

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION AND STUDY

relating to

Civil Arrest

July 1972

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

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NOTE

This pamphlet begins on page 1. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 11 of the Commission's *Reports, Recommendations, and Studies*.

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

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SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

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Ex Officio

July 15, 1972

**To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA**

The California Law Revision Commission was directed by Resolution Chapter 27 of the Statutes of 1972 to study the law relating to attachment, garnishment, execution, repossession of property, civil arrest, confession of judgment procedures, default judgment procedures, and related matters.

The Commission herewith submits its recommendation and a background study relating to one aspect of the 1972 resolution—civil arrest. The background study was prepared by Nathaniel Sterling, a member of the Commission's staff.

Respectfully submitted,
JOHN D. MILLER
Chairman

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Civil Arrest

BACKGROUND

In contract cases involving fraud, the plaintiff may have the defendant arrested on *ex parte* application prior to judgment and imprisoned until the defendant either posts bail or a cash deposit or demonstrates that the arrest was not proper.¹ Arrest and bail is a provisional remedy, available only between the time the complaint is filed and judgment is entered, and is designed to secure the presence of the defendant until final judgment. However, following judgment, the creditor may, if he is unable to satisfy the judgment from assets of the debtor, obtain execution upon the body of the debtor in those cases in which arrest and bail is available.² In such a case, the defendant is jailed until the debt is paid although he may be discharged from jail upon the creditor's consent, upon the creditor's failure to advance money to the jailer for the debtor's support, or upon taking the "pauper's oath."³

Civil arrest in California is available only in certain cases involving fraud and is rarely used. It is ineffective as a collection remedy, and existing California law provides other more effective means of achieving the ends served by civil arrest. It is likely that the civil arrest procedure denies due process of law to defendants. The arrest on execution procedure is anomalous

¹ CODE CIV. PROC. §§ 478-505; see also CAL. CONST., Art. I, § 15 and CODE CIV. PROC. §§ 804 and 1168. The statutory scheme of arrest and bail is described in CALIFORNIA REMEDIES FOR UNSECURED CREDITORS, Callister, *Arrest and Bail and Arrest on Execution* §§ 1-26 at 75-83 (Cal. Cont. Ed. Bar 1957) and 2 B. WITKIN, CALIFORNIA PROCEDURE *Provisional Remedies* §§ 7-23 (2d ed. 1970).

² CODE CIV. PROC. §§ 667, 682(3), and 684. For a discussion of arrest on execution, see CALIFORNIA REMEDIES FOR UNSECURED CREDITORS, Callister, *Arrest and Bail and Arrest on Execution* §§ 27-34 at 84-87 (Cal. Cont. Ed. Bar 1957) and 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgment* §§ 177-178 at 3536-3538 (2d ed. 1971).

³ CODE CIV. PROC. §§ 1143-1154.

in imposing a criminal consequence upon a civil judgment. The requirement that the indigent defendant be provided counsel at public expense imposes an economic burden on the taxpayers that is out of all proportion to the value of civil arrest.

RECOMMENDATION

The California Law Revision Commission recommends the repeal of those provisions of California law that permit civil arrest and imprisonment.⁴ The California Constitution Revision Commission has recommended that the prohibition against imprisonment for debt be made absolute,⁵ and many commentators on the history and law of civil arrest have urged its repeal. The repeal of the civil arrest provisions would not affect the power of a court to order the arrest and imprisonment of a person for disobedience of its orders.

PROPOSED LEGISLATION

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

An act to amend Sections 340, 515, 539, 667, 682, 684, 804, and 1014 of, to add Chapter 1 (commencing with Section 477) to Title 7 of Part 2 of, and to repeal Sections 477 and 1168 of, and to repeal Chapter 1 (commencing with Section 478) of Title 7 of Part 2 of, and to repeal Chapter 3 (commencing with Section 1143) of Title 3 of Part 3 of, the Code of Civil Procedure, to amend Sections 202, 27823, and 71265 of, and to repeal Sections 26681, 26682, 26683, 26684, and 26686 of, the Government Code, relating to civil arrest and bail.

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

Code of Civil Procedure § 340 (amended)

SECTION 1. Section 340 of the Code of Civil Procedure is amended to read:

⁴ Repeal of the civil arrest provisions will make unnecessary the provisions relating to liability of public officers for escape of persons arrested in civil actions, and these provisions—Civil Code Section 340(4) and Government Code Sections 26681–26684, 26686—also should be repealed.

⁵ CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION, PART 6, Art. I, § 10 (1971).

340. Within one year:

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this state;

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl;

~~4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;~~

~~5.~~

4. An action against an officer to recover damages for the seizure of any property for a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person in making any such seizure.

~~6.~~

5. An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that he is not the owner of the land upon which the improvements have been made.

Comment. Section 340 is amended to reflect the fact that arrest and imprisonment in a civil action is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto. See also

former GOVT. CODE § 26681 *et seq.* (liability of sheriff for escape of person held upon civil arrest). *Cf.* former CODE CIV. PROC. § 501 (liability of officer for escape).

Code of Civil Procedure § 477 (repealed)

SEC. 2. Section 477 of the Code of Civil Procedure is repealed.

~~477. Except as otherwise expressly provided, the provisional remedies, deposit in court, injunction and receivers, may not be had in justice courts.~~

Code of Civil Procedure §§ 478–505 (repealed)

SEC. 3. Chapter 1 (commencing with Section 478) of Title 7 of Part 2 of the Code of Civil Procedure is repealed.

Comment. Sections 478–505, providing for arrest and bail, are repealed since arrest of a defendant in a civil action is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto.

Code of Civil Procedure §§ 477, 478 (added)

SEC. 4. Chapter 1 (commencing with Section 477) is added to Title 7 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 1. GENERAL PROVISIONS

477. Except as otherwise expressly provided, the provisional remedies, deposit in court, injunction and receivers, may not be had in justice courts.

Comment. Section 477 continues former Section 477 without change.

478. A person may not be imprisoned in a civil action for debt or tort, whether before or after judgment. Nothing in this section affects any power a court may have to imprison a person who violates a court order.

Comment. Section 478 prohibits the arrest of a defendant in a civil action. The provisional remedy of arrest and bail and the remedy of body execution were previously permitted in California. See former Chapter 1 (commencing with Section 478) of Title 7 of Part 2 of the Code of Civil Procedure, provisions formerly found in Sections 667, 682, and 684 of the

Code of Civil Procedure, and Section 15 of Article I of the California Constitution. See also *Recommendation and Study Relating to Civil Arrest*, 11 CAL. L. REVISION COMM'N REPORTS 1 (1973).

