

## First Supplement to Memorandum 72-34

Subject: Study 39.80 - Attachment, Garnishment, Execution (Civil Arrest and Bail)

Attached as Exhibit I are several code sections we have recently discovered containing cross-references to arrest and bail. The staff proposes to amend the sections as indicated although, if the claim and delivery and the attachment statutes are affected by legislation at the current or forthcoming legislative sessions, they may have to be further altered. The proposed changes retain the substance of existing law, albeit existing law has been declared unconstitutional in other respects.

The recommendation as it stands also proposes two new sections--one for attachment and one of execution--that make clear the repeal of civil arrest. See proposed Sections 478 and 684.2. The staff has given further consideration to this scheme and believes that it would be simpler to have just one section repealing civil arrest both pre- and postjudgment, even though this section would appear among the prejudgment provisions. The staff's proposal is to delete Section 684.2 from the recommendation and to alter Section 478 to read:

478. A person may not be imprisoned in a civil action for debt or tort, whether before or after judgment.

The recommendation as it stands proposes a minor change in Government Code Section 202--power of state to imprison or confine. The staff has given further consideration to this minor change and believes that subdivision (b) should be deleted altogether. To provide that the state has the power to imprison in order to enforce civil "process" is redundant since the courts have inherent authority to enforce their process. And the term "process" is

undefined, and might be used for some purpose not intended. We would amend Section 202 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.~~

The Comment would be changed accordingly.

Respectfully submitted,

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Legal Counsel

EXHIBIT I

Code of Civil Procedure § 513 (amended)

Sec. . Section 513 of the Code of Civil Procedure is amended  
to read:

513. The defendant may, within two days after the service of  
a copy of the affidavit and undertaking, give notice to the officer  
making the service 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 the defendant excepts, the sureties must justify on notice~~  
~~in like manner as upon bail on arrest.~~ The plaintiff's sureties, upon  
notice to the defendant within five days after the service of written  
notice of exception, must justify in like manner as provided in Chapter  
7 (commencing with Section 830) of Title 10 of Part 2. If the defend-  
ant except to the sureties, he can not reclaim the property as pro-  
vided in the next section.

Comment. Section 513, providing for justification of sureties in claim  
and delivery 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 513 incorporates the time limit from former Code of Civil  
Procedure Section 493 and the justification procedures from Code of Civil Pro-  
cedure Sections 832 and 833 (actions for slander and libel), which are basic-  
ally similar to those formerly provided for arrest and bail.

Note: The Commission is actively engaged in a study of the undertaking  
provisions of the Code of Civil Procedure in connection with its study of  
attachment, garnishment, and execution with the view to developing uniform  
provisions of general applicability.

Code of Civil Procedure § 515 (amended)

Sec. . Section 515 of the Code of Civil Procedure is amended to read:

515. The plaintiff may, within two days after service upon him of a copy of the undertaking given to the officer under Section 514 of this code, give notice to the officer making the service 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 the plaintiff excepts, the defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, must justify before a judge ~~or~~ ~~the-clerk,~~ of the court in which the action is pending ~~in-the-same~~ like manner as upon-bail-on-arrest provided in Chapter 7 (commencing with Section 830) of Title 10 of Part 2 ; and upon such justification the officer taking the property must deliver the property to the defendant. Such officer is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

Comment. Section 515, providing for justification of sureties in claim and delivery 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 515 incorporates the justification procedures from Code of Civil Procedure Sections 832 and 833 (actions for slander and libel), which are basically similar to those formerly provided for arrest and bail.

Note: The Commission is actively engaged in a study of the undertaking provisions of the Code of Civil Procedure in connection with its study of attachment, garnishment, and execution with the view to developing uniform provisions of general applicability.

Code of Civil Procedure § 516 (amended)

Sec. . Section 516 of the Code of Civil Procedure is amended to read:

516. The qualification of sureties must be such as are ~~prescribed by this Code, in respect to bail upon an order of arrest~~ provided in Chapter 7 (commencing with Section 1041) of Title 14 of Part 2 .

Comment. Section 516, providing for the qualifications of sureties in claim and delivery 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 516 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.

Note: The Commission is actively engaged in a study of the undertaking provisions of the Code of Civil Procedure in connection with its study of attachment, garnishment, and execution with the view to developing uniform provisions of general applicability.

Code of Civil Procedure § 539 (amended). Undertaking; amount; justification of sureties; increase of amount

Sec. . Section 539 of the Code of Civil Procedure is amended to read:

539. Before issuing the writ, 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 attachment, not exceeding the sum specified in the undertaking, and that if the attachment is discharged on the ground that the plaintiff was not entitled thereto under Section 537, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking. The sum specified in the undertaking shall be one-half (1/2) of the principal amount of the total indebtedness or damages claimed, or a partial amount thereof, as may be set forth in plaintiff's affidavit pursuant to Section 538, excluding attorneys' fees, but not less than fifty dollars (\$50). 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 writ on the filing of an undertaking in a lesser sum, but not less than fifty dollars (\$50).

At any time after the issuing of the attachment, but not later than five days after actual notice of the levy thereof, 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) of Title 10 of 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 writ, on motion of the defendant, after notice to the plaintiff, may order the amount of the undertaking increased, but in no event to an amount exceeding the amount for which the writ has been issued.

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 slander and libel), which are basically similar to those formerly provided for arrest and bail.

Note: The Commission is actively engaged in a study of the undertaking provisions of the Code of Civil Procedure in connection with its study of attachment, garnishment, and execution with the view to developing uniform provisions of general applicability.