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Robert G. Heywood

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CALIFORNIA CLAIM AND DELIVERY: PAST, PRESENT AND FUTURE

INTRODUCTION

Claim and delivery, the century-old California adaptation of common law replevin,¹ was dealt a fatal blow by a unanimous California Supreme Court on July 1, 1971. *Blair v. Pitchess*² extended to claim and delivery proceedings the principles of due process—notice and hearing—embodied in the 1969 United States Supreme Court decision of *Sniadach v. Family Finance Corp.*³ The nullification of claim and delivery⁴ in *Blair* left California without this traditional prejudgment creditor remedy whereby a secured creditor could call upon the county sheriff to seize property in the possession of a defaulting debtor. Without such a procedure there was no judicial means by which a plaintiff could obtain immediate prejudgment possession of personal property held by the defendant. To fill the procedural void left by *Blair*, the legislature passed an urgency claim and delivery statute⁵ of limited duration.⁶ Subsequently, the legislature

1. Cal. Stats. (1851), ch. 5, § 99, at 65 [hereinafter cited as former Cal. Civ. Pro. Code].

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

3. 395 U.S. 337 (1969). Other cases in which due process challenges were successful include *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970) (prejudgment wage garnishments) and *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970) (New York replevin procedure similar to California claim and delivery). Other successful attacks on prejudgment creditor remedies are discussed *infra* at note 110 and text accompanying notes 54 and 64. See generally Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521, (1973); Comment, *The Demise of Summary Prejudgment Remedies in California*, 23 HAST. L.J. 489 (1972); Comment, *Attachment in California: Another Round of Creditors' Rights and Debtor Protection*, 20 U.C.L.A.L. REV. 1015 (1973).

4. Former Cal. Civ. Pro. Code §§ 509-21.

5. CAL. CONST. art. IV, § 1 provides in part:

Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act. . . . Any law so passed by the Legislature and declared to be an urgency measure shall go into immediate effect.

Cal. Stats. (1972), ch. 855, § 4, provides:

The Legislature declares this act is for the purpose of giving persons claiming the legal right to possession of property the legal remedies necessary to do so, within the requirements of procedural due process as set forth in the decision of *Blair v. Pitchess*, and that this act will enable controversies to be decided within the judicial system,

enacted permanent legislation⁷ which on July 1, 1974, will supersede the interim measure.

This comment focuses on the competing interests of debtor and creditor in the contest for prejudgment possession and on the method by which the legislature and courts have attempted to resolve this natural conflict. The examination considers relevant judicial attitudes and trends during the past five years and the extent to which the constitutional requisites of due process are manifested in California claim and delivery legislation.

CLAIM AND DELIVERY BEFORE BLAIR V. PITCHESS

Competing Interests

Installment sales contracts were at the foundation of the typical situation in which the prejudgment remedy of claim and delivery was utilized.⁸ Generally a consumer would contract to purchase personal property and agree to make monthly payments. By the terms of the sales contract the merchant would retain an interest in the property until the buyer made the final payments. Following default by the buyer, the creditor would usually attempt collection through letters, telephone calls, personal visits or negotiations.⁹ If these collection techniques proved unsuccessful, the creditor would be forced to use the more costly procedure of claim and delivery¹⁰ whereby the property would be removed from the debtor's premises by the county sheriff.¹¹

and prevent controversies arising which will disturb the peace and well-being of the people of the State of California.

6. CAL. CIV. PRO. CODE § 521 (West Supp. 1974) (effective until July 1, 1974) provides: "this chapter shall be operative only until December 31, 1975, and on and after that date shall have no force or effect." Section 521 became operative on August 14, 1972.

7. CAL. CIV. PRO. CODE §§ 511.010-516.050 (West Supp. 1974) (effective July 1, 1974) (Cal. Stats. (1973), ch. 526, § 4, to repeal CAL. CIV. PRO. CODE §§ 509-21 (West Supp. 1974)).

8. Claim and delivery is primarily a creditor remedy but may be used by anyone who seeks possession of goods wrongfully held by another as, for example, in a theft situation. Claim and delivery is used in situations in which persons having a claim to personal property are unable to use so-called "self-help repossession". For a detailed discussion of "self-help repossession" of automobiles see Comment, *State Action in Self-Help Automobile Repossession*, 14 SANTA CLARA LAW. 659 (1974).

9. See *Blair v. Pitchess*, 5 Cal. 3d 258, 267, 486 P.2d 1242, 1248, 96 Cal. Rptr. 42, 48 (1971).

10. *Id.* wherein the court states:

The fees charged for executing the process include a mileage fee of 70¢ per mile and a flat service charge of \$5 for each seizure of property. In addition, fees are charged for the expenses of moving and storing the property and for the costs of any locksmiths or keepers employed.

An additional financial burden was the requirement of the posting of an undertaking. See note 15 *infra*.

11. See note 15 *infra*.

Claim and delivery is a *remedy* antecedent to a judicial determination as to whether the plaintiff or defendant has the superior right to possession. From the standpoint of the creditor-claimant, immediate repossession is desirable because it prevents the debtor from further depreciating the property through continued use, and also prevents the debtor from selling or otherwise disposing of it. The creditor has a particularly strong interest in preventing disposition since many defaulting debtors are judgment proof; if the property is no longer in the control of the debtor, the creditor will find no assets of the debtor upon which to levy in execution of his judgment.¹²

However, from the standpoint of the debtor, even the temporary loss of his property may work a tremendous hardship, particularly if the property is necessary to his trade or business. Even if the debtor has a valid defense to the creditor's claim and the ultimate resolution of the dispute is in his favor, the debtor may have nevertheless lost his job because he was unable to get to work or could not adequately perform the tasks required in his employment due to the temporary loss of his property.¹⁸

Claim and Delivery Procedures Under the 1872 Legislation

Claim and delivery under the 1872 statutory scheme was an *ex parte* procedure initiated by filing a complaint and obtaining issuance of a summons. The plaintiff was required to submit an affidavit showing that he was entitled to possession of the claimed property and that the defendant was wrongfully detaining it.¹⁴ The plaintiff was also required to file an undertaking executed by two or more sureties of a value at least double that of the claimed property.¹⁵ This bond protected the defendant from damage which the plaintiff might cause should the court rule in favor of the defendant at the final judgment hearing.¹⁶

Although the defendant could except to the sufficiency of the plaintiff's sureties¹⁷ or file a counterbond,¹⁸ the usual course of events found the clerk of the court issuing a writ of possession

12. See *Blair v. Pitchess*, 5 Cal. 3d 258, 278 n.12, 486 P.2d 1242, 1256 n.12, 96 Cal. Rptr. 42, 56 n.12 (1971).

13. See *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

14. Former Cal. Civ. Pro. Code § 510.

15. *Id.* § 512 provided in part:

Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, constable, or marshal receiving such affidavit and notice, to the effect that they are bound to the defendant in double the value of the property . . . such officer must forthwith take the property . . . and retain it in his custody.

16. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 400 (1973).

17. Former Cal. Civ. Pro. Code § 513.

18. *Id.* § 514.

directed to the county sheriff to levy upon the property. During regular business hours, the sheriff visited the situs of the property, identified himself, served the summons, demanded permission to enter and removed the claimed property.¹⁹

If the property was not willingly surrendered, the sheriff was required to break open the building, and, in the words of the statute, could "call to his aid the power of his county"²⁰; he could, in other words, use whatever force was necessary to obtain possession. If the sheriff found no one present at the sites of the property who could deliver it to him, he might enter through an open window or employ a locksmith to open a door.²¹ Physical force against the person of the defendant was authorized if the officer encountered resistance.²² After obtaining the property and receiving his fees from the claiming creditor the sheriff delivered the property to the creditor. A final judicial hearing on the plaintiff's complaint was later held, typically resulting in a default judgment in the creditor's favor.