The last sentence of Section 478 makes clear that the prohibition of prejudgment attachment of the body of the defendant in a civil action does not affect the power of a court to enforce a court order by imprisonment. See, *e.g.*, CODE CIV. PROC. § 1209 *et seq.* (contempt of court). *Cf.* Comment, *Enforcement of Divorce Decrees and Settlements by Contempt and Imprisonment in California*, 9 HASTINGS L.J. 57 (1957); Comment, *Integrated Property Settlement Agreements: Constitutional Problems With the 1967 Amendment to California Civil Code Section 139*, 8 SANTA CLARA LAWYER 84 (1967); 2 THE CALIFORNIA FAMILY LAWYER, Sapiro, *Enforcement and Modification of Judgments and Orders* §§ 30.54–30.101 (Cal. Cont. Ed. Bar 1962); THE CALIFORNIA FAMILY LAWYER SUPPLEMENT, Walzer, *Divorce Settlement Agreements* §§ 26A.9 and 26A.17 (Cal. Cont. Ed. Bar 1969). See also CODE CIV. PROC. §§ 238 (juror summons), 545 (garnishee examination), 715 (supplementary proceedings), 1097 (writ of mandate), 1105 (writ of prohibition), 1993–1994 and 2067–2070 (witness summons); PROB. CODE §§ 321 (production of will), 523 (attendance of court proceedings), 571 (render accounting), 614 (examination), 921–922 (render accounting). *Cf.* GOVT. CODE §§ 9405–9409 (contempt of Legislature).

Code of Civil Procedure § 515 (amended)

SEC. 5. Section 515 of the Code of Civil Procedure, as amended by Chapter 855 of the Statutes of 1972, is amended to read:

515. The qualification of sureties under any written undertaking referred to in this chapter shall be such as are ~~prescribed by this code, in respect to bail upon an order of civil arrest, provided in Chapter 7 (commencing with Section 1041) of Title 14 of Part 2.~~ Either party may, within two days after service of an undertaking or notice of filing an undertaking under the provisions of this chapter, give written notice to the court and the other party that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them.

When a party excepts, the other party's sureties shall justify on notice within not less than two, nor more than five, days, in like manner as ~~upon bail on civil arrest provided in Chapter 7 (commencing with Section 830) of Title 10 of Part 2~~. If the property be in the custody of the levying officer, he shall retain custody thereof until the justification is completed or waived or fails. If the sureties fail to justify, the levying officer shall proceed as if no such undertaking had been filed. If the sureties justify or the exception is waived, he shall deliver the property to the party filing such undertaking.

Comment. Section 515 is amended to delete the references to civil arrest. See CODE CIV. PROC. § 478 (civil arrest repealed). With respect to the qualification of sureties, Section 515 incorporates the qualifications from Code of Civil Procedure Section 1057 (qualifications of sureties in any civil case in which undertaking required or permitted), which are basically similar to those formerly provided for arrest and bail. With respect to the justification of sureties, Section 515 incorporates the justification procedures from Code of Civil Procedure Sections 832 and 833 (actions for libel and slander), which are basically similar to those formerly provided for arrest and bail.

Code of Civil Procedure § 539 (amended)

SEC. 6. Section 539 of the Code of Civil Procedure, as amended by Chapter 550 of the Statutes of 1972, is amended to read:

539. (a) Before issuing the notice and order pursuant to Section 538.1 or the writ pursuant to Section 538.5, the plaintiff must file with the clerk or judge a written undertaking with two or more sufficient sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking, and that if the restraining order or the attachment is discharged on the ground that the plaintiff was not entitled thereto under Sections 537 to 537.2, inclusive, the plaintiff will pay all damages which the defendant may have sustained by reason of the restraining order or the attachment, not

exceeding the sum specified in the undertaking. The sum specified in the undertaking shall be one-half ($\frac{1}{2}$) of the principal amount of the total indebtedness or damages claimed, excluding attorneys' fees. Nothing herein shall be construed to preclude the acceptance of an undertaking in which a larger sum is specified, if such undertaking be offered. The court on ex parte application of the plaintiff, may by written order, direct the issuance of the restraining order or the writ on the filing of an undertaking in a lesser sum, if the court is satisfied that the defendant will be adequately protected thereby. The damages recoverable by the defendant pursuant to this section shall include all damages proximately caused by the service of the restraining order or the levy of the writ of attachment.

At any time after the issuing of the restraining order or the attachment, but not later than five days after actual notice of the levy of the writ of attachment, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When excepted to, the plaintiff's sureties, within five days from service of written notice of exception, upon notice to the defendant of not less than two nor more than five days, must justify before the judge or clerk of the court in which the action is pending, ~~in the same manner as upon bail on arrest;~~ *like manner as provided in Chapter 7 (commencing with Section 830), Title 10, Part 2;* and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the writ of attachment must be vacated.

The court, at any time after issuance of the restraining order or the writ, on motion of the defendant, after notice to the plaintiff, or at the hearing pursuant to Section 538.4, may order the amount of the undertaking increased.

(b) The liability of any surety furnishing a bond pursuant to this section, if any, may be enforced on motion in the trial court without the necessity of an independent action. Notice of the motion shall be served on the persons whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. The notice shall state the amount of the claim and shall be supported

by an affidavit or affidavits setting forth the facts on which the claim is based. Such notice and affidavit may be served in accordance with any procedure authorized by Chapter 5 (commencing with Section 1010), Title 14, Part 2. Judgment may be entered in accordance with the notice against the person or persons served therewith, unless such person or persons shall serve and file an affidavit or affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such showing is made, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery. The surety shall not obtain a stay of the proceedings pending the determination of any third-party claims. Affidavits filed pursuant to this section shall conform to the requirements prescribed for affidavits filed pursuant to Section 437c.

Comment. Section 539, providing for the justification of sureties in attachment proceedings, is amended to delete the reference to arrest and bail. See CODE CIV. PROC. § 478 (civil arrest repealed). In place of this reference, Section 539 incorporates the justification procedures from Code of Civil Procedure Sections 832 and 833 (actions for libel and slander), which are basically similar to those formerly provided for arrest and bail.

