

#39.80

6/12/72

Memorandum 72-43

Subject: Study 39.80 - Civil Arrest and Bail

You will recall that the Commission approved for distribution a tentative recommendation on civil arrest and bail. We have distributed the tentative recommendation for comment. Letters received to date all approve the tentative recommendation (see attached 22 letters--Exhibits I-XXII). We expect to receive additional letters, but we plan to reproduce only the additional letters that contain more than a mere general approval of the tentative recommendation.

We assume that the tentative recommendation will be approved at the July meeting to send to the printer and to submit to the 1973 legislative session. We attach two copies of the tentative recommendation. Please indicate on one copy the editorial changes you suggest and hand it in to the staff at the July meeting. We also attach a copy of the background study. We are now cite checking and editing the recommendation and study so they will be ready to print after the July meeting.

Exhibit XVIII and Exhibit XX suggest that the last sentence of the proposed new Section 478 (see page 5 of the tentative recommendation) be expanded or clarified. Because of the difficulty of expressing the sentence in more precise terms, we suggest that it be left as is. In some cases, a court order may not be enforced by arrest. If it is desired to revise the language of the sentence, the following is suggested:

Nothing in this section affects any power a court may have to imprison a person who violates a court order.

We are concerned, however, that the suggested language would create more problems than it would resolve.

We are revising the background study (which will be printed in the pamphlet containing the recommendation) to indicate that the procedures for examination of judgment debtors may present difficulties to the creditor (see Exhibit IV attached).

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memorandum 72-43

EXHIBIT I

REITH & WELLINGTON
ATTORNEYS AT LAW
444 PEARL STREET
P.O. BOX 188
MONTEREY, CALIFORNIA 93940

DANIEL I. REITH
ROBERT W. WELLINGTON

AREA CODE 408
TELEPHONE 375-3181

May 27, 1972

Mr. John D. Miller, Chairman
California Law Revision Commission
School of Law
Stanford, California 94305

RE: Civil Arrest

Dear Mr. Miller:

The tentative recommendation for total abolition of civil arrest as a collection remedy seems to me to be entirely proper and should be adopted. In fact, such action could and should be taken without awaiting decision on revision of the laws regarding attachment, garnishment, and exemptions from execution.

Very truly yours,



Daniel I. Reith

DIR:ms

Memorandum 72-43

EXHIBIT II

LAW OFFICES

WOLF & DUBIN

9465 WILSHIRE BOULEVARD

BEVERLY HILLS, CALIFORNIA 90212

JOSEPH HENRY WOLF
LEONARD R. DUBIN
EMIL WYLER
LAWRENCE S. GROSSBERG
BERYL WEINER

(213) 273-6644
(213) 272-6466

May 30, 1972

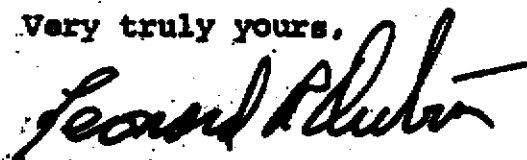
California Law Revision Committee
Stanford Law School
Stanford, California 94305

Re: Civil arrest

Gentlemen:

I have reviewed your recommendation for removal of civil arrest as creditors' right. I agree completely with the suggestions in your report. Although this remedy has seldom been granted to a creditor, it should be removed completely from the laws of this state.

Very truly yours,



LEONARD R. DUBIN

LED:re

EXHIBIT III

JOHN L. ENDICOTT
Attorney at Law
515 South Flower Street
Los Angeles, California 90071
(213) 620-9300

May 30, 1972

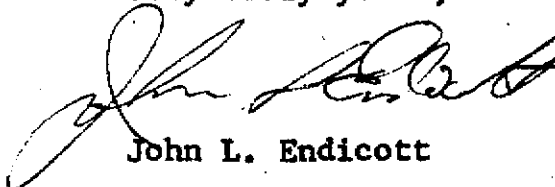
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation Relating
to Attachment, Garnishment and
Exemptions from Execution

Gentlemen:

I have received your tentative recommendation No. 39.80 dated May 15, 1972, concerning civil arrest. I think your proposed recommendation is desirable. I have never had occasion to use civil arrest at any time, nor have I known anyone who has. I agree that it is ineffective as a collection remedy and probably denies due process of law to defendants.

Very truly yours,



John L. Endicott

JLE:cc

Memorandum 72-43

EXHIBIT IV

SILBER & KIPPERMAN
ATTORNEYS AT LAW
802 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94133

MICHAEL D. SILBER
STEVEN M. KIPPERMAN

May 30, 1972

TELEPHONE: (415) 788-8870

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

RE: TENTATIVE RECOMMENDATION RELATING TO ATTACHMENT,
GARNISHMENT AND EXEMPTIONS FROM EXECUTION -- CIVIL ARREST

Dear Sirs:

The only specific comment I have with respect to the above-entitled report -- which I enclose only so that I may continue to receive such material from you -- is that it is unfortunate that you had to waste so much time discussing such a "rarely used" and "obsolete" remedy. I, of course, support the repeal of the statutes authorizing arrest for debt or tort.

