance and has refused to give it up. Plaintiff decides that he has no choice but to seek claim and delivery of the refrigerator.

These cases illustrate, respectively, a purchase money security interest transaction, a nonpurchase money security interest transaction, and a claim of ownership situation. In each instance 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." 96 Cal. Rptr. at 726.

Thus in attachment cases it is understandable why Justice Tobriner would say that it is only fair to wait until the plaintiff's claim in the underlying transaction is well established before allowing him to tie up by attachment until the time of trial property to which he has no prior claim and which is necessary to the defendant's support. To the contrary, 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, 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.

This point is best seen in Case 1, the purchase money transaction, in which the unpaid seller seeks repossession. If the defendant is unable to make payments and cannot establish at a hearing the probability that he will be able to prove a defense, it is an unwarranted economic cost to be borne by the seller--and thus passed on to other consumers--to allow the buyer who is not making payments to keep the refrigerator which is depreciating in value each month until the time of the trial solely because the buyer needs a refrigerator. Case 3 seems another strong case for allowing the plaintiff immediate possession upon a preliminary hearing even though the property is a necessity with respect to the defendant. Again, if plaintiff can show his probable right to the property at a hearing and the defendant is unable to show the likelihood that he can raise a defense at the trial, the equities would seem to favor giving possession to the plaintiff who bonds the defendant against any potential damage resulting from loss of possession in case the plaintiff's claim turns out to be invalid.

Case 2 is the situation on which opinions would be most likely to vary. Here the defendant owned the property before granting a security interest in it to the lender, and the property is such as to be exempt from the claims of attaching and judgment creditors. Would the Randone necessities doctrine

apply here to compel the plaintiff to leave the property in the possession of the debtor pending final determination of plaintiff's suit for possession? Although the defendant's equities are appealing in this case, it is more likely that the view that defendant should not lose his refrigerator stems from a belief that creditors should not be able to take non-purchase money security interests in exempt property--some would contend that allowing the taking of a nonpurchase money security interest in exempt property is oppressive if not in fact unconstitutional while others defend the practice by arguing that debtors should be able to use all of their assets to raise needed money--rather than from the conviction that the remedy of claim and delivery is inappropriate to enforce a valid security interest. If the taking of a nonpurchase money security interest in exempt property is a valid transaction and if the defendant is unable to show at a preliminary hearing that he has a probable defense to the plaintiff's claim, again it seems unwise to allow the defendant to retain the property until trial merely upon a showing that he needs a refrigerator.

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 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 who is able to show

at a hearing that there is a reasonable probability that he will be able to defeat the plaintiff's 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. In Randone the court observed: "Thus, the greater the deprivation an individual will suffer by the attachment of property, the greater the public urgency must be to justify the imposition of that loss on an individual before notice and a hearing, and the more substantial the procedural safeguards that must be afforded when such notice and hearing are required." 96 Cal. Rptr. at 724.

B. Dual Hearing Requirement

Blair and Fuentes would require a preliminary hearing on the probable validity of the plaintiff's claim for delivery followed by trial on the action for possession in all cases except those falling within the extraordinary circumstances category discussed later. On its face this dual hearing procedure appears wasteful of time (particularly judicial time) and money, and an attractive speculation arises whether the preliminary hearing could not be made to serve as a summary judgment proceeding thus obviating the need for trial in many cases.

In a typical creditor repossession case, one might expect

events to occur in this manner. The creditor would bring in the contract and his payment records at the time of the preliminary hearing and show that the defendant was in default and that he was entitled to realize on the collateral by retaking possession. The defendant might choose to appear in an attempt to establish either that he was not in default on his payments or that there was some failure of consideration or breach of warranty on the part of the plaintiff. The court would deny the issuance of a writ of possession if either the plaintiff failed to prove a prima facie case for recovery on the contract or the defendant showed the probable validity of a defense. If the defendant has no meritorious defense, he might not attend the preliminary hearing, or he might attend the hearing but default at the subsequent trial. On the other hand, if he has a meritorious defense, he would be expected to raise it at the hearing to keep temporary possession of the article and at the trial to keep permanent possession. At the preliminary hearing the court would not be adjudicating the validity of either the plaintiff's or defendant's claims, rather it would make a determination of the probable validity of these claims, leaving final determination for trial.