Code of Civil Procedure § 667 (amended)

SEC. 7. Section 667 of the Code of Civil Procedure is amended to read:

667. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery can not be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return can not be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the

plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

~~Where the defendant is subject to arrest and imprisonment on the judgment, that fact must be stated in the judgment.~~

Comment. Section 667 is amended to reflect the fact that execution may no longer issue against the person of the judgment debtor in a civil action. See CODE CIV. PROC. § 478 and Comment thereto.

Code of Civil Procedure § 682 (amended)

SEC. 8. Section 682 of the Code of Civil Procedure is amended to read:

682. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge, and be directed to the sheriff, constable, or marshal, and it must intelligibly refer to the judgment, stating the court, the county, and in municipal and justice courts, the judicial district, where the judgment is entered, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in Section 667, the execution must also state the kind of money or currency in which the judgment is payable, and must require the officer to whom it is directed to proceed substantially as follows:

1. If it be against the property of the judgment debtor,

it must require such officer to satisfy the judgment, with interest, out of the personal property of such debtor, or if it is against the earnings of such debtor, such levy shall be made in accordance with Section 682.3, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the abstract of judgment was filed as provided in Section 674 of this code, or at any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require such officer to satisfy the judgment, with interest, out of such property.

~~3. If it be against the person of the judgment debtor, it must require such officer to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.~~

~~4.~~

3. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in Section 667, it must also require such officer to satisfy the same in the kind of money or currency in which the judgment is made payable, and such officer must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. Any such officer collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal to do so, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

~~5.~~

4. If it be for the delivery of the possession of real or personal property, it must require such officer to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require such officer to satisfy any cost, damages, rents, or profits

recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Comment. Section 682 is amended to reflect the fact that execution may no longer issue against the person of the judgment debtor in a civil action. See CODE CIV. PROC. § 478 and *Comment* thereto.

Code of Civil Procedure § 684 (amended)

SEC. 9. Section 684 of the Code of Civil Procedure is amended to read:

~~Section Six Hundred and Eighty-four.~~ 684. When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; ~~and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part;~~ when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the Court.

Comment. Section 684 is amended to reflect the fact that execution may no longer issue against the person of the judgment debtor in a civil action. See CODE CIV. PROC. § 478 and *Comment* thereto.

Code of Civil Procedure § 804 (amended)

SEC. 10. Section 804 of the Code of Civil Procedure is amended to read:

804. Whenever such action is brought, the Attorney-General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto ; ~~and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Justice of the Supreme Court, or a Judge of the Superior Court, for the arrest of such defendant and holding him to bail, and thereupon he may be arrested and held to bail in the same manner and with the same effect and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest .~~

Comment. Section 804, providing for arrest of the defendant in a *quo warranto* proceeding, is amended to reflect the fact that arrest of a defendant in a civil action is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto. Criminal arrest of the defendant may be available if his taking of public moneys was wrongful. See PENAL CODE § 424 *et seq.*

Code of Civil Procedure § 1014 (amended)

SEC. 11. Section 1014 of the Code of Civil Procedure is amended to read:

1014. A defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Where a defendant has not appeared, service of notice or papers need not be made upon him ~~unless he is imprisoned for want of bail .~~

Comment. Section 1014 is amended to reflect the fact that arrest of a defendant in a civil action is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto.

Code of Civil Procedure §§ 1143–1154 (repealed)

SEC. 12. Chapter 3 (commencing with Section 1143) of Title 3 of Part 3 of the Code of Civil Procedure is repealed.

Comment. Sections 1143–1154, providing for discharge of persons imprisoned on civil process, are repealed since execution may no longer issue against the person of the judgment debtor in a civil action. See CODE CIV. PROC. § 478 and Comment thereto.

These sections also provided a remedy for a person imprisoned for contempt of court for failure to pay court-ordered support. See, e.g., *Ellery v. Superior Court*, 25 Cal. App.2d 222, 77 P.2d 280 (1938). Even though the imprisonment for civil contempt may have been initially lawful under Code of Civil Procedure Section 1219, which provides for imprisonment until performance, the subsequent inability to comply with the court order is ground for discharge from imprisonment. *Cf. In re Wilson*, 75 Cal. 580, 17 P. 698 (1888). It has been stated that a person entitled to release because of his subsequent inability to comply might apply for discharge under the statutory procedure. *In re Wilson*, 75 Cal. 580, 17 P. 698 (1888); *Ex parte Levin*, 191 Cal. 207, 215 P. 908 (1923) (*semble*); *In re Brune*, 113 Cal. App. 254, 298 P. 80 (1931) (*semble*). The statutory procedure, however, was simply an alternative means of discharge, and release on habeas corpus for subsequent inability to comply is also available. See *In re Johnson*, 92 Cal. App.2d 467, 207 P.2d 123 (1949).

Repeal of Sections 1143–1154 will not affect the ability of a person imprisoned for civil contempt to obtain his release upon a subsequent inability to comply with the court order. The writ of habeas corpus is available in such a contingency. PENAL CODE §§ 1485 and 1487(2). As under the prior provisions, the prisoner may obtain his release on habeas corpus following summary procedures for court hearing. PENAL CODE § 1484. And, as under the prior provisions, once discharged, a person may not be again imprisoned for the prior obligation. PENAL CODE § 1496. *Cf. Ex parte Batchelder*, 96 Cal. 233, 31 P. 45 (1892).

Code of Civil Procedure § 1168 (repealed)

SEC. 13. Section 1168 of the Code of Civil Procedure is repealed.

~~1168. If the complaint presented establishes, to the satisfaction of the judge, fraud, force, or violence, in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.~~

Comment. Section 1168, providing for arrest of the defendant in an unlawful detainer proceeding, is repealed since arrest of a defendant in a civil action is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto.

Government Code § 202 (amended)

SEC. 14. Section 202 of the Government Code is amended to read:

202. The State may imprison or confine for : ~~(a) The~~ *the* protection of the public peace or health or of individual life or safety.

~~(b) The purpose of enforcing civil remedies.~~

Comment. Section 202 is amended to avoid the implication that arrest and imprisonment is a remedy available to individuals in private civil actions. Arrest of a defendant in a civil action and execution against the person of a judgment debtor in a civil action are no longer permitted. See CODE CIV. PROC. § 478. Imprisonment may be used as a means to enforce the process of the court. See CODE CIV. PROC. § 478 and Comment thereto.

Government Code § 26681 (repealed)

SEC. 15. Section 26681 of the Government Code is repealed.

