

Memorandum 73-24

Subject: Study 39.90 - Claim and Delivery Statute

Attached to this memorandum is a letter from Mr. Allen M. Garfield (Exhibit I) which comments on AB 103 (Exhibit II)--the Commission's claim and delivery statute. These comments are reviewed in order below.

Separate application. Mr. Garfield objects to the requirement of Section 512.010 that a separate application for issuance of a writ of possession be filed when such relief is sought as being overly burdensome. The staff does not believe that the requirement is too burdensome. Moreover, it seems to us that some form of application is essential because, under the scheme proposed, relief is not necessarily always sought at the time of the filing of the complaint; hence, some procedure must exist for starting the ball rolling and informing the court that relief is now being sought. However, as the Comment to this section makes clear, a verified complaint may support the application and furnish the necessary evidentiary showings.

Evidence limited to affidavits. Mr. Garfield (on page 2) submits "that like all other law and motion matters, that this [procedure] should be limited strictly to affidavits and that the hearing officer . . . should not take testimony or listen to oral evidence." The Commission has previously rejected the idea that oral testimony be completely barred, and we see no reason to change this decision. Sections 512.100 and 512.110 make clear that the action or inaction of the defendant and the determinations of the judicial officer at the probable cause hearing do not affect the defendant's rights to a full trial (including trial by jury) of the action, and we do not understand Mr. Garfield's apparently contrary comment. Finally, Section 512.050 authorizes

the taking of oral testimony only on a showing of good cause; hence, we suspect that, in most situations, the taking of oral evidence will not be permitted or will at most be very limited.

Defendant subject to arrest. Mr. Garfield is apparently not aware of our recommendation relating to civil arrest which would repeal Section 479. However, that recommendation includes a provision (new Section 478) which makes clear that the court retains any power it may have to imprison a person who violates a court order. Hence, presumably a balky defendant could ultimately be imprisoned for contempt of court if he fails to comply with a Section 512.070 order. See Sections 1209(5), 1212, 1214, 1218, 1219. Whether or not a notice that such action may ultimately be taken against the defendant should be included in the court's order seems to us to be a matter for the Judicial Council to determine. See Section 516.020. As a matter of policy, we do not care whether the order contains such a notice or not, but we are reluctant to clutter up the statute with requirements telling the Judicial Council what to do in areas where they are especially well qualified.

Service of writ of possession. Section 514.020 requires service of the writ of possession on the defendant only if he is the person in possession or no one is in possession of the property at the time of levy. The first situation cannot, it seems, cause any difficulty with respect to service. In the second situation, levy is accomplished by taking the property into custody. The requirement of service is not a precondition to levy, and we see no detriment to the plaintiff in being required subsequently to serve the defendant with a copy of the writ and undertaking (especially since this may be accomplished by substituted service where necessary). In short, the statement that the service requirement may defeat the plaintiff's right to

possession is, we think, simply mistaken. Whether the method of service should be left up to the court is a different matter. We have no very strong objection to this suggestion but would prefer to have the statute be definite in this regard.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

EXHIBIT I
LAW OFFICES OF
ALLEN M. GARFIELD
55 NINTH STREET
SAN FRANCISCO, CALIFORNIA 94103

TELEPHONE
526-3471

February 21, 1973

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

Attention: Mr. John De Molle

RE: AB 103, CLAIM AND DELIVERY
OF PERSONAL PROPERTY

Dear Sir:

I have received a copy of AB 103. I am informed that this is the Law Revision Commission's draft on claim and delivery. This law, when enacted, will, of course, supersede AB 1623 which was signed by the Governor August 14, 1972 as Chapter 855.

I helped Mr. Wallace O'Connell on the drafting of AB 1623 which Assemblyman Warren was kind enough to introduce and work for the passage of said bill.

In comparing AB 103 with the present Chapter 855, I note that in your Section 512.010, you do not permit the verified complaint to be the basis for issuance of a writ of possession. I submit that the requirement of an additional application requires an additional piece of paper that is not necessary.