Is the dual hearing procedure necessary or even desirable? Could the preliminary hearing be made to serve the function of a summary judgment proceeding? Here the plaintiff's interest

in taking possession quickly conflicts with his legitimate concern for getting the matter settled finally in one hearing. Save for the exceptional circumstances situations, the plaintiff cannot seize the property before extending to the defendant an opportunity for a hearing, and his desire to be able to take possession quickly would probably mean that he would prefer a hearing after a reasonably brief notice period of, say, 7-10 days. It is unlikely that a hearing on such short notice could serve as the basis of a summary judgment in terms of allowing the defendant adequate time to prepare his case. Then, too, in those cases in which the defendant appears at the preliminary hearing he will often be asserting a defense that will involve a triable issue of fact, thus defeating a summary judgment. Since a summary judgment procedure would slow the plaintiff's ability to take possession of the property and would probably not save a subsequent trial in many cases in which the debtor appears and asserts his defense, it may well be that the plaintiff is better off with the preliminary show cause type of hearing procedure. This is particularly true because in most cases in which the defendant has no meritorious defense he will not appear at either the hearing or the trial. Thus the plaintiff gets quick possession and little judicial time is expended in getting final judgment.

Nor would the defendant's interests appear to be particularly well served by a summary judgment procedure. In

those cases in which a defendant wishes to assert a defense he would be hard pressed to get his case prepared for a summary judgment unless the period before the hearing were substantially extended beyond the time usually set for the show cause type of hearing, thus prolonging the repossession procedure unduly. Then, too, it is not likely that defendants in repossession cases would often profit from summary judgments. They are not often going to be able to obtain summary judgments on their own claims, and the best they can usually hope for is to frustrate the plaintiff's claim by showing the existence of a triable issue of fact. Thus it may be to the defendant's interest as well to have a quick preliminary hearing at which he can show the probability that he has a defense and thereby retain possession of goods until trial.

Arguably, then, a quick preliminary hearing procedure for determination of the probable validity of the claims of the plaintiff and defendant, followed by final determination of the right to possession at trial is the most desirable claim and delivery structure from the standpoint of both plaintiffs and defendants. It is constitutional in that the defendant has an opportunity to be heard before seizure. It is fair in that it gives the plaintiff quick possession only if the defendant is unable to show a probability of being able to raise a defense. And it is feasible in that it is anticipated that only a small percentage of repossession cases will actually involve contested hearings.

III. Ex Parte Hearing

A major issue to be decided in drawing a claim and delivery statute is whether and under what circumstances a plaintiff should be allowed to take possession of the property claimed on an ex parte hearing. Blair states: "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 constitutional principles." 96 Cal. Rptr. at 42. Fuentes seems more restrictive. There the Court said:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. . . . These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining under the standards of a narrowly drawn statute,

that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure and to protect the public from misbranded drugs and contaminated food."

Were it only for these two cases, one might conclude that allowing a plaintiff claim and delivery upon his showing 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 Randone poses serious if not insurmountable operational 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." 96 Cal. Rptr. at 723, fn. 19.

Though, as explained earlier, 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, it is

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. When a defendant has an opportunity to be heard before property in his possession is taken by one claiming an interest in it, he at least has a chance to show the probable existence of a defense and the courts can be directed by statute to be circumspect in taking property away from a defendant which can be shown to be necessary for the support of him and his family when the defendant can show some probability that he has a defense. On the contrary, if the plaintiff is allowed to seize the defendant's necessities on claim and delivery after only an ex parte hearing the defendant has no opportunity prior to seizure to raise either the issue of the status of the property as a necessity or the likelihood that he has a defense to the plaintiff's claim.