~~26681. A sheriff who suffers the escape of a person arrested in a civil action without the consent or connivance of the party in whose behalf the arrest or imprisonment is made is liable as follows:~~

~~(a) When the arrest is upon an order to hold to bail or upon a surrender in exoneration of bail before judgment, he is liable to the plaintiff as bail.~~

~~(b) When the arrest is on an execution or commitment to enforce the payment of money, he is liable for the~~

~~amount expressed in the execution or commitment.~~

~~(c) When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained.~~

Comment. Sections 26681–26684, providing for the liability of a sheriff for the escape or rescue of a person arrested or imprisoned in a civil action, are repealed since civil arrest and imprisonment is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto. *Cf.* former CODE CIV. PROC. § 501 (liability of officer for escape).

To the extent that Sections 26681–26684 may have applied to a person committed for contempt of court, they are not continued. It is against public policy to hold a public officer liable for damages or injuries caused by the prisoner's escape. See GOVT. CODE § 845.8.

Government Code § 26682 (repealed)

SEC. 16. Section 26682 of the Government Code is repealed.

~~26682. The sheriff is liable for the rescue of a person arrested in a civil action equally as for an escape.~~

Comment. See Comment to former Section 26681.

Government Code § 26683 (repealed)

SEC. 17. Section 26683 of the Government Code is repealed.

~~26683. Upon being sued for damages for an escape or rescue, the sheriff may introduce evidence in mitigation and exculpation.~~

Comment. See Comment to former Section 26681.

Government Code § 26684 (repealed)

SEC. 18. Section 26684 of the Government Code is repealed.

~~26684. An action cannot be maintained against the sheriff for a rescue or for an escape of a person arrested upon an execution or commitment, if, after his rescue or~~

escape and before the commencement of the action, the prisoner returns to the jail or is retaken by the sheriff.

Comment. See Comment to former Section 26681.

Government Code § 26686 (repealed)

SEC. 19. Section 26686 of the Government Code is repealed.

~~26686. When the sheriff is committed under an execution or commitment for not paying over money received by him by virtue of his office and remains committed for 60 days, his office is vacant.~~

Comment. Section 26686, providing that the sheriff's office is vacant when the sheriff has been imprisoned for 60 days under an execution or commitment for failure to pay over money received (Section 26680), is repealed since civil arrest and imprisonment is no longer permitted. See CODE CIV. PROC. § 478 and Comment thereto.

A sheriff may lose his office, however, under other provisions relating to malfeasance in office. *Cf.* GOVT. CODE § 1222 (willful omission to perform duty a misdemeanor); PENAL CODE § 661 (removal from office in case of violation of official duty); GOVT. CODE §§ 1770(h) (office vacant upon conviction of offense involving a violation of official duties) and 3000 (forfeiture of office upon conviction of malfeasance in office). See also GOVT. CODE § 3060 *et seq.* (removal from office pursuant to grand jury proceeding).

Government Code § 27823 (amended)

SEC. 20. Section 27823 of the Government Code is amended to read:

27823. The provisions of Sections 26600, 26601, 26602, 26604, 26606 to 26609, inclusive, 26611, 26660 to 26664, inclusive, ~~and 26680 to 26684, inclusive, and 26686~~ of this code and Sections 262 to 262.5, inclusive, of the Code of Civil Procedure apply to constables, and govern their powers, duties, and liabilities.

Comment. Section 27823 is amended to reflect the repeal of Sections 26681, 26682, 26683, 26684, and 26686 of the Government Code.

Government Code § 71265 (amended)

SEC. 21. Section 71265 of the Government Code is amended to read:

71265. All provisions of Government Code Sections 26600–26602, 26604, 26606–26608.1, 26609, 26611, 26660–26664, 26680 ~~26684~~, ~~26686~~, and Code of Civil Procedure Sections 262, 262.1, 262.2, 262.3, 262.4, and 262.5, apply to marshals and constables and govern their powers, duties, and liabilities.

Comment. Section 71265 is amended to reflect the repeal of Sections 26681, 26682, 26683, 26684, and 26686 of the Government Code.

STUDY RELATING TO CIVIL ARREST IN CALIFORNIA

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STUDY RELATING TO CIVIL ARREST IN CALIFORNIA

by Nathaniel Sterling *

California Law of Civil Arrest

In California, in certain classes of civil cases,¹ the plaintiff may have the defendant arrested on ex parte application prior to judgment and imprisoned until the defendant posts bail, makes a cash deposit, or demonstrates that the arrest was not proper.² This device of arrest and bail is a provisional remedy only, available between the time the complaint is filed and judgment

* B.A. 1967, University of California at Berkeley; J.D. 1970, University of California at Davis. Member of the legal staff of the California Law Revision Commission. Member of the California Bar.

This study was prepared by the author to provide the California Law Revision Commission with background information to assist it in its study of attachment, garnishment, and exemptions from execution. Any conclusions, opinions, or recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the views of the California Law Revision Commission or its individual members.

¹ Code of Civil Procedure Section 479 authorizes the use of the provisional remedy of arrest and bail in the following cases, any one of which is sufficient:

(1) In an action for the recovery of money on a contract when the defendant is about to depart from the state with intent to defraud his creditors. (See *In re Caples*, 26 Cal. App. 786, 148 P. 795 (1915).)

(2) In an action for a fine or penalty, or money or property embezzled or fraudulently converted to his own use by a public officer or any other person in a fiduciary capacity, or for misconduct or neglect in office or in a professional employment, or for a willful violation of duty.

(3) In an action to recover the possession of personal property unjustly detained when the property or any part of it has been concealed, removed, or disposed of to prevent its being found or taken by the sheriff.

(4) When the defendant fraudulently incurred the obligation on which the action is brought or fraudulently concealed or disposed of the property for the recovery of which the action is brought. (See *In re Keene*, 34 Cal. App. 263, 167 P. 194 (1917).)

(5) When the defendant has removed or disposed of his property or is about to do so with intent to defraud his creditors.

In addition, Code of Civil Procedure Section 804 authorizes pretrial arrest in *quo warranto* proceedings (compare subdivision (2) of Section 479), and Code of Civil Procedure Section 1168 authorizes pretrial arrest in unlawful detainer proceedings (compare subdivision (3) of Section 479).