I have had a great deal of experience with Chapter 855 since I probably file as many claim and delivery actions as any attorney in California. I represent many members of the Automotive Leasing Association and we have used Chapter 855 extensively to recover leased vehicles that are withheld by the lessees. The procedure under Chapter 855 has worked very well. The verified complaint is the basis for the order to show cause. The verified complaint under Chapter 855 is the basis for a temporary restraining order. While putting the probative facts in the verified complaint, violates the rules of code pleading that only the ultimate facts should be pleaded, I submit that it is better practice to have everything in one document so that the defendant by reading the complaint is told the basis of plaintiff's complaint and

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what plaintiff is required to prove at the hearing for the pre-judgment writ of possession.

I further submit that like all other law and motion matters, that this should be limited strictly to affidavits and that the hearing officer at the hearing for the writ of possession should not take testimony or listen to oral evidence. Otherwise, you are going to have a duplication of the matters that properly should be reserved at the trial of the action. To permit the taking of oral testimony before the hearing officer would deprive the defendant of his right to trial by jury which he would be entitled to at the hearing on the merits of the case. I submit that the better practice would be to limit the hearing on the writ of possession strictly to affidavits and counter-affidavits.

I believe your Section 512.070 is desirable and necessary. We have found now that when under Chapter 855 we go through the complete procedure, get a writ of possession and the defendant conceals the property or removes it from the jurisdiction, the only procedure is an order to show cause re contempt for violation of the pre-judgment writ of possession. I would suggest that in addition to the direction contained in 512.070, that there be a further direction that there should be notice to the defendant pursuant to C.C.P. 479 (arrest and bail) to the effect that if the defendant conceals, removes or disposes of the property to prevent it from being found or taken by the Sheriff or levying officer, that he is subject to arrest.

I would suggest that your Section 514.020, which requires service on the defendant in the same manner as a summons and complaint, is too rigorous and defeats the plaintiff's right to recover possession. In Chapter 855, the method of service was that set forth in C.C.P. 1011, or in such manner as the judge may direct.

We frequently run into the situation where the defendant, particularly in the case of motor vehicles or trucks, is concealing the property, neither he nor the property can be found, and in such case,

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the entire claim and delivery procedure fails because we cannot get service. By hiding out, the defendant prevents the court from getting jurisdiction over him, and even though substitute service is allowed under 415.10 etc., in many cases, due to the absence of the defendant, the purpose of the law is defeated. I submit that by using the less rigorous procedure of 1011 or by such method as the court may direct for service, satisfies due process and will enable the court to obtain jurisdiction over the defendant.

In certain cases, we can find the property but cannot find the defendant. The property may be in storage, abandoned, or in the possession of a third party, and not the named lessee or conditional buyer.

I trust that you will consider these objections and suggestions in the consideration of the bill before the Legislature.

Yours very truly,


ALLEN M. GARFIELD

AMG/es

cc: Assemblyman Charles Warren

cc: Wallace O'Connell, Esq.

EXHIBIT II

CALIFORNIA LEGISLATURE—1973-74 REGULAR SESSION

ASSEMBLY BILL

No. 103

Introduced by Assemblyman Warren
(Coauthor: Senator Song)

January 18, 1973

REFERRED TO COMMITTEE ON JUDICIARY

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

LEGISLATIVE COUNSEL'S DIGEST

AB 103, as introduced, Warren (Jud.). Claim and delivery.
Revises claim and delivery law.

Operative July 1, 1974.

Vote: majority. Appropriation: no. Fiscal committee: no.