The Randone doctrine which prohibits an attaching plaintiff from seizing necessities upon an ex parte hearing would, therefore, seem to apply with equal validity to claim and delivery in this respect so as to prevent seizure upon an ex parte hearing of necessities even though extraordinary circumstances are shown. If an attaching creditor cannot take, upon a showing of special 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. Merely giving the defendant back an automobile which he needs to drive to his job which was wrongfully taken from him on the plaintiff's ex parte showing that the defendant was about to abscond does not compensate the defendant for the resulting loss of his job.

If this analysis of the applicability of the Randone necessities doctrine to claim and delivery is correct, one of two policy decisions must be made in preparing a statute. Either a claim and delivery law must 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 to prohibit the seizure of that property, even though special circumstances are shown, until the defendant can be given a hearing or the statute must not allow for the seizure of any property on ex parte hearing but must give plaintiff's 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 not only apply to consumer-type necessities but also, as Randone requires, to

commercial necessities as well. Second, in each case in which a plaintiff attempted 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 ken, 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 for the plaintiff's interest in repossessing property hardly serves an "important governmental or general public interest." Fuentes, VI. Thus the third difficulty of this course of action is setting forth special circumstances that would constitutionally allow ex parte seizure, and that question is still up in the air with respect to reliable guidance from the United States Supreme Court.

These difficulties are so formidable as to make the choice of the second course of action much preferable. This procedure

would 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 would be issued and would 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 can be broadly drawn without running afoul of the Fuentes restrictions because no seizure is contemplated until the defendant is given a hearing. If the property sought turns out to be necessities and 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 course of action preserves the spirit of Randone in that it does not disturb the defendant's use of his necessities until he gets a hearing, it gives the plaintiff a good measure of protection owing to the contempt power of the court, and as a practical matter it avoids both cluttering up the statute with cumbersome provisions dealing with the near-insoluble 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. 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 issue of the plaintiff's right to repossess will only become another step in that process. A brief delay of 7-10 days will rarely 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 a restraining order punishable by contempt can be quickly 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 over-zealous plaintiffs to subvert the constitutional requirements by alleging danger of concealment or absconding in all cases involving mobile collateral like motor vehicles.

IV. Fourth Amendment

Blair states:

"Therefore, we 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 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." 96 Cal. Rptr. at 52-53.

Thus Blair establishes that public officials cannot enter "private places" to make searches and seizures pursuant to claim and delivery proceedings unless probable cause is shown before a judicial officer, but little is said in the decisions about the meaning of probable cause. Fuentes says: "We do not reach appellant's argument with [sic] the Florida and Pennsylvania statutory procedures violate the Fourth Amendment, made applicable to the States by the Fourteenth. See n. 2, supra. For 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. There is no need for us to decide that question at this point." Fuentes, VIII, fn. 32. Another major decision on the Fourth Amendment as it relates to replevin, Laprease v. Raymours Furniture Company, 315 F. Supp. 716 (N.D. N.Y. 1970), is silent on what the Fourth Amendment calls for in civil cases. However, something of the views of the California Supreme Court on the meaning of probable cause may be gleaned from the following paragraph from Blair:

> "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." 96 Cal. Rptr. at 53.

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.

Without an extended discussion of the point, it seems clear that 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 seems to be what Fuentes is saying. Of course, the requirements of the Fourth Amendment could possibly be met by an ex parte hearing, but the position of the plaintiff under the Fourth Amendment seems

stronger if the probable validity of his claim is determined at a noticed hearing. This is true because "probable cause" may be construed to include both elements, the demonstrated validity of the plaintiff's right to possession of property, and reason to believe the property is at the location alleged by the plaintiff. The issue of the probable validity of the plaintiff's claim is better settled if the defendant has the right to appear and present defenses.