² The provisions relating to arrest and bail are contained in Code of Civil Procedure Sections 478-505. The statutory scheme is described in some detail in CALIFORNIA REMEDIES FOR UNSECURED CREDITORS, Callister, *Arrest and Bail and Arrest on Execution* §§ 1-26 at 75-83 (Cal. Cont. Ed. Bar 1957) (hereinafter cited as CALLISTER) and in 2 B. WITKIN, CALIFORNIA PROCEDURE *Provisional Remedies* §§ 7-23 at 1470-1480 (2d ed. 1970).

is entered,³ designed to secure the presence of the defendant until final judgment.⁴

Following judgment, the creditor may, if he is unable to satisfy the judgment from assets of the debtor, obtain execution upon the body of the debtor in those cases in which arrest is available.⁵ In such a case, the debtor is imprisoned until the debt is paid although he may be discharged from prison upon the creditor's consent, upon the creditor's failure to advance to the jailer money for the debtor's support, or upon taking the "pauper's oath."⁶

The provisions for arrest and bail and the arrest on execution described above fall within the fraud exception to the constitutional prohibition against imprisonment for debt.⁷ Court enforcement of civil process is also exempted from the constitutional ban on civil arrest.⁸

³ See *Ex parte* Cohen, 6 Cal. 318 (1856), and *Hittson v. Stanich*, 84 Cal. App. 434, 258 P. 405 (1927).

⁴ See *Davis v. Robinson*, 10 Cal. 411 (1858); *Carradine v. Carradine*, 75 Cal. App.2d 775, 171 P.2d 911 (1946); *cf. Knight v. Cohen*, 5 Cal. App. 296, 90 P. 145 (1907).

⁵ Although the remedy of execution on the body of a debtor by imprisonment in civil actions is not expressly provided in the California codes, numerous statutory provisions imply that such a remedy is available. See, e.g., CODE CIV. PROC. §§ 667, 682(3), 684, and 1143-1154. These statutory provisions, combined with the provisions for prejudgment arrest, impliedly authorize body execution in cases where arrest and bail would be available. *Stewart v. Levy*, 36 Cal. 159 (1868); *Davis v. Robinson*, 10 Cal. 411 (1858) (dictum).

⁶ The "pauper's oath" is set out in Code of Civil Procedure Section 1148. The statutory provisions for discharge of persons imprisoned on civil process are Sections 1143-1154 of the Code of Civil Procedure. For a discussion of imprisonment and release, see CALLISTER §§ 27-34 at 84-87 and 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgment* §§ 177-178 at 3536-3538 (2d ed. 1971).

⁷ CAL. CONST., Art. I, § 15:

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace.

⁸ See, e.g., CODE CIV. PROC. § 1209 *et seq.* (contempt of court). *Cf.* 2 THE CALIFORNIA FAMILY LAWYER, Sapiro, *Enforcement and Modification of Judgments and Orders* §§ 30.54-30.101 (Cal. Cont. Ed. Bar 1962); THE CALIFORNIA FAMILY LAWYER SUPPLEMENT, Walzer, *Divorce Settlement Agreements* §§ 26A.9, 26A.17 (Cal. Cont. Ed. Bar 1969); Comment, *Enforcement of Divorce Decrees and Settlements by Contempt and Imprisonment in California*, 9 HASTINGS L.J. 57 (1957); Comment, *Integrated Property Settlement Agreements: Constitutional Problems With the 1967 Amendment to California Civil Code Section 139*, 8 SANTA CLARA LAWYER 84 (1967).

See also CODE CIV. PROC. §§ 238 (juror summons), 545 (garnishee examination), 715 (supplementary proceedings), 1097 (writ of mandate), 1105 (writ of prohibition), 1993-1994 and 2067-2070 (witness summons); PROB. CODE §§ 321 (production of will), 523 (attendance at court proceedings), 571 (render accounting), 614 (examination), 921-922 (render accounting).

See also GOVT. CODE §§ 9405-9409 (contempt of Legislature).

Critical Analysis of Civil Arrest Provisions

While the provision for arrest to enforce court orders may be quite proper, arrest and imprisonment for debt on mesne and final process presents numerous difficulties. Civil arrest has quite limited applicability to certain cases involving fraud and is obsolete and rarely used. It has proved to be ineffective as a collection remedy, and existing California law provides other more effective means of achieving the ends served by civil arrest. Civil arrest imposes a substantial hardship on defendants and debtors and is more often abused than properly used. It denies basic due process of law to defendants and presents the anomaly of imposing a criminal consequence upon a civil judgment. And civil arrest imposes an economic burden on the courts and the public out of all proportion to its value.

Obsolete and Rarely Used

Although civil arrest once was commonly used as a creditor's remedy,⁹ it is no longer.¹⁰ It has been abolished in nearly every jurisdiction except in certain extreme cases¹¹ and remains as a vestige of an era whose jurisprudence was characterized by punitive measures.¹² In California, it is limited to a small class of cases based upon fraud and remains one of the least known

⁹ For detailed development of the history of civil arrest and imprisonment, see, e.g., Note, *On the History of Personal Execution for Debt*, 5 JOUR. JUR. SC. 239, 303 (1861); Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1926); Freedman, *Imprisonment for Debt*, 2 TEMPLE L.Q. 330 (1928).

¹⁰ See, e.g., 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgment* § 177 at 3537 (2d ed. 1971) ("[T]he remedy is almost never used."); REVIEW OF SELECTED 1969 CODE LEGISLATION 80 (Cal. Cont. Ed. Bar 1969) ("Civil arrest is a rarely invoked provisional remedy . . .").

¹¹ At least nine jurisdictions have absolute constitutional prohibitions against civil arrest. The remaining jurisdictions limit the use of civil arrest in any of several ways:

(1) as to certain classes of debtors, (2) if the pecuniary sum involved does not constitute a specific minimum, (3) as to certain theories of action, or (4) unless the court or jury, as trier of fact, arrives at a required conclusion. [Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306, 310 (1957). For a full listing and discussion of these prohibitions and limitations, see *id.* at 307-311.]

Federal law likewise has not been favorable to civil arrest and imprisonment. 28 U.S.C. § 2007 (a) (1970) provides that:

A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished.

Moreover, Section 9 of the federal Bankruptcy Act generally exempts bankrupts from arrest upon civil process. 11 U.S.C. § 27 (1970); see also General Orders in Bankruptcy 12(1) and 30 in Appendix to 11 U.S.C. at 2202 and 2208 (1970).