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

- 1 SECTION 1. Chapter 2 (commencing with Section
- 2 509) of Title 7 of Part 2 of the Code of Civil Procedure is
- 3 repealed.
- 4 SEC. 2. Chapter 2 (commencing with Section
- 5 511.010) is added to Title 7 of Part 2 of the Code of Civil
- 6 Procedure, to read:

1 CHAPTER 2. CLAIM AND DELIVERY OF
2 PERSONAL PROPERTY

3
4 Article 1. Words and Phrases Defined

5
6 511.010. Unless the provision or context otherwise
7 requires, the definitions in this article govern the
8 construction of this chapter.

9 511.020. "Complaint" includes a cross-complaint.

10 511.030. "Defendant" includes a cross-defendant.

11 511.040. "Farm products" means crops or livestock or
12 supplies used or produced in farming operations or
13 products of crops or livestock in their unmanufactured
14 states (such as ginned cotton, wool clip, maple syrup,
15 honey, milk, and eggs) while in the possession of a
16 defendant engaged in raising, fattening, grazing, or other
17 farming operations. If tangible personal property is a
18 farm product, it is not inventory.

19 511.050. "Inventory" means tangible personal
20 property in the possession of a defendant who holds it for
21 sale or lease or to be furnished under contracts of service.

22 511.060. "Judicial officer" means any judge or any
23 commissioner or other officer appointed by the trial court
24 to perform the duties required by this chapter.

25 511.070. "Levying officer" means the sheriff,
26 constable, or marshal who is directed to execute a writ of
27 possession issued under this chapter.

28 511.080. "Person" includes an individual, a
29 corporation, a partnership or other unincorporated
30 association, and a public entity.

31 511.090. "Plaintiff" means a person who files a
32 complaint or cross-complaint.

33 511.100. A claim has "probable validity" where it is
34 more likely than not that the plaintiff will obtain a
35 judgment against the defendant on that claim.

36 511.110. "Public entity" includes the state, the
37 Regents of the University of California, a county, city,
38 district, public authority, public agency, and any other
39 political subdivision or public corporation in the state.

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Article 2. Writ of Possession

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

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

(1) A showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of the instrument shall be attached.

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

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

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

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

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

512.020. (a) Except as otherwise provided in this section, no writ shall be issued under this chapter except after a hearing by a judicial officer on a noticed motion.

(b) A writ of possession may be issued ex parte pursuant to this subdivision if probable cause appears that either of the following conditions exists:

1 (1) The defendant gained possession of the property
2 by feloniously taking the property from the plaintiff. This
3 subdivision shall not apply where the defendant has
4 fraudulently appropriated property entrusted to him or
5 obtained possession by false or fraudulent representation
6 or pretense or by embezzlement.

7 (2) The property is a credit card.

8 The plaintiff's application for the writ shall satisfy the
9 requirements of Section 512.010 and, in addition, shall
10 include a showing that the conditions required by this
11 subdivision exist. The judicial officer may issue a writ of
12 possession if he finds that the conditions required by this
13 subdivision exist and the requirements of Section 512.060
14 are met. Where a writ of possession has been issued
15 pursuant to this subdivision, a copy of the summons and
16 complaint, a copy of the application and any affidavit in
17 support thereof, and a notice which satisfies the
18 requirements of subdivisions (c) and (d) of Section
19 512.040 and informs the defendant of his rights under this
20 subdivision shall be served upon persons required by
21 Section 514.020 to be served with a writ of possession. Any
22 defendant whose property has been taken pursuant to a
23 writ of possession issued under this subdivision may apply
24 for an order that the writ be quashed and any property
25 levied on pursuant to the writ be released. Such
26 application shall be made by noticed motion, and the
27 provisions of Section 512.050 shall apply. Pending the
28 hearing on the defendant's application, the judicial
29 officer may order that delivery pursuant to Section
30 514.030 of any property previously levied upon be stayed.
31 If the judicial officer determines that the plaintiff is not
32 entitled to a writ of possession, he shall quash the writ of
33 possession and order the release of any property
34 previously levied upon.

35 512.030. Prior to the hearing required by subdivision
36 (a) of Section 512.020, the defendant shall be served with
37 all of the following:

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

1 support thereof.