Since the statute proposed has no provision for seizure upon ex parte hearing, the Fourth Amendment problem seems easily solved in this statute. Once the plaintiff establishes the probable validity of his claim and the location of the property at a noticed hearing, issuance of a writ of possession by the court empowering judicial officers to enter private places, seems to meet any foreseeable requirement of the Fourth Amendment. 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 certain described goods. No search or seizure problem is raised by such an order.

STATE OF CALIFORNIA

RONALD REAGAN, Governor

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Ex Officio

September 15, 1972

LETTER OF TRANSMITTAL

Last year, the California Supreme Court held generally unconstitutional the procedures provided in California for prejudgment judicial repossession by secured creditors and attachment by unsecured creditors. The Court ruled that, except in "exceptional circumstances," a defendant has a constitutional right to an opportunity for a hearing on the probable validity of the plaintiff's claim before any property may be taken from him and, moreover, that all "necessities" must be automatically exempt from attachment prior to a determination of the actual (as distinguished from the "probable") validity of the plaintiff's claim.

This year, the California Legislature is considering several bills which attempt to restore in some manner the prejudgment remedies of attachment and repossession. However, if any legislation is enacted, the Commission believes that it will be stopgap only and will have an expiration date in 1975.

In the meantime, the Legislature has directed the Law Revision Commission to study the law relating to prejudgment attachment and repossession of property and related matters, and the Commission plans to submit recommendations on these subjects to the Legislature. A tentative recommendation relating to judicial repossession should be ready for distribution before the end of 1972. However, the area of prejudgment attachment presents many basic questions which must be answered before even a tentative recommendation may be prepared. The attached questionnaire presents many of these questions. The Commission seeks your assistance in answering them. Please help by answering the attached questionnaire as fully and completely as possible.

Please return the questionnaire to: California Law Revision Commission, School of Law, Stanford, California 94305. To permit full consideration of your answers, the completed questionnaire must be returned prior to October 15, 1972.

Sincerely,

John H. DeMoully
Executive Secretary

CREDITORS' REMEDIES QUESTIONNAIRE

If your answer to any question requires more space than is allotted in the questionnaire, please attach as many extra pages as necessary. You may also supplement your answers with any comments or suggestions you believe would be of value to the Commission.

Return completed questionnaire to: California Law Revision Commission, School of Law, Stanford, California 94305.

BACKGROUND INFORMATION

Your name _____

Organization _____

Address _____

Your position _____

ATTORNEYS ONLY

Indicate the type of practice in which you are primarily engaged (check only one).

- ☐ General practice
- ☐ Business practice
- ☐ Collection practice
- ☐ Domestic relations
- ☐ Defendant-debtor oriented practice (other than legal aid)
- ☐ Legal aid
- ☐ Other (specify) _____

Indicate the number of years that you have been engaged in this type of practice.

☐ Less than 5 years ☐ 6-10 years ☐ More than 10 years

BUSINESSMEN ONLY

Indicate the type of business in which you or your organization is primarily engaged (check only one).

- ☐ Manufacturer
- ☐ Wholesaler
- ☐ Retailer
- ☐ Collection agency

Please indicate the type of goods or services sold and the persons to whom sold (e.g., meat to restaurants) or type of accounts primarily handled (e.g., collection of dental and medical accounts) _____

_____

PREJUDGMENT ATTACHMENT IN COMMERCIAL CASES PRIOR TO 1971

INSTRUCTIONS: This portion of the questionnaire deals with attachment in commercial cases. These are cases where the writ of attachment was issued in an action brought against a going business to recover payment for materials, goods, or services provided to the business by an unsecured creditor. This portion of the questionnaire is not concerned with judicial repossession by a secured creditor.

1. Have you ever obtained a prejudgment writ of attachment in a commercial case? (check one answer)

☐ Yes. If "Yes," please answer remaining questions in this portion of the questionnaire.

☐ No. If "No," please skip the remaining questions in this portion of the questionnaire. Go directly to Question 12 on page 5.