¹² "Imprisonment for debt, as it formerly existed in England and in most of the states, has become abhorrent to the spirit of free government . . ." CALLISTER § 2 at 75.

remedies available.¹³ Civil arrest is in essence obsolete.¹⁴

Ineffective as Collection Device

The prejudgment remedy of arrest and bail derives from the old common law writ *capias ad respondendum*, designed to bring the defendant within the reach of the court's final process.¹⁵ However, the preferable current use of default judgments¹⁶ makes this function obsolete. Moreover, the physical presence of the defendant is no longer essential to court jurisdiction which may be obtained simply by service of process in person, by mail, or by publication in appropriate cases.¹⁷ Incarceration for purposes of jurisdiction is unnecessary.

Arrest and bail has also been used by plaintiffs to assure that any judgment rendered will be satisfied by having the bail set in the amount of or in excess of the plaintiff's claim.¹⁸ There are other remedies designed for precisely this purpose, however, such as attachment of property¹⁹ or a temporary restraining order and injunction to prohibit disposition of assets.²⁰

Imprisonment on execution following judgment derives from the old common law writ *capias ad satisfaciendum*, designed to assure satisfaction of a judgment.²¹ The remedy has proved to be almost useless as a means of collecting debts.²² A debtor

¹³ E. JACKSON, CALIFORNIA DEBT COLLECTION PRACTICE § 1.8 (Cal. Cont. Ed. Bar 1968); CALLISTER §§ 1-2 at 75.

¹⁴ See Leighton, *The "Care and Feeding" of Creditors' Claims Under California Procedure*, 14 HASTINGS L.J. 1, 17 (1962):

[A]rrest or execution of the debtor is hardly considered a desirable weapon for the contemporary creditor.

¹⁵ See 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 229 *et seq.* (1st ed. n.d.).

¹⁶ See CODE CIV. PROC. §§ 585, 594.

¹⁷ See CODE CIV. PROC. §§ 410.10, 410.50, 415.10-415.50.

¹⁸ See, e.g., *In re Harris*, 69 Cal.2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), discussed in text at notes 36-38 *infra*, in which bail was set at \$16,000, the amount of plaintiff's claim.

¹⁹ CODE CIV. PROC. §§ 537-561. *Randone v. Appellate Dep't*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), ruled the *procedure* but not the *remedy* unconstitutional. See Alexander, *Election of Remedies and Pretrial Writs*, 9 SAN DIEGO L. REV. 312 (1972).

²⁰ CODE CIV. PROC. §§ 525-535. See discussion in M. MCANDREWS, CALIFORNIA DEBT COLLECTION PRACTICE SUPPLEMENT § 10.14 (Cal. Cont. Ed. Bar 1972). *Cf.* REPORT OF THE COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS (Cmd. No. 3909, ¶ 1255 at 325 (1969)) (British study recommending prejudgment examination of defendant to compel disclosure of assets).

²¹ See 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 229 *et seq.* (1st ed. n.d.).

²² See Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 47 (1926); Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243, 244 (1872):

The order of arrest, as a means of collecting debts, is practically valueless. The experience of practicing attorneys will bear out the assertion that there are not

who is unable to pay will not be made more able to pay by imprisonment; his financial position is not likely to improve during the period of his incarceration. Moreover, imprisonment cannot detain the indigent debtor, who may be released by taking the pauper's oath.

Imprisonment may be a means of coercing the debtor to pay with concealed property the creditor cannot reach, but another means of reaching concealed assets is available which does not also impose harsh penalties on innocent debtors or require debtors to give up exempt property in an effort to obtain release from prison. This remedy is examination of the debtor in supplementary proceedings.²³ The debtor may be arrested in order to secure his appearance at examinations ordered in supplementary proceedings, and imprisonment may be employed as a sanction for contempt if the judgment debtor does not abide by a court order to enter into an undertaking that he will not dispose of his property during the proceedings.²⁴

Since the creditor has the examination process available to him and since the debtor may obtain his release by oath, there is little to motivate a creditor to imprison the debtor. This is particularly true since the creditor must pay the cost of imprisonment.²⁵ The creditor who employs imprisonment as a

five instances in a hundred in which the order of arrest results in the collection of a debt from a party who could not be otherwise compelled to pay.

²³ See CODE CIV. PROC. §§ 714-723. The concept that the proper way to reach concealed assets is through an examination of the debtor is not a novel idea. See, e.g., Robinson, *Attachment of the Body Upon Civil Process*, 7 YALE L.J. 295, 296-298 (1898); Note, *Present Statute of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306, 313-314 (1957); Note, *Arrest and Imprisonment in Civil Actions in New York*, 26 N.Y.U.L. REV. 172, 179-180 (1951):

Where the plaintiff holds an unsatisfied judgment, examination of the judgment debtor in supplementary proceedings, or garnishee execution, provides a remedy that is at least as effective as that afforded by body execution. It should be noted, however, that the existing California provisions for the debtor's examination are not without their practical problems.

²⁴ See CODE CIV. PROC. § 715.

²⁵ See CODE CIV. PROC. § 1154. It used to be otherwise. In Tudor England, an imprisoned debtor had to support himself, depend on charity, or starve to death. The medieval view of the position of the imprisoned debtor may be found in the 1551 case of *Dive v. Maningham*, 1 Plowden 60, 68, 75 Eng. Rep. 96, 108-109 (K.B. 1551):

[I]f one be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle, and puts them in a pound . . . and if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment.

See 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 232-233 (1st ed. n.d.); see also *Manby v. Scott*, 1 Mod. 124, 86 Eng.Rep. 781 (Ex. 1659).

collection device will find, in many cases, that he has only spent more good money in an ineffectual effort to collect a bad claim. There thus appears to be no legitimate use for arrest on execution in the debt collection process. In practice, its only possible purpose is for nuisance value as an aid to satisfy the creditor's vengeance or desire to punish the debtor.²⁶

Even as a punitive device, however, imprisonment for debt is not adequate. Use of penal sanctions in civil cases is undesirable for several reasons. It offends a basic concept of correctional theory by imprisoning persons for purposes other than rehabilitation. It offends basic notions of penal theory by permitting an individual in his own private action to invoke the sanction of the state reserved for wrongs against society. And the criminal law itself provides adequate deterrence for all cases in which civil arrest would be available; in fact, all cases of imprisonment for fraudulent failure to pay debts in California have been predicated on a finding of criminal liability.²⁷

Procedures Subject to Abuse

While designed for jurisdictional purposes only, the remedy of arrest and bail has been employed for other purposes by unscrupulous plaintiffs. The history of pretrial civil arrest is the history of abuse and coercion.²⁸ The arrest is a tool to force

²⁶ Robinson, *Attachment of the Body Upon Civil Process*, 7 YALE L.J. 295, 297 (1898):

Attachment of the body in civil process has no justification as a method of satisfying a fair claim, either in contract or tort. To shut up a man in prison doesn't in any degree or to any extent pay the debt or damage. In this regard it satisfies only a sense of vengeance, which should have no place in the philosophy of Christian jurisprudence or Christian civilization.