BLAIR V. PITCHESS

Cleve Blair and several other taxpayers of the County of Los Angeles brought suit against the county sheriff, Peter Pitchess, challenging the constitutionality of California's claim and delivery law. Plaintiffs asserted that the statutory procedure was unconstitutional on its face as violative of the due process clauses of the fifth and fourteenth amendments of the United States Constitution in that debtors were deprived of their property as taxpayers without a hearing or notice.²³ Plaintiffs further attacked the law on fourth amendment grounds, asserting that the statute per-

19. See *Blair v. Pitchess*, 5 Cal. 3d 258, 266, 486 P.2d 1242, 1247-48, 96 Cal. Rptr. 42, 47-48 (1971).

20. Former Cal. Civ. Pro. Code § 517 provided:

If the property, or any part thereof, be in a building or inclosure, the sheriff, constable, or marshal must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

However, see E. JACKSON, CALIFORNIA DEBT COLLECTION AND PRACTICE 240-41 (1968) which states:

In practice, most officers will refuse to make a forcible entry unless they can identify the property from without. For example, a television set of a certain make is directed to be seized, and a set can be seen from the outside. The officer will enter at his own peril, for very often the set he sees turns out to be a newer model or a "loaner" while the set he is seeking is in a TV shop for repairs. He could thus be guilty of a trespass and will usually refuse to break and enter unless identification is positive or the defendant admits the property sought is on the premises.

21. See *Blair v. Pitchess*, 5 Cal. 3d 258, 266, 486 P.2d 1242, 1248, 96 Cal. Rptr. 42, 48 (1971).

22. *Id.*

23. *Id.* at 264 n.3, 486 P.2d at 1247 n.3, 96 Cal. Rptr. at 47 n.3.

mitted unreasonable searches and seizures.²⁴

The trial court granted plaintiffs' motion for summary judgment and the court permanently enjoined defendants from seizing property under the claim and delivery law unless a hearing was given to the debtor. The court further enjoined defendants from entering private places pursuant to the claim and delivery law unless probable cause had been established before a magistrate.

Standing

Plaintiffs brought this action under California Code of Civil Procedure section 526a which authorizes taxpayer suits against officers of a county or municipality.²⁵ The defendant challenged the plaintiffs' standing to sue on grounds that they had failed to allege that they were or might be parties to a claim and delivery action, and that the action thus did not represent a true case or controversy.²⁶ The California Supreme Court reached the merits of the case by ruling that section 526a was to be interpreted broadly, citing numerous cases in which the standing issue had been resolved in favor of the taxpayer.²⁷

The Fourth Amendment Challenge

Under section 517 of the California Code of Civil Procedure²⁸ the sheriff was authorized to use whatever force was necessary to take the claimed property into his possession for the

24. *Id.*

25. CAL. CIV. PRO. CODE § 526a (West Supp. 1974) provides in part:

An action to obtain a judgment, restraining and preventing any illegal expenditure of . . . funds . . . of a county . . . may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.

26. 5 Cal. 3d at 269, 486 P.2d at 1249-50, 96 Cal. Rptr. at 49-50.

27. *Id.* at 269, 486 P.2d at 1250, 96 Cal. Rptr. at 50 where the court stated:

[T]he primary purpose of section 526a was to give a large body of citizens standing to challenge governmental action. If we were to hold that such suits did not present a true case or controversy unless the plaintiff and defendant each had a special, personal interest in the outcome, we would drastically curtail their usefulness as a check on illegal governmental activity. . . .

Furthermore it has never been the rule in this state that the parties in suits under section 526a must have a personal interest in the litigation.

The court cited the following cases as examples of the liberal interpretation of § 526a: *Vogel v. County of Los Angeles*, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967) (to enjoin county officials from administering loyalty oaths); *Wirin v. Parker*, 48 Cal. 2d 890, 313 P.2d 844 (1957) (to enjoin illegal wiretaps); *Crowe v. Boyle*, 184 Cal. 117, 193 P. 111 (1920) (action to enjoin construction of an aqueduct by county).

28. For the text of § 517 see note 20 *supra*.

benefit of the plaintiff. The force might include breaking down doors, entering through open windows, removing locks, and using physical force against the possessor of the property.²⁹ The subsequent search and seizure conducted by the officer took place without the issuance of a warrant by a neutral and detached magistrate upon probable cause.

The *Blair* court was not persuaded by the defendant's argument that the constitutional ban on unreasonable searches and seizures does not apply to civil matters. The court found two 1967 United States Supreme Court decisions controlling. In the companion cases of *Camara v. Municipal Court*³⁰ and *See v. City of Seattle*,³¹ the Court held that inspections of private dwellings and commercial buildings were subject to the limitations of the fourth amendment, even though the challenged inspections were basically civil in nature and for the purpose of ascertaining compliance with building and housing codes. While the *Blair* court would grant that some official entries might not be unreasonable searches,³² it specifically held that the unrestricted searches not approved by a judicial officer which the claim and delivery law authorized were unreasonable, absent a prior showing of probable cause.³³

Subsequently the United States Supreme Court in *Fuentes v. Shevin*³⁴ declined to reach the fourth amendment question in a challenge to replevin statutes similar to the one invalidated in *Blair*. The Court indicated that there was no need to decide the question of possible fourth amendment violations since the requirements of due process were held to demand a prior judicial hearing at which the plaintiff must establish the probable validity of his claim. Thus the Court concluded that the fourth amendment problem "may well be obviated".³⁵ Significantly both California legislative responses to *Blair* include a requirement that the plaintiff show probable cause to believe the property is located where he claims it to be.³⁶

Due Process Requirements

The plaintiffs in *Blair* also challenged California's claim and

29. *Id.* See also *Blair v. Pitchess*, 5 Cal. 3d 258, 266, 486 P.2d 1242, 1248, 96 Cal. Rptr. 42, 48 (1971).

30. 387 U.S. 523 (1967).

31. 387 U.S. 541 (1967).

32. 5 Cal. 3d at 272, 486 P.2d at 1252, 96 Cal. Rptr. at 52, citing *Wyman v. James*, 400 U.S. 309 (1971), in which the challenged entry was made by a welfare worker. Such entry was perceived to be for the benefit of the welfare recipient as well as the state and was thus not unreasonable.

33. *Id.* at 273, 486 P.2d at 1252-53, 96 Cal. Rptr. at 52-53.

34. 407 U.S. 67 (1972).

35. *Id.* at 96 n.32.

36. See notes 125 and 150 *infra*.

delivery procedure on due process grounds in that the alleged debtor was not given a prejudgment opportunity to contest the claimant's right to possession and was not given advance notice that the claimant sought recovery. Plaintiffs placed primary reliance on the 1969 decision of the United States Supreme Court in *Sniadach v. Family Finance Corp.*³⁷ which invalidated Wisconsin's prejudgment wage garnishment statute on due process grounds.

The *Sniadach* Court regarded prejudgment garnishment as imposing a substantial hardship on wage earners³⁸ for which there was no countervailing state or creditor interest of sufficient weight to justify the taking.³⁹ That the garnishee might ultimately prevail and obtain restitution and damages was unimportant to the Court, which viewed the interim deprivation of the right to enjoy earned wages as too substantial to permit a prejudgment taking without the debtors having first had an opportunity to be heard and to defend himself. To the Court, the right to be heard before suffering a deprivation of property is the essence of procedural due process.⁴⁰

Recognizing, however, that there do exist situations in which an ex parte garnishment proceeding might be appropriate and lawful under the due process clause, the Court refused to declare that all ex parte prejudgment wage garnishment procedures would be construed as unconstitutional. Rather, the Court announced that a statute allowing ex parte wage garnishment would be consistent with the due process clause only in "extraordinary situations."⁴¹

Although the defendant in *Blair* argued that *Sniadach* should be limited to its narrow factual setting of wage garnishment, the California Supreme Court agreed with the plaintiffs that the principles announced in *Sniadach* had wide-ranging importance and applicability to all situations in which there was a prejudgment deprivation of property.⁴² Thus the California Supreme Court as had the *Sniadach* Court with respect to wage garnish-

37. 395 U.S. 337 (1969).