INSTRUCTIONS: Please answer the remaining questions in this part on the basis of your experience in commercial cases in a typical year, or on an average yearly basis over a representative period, prior to 1971 (when the prejudgment attachment statute was held largely unconstitutional). When the question asks for a percentage, please give your rough estimate of the approximate or average percentage.

2. Approximately how often in a year did you secure the issuance of a prejudgment writ of attachment? (check one answer)

☐ Rarely (less than once a year)

☐ Seldom (1-3 times)

☐ Occasionally (4-14 times)

☐ Moderately (15-50 times)

☐ Frequently (over 50 times) State how many times _____

3. Indicate the percentage of cases where your action was based on:

An express or implied contract with a resident defendant ____%

A claim against a nonresident defendant ____%

A claim against a defendant who could not be found within the state or who concealed himself to avoid service ____%

100%

4. Indicate the percentage of cases where the amount of recovery sought was:

Less than $200	____%
$200-$499	____%
$500-$1,000	____%
Over $1,000	____%
	100%

5. In what percentage of cases where a writ was obtained was some property initially attached (without regard to whether subsequently the defendant successfully made a claim of exemption or posted a release bond)? ____%

INSTRUCTIONS: Base your answers to the remaining questions in this portion of the questionnaire only on those cases in which some property was initially attached. Remember that we are concerned only with attachment in commercial cases.

6. Indicate the percentage of cases where the following type of property was attached:

Keeper placed in place of business	____%
Equipment (other than motor vehicle)	____%
Motor vehicle (includes trucks and other vehicles registered with Department of Motor Vehicles)	____%
Inventory	____%
Bank or checking account	____%
Other (please specify type_____)	____%
	100%

7. Indicate the percentage of cases where the defendant secured the release of his property by posting an undertaking ____%

8. Indicate the percentage of cases where the defendant claimed his property was exempt from attachment ____%
In cases where a claim of exemption was made, in what percentage of the cases was the exemption allowed? ____%
What types of property were attached in cases where the claim of exemption was allowed (list types of property)?

9. Indicate the percentage of cases where the defendant made a motion to increase the amount of the undertaking you provided to obtain the writ of attachment _____%

In what percentage of cases where such a motion was made was the motion granted? _____%

What types of property were attached in cases where the motion to increase the amount of your undertaking <u>was successful</u> (list types of property)?

10. Considering only cases where some property was initially attached, indicate the percentage of these cases in which:

(a) You secured a default judgment ____%

(b) You settled the case and obtained a recovery <u>at least equal</u> to the value of the property attached ____%

(c) You settled the case and obtained a recovery <u>less than</u> the value of the property attached ____%

(d) You obtained judgment after the issue of liability, damages, or both was tried to a court or jury and the judgment was for an amount <u>at least equal</u> to the value of the property attached ____%

(e) You obtained judgment after the issue of liability, damages, or both was tried to a court or jury and the judgment was for an amount <u>less than</u> the value of the property attached ____%

(f) The defendant obtained judgment or the action was dismissed without your obtaining any recovery ____%

100%

11. In what percentage of the cases where the issue of liability, damages, or both was tried to a court or jury were you successful in obtaining a judgment equal to the amount of your claim as set forth in your complaint? _____%

PREJUDGMENT ATTACHMENT IN CONSUMER CASES PRIOR TO 1971

INSTRUCTIONS: This portion of the questionnaire deals with attachment by unsecured creditors in "consumer" cases. These are cases where the action in which the writ of attachment was issued was not brought against a going business. The claim on which the action was brought did not arise out of the furnishing of materials, goods, or services to a business. The type of property attached or sought to be attached was nonbusiness property.

12. Have you ever obtained a prejudgment writ of attachment in a consumer case? (check one answer)

☐ Yes. If "Yes," please answer remaining questions in this portion of the questionnaire.

☐ No. If "No," please skip the remaining questions in this portion of the questionnaire. Go directly to Question 23 on page 8.