²⁷ CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF ARTICLE I OF THE CALIFORNIA CONSTITUTION, PART 5, at 27 (1971).

²⁸ As early as 1661, there were documented abuses of pretrial civil detention as recited in a reform statute of that year:

And whereas there is a great complaint of the people of this Realme that for diverse yeares now last past very many of His Majesties good Subjects have bene arrested upon generall Writts of trespass quare clausū fregit Bills of Middlesex Latitat's and other like Writts issued out of the Courts of King Bench and Common Pleas not expressing any particular or certain cause of Action and thereupon kept prisoners for a long time for want of Bayle Bonds with Sureties for Apparances having bene demanded in so great sūms that few or none have dared to be Security for the Apparances of such persons soe arrested and imprisoned although in truth there hath bene little or no cause of Action and often times there are no such persons who were named Plaintiffs but those Arrests have bene many times procured by malicious persons to vex and oppress the Defendants or to force from them unreasonable and unjust compositions for obtaining their Liberty And by such evill practices many men have bene and are daily undone and destroyed in their Estates without possibility of having reparation the Actors employed in such practises having bene for the most part poore and lurking persons and their actings so secret that it hath bene found

the settlement of dubious claims, particularly effective against the poor and working people who cannot afford the expense of contesting a claim and for whom detention even for a few days is a substantial hardship and could mean the loss of a job.

In addition to the fact that the remedy of arrest and bail has no contemporary application and is subject to abuse, its operation in practice has proved unduly oppressive. Due to demands on court time, plaintiffs' applications for arrest have not been given careful scrutiny, and arrests have been ordered in inappropriate cases;²⁹ exorbitant bail has often been required,³⁰ and court congestion and delay have resulted in the incarceration of persons prior to any trial for unconscionable lengths of time.³¹ Of course, the imprisoned defendant has his remedies for these oppressive results of the arrest and bail system in his right to post bail,³² to obtain a reduction of bail,³³ or to recover for false imprisonment or malicious prosecution.³⁴ But these remedies are of little use to the poor or unsophisticated defendant.³⁵

very difficult to make true discoveries or proove thereof [13 Car. II, Stat. 2, c.2.]

In more recent times in the United States, observers have documented the continuing abuse of the arrest process. See Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243 (1872) ("However wise or judicious these provisions of the code may be in and of themselves in the hands of rapacious plaintiffs and unscrupulous lawyers, they have been turned into instruments of oppression and extortion."); Hughes, *Arrest and Imprisonment on Civil Process*, 28 N.Y.S.B. ASS'N REP. 151, 177-178 (1905) ("As a rule, 'the motive in procuring the imprisonment of our poor citizens has either been to obtain revenge or to extort money from them.'" (quoting Sheriff Mitchell Erlanger of New York County)); Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 47 (1926) (civil arrest apt to be used for extortion and nuisance value, to threaten and intimidate).

²⁹ See NEW YORK JUDICIAL COUNCIL, *Proposals Under Consideration by the Judicial Council Relating to Execution Against the Person and Civil Arrest as a Provisional Remedy in Legal Actions*, 12 ANNUAL REPORTS & STUDIES 337, 342 (1946):

The judge who grants the order makes no inquiry into the veracity of the assertions and, before granting the order, offers the defendant no opportunity to disprove the assertions.

See also Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243 (1872). A 1904 investigation by the New York County Sheriff revealed that, out of all cases of prejudgment arrest and postjudgment imprisonment that occurred in that year, in not one was any justification for confining the defendant found. See Hughes, *Arrest and Imprisonment on Civil Process*, 28 N.Y.S.B. ASS'N REP. 151, 174-178 (1905).

³⁰ See Hughes, *Arrest and Imprisonment on Civil Process*, 28 N.Y.S.B. ASS'N REP. 151, 174-178 (1905); Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243, 244 (1872).

³¹ In *In re Harris*, 69 Cal.2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), discussed in text at notes 36-38 *infra*, for example, the defendant was incarcerated for five weeks before he was able to obtain his release.

³² CODE CIV. PROC. §§ 486, 497.

³³ CODE CIV. PROC. § 503.

³⁴ See, e.g., *Neves v. Costa*, 5 Cal. App. 111, 89 P. 860 (1907) (false imprisonment), and *Siffert v. McDowell*, 103 Cal. App.2d 373, 229 P.2d 388 (1951) (malicious prosecution).

³⁵ In *In re Harris*, 69 Cal.2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), discussed in text at notes 36-38 *infra*, for example, the defendant was able to obtain a reduction of

Arrest on execution likewise is used primarily for its nuisance value—to threaten and intimidate the debtor and to punish him. It is also used by creditors as a means of enlisting the aid of the penal system in the attempt to coerce payment of a judgment without, at the same time, being subject to liability for malicious prosecution. And it is a means of attempting to force payment of a judgment with assets that are exempt from execution.

Deprivation of Due Process of Law

The remedy of civil arrest and bail in California violates due process of law. The California Supreme Court has previously held the arrest and bail scheme unconstitutional in *In re Harris*.³⁶ The procedural defects in the scheme at that time were identified as a failure to provide the defendant with an opportunity for a hearing on the validity of the arrest and the failure to notify the defendant of his rights to apply for a reduction of bail and to release on bail; the court also held that an indigent civil defendant who is deprived of his liberty is entitled to counsel.³⁷ Legislation intended to correct these defects in the mesne civil arrest scheme was enacted at the 1969 Regular Session of the Legislature.³⁸

Since 1968, when *In re Harris* was decided, the concept of due process of law has been further developed in decisions both of the United States Supreme Court³⁹ and the California Supreme Court.⁴⁰ Under these decisions, the property of a defendant may not generally be seized absent prior notice and an opportunity for a hearing on the probable validity of the plaintiff's claim, nor may a defendant's "necessities of life" be seized absent a judicial determination of the actual validity of the plaintiff's claim. Measured by these standards, the system of

bail and release from imprisonment only after his case came by chance to the attention of the county public defender.

