

#39.80

4/21/72

Memorandum 72-34

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

Attached are two copies of a background study and tentative recommendation to repeal the California law relating to arrest and bail and arrest on execution. Please mark your changes on one copy of the recommendation and return it to the staff at the meeting. We hope to distribute the recommendation for comment after the May meeting with the view to recommending legislation on the subject to the 1973 Legislature. Please note the letter of transmittal attached.

A constitutional amendment of the sort proposed by the Constitution Revision Commission is not essential to the statutory changes, although if such an amendment were adopted, the attached tentative recommendation would be essential.

Respectfully submitted,

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Legal Counsel

#39.80

April 21, 1972

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Civil Arrest

CALIFORNIA LAW REVISION COMMISSION
School of Law
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Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN JULY 1, 1972.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Civil Arrest

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 civil arrest 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 for the debtor's support to the jailer, or upon taking the "pauper's oath."³

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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 75-83 (Cal. Cont. Ed. Bar 1957) and 2 B. Witkin, California Procedure 2d Provisional Remedies §§ 7-23 (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 75, 84-87 (Cal. Cont. Ed. Bar 1957) and 5 B. Witkin, California Procedure 2d Enforcement of Judgment §§ 177-178 (1971).
 3. Code Civ. Proc. §§ 1143-1154.

The California Law Revision Commission recommends the repeal of those provisions of California law that permit civil arrest and imprisonment. The California Constitution. Revision Commission has recommended that the prohibition against imprisonment for debt be made absolute,⁴ and many commentators on the history and law of civil arrest have urged its repeal. The reasons for this recommendation are fully developed in the background study and are summarized below.

Civil Arrest in California is available only in certain cases involving fraud and is rarely used. It imposes a substantial hardship on defendants and debtors and is more often abused than properly 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 and the arrest on execution procedure is anomalous 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. 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.

4. California Constitution Revision Commission, Proposed Revised California Constitution (Part 6, 1971).

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

An act to amend Sections 667, 682, 684, 804, and 1014 of, to add a chapter heading to Title 7 of Part 2 of, to add Sections 478 and 684.2 to, and to repeal Chapter 1 (commencing with Section 578) of Title 7 of Part 2 of, Chapter 3 (commencing with Section 1143) of Title 3 of Part 3 of, and Section 1168 of the Code of Civil Procedure, and to amend Section 202 of the Government Code.

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

Section 1. A new heading is added to Title 7 (immediately preceding Section 477) of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 1. GENERAL PROVISIONS

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

Sec. 2. 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 § 478 (added)

Sec. 3. Section 478 is added to Chapter 1 (commencing with Section 477) of Title 7 of Part 2 of the Code of Civil Procedure, to read:

478. No person shall be arrested on mesne process in a civil action.

Comment. Section 478 prohibits the arrest on mesne process of a defendant in a civil action. The provisional remedy of arrest and bail was previously permitted in California. See former Chapter 1 (commencing with Section 478) of Title 7 of Part 2 of the Code of Civil Procedure, and Section 15 of Article I of the California Constitution. See also Recommendation and Study Relating to Attachment, Garnishment, and Exemptions from Execution: Civil Arrest, ___ Cal. L. Revision Comm'n Reports ___ (19__). Civil arrest is not available on execution. See Code Civ. Proc. § 684.2 and Comment thereto.

The prohibition of prejudgment attachment of the body of the defendant in civil actions does not affect the power of the court to enforce its civil process by arrest. 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), 641 (examination), 921-922 (render accounting).

See also Govt. Code §§ 9405-9409 (contempt of Legislature).

Code of Civil Procedure § 667 (amended)

Sec. 4. 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.~~

§ 667

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. § 684.2 and Comment thereto.

Code of Civil Procedure § 682 (amended)

Sec. 5. 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

§ 682

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. § 684.2 and Comment thereto.

Code of Civil Procedure § 684 (amended)

Sec. 6. Section 684 of the Code of Civil Procedure is amended to read:

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. § 684.2 and Comment thereto.

Code of Civil Procedure § 684.2 (added)

Sec. 7. Section 684.2 is added to Chapter 1 (commencing with Section 681) of Title 9 of Part 2 of the Code of Civil Procedure, to read:

684.2. Execution shall not issue against the person of the judgment debtor.

Comment. Section 684.2 prohibits the arrest and imprisonment on final process of a judgment debtor. The remedy of body execution was previously permitted in California. See former Code Civ. Proc. §§ 667, 682(3), and 684, and Cal. Const., Art. I, § 15. See also Recommendation and Study Relating to Attachment, Garnishment, and Exemptions from Execution: Civil Arrest, ___ Cal. L. Revision Comm'n Reports ___ (19 ___). Nor is civil arrest available prior to judgment. See Code Civ. Proc. § 478 and Comment thereto.