38. *Id.* at 340. "[A] prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." *Id.* at 341-42 (footnote omitted).

39. *Id.*

40. *Id.* at 339-40 where the Court stated:

We have dealt over and again with the question of what constitutes "the right to be heard" . . . within the meaning of procedural due process. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950] . . . [in which] we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

41. *Id.* at 339. See also text accompanying notes 107-16 *infra*.

42. 5 Cal. 3d at 280, 486 P.2d at 1258, 96 Cal. Rptr. at 58.

ment, decided that the prejudgment remedy of claim and delivery denied the debtor due process of law by depriving him of the use of property without notice and hearing pending a final determination of the right to possession. The *Blair* court, paralleling *Sniadach*, decided that only in extraordinary situations would it find the ex parte issuance of a writ of possession in a claim and delivery action to be constitutional. Further it held that any statute which authorized ex parte writs would have to be narrowly drawn to cover only such extraordinary situations.⁴³

To defendant's argument that denying the creditor immediate possession would allow further depreciation of the property and increase the likelihood that it would be valueless, the *Blair* court answered that this was not an excuse for depriving the debtor of a hearing; it was rather an argument in favor of an expeditious proceeding.⁴⁴ To the similar argument that allowing the debtor to remain in possession increased the risk that the debtor would dispose of the property and make repossession impossible, the court responded that such an argument was unrealistic, given the fact that claim and delivery is usually the final phase in a creditor's attempt to collect a debt.⁴⁵ The court did suggest, however, that when the risk is substantial that the debtor would abscond with or destroy the property, a summary proceeding might pass constitutional muster.⁴⁶

At the conclusion of its opinion, the court suggested that the legislature enact a narrowly drawn claim and delivery statute limited to extraordinary situations in which state or creditor interests outweigh the rights of the debtor.⁴⁷ Responding to this invitation by the court, the California Legislature enacted another claim and delivery law,⁴⁸ which was influenced not only by *Blair* but by succeeding judicial opinions of the California Supreme Court and the United States Supreme Court.

DEVELOPMENTS BETWEEN BLAIR AND THE INTERIM LEGISLATION⁴⁹

Between the time of the decision in *Blair* and the enactment

43. *Id.* at 279, 486 P.2d at 1257, 96 Cal. Rptr. at 57.

44. *Id.* at 278, n.12, 486 P.2d at 1256 n.12, 96 Cal. Rptr. at 56 n.12.

45. *Id.* at 278, 486 P.2d at 1256, 96 Cal. Rptr. at 56, where the court stated that "[i]f the debtor wishes to abscond with the property, he will have had more than ample opportunity to do so long before the claim and delivery process is initiated."

46. *Id.* at 278, 486 P.2d at 1257, 96 Cal. Rptr. at 57.

47. *Id.* at 284, 486 P.2d at 1260, 96 Cal. Rptr. at 60.

48. CAL. CIV. PRO. CODE §§ 511.010-516.050 (West Supp. 1974) (effective July 1, 1974).

49. The term "interim legislation" is used to refer to the emergency legislation mentioned in text accompanying note 5 *supra*.

of the interim legislation, both the Supreme Court of California and the United States Supreme Court issued significant opinions regarding prejudgment creditor remedies. *Randone v. Appellate Department of Superior Court*⁵⁰ and *Fuentes v. Shevin*⁵¹ are of importance in any assessment of either the interim legislation or the statute taking effect July 1, 1974. Presumably these cases influenced and guided the legislature in its attempt to enact a statute which would adequately protect due process and fourth amendment rights. Furthermore, these cases will unquestionably influence the judicial response to any challenges which the new statutory provision will face.

In both *Randone* and *Fuentes* the term "extraordinary situations" came under judicial scrutiny. A definition of this term is essential because under *Sniadach* and *Blair* summary ex parte prejudgment remedies are constitutionally valid only in extraordinary cases.⁵² In addition to the notion of "extraordinary circumstances" both courts have considered the concept of "necessities" and the constitutional confusion surrounding the susceptibility of necessities to the application of prejudgment creditor remedies.⁵³

Necessities

*Fuentes v. Shevin*⁵⁴ involved the consolidation on appeal of challenges to the prejudgment replevin laws of Florida and Pennsylvania. Like the procedure invalidated by the California Supreme Court in *Blair*, the provisions challenged in *Fuentes* allowed for ex parte issuance of a writ of possession without notice to the alleged debtor and without affording him a hearing.⁵⁵

Mrs. Fuentes had purchased a gas stove and service policy from the Firestone Tire and Rubber Company on an installment contract. She regularly made the payments until a dispute arose as to the servicing of the stove. Firestone then initiated an action to recover possession, but before Mrs. Fuentes had received a summons to answer the complaint, Firestone obtained a writ of replevin pursuant to which a deputy sheriff seized her stove. Subsequently Mrs. Fuentes brought an action in federal court challenging the constitutionality of Florida's replevin procedure.⁵⁶

50. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), cert. denied, 407 U.S. 924 (1972).

51. 407 U.S. 67 (1972).

52. See text accompanying notes 62 and 71 *infra*.

53. See text accompanying notes 78-106 *infra*.

54. 407 U.S. 67 (1972).

55. *Id.* at 70.

56. The procedural background of the Pennsylvania case is similar.

The district court upheld the constitutionality of the statute,⁵⁷ and the United States Supreme Court granted certiorari.⁵⁸

In holding the procedure unconstitutional on due process grounds,⁵⁹ the Court rejected the defendants' contention that the due process clause required notice and hearing only when the claimed property was a necessity.⁶⁰ The Court insisted that the *Sniadach* holding as to the requisites of due process—notice and hearing before deprivation—was applicable whenever a deprivation of property was threatened,⁶¹ whether the claimed property was a necessity or non-necessity.

No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods . . . but if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally . . . It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary'.⁶²

The *Fuentes* Court established the principle, therefore, that all significant property interests are to be afforded the minimal protections of due process. But more than this, the Court impliedly held that there may be property interests which could be subjected to a due process standard more rigorous than simple notice and hearing. However, because the only question before the Court was whether the deprivation of property *other* than necessities required minimal protections of notice and hearing, commentary on a stricter standard for other property would have been premature.*

57. 317 F. Supp. 954 (S.D. Fla. 1970).

58. 401 U.S. 906 (1971).

59. 407 U.S. at 82.

60. *Id.* at 88-89.

61. *Id.* at 90-91 (except in "extraordinary circumstances" as discussed in text accompanying notes 107-16 *infra*).

62. *Id.*

* After initial printing of this comment, the United States Supreme Court in a five to four decision distinguished *Fuentes* in *Mitchell v. W.T. Grant Co.*, 42 U.S.L.W. 4671 (May 13, 1974). The case involved the replevin statute of Louisiana which authorized the ex parte seizure of goods held by a defaulting debtor when both the seller and buyer had interests in the property seized. The Court emphasized the existence of a statutory vendor's lien and the opportunity for an immediate hearing on the creditor-seller's claim. The Court also stressed the importance of protecting the seller's property interest which would suffer from further depreciation due to continued use of the property.

In apparent retreat from *Fuentes* the Court said, at 42 U.S.L.W. 4675:

The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination is adequate. [citations]."

The California Supreme Court has gone beyond the *Fuentes* and *Sniadach* decisions in its rulings as to the requirements of due process when the property which is the subject of a possessory action is a "necessity".⁶³ *Randone v. Appellate Department of Superior Court*⁶⁴ illustrates the view of the California court as to necessities.