2 512.040. The "Notice of Application and Hearing"
3 shall inform the defendant of all of the following:

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

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

16 (c) If the defendant desires to oppose the issuance of
17 the writ, he shall file with the court either an affidavit
18 providing evidence sufficient to defeat the plaintiff's
19 right to issuance of the writ or an undertaking to stay the
20 delivery of the property in accordance with Section
21 515.020.

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

28 512.050. Each party shall file with the court and serve
29 upon the other party within the time prescribed by rule
30 any affidavits and points and authorities intended to be
31 relied upon at the hearing. At the hearing, the judicial
32 officer shall make his determinations upon the basis of
33 the pleadings and other papers in the record; but, upon
34 good cause shown, he may receive and consider
35 additional evidence and authority produced at the
36 hearing or he may continue the hearing for the
37 production of such additional evidence, oral or
38 documentary, or the filing of other affidavits or points
39 and authorities.

40 512.060. (a) At the hearing, the judicial officer shall

1 issue a writ of possession if he finds both of the following:

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

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

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

11 512.070. If a writ of possession is issued, the judicial
12 officer may also issue an order directing the defendant to
13 transfer possession of the property to the plaintiff.

14 512.080. The writ of possession shall meet all of the
15 following requirements:

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

18 (b) Describe the specific property to be seized.

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

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

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

29 512.090. (a) The plaintiff may apply ex parte in
30 writing to the court in which the action was brought for
31 an endorsement on the writ directing the levying officer
32 to seize the property at a private place not specified in
33 the writ.

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

38 512.100. Neither the failure of the defendant to
39 oppose the issuance of a writ of possession under this
40 chapter nor his failure to rebut any evidence produced by

1 the plaintiff in connection with proceedings under this
2 chapter shall constitute a waiver of any defense to
3 plaintiff's claim in the action or any other action or have
4 any effect on the right of the defendant to produce or
5 exclude evidence at the trial of any such action.

6 512.110. The determinations of the judicial officer
7 under this chapter shall have no effect on the
8 determination of any issues in the action other than the
9 issues relevant to proceedings under this chapter, nor
10 shall they affect the rights of any party in any other action
11 arising out of the same claim. The determinations of the
12 judicial officer under this chapter shall not be given in
13 evidence nor referred to in the trial of any such action.
14

15 Article 3. Temporary Restraining Order

16
17 513.010. (a) Except as otherwise provided by this
18 chapter, the provisions of Chapter 3 (commencing with
19 Section 525) of this title relating to the issuance of a
20 temporary restraining order apply. At or after the time
21 he files his application for writ of possession, the plaintiff
22 may apply for a temporary restraining order by setting
23 forth in the application a statement of grounds justifying
24 the issuance of such order.

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

32 (c) If at the hearing on issuance of the writ of
33 possession the judicial officer determines that the
34 plaintiff is not entitled to a writ of possession, the judicial
35 officer shall dissolve any temporary restraining order;
36 otherwise, he may issue a preliminary injunction to
37 remain in effect until the property claimed is seized
38 pursuant to the writ of possession.

39 513.020. In the discretion of the judicial officer, the
40 temporary restraining order may prohibit the defendant

1 from doing any or all of the following:

2 (a) Transferring any interest in the property by sale,
3 pledge, or grant of security interest, or otherwise
4 disposing of, or encumbering, the property. If the
5 property is farm products held for sale or lease or is
6 inventory, the order may not prohibit the defendant
7 from transferring the property in the ordinary course of
8 business, but the order may impose appropriate
9 restrictions on the disposition of the proceeds from such
10 transfer.

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

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

17

18 Article 4. Levy and Custody

19

20 514.010. (a) Except as otherwise provided in this
21 section, upon receipt of the writ of possession the levying
22 officer shall search for and take custody of the specified
23 property, if it be in the possession of the defendant or his
24 agent, either by removing the property to a place of
25 safekeeping or, upon order of the judicial officer, by
26 installing a keeper.