INSTRUCTIONS: Please answer the remaining questions in this part on the basis of your experience in consumer cases in a typical year, or on an average yearly basis over a representative period, prior to 1971 (when the prejudgment attachment statute was held largely unconstitutional). When the question asks for a percentage, please give your rough estimate of the approximate or average percentage.

13. Approximately how often in a year did you secure the issuance of a prejudgment writ of attachment? (check one answer)

☐ Rarely (less than once a year)

☐ Seldom (1-3 times)

☐ Occasionally (4-14 times)

☐ Moderately (15-50 times)

☐ Frequently (over 50 times) State how many times _____

14. Indicate the percentage of cases where your action was based on:

An express or implied contract with a resident defendant ____%

A liability for the support of a spouse, child, or other relative ____%

A claim for rent in an unlawful detainer action ____%

A claim against a nonresident defendant ____%

A claim against a defendant who could not be found within the state or who concealed himself to avoid service ____%

Other (please specify_____) ____%

100%

15. Indicate the percentage of cases where the amount of recovery sought was:

Less than $200	____%
$200-$499	____%
$500-$1,000	____%
Over $1,000	____%
	100%

16. In what percentage of cases where a writ was obtained was some property initially attached (without regard to whether subsequently the defendant successfully made a claim of exemption or posted a release bond)? _____%

INSTRUCTIONS: Base your answers to the remaining questions in this portion of the questionnaire only on those cases in which some property was initially attached. Remember that we are concerned only with attachment in consumer cases.

17. Indicate the percentage of cases where the following type of property was attached under a prejudgment writ of attachment:

Motor vehicle	____%
Bank or checking account	____%
Credit union account	____%
Savings and loan association account	____%
Salary or wages	____%
Furniture or appliances	____%
Life insurance	____%
Other (please specify_____ _____	____%
	100%

18. Indicate the percentage of cases where the defendant secured the release of his property by posting an undertaking _____%

19. Indicate the percentage of cases where the defendant claimed his property was exempt from attachment _____%

In cases where a claim of exemption was made, in what percentage of the cases was the exemption allowed? _____%

What types of property were attached in cases where the claim of exemption was allowed (list types of property)?

20. Indicate the percentage of cases where the defendant made a motion to increase the amount of the undertaking you provided to obtain the writ of attachment _____%

In what percentage of cases where such a motion was made was the motion granted? _____%

What types of property were attached in cases where the motion to increase the amount of your undertaking was successful (list types of property)?

21. Considering only cases where some property was initially attached, indicate the percentage of these cases in which:

(a) You secured a default judgment ____%

(b) You settled the case and obtained a recovery at least equal to the value of the property attached ____%

(c) You settled the case and obtained a recovery less than the value of the property attached ____%

(d) You obtained judgment after the issue of liability, damages, or both was tried to a court or jury and the judgment was for an amount at least equal to the value of the property attached ____%

(e) You obtained judgment after the issue of liability, damages, or both was tried to a court or jury and the judgment was for an amount less than the value of the property attached ____%

(f) The defendant obtained judgment or the action was dismissed without your obtaining any recovery ____%

100%

22. In what percentage of the cases where the issue of liability, damages, or both was tried to a court or jury were you successful in obtaining a judgment equal to the amount of your claim as set forth in your complaint? _____%

PRESENT PROCEDURES USED IN LIEU OF ATTACHMENT

INSTRUCTIONS: In answering this portion of the questionnaire, ignore any legislation enacted by the 1972 Legislature.

23. Indicate what, if any, substitute remedies or approaches to secure recovery you now use. For example, have you been able to obtain equitable relief (temporary restraining order and/or preliminary injunction) or a receiver in some cases? If so, in what types of cases?

24. Have these equitable remedies or other remedies been generally satisfactory?

☐ Yes

☐ No

If "No," state why they have not been satisfactory.

25. Have you attempted to shorten the time to judgment by use of the summary judgment procedure?

☐ Yes

☐ No

Has the summary judgment procedure been of any use?