Mr. and Mrs. Joseph Randone were sued by Thunderbird Collection Services, Inc., a collection agency, which alleged that the Randones had failed to pay a bill for legal services for which debt the collection agency was the assignee. One month after filing its action against the Randones the collection agency secured a writ of attachment and levied upon their checking account.⁶⁵ Two weeks later the Randones filed a motion to quash the writ of attachment, arguing that the prejudgment issuance of a writ of attachment was a violation of due process.

The California Supreme Court reviewed the pertinent statutory provisions and noted that under the attachment statute the alleged debtor had neither notice of the writ of attachment nor the opportunity to contest its issuance.⁶⁶ The court rejected the contention that *Sniadach* was limited to its facts stating that *Sniadach* did not create a special rule for wages but rather recognized that, except in extraordinary situations, prejudgment remedies could not be used to deprive individuals of property without notice and hearing.⁶⁷ Because California's attachment statute was broadly drawn, was not limited to extraordinary situations, and permitted attachments of "necessities of life" before a hearing as

The Court also highlighted the fact that the Louisiana procedure, in contrast to that invalidated in *Fuentes*, authorized repossession only upon judicial order. Notably, in an obvious effort to avoid a flood of litigation reviewing past decisions, the Court added a note to the effect that the *Mitchell* case would not affect cases such as *Blair* and *Randone* (footnote 14).

The dissenters argued that *Fuentes* was controlling and four members of the Court in two opinions suggested that *Fuentes* was effectively overruled.

The effect of *Mitchell* on California courts, though potentially significant, will probably be minimal. While strongly influenced by federal cases, the California courts have consistently based their decisions on California law in addition to federal law. Furthermore, for purposes of this analysis, it should be noted that both *Blair* and *Randone* were decided before *Fuentes*. Thus it seems likely that the California courts will not, by virtue of *Mitchell*, automatically approve revised creditor-remedy statutes such as that discussed herein.

63. The meaning of the word "necessities" and California cases interpreting it are discussed in text accompanying notes 78-106 *infra*.

64. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), cert. denied, 407 U.S. 924 (1972).

65. *Id.* at 542, 488 P.2d at 16, 96 Cal. Rptr. at 712. The fundamental difference between attachment and claim and delivery is that the attaching creditor has no pre-existing interest in the property seized whereas the creditor using claim and delivery does.

66. *Id.* at 544, 488 P.2d at 17, 96 Cal. Rptr. at 713.

67. *Id.* at 547-48, 488 P.2d at 20, 96 Cal. Rptr. at 716.

to the validity of the creditor's claim, the court ruled that the procedure violated due process.⁶⁸

Prior to its decision in *Randone*, the California Supreme Court in *Blair* had hinted that it would look with particular disfavor upon a procedure which, without a noticed hearing, deprives individuals of property necessary for their personal well-being or necessary in their business.⁶⁹ The *Blair* court, however, did not hold that in order to pass constitutional muster a claim and delivery law would have to except necessities, or that a *final* hearing would be required before the creditor could be placed in possession of the property. However, in *Randone* California's prejudgment attachment procedure was held to be deficient because debtors could be deprived of property without a "meaningful opportunity to be heard on the merits of a plaintiff's claim,"⁷⁰ yet even more significantly because

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 probable, validity of the creditor's claim after a hearing on that issue.⁷¹

While this language clearly suggests that a constitutionally valid *attachment* statute would have to delay the taking of necessities until after a final judgment, it is uncertain whether such a strict rule is required in a claim and delivery action. Because *Blair* was decided just two months before *Randone*, the absence in *Blair* of language requiring a final judgment as to necessities in a claim and delivery situation is puzzling.

There are at least three possible explanations for the lack of a discussion of necessities in *Blair*. It is possible that the court did not feel it necessary to touch upon the subject in that it had invalidated the entire statute without having to reach the issue and thus did not wish to dilute its opinion with dicta. Perhaps the court did not believe it proper to suggest further the form which a new statute should take.⁷² It is unlikely that traditional

68. *Id.* at 547, 488 P.2d at 19, 96 Cal. Rptr. at 715.

69. See *Blair v. Pitchess*, 5 Cal. 3d 258, 284, 486 P.2d 1242, 1260, 96 Cal. Rptr. 42, 60 (1971) where the court stated:

[T]he subsequent return of property [cannot] compensate for or repair the suffering caused a family by temporary loss of appliances *indispensable to its day to day living* (emphasis added).

70. 5 Cal. 3d at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726 (emphasis in original).

71. *Id.* (emphasis added).

72. *Blair v. Pitchess*, 5 Cal. 3d 258, 285, 486 P.2d 1242, 1260, 96 Cal. Rptr. 42, 60 (1971) where the court states:

Obviously, it is not within our judicial province to prescribe which of the multitude of possible, constitutional procedures for prejudgment

deference to the legislature is the reason why *Blair* did not reach the issue of whether a final hearing was required by due process when the action is one in claim and delivery. In *Randone*, decided just two months after *Blair*, the court could have again left the necessities problem to the legislature.

A second, and more plausible explanation is that the *Blair* court believed it had adequately set forth the due process standard to be applied—a standard which would avoid distinguishing between necessities and non-necessities. *Blair* suggested application of a balancing test which would permit claim and delivery only when state or creditor interests outweighed the debtor's due process rights.⁷³ Presumably, when the property was a necessity the debtor's needs would weigh more heavily in the balance, and the burden on the creditor would be appropriately greater. But, because *Blair* arose as a taxpayers' suit, the practical operation of this test was not illustrated.

The question of course arises as to why the court utilized stronger language in *Randone* when it could have again relied on an established balancing test. A possible answer is that the court felt that the balancing test of *Blair* needed clarification. In *Randone* the court explained the concept of "extraordinary circumstances" at greater length than it had in *Blair*;⁷⁴ it was therefore logical for the court to clarify the meaning of "necessities", another area of possible confusion.

This second explanation contains the implication that the court would require, as it has in the context of attachment,⁷⁵ that any constitutional claim and delivery law provide for a *final* determination of the right to possession before the debtor could be deprived of a necessity.

A third explanation for the absence in *Blair* of the strong language found in *Randone* with respect to necessities is that the court believed there to be a fundamental difference of constitutional dimensions between the remedies of claim and delivery and attachment. If this is the case, a valid claim and delivery procedure might allow the prejudgment taking of necessities upon the mere showing at a noticed preliminary hearing that it is more likely than not that the plaintiff will prevail at the final hearing. In contrast, a creditor could not *attach* the same property before a final hearing.

The source of a possible constitutional distinction between

claim and delivery should be adopted; that is a proper task for the Legislature.

73. *Id.* at 284, 486 P.2d at 1260, 96 Cal. Rptr. at 60.

74. 5 Cal. 3d at 552-57, 488 P.2d at 24-27, 96 Cal. Rptr. at 720-23.

75. See text accompanying note 71 *supra*.

the two remedies stems from the relationship of the creditor to the property which he seeks to recover in satisfaction of the obligation owed by the debtor. In the typical claim and delivery situation the debtor purchases an item under an installment sales contract in which the creditor retains an interest in the sold property until payments are complete. When the creditor institutes a claim and delivery proceeding he is getting back a specific piece of property which he formerly owned and for which the debtor has not fully paid. At the hearing on the merits the question to be resolved is whether the debtor or creditor has a superior right to possession. In contrast, in an attachment proceeding the creditor does not claim a property interest in the specific piece of property attached; rather, the issue is whether the defendant owes the plaintiff money from a transaction unrelated to the attached property. The stronger property interest of the claim and delivery plaintiff arguably permits prejudgment deprivation of necessities under a due process balancing test while the prospective interest of the attaching creditor would not.