³⁶ 69 Cal.2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).

³⁷ For analyses of the holding in *In re Harris*, see M. MCANDREWS, CALIFORNIA DEBT COLLECTION PRACTICE SUPPLEMENT § 1.8 (Cal. Cont. Ed. Bar 1972); REVIEW OF SELECTED 1969 CODE LEGISLATION 80 (Cal. Cont. Ed. Bar 1969); and Comment, *Due Process—Pretrial Civil Arrest*, 58 CAL. L. REV. 178 (1970).

³⁸ Cal. Stats. 1969, Ch. 690. See M. MCANDREWS, CALIFORNIA DEBT COLLECTION PRACTICE SUPPLEMENT (Cal. Cont. Ed. Bar 1972) and REVIEW OF SELECTED 1969 CODE LEGISLATION 80 (Cal. Cont. Ed. Bar 1969).

³⁹ See, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment of wages).

⁴⁰ See, e.g., *Randone v. Appellate Dep't*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (prejudgment attachment of property).

arrest and bail as it is presently embodied in California law violates due process protections in that the defendant is not afforded prior notice and an opportunity to be heard. While it might be said that arrest does not amount to deprivation of a substantial property right, the due process clause applies with perhaps greater force to deprivations of liberty than to deprivations of property.⁴¹ Deprivation of liberty imposes such a severe hardship upon a defendant that it is analogous to deprivation of a "necessity of life" and, hence, could not be valid prior to judgment even if the defendant were afforded prior notice and an opportunity for hearing.⁴²

Imprisonment on final process has also been strongly attacked on due process grounds.⁴³ Although many of these attacks center around the concept that imprisonment for debt offends fundamental social values,⁴⁴ perhaps the most commonly expressed concern is that civil arrest imposes harsh and burdensome penalties in cases in which the judgment may well have been taken in default or in which the debtor has had none of the safeguards of a criminal trial, such as burden of proof beyond a reasonable doubt.⁴⁵

⁴¹ *In re Harris* is an illustration of this point. See also the language of the Supreme Court of the United States in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (protection of civil rights statutes against prejudgment garnishment):

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. [405 U.S. at 552.]

In this connection, it should be noted that one of the harshest consequences of civil arrest is that the defendant is deprived of the opportunity to earn a living which is in itself a property right. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wages a special form of property).

⁴² "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969). This applies with equal force to the system of arrest and bail.

⁴³ See, e.g., *Rogge, A Technique for Change*, 11 U.C.L.A.L. REV. 481 (1964) (violates fundamental liberties); Comment, *Due Process—Pretrial Civil Arrest*, 58 CAL. L. REV. 178 (1970) (no substantial relation to desired object); Comment, 24 VAND. L. REV. 621 (1971) (freedom from arbitrary process). Contrast *Carter v. Lynch*, 429 F.2d 154 (4th Cir. 1970) (South Carolina civil arrest statute satisfies due process of law).

⁴⁴ Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243, 245 (1872), says of the civil arrest law:

Its removal from our statute books would do away with the last remnants of the barbarous practice of imprisonment for debt, and be a guarantee of the personal liberty of which we so proudly boast.

⁴⁵ See, e.g., *Freedman, Imprisonment for Debt*, 2 TEMPLE L.Q. 330 (1928); *Parnass, Imprisonment for Civil Obligations in Illinois*, 15 ILL. L. REV. 559 (1921); Comment, *Due Process—Pretrial Civil Arrest*, 58 CAL. L. REV. 178 (1970); Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306 (1957);

Undue Economic Burden

The volume of litigation generated by the system of civil arrest, even though relatively insignificant in recent years, has been out of all proportion to the importance of the remedy to plaintiffs.⁴⁶ In an individual case, the cost to the public of providing county services such as sheriffs' services, jailing costs,⁴⁷ and supplying counsel for the indigent,⁴⁸ all for the benefit of a private litigant, may be substantial. The expense required of the public to maintain an obsolete and little-used system is sufficient reason in itself for the repeal of the civil arrest provisions.

Conclusion

Practically every commentator on the history and law of civil arrest has urged its repeal.⁴⁹ The California Constitution Revision Commission has recommended that the prohibition against imprisonment for debt be made absolute.⁵⁰ In the words

Note, *Arrest and Imprisonment in Civil Actions in New York*, 26 N.Y.U.L. REV. 172 (1951).

⁴⁶ As early as 1872, the burden of motions to vacate, for reduction of bail, and the like upon an already overburdened court system was noted:

Our courts of civil jurisdiction are overburdened with business; litigants are compelled, in many instances, to wait for years to have their rights adjudicated upon. Whatever tends to reduce the volume of litigation, or simplify the machinery of the courts, will go far to secure the more speedy administration of justice—a result greatly to be desired. [Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243, 244 (1872).]

The conclusion reached by Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 48 (1926), after observing that the amount of litigation over procedural phases of civil arrest has far overshadowed any utility the remedy might have, was that, "The whole represents a large economic waste."

⁴⁷ The jailing cost for prejudgment arrest is borne by the county. Contrast CODE CIV. PROC. § 1154 (creditor bound to support debtor in jail on execution).

⁴⁸ See CODE CIV. PROC. § 505.

⁴⁹ See, e.g., Hughes, *Arrest and Imprisonment on Civil Process*, 28 N.Y.S.B. ASS'N REP. 151 (1905); Parnass, *Imprisonment for Civil Obligations*, 15 ILL. L. REV. 559 (1921); Robinson, *Attachment of the Body*, 7 YALE L.J. 295 (1898); Note, *Arrests in Civil Actions*, 5 ALBANY L.J. 243 (1872).

For a thorough analysis of the British law of civil arrest and a recommendation for its repeal, see REPORT OF THE COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS, Cmnd. No. 3909, ¶¶ 952-1007 at 246-261 (1969).

⁵⁰ The Constitution Revision Commission has proposed the following revision of Section 15 of Article I:

A person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine.

See CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION, PART 6, Art. I, § 10 (1971).

of Charles Evans Hughes (later Chief Justice), uttered at the beginning of this century: "Provisions of such slight utility at the best and so commonly perverted should be repealed without delay." ⁵¹

⁵¹ Hughes, *Arrest and Imprisonment on Civil Process*, 28 N.Y.S.B. ASS'N REP. 151, 180 (1905).

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