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

34 (c) If the specified property or any part of it is in a
35 private place, the levying officer shall at the time he
36 demands possession of the property announce his
37 identity, purpose, and authority. If the property is not
38 voluntarily delivered, the levying officer may cause any
39 building or enclosure where the property may be located
40 to be broken open in such a manner as he reasonably

1 believes will cause the least damage and may call upon
2 the power of the county to aid and protect him, but, if he
3 reasonably believes that entry and seizure of the
4 property will involve a substantial risk of death or serious
5 bodily harm to any person, he shall refrain from seizing
6 the property and shall promptly make a return to the
7 court from which the writ issued setting forth the reasons
8 for his belief that the risk exists. In such case, the judicial
9 officer shall make such orders as may be appropriate.

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

14 514.020. (a) At the time of levy, the levying officer
15 shall deliver to the person in possession of the property
16 a copy of the writ of possession with a copy of the
17 plaintiff's undertaking attached.

18 (b) If no one is in possession of the property at the
19 time of levy, the levying officer shall subsequently serve
20 the writ and attached undertaking on the defendant. If
21 the defendant has appeared in the action, service shall be
22 accomplished in the manner provided by Chapter 5
23 (commencing with Section 1010) of Title 14 of this part.
24 If the defendant has not appeared in the action, service
25 shall be accomplished in the manner provided for the
26 service of summons and complaint by Article 3
27 (commencing with Section 415.10) of Chapter 4 of Title
28 5 of this part.

29 514.030. (a) After the levying officer takes possession
30 pursuant to a writ of possession, he shall keep the
31 property in a secure place. Except as otherwise provided
32 by Sections 512.020 and 514.050:

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

38 (2) If an undertaking for redelivery is filed within 10
39 days after levy of the writ of possession and defendant's
40 sureties are not excepted to, the sheriff shall redeliver the

1 property to defendant upon expiration of the time to so
2 except, upon receiving his fees for taking and necessary
3 expenses for keeping the property not already paid or
4 advanced by the plaintiff.

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

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

18 514.040. The levying officer shall return the writ of
19 possession, with his proceedings thereon, to the court in
20 which the action is pending within 30 days after levy but
21 in no event more than 60 days after the writ is issued.

22 514.050. Where the property taken is claimed by one
23 other than the defendant or his agent, the rules and
24 proceedings applicable in cases of third-party claims after
25 levy under execution shall apply.

26

27

Article 5. Undertakings

28

29 515.010. (a) The judicial officer shall not issue a
30 temporary restraining order or a writ of possession until
31 the plaintiff has filed with the court a written
32 undertaking that, if the plaintiff fails to recover judgment
33 in the action, the plaintiff shall return the property to the
34 defendant, if return thereof be ordered, and shall pay all
35 costs that may be awarded to the defendant and all
36 damages referred to in subdivision (b), not exceeding the
37 amount of the undertaking. The undertaking shall be
38 executed by two or more sufficient sureties in an amount
39 not less than twice the value of the property as
40 determined by the judicial officer.

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

8 515.020. (a) The defendant may prevent the plaintiff
9 from taking possession of property pursuant to a writ of
10 possession or regain possession of property so taken by
11 filing with the court in which the action was brought a
12 written undertaking executed by two or more sufficient
13 sureties in an amount equal to either the amount of the
14 plaintiff's undertaking required by Section 515.010 or, if
15 there has been no judicial determination, the value of the
16 property stated in the plaintiff's application for a writ of
17 possession. The undertaking shall state that, if the
18 plaintiff recovers judgment on the action, the defendant
19 shall pay all costs awarded to the plaintiff and all damages
20 that the plaintiff may sustain by reason of the loss of
21 possession of the property, not exceeding the amount of
22 the undertaking. The damages recoverable by the
23 plaintiff pursuant to this section shall include all damages
24 proximately caused by the plaintiff's failure to gain or
25 retain possession.