Although there is support in *Randone* for distinguishing between the two remedies on the basis of the creditor's interest,⁷⁶ the focus of both the California Supreme Court and the United States Supreme Court has not been on the nature of the creditor's interests and rights in the property seized. Instead, the courts have concentrated on the deprivation and hardship suffered by the debtor due to the temporary loss of his property.⁷⁷ The hardship upon the debtor is certainly not lessened if he has lost his property by claim and delivery rather than by attachment. In reality, the deprivation caused by claim and delivery is often more severe because the statutory provisions which exempt certain property from attachment do not extend to claim and delivery.⁷⁸

If the courts ultimately rule that due process requires that a claim and delivery statute provide for a final hearing before the

76. 5 Cal. 3d at 561, 488 P.2d at 30, 96 Cal. Rptr. at 726 where the court states:

[U]nlike 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.

77. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341 (1969); *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 552, 488 P.2d 13, 23, 96 Cal. Rptr. 709, 719 (1971); *Blair v. Pitchess*, 5 Cal. 3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971).

78. These exemptions may be found in CAL. CIV. PRO. CODE §§ 690-690.29 (West 1972).

creditor may recover necessities from the debtor, the meaning of the word "necessity" becomes of key importance.

In *Randone* the California Supreme Court did not define what is meant by the term "necessities"; rather, it merely stated that "due process requires that all 'necessities' be exempt from prejudgment attachment."⁷⁹ This is unfortunate since the court has indicated that necessities must not be attached prior to a final hearing,⁸⁰ while non-necessities presumably may be recovered after a noticed hearing in which the trial court will make a preliminary determination as to the right of possession. Thus, whether a final hearing or simply a preliminary hearing is required will hinge upon whether the property is a "necessity." Clearly it would be in the interests of both debtor and creditor to know in advance whether the subject property is such that recovery will be possible only after a final hearing.

Defining a necessity is not a simple process. As a starting point the statutory exemptions from attachment and execution should be examined.⁸¹ The items described in the exemption statutes are properties which the legislature has determined should be given special protection. It is reasonable to assume that they are immune from attachment and execution because the legislature thought them to be necessities. The exemption statutes⁸² include certain household furnishings and clothing "ordinarily and reasonably necessary to, and personally used by, the debtor and his resident family."⁸³ Also included are items such as a radio, a television, food and fuel for three months,⁸⁴ one motor vehicle,⁸⁵ one mobilehome,⁸⁶ certain tools of trade,⁸⁷ prosthetic and orthopedic appliances,⁸⁸ a portion of wages,⁸⁹ \$1000 savings,⁹⁰ workmen's compensation benefits,⁹¹ unemployment insurance,⁹² welfare,⁹³ and property held in an educational trust.⁹⁴

79. 5 Cal. 3d at 563, 488 P.2d at 31, 96 Cal. Rptr. at 727.

80. See text accompanying note 71 *supra*.

81. CAL. CIV. PRO. CODE §§ 690-690.29 (West 1972).

82. The items mentioned are not a complete listing of statutorily exempt property.

83. CAL. CIV. PRO. CODE § 690.1 (West 1972). This section lists some of the items that "are reasonably necessary to, and personally used" by the debtor. This section also states that the exemptions are not limited to those listed.

84. *Id.*

85. *Id.* § 690.2.

86. *Id.* § 690.3.

87. *Id.* § 690.4.

88. *Id.* § 690.5.

89. *Id.* § 690.6.

90. *Id.* § 690.7.

91. *Id.* § 690.15.

92. *Id.* § 690.16.

93. *Id.* § 690.19.

94. *Id.* § 690.28.

The concept of necessities, however, is broader than just the statutorily exempted property; what is a necessity for one person may not be for another.⁹⁵ In determining whether an item is a necessity *vis-a-vis* an individual, California courts look to all the circumstances surrounding the debtor, the debt, and the subject property.⁹⁶ As Justice (then Judge) Peters wrote in *Perfection Paint Products v. Johnson*,

[t]he basic theory of such exemption is that a debtor and his family, regardless of the debtor's improvidence, will retain enough money to maintain a basic standard of living in order that the debtor may have a fair chance to remain a productive member of the community [T]he determination of what is 'necessary for the use of the debtor's family' is not subject to precise definition, and differs with each debtor. Thus, the determination must be largely left to the discretion of the trial court.⁹⁷

In another significant California case⁹⁸ the court noted that an item such as a tuxedo may be necessary to one employed as a waiter but not to one who does not need a tuxedo in his work or does not commonly attend gatherings where a tuxedo is appropriate dress.⁹⁹

The importance of making the distinction between necessities and non-necessities is minimal when there is no danger of harm to or loss of the property. If the item is a necessity, the delay of several weeks between a preliminary hearing establish-

95. For an excellent discussion see Seid, *Necessaries—Common or Otherwise*, 14 HAST. L.J. 28 (1962). See generally 65 C.J.S. *Necessary* (1966) which states in part:

The word "necessary" is susceptible of various meanings, or various degrees of meaning, and is without fixed meaning or character peculiar to itself.

"Necessary" may have a broad or a strict meaning. It is flexible, relative, and, as some courts have described the word, a variable, and comparative term admitting of all degrees of comparison, somewhat elastic, and restricted or enlarged by the surrounding circumstances.

. . . It is defined as meaning such things as are useful and suitable to the person's estate and condition in life, and not merely such as are requisite for bare subsistence; whatever is convenient, usual, or adapted to the proper end or customary under similar circumstances.

The term "necessaries" is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society, such as ornaments of dress which are usually worn by persons of rank and position. (footnotes omitted).

96. See, e.g., *Ratzlaff v. Portillo*, 14 Cal. App. 3d 1013, 92 Cal. Rptr. 722 (1971); *Newport Nat'l Bank v. Adair*, 2 Cal. App. 3d 1043, 83 Cal. Rptr. 1 (1969); *Independence Bank v. Heller*, 275 Cal. App. 2d 84, 79 Cal. Rptr. 868 (1969).

97. 164 Cal. App. 2d 739, 741, 330 P.2d 829, 830-31 (1958) (emphasis added).

98. *Los Angeles Fin. Co. v. Flores*, 110 Cal. App. 2d Supp. 850, 243 P.2d 139 (1952).

99. *Id.* at 856, 243 P.2d at 143-44.

ing that the property is a necessity and a final judgment hearing should not, in the ordinary situation, adversely affect the creditor's interest. However, if extraordinary circumstances¹⁰⁰ warrant an ex parte summary proceeding, the question of whether the subject property is a necessity becomes crucial. The creditor has a strong interest in immediate recovery, but if the item is a necessity, the debtor may be greatly harmed by even its temporary loss. Following the rationale of *Randone*, the right of possession of a necessity must be determined only at a final hearing.¹⁰¹

California courts have on occasion drawn distinctions between "necessities of life" and other "necessities".¹⁰² "Necessities of life" are those things which are commonly required by persons for sustenance of life *regardless* of their employment or status.¹⁰³ By way of contrast, other "necessities" are those items which are somehow related to the individual's station in life or his employment as, for instance, the tuxedo mentioned in the example above.

At several points the *Randone* court indicated that one of the weaknesses of the attachment statute considered was its failure to provide a final hearing when "necessities of life" were the subject of an attachment.¹⁰⁴ However, the court apparently was not limiting its holding just to "necessaries of life" but rather included all "necessaries". The court's language makes it clear that necessary business property and even property necessary to litigate a pending action may not be taken prior to a final hearing. In unmistakable language the court commented:

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 probable, validity of the creditor's claim after a hearing on that issue.¹⁰⁵

100. See text accompanying notes 107-16 *infra* for a discussion of the concept of "extraordinary circumstances".

101. See text accompanying note 71 *supra*.

102. The court in *Los Angeles Fin. Co. v. Flores*, 110 Cal. App. 2d Supp. 850, 856, 243 P.2d 139, 143 (1952), noted that although a tuxedo may be necessary wearing apparel to a waiter and not to a laborer it would never be considered a common necessary of life.