The prohibition of execution on the body of a judgment debtor in civil actions does not affect the power of the court to enforce its civil process by arrest and 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

§ 684.2

of prohibition), 1993-1994 and 2067-2070 (witness summons); Prob. Code §§ 321 (production of will), 523 (attendance at court proceedings), 571 (render accounting), 641 (examination), 921-922 (render accounting).

See also Govt. Code §§ 9405-9409 (contempt of Legislature).

Code of Civil Procedure § 804 (amended)

Sec. 8. 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. 9. 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. 10. 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. § 684.2 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 lawful initially under Code of Civil Procedure Section 1219, the subsequent inability to comply with the court order is ground for discharge from imprisonment. See, e.g., In re Wilson, 75 Cal. 580, 17 P. 698 (1888). Although it has been stated that a person entitled to release because of his subsequent inability to comply must apply for discharge under the statutory procedure (Ex parte Levin, 191 Cal. 207, 215 P. 908 (1923); In re Brune, 113 Cal. App. 254, 298 P. 80 (1931)), this rule is predicated on an exhaustion or remedies concept. The statutory procedure was simply an alternative means of discharge, and release on habeas corpus for subsequent inability to comply is also available. Cf. 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. 11. 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. 12. Section 202 of the Government Code is amended to read:

202. The State may imprison or confine for:

(a) The protection of the public peace or health or of individual life or safety.

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

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 and 684.2. Civil arrest may be used as a means to enforce the process of the court, however. 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 at court proceedings), 571 (render accounting), 641 (examination), 921-922 (render accounting).

See also Govt. Code §§ 9405-9409 (contempt of Legislature).

STUDY RELATING TO CIVIL ARREST IN CALIFORNIA*

*This study was prepared for the California Law Revision Commission by Nathaniel Sterling of the Commission's staff. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

STUDY RELATING TO CIVIL ARREST IN CALIFORNIA

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

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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 (Murray v. Superior Court, 44 Cal.2d 611, 284 P.2d 1 (1955)):

(a) 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)).

(b) 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.

(c) 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.

(d) 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 (1947)).

imprisoned until the defendant posts bail or 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 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

(e) 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 (b) of Section 479), and Code of Civil Procedure Section 1168 authorizes pretrial arrest in unlawful detainer proceedings (compare subdivision (c) 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 75-83 (Cal. Cont. Ed. Bar 1957) (hereinafter cited as Callister) and in 2 B. Witkin, California Procedure 2d Provisional Remedies §§ 7-23 (1970).
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); 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 is not expressly provided for in the California codes, numerous statutory provisions contemplate that execution may be issued against the person of the judgment debtor in a civil action. 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).

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 an exemption from the constitutional prohibition against imprisonment for debt.⁷ Court enforcement of civil process is also excepted from the constitutional ban on civil arrest.⁸

6. The "pauper's oath" is set out in Code of Civil Procedure Section 1248. 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 at 84-87 and 5 B. Witkin, California Procedure 2d Enforcement of Judgment §§ 177-178 (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. 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 at court proceedings), 571 (render accounting), 641 (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 civil process is quite proper, imprisonment for debt on mesne and final process presents numerous difficulties. It 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 provides 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.

(1) 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

9. For detailed development of the history of civil arrest and imprisonment, see, e.g., Note, 5 J. Juris. 239 (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 2d Enforcement of Judgment § 177 (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 . . .").

except in certain extreme cases,¹¹ and remains as a vestige of an era whose jurisprudence was characterized by punitive measures.¹² It is limited in California to a small class of cases based upon fraud and remains one of the least known remedies available.¹³ Civil arrest is in essence obsolete.¹⁴

(2) 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 As such, it has no present

11. At least nine jurisdictions have absolute constitutional prohibitions against civil arrest, and at least three others have prohibited civil arrest by statute. 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, and (4) unless the court or jury, as trier of fact, arrives at a required conclusion. For a full listing and discussion of these prohibitions and limitations, see Note, Present Status of Execution Against the Body of the Judgment Debtor, 42 Iowa L. Rev. 306, 307-311 (1957).

Federal law likewise has not been favorable to civil arrest and imprisonment. 28 U.S.C.A. § 2007(a)(1964) 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, the federal substantive law of bankruptcy exempts bankrupts from arrest upon civil process. See Bankruptcy Act § 9 (11 U.S.C.A. § 27 (19)); see also General Orders in Bankruptcy 12(1) and 30.

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 75.
13. E. Jackson, California Debt Collection Practice § 1.8 (Cal. Cont. Ed. Bar 1968); Callister 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, History of English Law 229 et seq. (2d ed. 1937).

utility since judgments by default may now be taken¹⁶ and, in fact, regularly are taken. Moreover, 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 this purpose is not helpful.