☐ Yes

☐ No

Comment on summary judgment procedure:

26. Have you attempted to obtain a confession of judgment without action (Code of Civil Procedure Sections 1132-1135) in order to shorten the time to judgment?

☐ Yes

☐ No

Has the confession of judgment procedure been of any use?

☐ Yes

☐ No

Comment on confession of judgment procedure:

27. Are there transactions to which the provisions of Division 9 of the Commercial Code (authorizing security agreements and financing statements)aapply but in which you (or your client) as creditor do not obtain a security interest under the code?

☐ Yes

☐ No

If "Yes," please state the nature of the transactions and why you do not obtain a security interest:

28. Has your use of the procedures set forth in Division 9 of the Commercial Code increased since the courts ruled the present prejudgment attachment procedure largely unconstitutional?

☐ Yes

☐ No

29. Do the Division 9 procedures and remedies offer a satisfactory alternative to prejudgment attachment in your area of concern (assuming that adequate procedures for judicial repossession are provided to enforce any security agreement)?

☐ Yes

☐ No

If "No," please state why not:

NATURE OF LEGISLATION NEEDED

NOTE: The courts have held that the defendant has a constitutional right to an opportunity for a hearing on the probable validity of any claim prior to the levy of a writ of attachment (except in "exceptional circumstances") and that all "necessaries" must be automatically exempt from attachment prior to judgment. Moreover, most states limit the availability of the remedy of attachment to those situations where it is necessary to secure jurisdiction of a nonresident defendant or where the defendant threatens to abscond with or conceal or transfer his assets. In view of these facts, the Commission solicits the views of persons affected as to what, if any, prejudgment attachment procedures are believed to be necessary or desirable.

30. Do you believe that a prejudgment attachment procedure satisfying the constitutional requirements stated above is necessary in the following types of cases?

Type of case	Check "Yes" or "No" for each type of case	
A defendant who cannot be found within the state or who conceals himself to avoid service	☐ Yes	☐ No
A nonresident defendant	☐ Yes	☐ No
A case involving "exceptional circumstances"--defendant threatens to abscond with or conceal or transfer his assets	☐ Yes	☐ No
A commercial case--action against a going business for materials, equipment, services, etc. furnished to the business	☐ Yes	☐ No
A consumer case--action against individual for goods or services furnished to him for his own use or for the use of his family (such as, for example, medical services or furniture or appliances	☐ Yes	☐ No
A liability for the support of a spouse, child, or other relative	☐ Yes	☐ No
A claim for delinquent rent in an unlawful detainer case	☐ Yes	☐ No
Other (specify_____)	☐ Yes	☐ No

31. State the reasons why you believe a prejudgment attachment is necessary in the types of cases you checked in Question 30. Please give specific instances from your personal experience since 1971 (when prejudgment attachment was held generally unconstitutional) to support your views.

32. Would a provision permitting attorney's fees to be awarded to the plaintiff if he recovers an amount equal to or in excess of a statutory offer (or an amount equal to the amount set out in his complaint) be a satisfactory substitute for prejudgment attachment in commercial and consumer cases (i.e., would this sanction effectively preclude the frivolous answer, thus avoiding delay and permitting early utilization of postjudgment remedies)?

☐ Yes

☐ No

Comment:

33. Please comment upon any problems you encountered under the prejudgment attachment procedures in effect prior to 1971. Did the provisions relating to release of property, third-party claims, liability on the undertaking, manner of levy, and claims of exemption operate satisfactorily? If not, why not?

34. Having in mind the rights and needs of all parties, as well as the efficient administration of justice, please comment on what prejudgment remedies you believe should be provided to a plaintiff and under what circumstances--e.g., type of creditor (secured, unsecured), type of debt (size, nature), type of debtor (individual, consumer, business, nonresident, absconding defendant), type of relief (seizure, lien), sanctions for improper use of remedy, and other matters that would be helpful to the Law Revision Commission in drafting legislation on prejudgment remedies.