103. For an excellent discussion of the distinctions between the two see *Los Angeles Fin. Co. v. Flores*, 110 Cal. App. 2d Supp. 850, 852-55, 243 P.2d 139, 141-43 (1952).

104. See, e.g., 5 Cal. 3d at 558, 488 P.2d at 27, 96 Cal. Rptr. at 723.

105. *Id.* at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726 (citations omitted).

Read literally, the *Randone* court has indicated that in order to use an ex parte proceeding a creditor must not only prove extraordinary circumstances but also demonstrate that the property is *not* a necessity if he seeks possession prior to a noticed hearing. This is so because *Randone* held that even given extraordinary circumstances the creditor's interest is not sufficient to justify seizure of a debtor's necessities before a final hearing.¹⁰⁶ Since what constitutes a necessity is apparently a variable depending on the circumstances of the individual debtor, it will be extremely difficult for a creditor to prove that a specific piece of property is not a necessity to the debtor.

Extraordinary Circumstances

The opinions in *Sniadach*, *Blair*, *Randone* and *Fuentes* have stated that summary proceedings are consistent with due process only in "extraordinary circumstances."¹⁰⁷ Neither the United States Supreme Court nor the California Supreme Court has specifically defined what is meant by this term. However, from the cases cited by these courts as examples of situations properly denominated as "extraordinary"¹⁰⁸ certain generalities may be derived.

In determining whether a situation in which a plaintiff seeks an ex parte writ of possession is extraordinary, the court must balance the due process rights of the defendant against the property rights of the plaintiff. Only when the public or private interests represented by the plaintiff outweigh those of the defendant will a writ be proper.¹⁰⁹ One factor weighing heavily in the balance will be whether the defendant is a state resident.¹¹⁰ As

106. *Id.* at 557 n.19, 488 P.2d at 27 n.19, 96 Cal. Rptr. at 123 n.19.

107. See note 77 *supra*.

108. Among the cases cited are, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (mislabelled drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (prevention of a bank failure); *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589 (1931) (collection by the Internal Revenue Service); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) (prevention of a bank failure); *United States v. Pfitsch*, 256 U.S. 547 (1921) (meeting the needs of a war effort); *Ownbey v. Morgan*, 256 U.S. 94 (1921) (non-resident debtor); *Stoehr v. Wallace*, 255 U.S. 239 (1921); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921) (meeting the needs of a war effort); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (protecting public from contaminated food).

109. See *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972); *Blair v. Pitchess*, 5 Cal. 3d 258, 284, 486 P.2d 1242, 1260, 96 Cal. Rptr. 42, 60 (1971).

110. *Randone v. Appellate Dep't of Super. Ct.*, 5 Cal. 3d 536, 554, 488 P.2d 13, 25, 96 Cal. Rptr. 709, 721 (1971). See also *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972). The latter case held that neither *Sniadach* nor *Randone* forbids the attachment of property of a non-resident. The court said:

Prior notice and hearing inevitably provide the non-resident debtor with

the *Randone* court points out, because the property is not located in the debtor's home state there is less likelihood that the property would be a necessity; thus the hardship on the debtor would be minimal. Another important consideration is the probability that the defendant will abscond with or destroy the property. The California court in *Blair* suggested that in the presence of a very real danger of loss or destruction "a summary procedure may be consonant with constitutional principles."¹¹¹ Likewise, if there is a threat of imminent and serious physical danger to the public or the plaintiff if the defendant remains in possession, this will substantially affect the outcome of the balancing test.¹¹²

In *Fuentes*, the United States Supreme Court described the characteristics of situations which are "extraordinary." Stating that these circumstances must be "truly unusual",¹¹³ the Court noted that in each case in which it had approved ex parte deprivations of property, the seizure had been necessary to protect an important governmental or public interest, there was a special need for swift action, and the person initiating the seizure was a governmental official responsible for determining that seizure was necessary and justified.¹¹⁴ The Court did recognize, however, as had the California Supreme Court in *Blair*, that there could be situations in which a creditor could show that his property interest was in danger due to the likelihood that the debtor would destroy or conceal the goods.¹¹⁵ Though not so stating, the Court implies that an ex parte proceeding in such a case would be constitutionally permissible.

As a further requirement, it is clear that in order to comport with due process standards the statute under which the plaintiff seeks possession must be narrowly drawn so that it is applicable *only* to those extraordinary situations in which the plaintiff's interest outweigh those of the defendant.¹¹⁶

opportunity to defeat the primary purpose of foreign attachment by transferring his assets to his home state before the desired attachment can take effect.

23 Cal. App. 3d at 419, 100 Cal. Rptr. at 237.

111. 5 Cal. 3d at 278, 486 P.2d at 1257, 96 Cal. Rptr. at 57.

112. See *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972).

113. *Id.* at 90.

114. *Id.* at 91-92.

115. *Id.* at 93.

116. *Id.* at 91-92; *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969); *Blair v. Pitchess*, 5 Cal. 3d 258, 283, 486 P.2d 1242, 1259, 96 Cal. Rptr. 42, 59 (1971). See also *Adams v. Dept. of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), for the California Supreme Court's most recent decision discussing extraordinary circumstances. In *Adams* the court partially invalidated the state's garageman's lien law noting that operation of the law which deprived individuals of their property without notice and hearing was not restricted to extraordinary circumstances. The court held that the garageman had a possessory interest in the vehicle by virtue of the parts and labor

THE INTERIM STATUTE¹¹⁷

As a result of the decision in *Blair v. Pitchess* there was no statutory plan under which a California plaintiff claiming a superior right to possession of property in the hands of another could obtain a judicial order enabling him to recover the property.¹¹⁸ To provide such a remedy the California Legislature enacted a new claim and delivery law of temporary duration.¹¹⁹

Like the statute it replaced, the interim measure provides for the delivery of claimed property to the plaintiff prior to a final judgment.¹²⁰ The major difference, however, is that after the action is filed, the court must be satisfied at a preliminary hearing that the plaintiff has a colorable claim and that the probable resolution of the dispute will be in the plaintiff's favor at a final hearing on the merits.¹²¹ After the filing of the action, the court fixes a time for the preliminary hearing,¹²² directs the time within which the defendant must be served,¹²³ and issues to the defendant an order to show cause why he should not surrender the property. As with the pre-*Blair* procedure, the plaintiff is required to post a bond and the defendant may post a counterbond.¹²⁴

At the preliminary hearing, if the court finds that the plaintiff is otherwise entitled to a writ of possession, it may not issue the writ unless there is *probable cause* that the property is located where the plaintiff alleges it to be.¹²⁵ This requirement apparently corrects the fourth amendment defect of the former statute.

Under the interim statute, the plaintiff may obtain an ex parte writ of possession only if probable cause is shown that the

supplied. The court also reiterated the view that due process requires notice and hearing before even temporary deprivation of property. Thus the court upheld the right of the garageman to retain possession of the vehicle but not sell it. Such a scheme protects the debtor from total loss of his property but retains the *status quo* with the vehicle in possession of the garageman. In note fifteen of its opinion the court said:

Implicit in *Shevin* and *Blair* is the policy of honoring that possessory right actually vested in possession, at least until conflicting claims of possession have been judicially resolved. (emphasis added.) 11 Cal. 3d at 155 n.15, 520 P.2d at 966 n.15, 113 Cal. Rptr. at 150 n.15.

117. CAL. CIV. PRO. CODE §§ 509-21 (West Supp. 1974) (effective until July 1, 1974).

118. See *Blair v. Pitchess*, 5 Cal. 3d 258, 283, 486 P.2d 1242, 1260, 96 Cal. Rptr. 42, 60 (1971) where the court states: "[W]e are compelled to invalidate the statute in its entirety and await a legislative redrafting."

119. CAL. CIV. PRO. CODE §§ 509-21 (West Supp. 1974) (effective until July 1, 1974).

120. *Id.* § 516.

121. *Id.* § 510(a)-(b).