Arrest and bail has also been used by plaintiffs as a means of assuring that any judgment rendered will be satisfied since the bail set is often 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 who is unable to pay will not be made more

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 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 Pre-trial Writs, 9 San Diego L. Rev. 312 (1972).

20. Code Civ. Proc. §§ 525-535.

21. See 8 W. Holdsworth, History of English Law 347 et seq. (2d ed. 1937).

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 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.

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 a much more effective means of reaching concealed assets--a means that 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--is available. This remedy is examination of the debtor in supplementary proceedings.²³ Arrest of the debtor in order to secure his appearance in examinations ordered in supplementary proceedings is permitted, and imprisonment may be 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 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 As a collection device, imprisonment is

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, 7 Yale L.J. 295, 296 (1898); Note, Present Statute of Execution Against the Body of the Judgment Debtor, 42 Iowa L. Rev. 306 (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.

24. See Code Civ. Proc. § 715.

25. See Code Civ. Proc. § 1154.

thus worse than useless since the creditor will find that he has only spent more good money in an ineffectual effort to collect a bad claim. There appears to be no legitimate use for arrest on execution in the debt collection process. 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 basic concepts 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 remedies 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

(3) 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.

26. Robinson, Attachment of the Body, 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 in 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 27 (Part 1, 1971).

The history of pretrial civil arrest is the history of abuse and coercion.²⁸

The arrest is a tool to force 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

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

Whereas there is a great complaint of the people of this realm, that for divers years now last past, very many of his majesty's good subjects have been arrested upon general writs of trespass quare clausum fregit, bills of Middlesex, latitats, and other like writs issued out of the courts of king's bench and common pleas, not expressing any particular or certain cause of action, and thereupon kept prisoners for a long time for want of bail, bonds with sureties for appearances having been demanded in so great sums that few or none have dared to be security for the appearance of such persons so arrested and imprisoned, although in truth there hath been little or no cause of action; and often times there are no such persons who are named plaintiffs, but those arrests have been 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 evil practices many men have been; and are daily undone, and destroyed in their estates, without possibility of having reparation, the actors employed in such practices, having been (for the most part) poor and lurking persons, and their acting so secret, that it hath been found very difficult to make true discoveries or proof thereof. [13 Charles II Stat. 2, cap. 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, 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."); Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24, 25 (1926) (civil arrest apt to be used for extortion and nuisance value, to threaten and intimidate).

has proved unduly oppressive. Due to demands of 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 has 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 ability to post bail,³² or 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

29. See 12 N.Y. Jud. Council Rep. 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 study by the New York County Sheriff revealed that, out of all cases or 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 Note, Arrests in Civil Actions, 5 Albany L.J. 243 (1872).

31. In In re Harris, 69 Cal.2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), discussed 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 at notes 36-38 *infra*, for example, the defendant was able to obtain a reduction of bail and release from imprisonment only after his case came by chance to the attention of the county public defender.

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.

(4) Deprivation of Due Process of Law

The remedy of civil arrest and bail in California denies to defendants due process of law. The California Supreme Court has once 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 right 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

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 9 Cal. L. Revision Comm'n Reports at 110 (1969), 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 Review of Selected 1969 Code Legislation 80 (Cal. Cont. Ed. Bar 1969).

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. And a defendant's "necessities of life" may not be seized absent a judicial determination of the actual validity of the plaintiff's claim. Measured by these standards, the system of 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

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 of attachment of property).

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., U.S. (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. [U.S. at .]

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).

is analogous to deprivation of a "necessity of life" and, hence, can never 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 iterated 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

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 statement 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., 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); Note, *Arrest and Imprisonment in Civil Actions in New York*, 26 N.Y.U.L. Rev. 172 (1951); Freedman, *Imprisonment for Debt*, 2 Temple L.Q. 330 (1928); Parnass, *Imprisonment for Civil Obligations in Illinois*, 15 Ill. L. Rev. 559 (1921).

(5) Undue Economic Burden

The volume of litigation generated by the system of civil arrest has been out of all proportion to the importance of the remedy to plaintiffs.⁴⁶ 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, is 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.

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

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 (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.

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 of Charles Evans Hughes (later Chief Justice), uttered at the beginning of this century:⁵¹

Provisions of such slight utility at the best and so commonly perverted should be repealed without delay.

49. See, e.g., Note, Arrests in Civil Actions, 5 Albany L.J. 243 (1872); Robinson, Attachment of the Body, 7 Yale L.J. 295 (1898); 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).

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 Revised California Constitution, Art. I, § 10 (Part 6, 1971).

51. Hughes, Arrest and Imprisonment on Civil Process, 28 N.Y.S.B. Ass'n Rep. 151, 174 (1905).