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

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

35 (d) If an undertaking for redelivery is filed and
36 defendant's sureties are not excepted to, the levying
37 officer shall deliver the property to the defendant, or, if
38 the plaintiff has previously been given possession of the
39 property, the plaintiff shall deliver such property to the
40 defendant. If an undertaking for redelivery is filed and

- 1 defendant's sureties are excepted to, the provisions of
2 Section 515.030 shall apply.
- 3 515.030. (a) The defendant may except to the
4 plaintiff's sureties not later than 10 days after levy of the
5 writ of possession by filing with the court in which the
6 action was brought a notice of exception to sureties and
7 mailing a copy of the notice to the levying officer and to
8 the plaintiff. An affidavit stating that such copies have
9 been mailed shall be filed with the court at the time the
10 notice is filed.
- 11 (b) The plaintiff may except to the defendant's
12 sureties not later than 10 days after the defendant's
13 undertaking is filed by filing with the court in which the
14 action was brought a notice of exception to sureties and
15 mailing a copy of the notice to the levying officer and to
16 the defendant at the address set out in his undertaking.
17 An affidavit stating that such copies have been mailed
18 shall be filed with the court at the time the notice is filed.
- 19 (c) If the plaintiff or the defendant does not except to
20 the sureties of the other as provided in this section, he
21 waives all objection to them.
- 22 (d) When excepted to, the sureties shall justify in the
23 manner provided in Chapter 7 (commencing with
24 Section 830) of Title 10 of this part before a judicial officer
25 of the court in which the action was brought at a time
26 specified by the excepting party.
- 27 (e) If the plaintiff's sureties, or others in their place,
28 fail to justify at the time and place appointed or do not
29 qualify, the judicial officer shall vacate the temporary
30 restraining order or preliminary injunction, if any, and
31 the writ of possession and, if levy has occurred, order the
32 levying officer to return the property to the defendant.
33 If the plaintiff's sureties do qualify, the judicial officer
34 shall order the levying officer to deliver the property to
35 the plaintiff.
- 36 (f) If the defendant's sureties, or others in their place,
37 fail to justify at the time and place appointed or do not
38 qualify, the judicial officer shall order the levying officer
39 to deliver the property to the plaintiff, or, if the plaintiff
40 has previously been given possession of the property, he

1 shall retain such possession. If the defendant's sureties do
2 qualify, the judicial officer shall order the levying officer
3 or the plaintiff to deliver the property to the defendant.

4

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Article 6. Rules; Forms; Affidavits

6

7 516.010. The Judicial Council may provide by rule for
8 the practice and procedure in proceedings under this
9 chapter.

10 516.020. The Judicial Council shall prescribe the form
11 of the applications, notices, orders, and other documents
12 required by this chapter.

13 516.030. The facts stated in each affidavit filed
14 pursuant to this chapter shall be set forth with
15 particularity. Except where matters are specifically
16 permitted by this chapter to be shown by information
17 and belief, each affidavit shall show affirmatively that the
18 affiant, if sworn as a witness, can testify competently to
19 the facts stated therein. The affiant may be any person,
20 whether or not a party to the action, who has knowledge
21 of the facts.

22 SEC. 3. If any provision of this act or the application
23 thereof to any person or circumstance is held invalid,
24 such invalidity shall not affect any other provision or
25 application of this act which can be given effect without
26 the invalid provision or application, and to this end the
27 provisions of this act are severable.

28 SEC. 4. (a) This act becomes operative on July 1,
29 1974.

30 (b) Except as otherwise provided by rules adopted by
31 the Judicial Council effective on or after July 1, 1974, this
32 act shall not apply to any writ of possession issued prior
33 to July 1, 1974, and such writs of possession shall continue
34 to be governed in all respects by the provisions of
35 Chapter 2 (commencing with Section 509) of Title 7 of
36 Part 2 of the Code of Civil Procedure in effect on June 30,
37 1974.

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