122. *Id.*

123. *Id.*

124. *Id.* §§ 511(b), 514.

125. *Id.* § 511(a).

defendant came into possession of the property by theft,¹²⁶ the property is a negotiable instrument or a credit card, or the property is perishable. Also if there is an immediate danger of harm to the property, removal from the state, or sale to an innocent purchaser, an ex parte writ may be issued.¹²⁷ The court may also issue an ex parte temporary restraining order prohibiting the defendant from detrimentally affecting the property or the rights of parties claiming the property.¹²⁸

While the interim statute provides for a noticed preliminary hearing in most cases, it does not require a final determination on the merits where necessities are involved. Thus the scheme probably runs afoul of *Randone* unless the remedy of claim and delivery differs from attachment in a constitutionally significant manner.¹²⁹ Of questionable constitutionality, given the narrow scope of "extraordinary circumstances",¹³⁰ is the broad language of the interim statute which allows issuance of an ex parte writ if there is an immediate danger of harm to or concealment of the property. In *Fuentes* the United States Supreme Court noted that "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods,"¹³¹ thus suggesting that where there exists a serious and immediate threat, the situation may be validly classified as "extraordinary". It should be recalled, however, that a constitutionally viable statute must be narrowly drawn. Use of terms such as "immediate" and "serious harm", to which different judges will attach varying meanings, may result in the statute's failure to comport with the "narrowly drawn" requirement.

The constitutionality of the interim statute probably will not be resolved by California courts. As of this writing there have been no constitutional challenges to the procedure, and given both the short period of time until the interim statute is superseded and the length of the appellate process, no constitutional test is expected.

THE 1974 CLAIM AND DELIVERY LEGISLATION

Recommendation of the California Law Revision Commission

In light of the line of cases invalidating various prejudg-

126. Though claim and delivery is traditionally regarded as a *creditor* remedy, it may be used by anyone who seeks to recover possession of personal property from one wrongfully in possession.

127. CAL. CIV. PRO. CODE § 510(c) (West Supp. 1974) (effective until July 1, 1974).

128. *Id.* § 510(d).

129. See text accompanying notes 75-76 *supra*.

130. See notes 107-16 and accompanying text *supra*.

131. *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972).

ment remedies,¹³² the California Law Revision Commission in 1972 recommended major changes in the operation of California's claim and delivery procedure. The most significant alteration suggested was a strict limitation on ex parte proceedings wherein a writ of possession is issued without notice and without an opportunity for the defendant to be heard. The Commission's Recommendation urged that the legislature adopt a statute more restrictive than the interim statute in its treatment of those extraordinary circumstances in which an ex parte procedure would be permissible.¹³³

The Commission suggested that a complete prohibition of any seizure based on an ex parte hearing would be more consistent with due process. Rather than the ex parte issuance of a writ of possession, the Commission suggested that a plaintiff be awarded injunctive relief ordering the defendant to refrain from use of the property in a manner disadvantageous to the plaintiff prior to a noticed hearing. Such a scheme avoids the problem of having a court determine, without the presence of the defendant, whether the property sought is immune from prejudgment seizure as a necessity when the circumstances are properly considered extraordinary. Arguably, the restraints placed upon the debtor by virtue of a temporary restraining order would infringe upon certain possessory rights such as the right to transport the property out of the jurisdiction. However, the restrictions of a temporary restraining order are minimal compared to forfeiture of possession. The scheme thus strikes a reasonable balance between the rights of both debtor and creditor.

Under the statute recommended by the Commission, the only extraordinary circumstances in which an ex parte writ of possession could be lawfully issued are those in which the defendant came into possession of the property by means of a felonious taking (excluding false pretenses and embezzlement), or when the property is a credit card.¹³⁴ Furthermore, the Commission points out that if plaintiff is the victim of a felonious taking, he may secure an ex parte writ only when the property is still in the possession of the thief.¹³⁵ The rationale for the inclusion of "theft" under extraordinary circumstances is to provide an alternative to the criminal process. Presumably credit cards are not necessities, and given the judicial guidelines as to what constitute extraordinary circumstances,¹³⁶ the dangers presented by virtue of contin-

132. See note 3 *supra*.

133. 11 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES, *Recommendation Relating to the Claim and Delivery Statute* 301, 315 (1972) [hereinafter cited as *Recommendation*].

134. *Id.* at 324-26.

135. *Id.* at 326.

136. See notes 107-16 *supra*.

ued possession of the credit card do not fall within that category. The credit card company can issue a notice to retailers who accept the card that the defendant's card is no longer to be honored, or, alternatively, it may apply for injunctive relief ordering the defendant to cease use of the card pending a preliminary hearing.¹³⁷

The Recommendation suggested eliminating provisions of the interim legislation under which *ex parte* issuance of a writ of possession may be obtained upon a showing that the property is perishable or that there is a threat of harm to the property.¹³⁸ The probable rationale for this aspect of the Recommendation was a belief that issuance of a temporary restraining order would furnish a better remedy by avoiding the necessities problem. If the defendant violated the injunction by letting the property spoil or by willfully damaging or selling it, he would be liable to the plaintiff for those damages and could be held in contempt. From the viewpoint of the creditor there remains the danger that the defendant will abscond with the property or will be judgment proof, but a temporary restraining order procedure affords the defendant some measure of protection by allowing him continued possession until his due process rights of notice and hearing are met.

In addition to suggesting modification, the Law Revision Commission recommended several new provisions. The most important of these proposals would allow the judge in the action to issue an order to the defendant directing him to transfer the property to the plaintiff after the preliminary hearing.¹³⁹ As the Commission's comment to this recommended provision makes clear, such an order is cumulative with the writ of possession and is designed to permit the plaintiff to use a means of recovery less expensive than execution by the sheriff.¹⁴⁰

The claim and delivery statute which takes effect July 1, 1974, was heavily influenced by the Commission's Recommendation, with most of the statutory provisions verbatim extracts from the Recommendation. However, changes were made by the legislature. Those modifications and other significant aspects of the new procedure are considered below.

Legislative Expansion of Extraordinary Circumstances

The Recommendation of the California Law Revision Commission as to *ex parte* proceedings in extraordinary situations ad-

137. See note 134 and accompanying text *supra*.

138. See Recommendation at 315-18.

139. *Id.* at 329.

140. *Id.* See also note 10 *supra*.

vocated the use of a summary procedure in only two instances: when the property was feloniously taken from the plaintiff or when the property itself was a credit card.¹⁴¹ While incorporating these provisions in the new statute, the legislature substantially broadened the ex parte section to permit an ex parte writ when there is a threat of loss or harm to commercial personal property. Under the new statute a summary proceeding will be permissible if all of the following conditions exist: (1) the defendant acquired possession in the ordinary course of business for commercial purposes; (2) the property is not necessary for the support of the defendant or his family; (3) there is an immediate danger that the property will become unavailable because of transfer, concealment, removal from the state or there is an immediate danger that the defendant will substantially impair the property by destruction or lack of care; (4) the ex parte writ is necessary to protect the property.¹⁴²

While language in *Fuentes*¹⁴³ and *Blair*¹⁴⁴ suggests that evidence of elements (3) and (4) gives rise to extraordinary circumstances, the problem which also existed in the interim measure¹⁴⁵ as to whether a statute cast in terms such as "immediate danger", "substantially impair" and "necessary to protect the property" is drawn narrowly enough to comply with due process standards is not solved by the new statute. Without a definition of these terms the ex parte procedure has the potential for abuse by creditors who may simply allege that there is a threat of substantial impairment in the value of the property if it remains in the possession of the defendant. The defendant, not having notice or opportunity to show that the danger does not exist and without the opportunity to enter a defense may have his due process rights rendered meaningless by this legislative addition. This section of the statute also requires the plaintiff to show that the claimed property is *not* a necessity. Such a showing may be extremely difficult for a plaintiff, given the variable nature of what constitutes a necessity for an individual defendant.¹⁴⁶

Necessities and the New Procedure

As with the interim legislation, noteworthy in its absence from the statute is a differentiation between necessities and non-necessities. As did the interim measure, the statute permits the

141. See text accompanying note 134 *supra*.

142. CAL. CIV. PRO. CODE § 512.020(b) (West Supp. 1974) (effective July 1, 1974).

143. 407 U.S. at 93.

144. 5 Cal. 3d at 278, 486 P.2d at 1257, 96 Cal. Rptr. at 57.

145. See text accompanying note 131 *supra*.

146. See text accompanying note 95 *supra*.

use of claim and delivery as a means whereby a creditor may obtain necessities from the debtor before a final judgment hearing by merely showing at a noticed hearing the probable validity of his claim. Again the statement of *Randone* as to necessities must be recalled:

[T]he 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 probable, validity of the creditor's claim after a hearing on that issue.¹⁴⁷

As discussed above, there is the possibility that there exists a fundamental difference between claim and delivery and attachment which would permit the prejudgment deprivation of necessities in claim and delivery actions but not in attachment actions. This distinction is due to the differing relationship of the plaintiff to the property which is the subject of the action.¹⁴⁸ However, this distinction between the two remedies may not be of constitutional magnitude in that in each of the major cases decided it was the defendant's deprivation, rather than the plaintiff's claim, which was of concern to the court.

Though the statute is surely an improvement on the pre-*Blair* scheme in that the defendant at least has an opportunity to contest the plaintiff's claim before losing possession, the question of whether this alone meets the requirements of due process when the property claimed is a necessity is a point which will surely be the object of a constitutional challenge.

Other Aspects of the 1974 Act

Another change in the claim and delivery procedure under the 1974 legislation is the elimination of one of the judicial steps required under the interim measure. Instead of the two-phase judicial review required by the interim measure before a plaintiff may obtain a writ of possession (a review of plaintiff's application and a hearing on the order to show cause), the statute provides that there be a single noticed hearing in which each party would make a preliminary showing as to the validity of his claim so that the court could make a finding as to the probable outcome at the final judgment hearing. If the defendant does not appear at the hearing, the plaintiff must still establish a *prima facie* case and convince the court that it is "more likely than not" that he will prevail at the final hearing.¹⁴⁹

147. 5 Cal. 3d at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726.

148. See text accompanying notes 75-76 *supra*.

149. CAL. CIV. PRO. CODE § 511.090 (West Supp. 1974) (effective July 1, 1974).

The procedure for determining probable cause is substantively identical to that required under the interim legislation and apparently complies with the command of *Blair* by the requirement that the writ be issued by a court only upon probable cause, and that absent extraordinary circumstances the defendant have the opportunity to appear and contest the granting of the writ.¹⁵⁰

The statutory provisions dealing with levy and custody are substantively the same as the interim and pre-*Blair* legislation.¹⁵¹ Upon issuance of a writ of possession, the sheriff may take possession of the property from the defendant using the power of his county to aid him.¹⁵² If the property is not voluntarily surrendered, the sheriff may break open the enclosure in which the property is located. Minimal limits are imposed on the sheriff: if he must break into a building, he must do so in a manner which he reasonably believes will do the least damage; and if he believes that seizure involves a serious risk of grave bodily harm to anyone, he must return the writ to the issuing court and explain the reasons for his belief that the risk exists.¹⁵³

Following the Recommendation of the Law Revision Commission, the legislature included a severability clause.¹⁵⁴ Thus, if any portion of the newly enacted procedure is invalidated the remainder will continue to be operative. The ex parte proceeding section is the most vulnerable to a constitutional attack, but should any section fail to comport with the due process clause or any other provision of the constitution the plaintiff will not be without a remedy as he will still have the benefit of other provisions of the act such as the right to obtain a temporary restraining order to protect the property.¹⁵⁵

Operation of the New Procedure

The typical case which will arise under the new statute will involve an individual who has purchased an item on the installment plan. He will miss payments and the store will attempt various collection techniques. These proving unsuccessful, and assuming self-help repossession is unavailable and that the debtor is unwilling to voluntarily surrender the property, the creditor will resort to claim and delivery.

The creditor will go to a court of appropriate jurisdiction and file his complaint. At the time of filing the complaint, the

150. *Id.* § 512.040.

151. *Id.* § 514.010.

152. *Id.* § 514.010(c).

153. *Id.*

154. Cal. Stats. (1973), ch. 526, § 3.

155. CAL. CIV. PRO. CODE § 513.010 (West Supp. 1974) (effective July 1, 1974).

plaintiff may apply for a writ of possession by filing a sworn application stating the basis of his claim (probably a sales contract), describing how the defendant came into possession of the item, why the defendant is detaining the property, and by describing the property and its value.¹⁵⁶ The plaintiff must also state, to the best of his information and belief, the location of the property and why there is probable cause to believe it is located there.¹⁵⁷

Assuming that there are no extraordinary circumstances justifying an *ex parte* writ of possession, the defendant must have the opportunity to contest the issuance of the writ. Before the hearing he must be served with a copy of the summons and complaint, a notice of application and hearing, and a copy of the application for the writ and any affidavit in support of plaintiff's claim.¹⁵⁸ The notice of application and hearing must inform the defendant of the place and time of the hearing and that the writ will be issued if the plaintiff demonstrates the probable validity of his claim.¹⁵⁹ The defendant must also be informed that the hearing is not a final determination of the rights of the parties *vis-a-vis* the property, that he may file an affidavit providing evidence to defeat the plaintiff's claim, and that he may post a bond¹⁶⁰ and thus remain in possession pending a final hearing.

If, at the preliminary hearing, the court rules in favor of the defendant, the defendant retains possession pending the final judgment. If the court rules in favor of the plaintiff, the court will grant the writ which must describe the property to be seized, specify its location, and be directed to the levying officer.¹⁶¹ Assuming that the defendant does not post a bond, the sheriff will call upon the defendant to surrender the property. If the defendant does not, the sheriff may then use whatever reasonable force is necessary to obtain the property.¹⁶² At the end of a ten day waiting period, the sheriff will deliver the property to the plaintiff and return the writ to the court in which the action is pending.¹⁶³ Although the defendant has lost possession his defense is in no way affected by the determination made at the preliminary hearing, and the findings made at the hearing are inadmissible at the final hearing.¹⁶⁴

156. *Id.* § 512.010.

157. *Id.*

158. *Id.* § 512.030.

159. *Id.* § 512.040.

160. *Id.* § 515.020.

161. *Id.* § 512.080.

162. *Id.* § 514.010(c).

163. *Id.* § 514.030.

164. *Id.* § 512.110.

CONCLUSION

By virtue of its strict requirements for the issuance of a writ of possession, including notice, preliminary hearing, and judicial finding of probable cause, California's new claim and delivery law much more closely complies with the commands of the state and federal constitutions as interpreted in *Sniadach*, *Blair*, *Randone*, and *Fuentes*.

The sweeping language of *Randone* with respect to necessities will surely provide the basis for a constitutional challenge to the 1974 statute. The statute allows for the seizure of a defendant's necessities upon a finding made at a preliminary hearing of the probable validity of a plaintiff's claim—not at a final judgment hearing as *Randone* suggests due process requires. The ex parte provisions of the statute are also vulnerable to challenge on the basis that the situations in which summary proceedings are allowed are not sufficiently "extraordinary". Resolution of these conflicts will determine whether the legislation strikes the proper constitutional balance in its treatment of the legitimate possessory rights of the creditor and the due process rights of the debtor.

Becoming law on July 1, 1974, California's new claim and delivery statute faces an uncertain future. The constitutionality of the procedure is not clear, but it is certain that a constitutional challenge will be forthcoming. How it will be resolved remains to be seen.

Robert G. Heywood