I might add, however, that I feel the STUDY RELATING TO CIVIL ARREST IN CALIFORNIA contains an incredibly naive statement on page 7 in the first full paragraph on that page. The author of the STUDY states, I suspect without ever having attempted to use the remedy himself, that an examination of the debtor is a "much more effective means of reaching concealed assets" than is civil arrest. In short, the statement is nonsense. The quantity of perjury that takes place at examinations of judgment debtors is probably not exceeded in any other kind of judicial proceeding. Many problems attend this procedure, not the least of which are (1) that most courts fail in any way to record these proceedings, making perjury prosecutions no threat whatsoever, (2) in the event of any dispute over what was said at any later time, the attorney examining the judgment debtor has only his own notes to corroborate his statements, and (3) most courts will not allow an attorney to make his own electronic recording of such proceedings. An additional problem is that an incredible amount of wasted time must be incurred by counsel (who do not appear regularly in court for these purposes)

when judgment debtors fail to respond to orders to appear. Courts are outrageously lax in enforcing these orders. In San Francisco, the procedure appears to be that the order of examination is meaningless, that if a debtor fails to appear he will be sent a letter which turns out to be meaningless, because if he fails to appear at that an order to show cause will be sent, and only then will a civil arrest for failure to appear pursuant to the court's order be authorized. In practice, counsel for the judgment creditor is lucky if he receives notice from the sheriff of the arrest of the judgment debtor and when the judgment debtor appears in court and the attorney has not been notified by the sheriff, the judgment debtor may be discharged and the whole process must start over again through no fault of the attorney whatsoever and without the attorney having any opportunity to seek recovery for the lost time due to the fault of the judgment debtor who disobeyed court orders.

I would suggest as a possible future study topic means of improving the order of examination process. I think that my above criticisms of the present process are probably indicative of areas in which I think improvement is needed. Proceedings more analogous to depositions or interrogatories ought to be authorized and counsel should have the opportunity to compel a judgment debtor to appear in the attorney's office to respond to questions and at such proceedings the attorney should be allowed to electronically record the examination if he desires to do so. Also, an ambiguity in the proceedings should be resolved and made expressly clear that an order of examination duces tecum should be permitted so that there is no question but that the attorney may compel the production of documents pertinent to the subject matter of the examination.

Very truly yours,



STEVEN M. KIPPERMAN

SMK:CD

SAN FERNANDO VALLEY NEIGHBORHOOD LEGAL SERVICES, INC.

EXECUTIVE DIRECTOR
JOEL S. AARONSON

13327 VAN NUYS BLVD.
PACOIMA, CALIF. 91331
896-3211

May 30, 1972
Pacoima Office

7206 OWENSMOUTH AVE.
CANOGA PARK, CALIF. 91304
346-9470

Mr. John H. DeMouilly
Executive Secretary
California Law Revisions Commission
School of Law
Stanford, California 94305

Re: Tentative Recommendations on Civil Arrest
Comment

Dear Mr. DeMouilly:

Thank you for your above-named recommendations.
I would comment upon them briefly, but with great emphasis.

Although my experience with civil arrest is small, it does seem to be a vestige of an oppressive ethos which no longer has a place in our system of laws. I think that the fact it is little used, or seems to be little used, at least in Los Angeles County, is partially a reflection of a growing awareness of what is consistent with due process, but even more, a realization by creditors that they will not be repaid unless their debtors are working and productive members of our economic system.

Although I have disagreed with your recommendations in the past, I must agree with you whole heartedly and hope you will have little trouble in the acceptance of your recommendations.

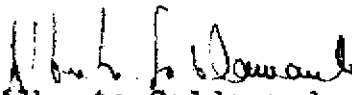
Frank Kennedy, in 19 American University Law Review 159 makes the statement to the following effect: In Roman days a debtor could be taken by his creditor and sold as a slave for the indebtedness. If no buyers could be found he could be dismembered by his several creditors each taking a proportion of the debtor's body. Although our legal system no longer provides such drastic remedies, in

May 30, 1972
John H. DeMouilly
Page 2

Mr. Kennedy's opinion, two vestiges of this ethos were wage garnishment and imprisonment for debt.

Thank you for your recommendation that imprisonment for debt be eliminated.

Cordially,


Alberto Saldamando
Attorney at Law

AS:jr

EXHIBIT VI

FITZGERALD, ABBOTT & BEARDSLEY

ATTORNEYS AT LAW

SUITE 1730

UNITED CALIFORNIA BANK BUILDING

1330 BROADWAY

OAKLAND, CALIFORNIA 94612

AREA CODE 415 481-3300

R. M. FITZGERALD 1886-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1862-1903

JAMES H. ANGLIM
STACY H. DOBRZENSKY
JAMES C. BOPER
PHILIP M. JELLEY
JOHN L. McDONNELL, JR.
GERALD C. SMITH

LAWRENCE R. SHEPP
LLEWELLYN E. THOMPSON II

May 31, 1972

The California Law Division Commission
School of Law
Stanford University
Stanford, California 94305

Re: Recommendation Concerning Civil Arrest

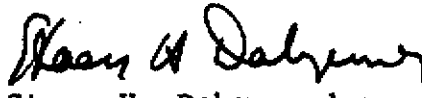
Gentlemen:

We have reviewed the Tentative Recommendation relating to "Civil Arrest" dated May 15, 1972.

The only comment we can furnish is to state that several of us have reviewed it and we support and endorse the proposed changes and urge that the Commission submit a recommendation on this subject to the Legislature with a strong "do pass".

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY

By 
Stacy H. Dobrzensky

SHD:wlm



C O U N T Y C O U N S E L

FOURTH FLOOR, ADMINISTRATION BUILDING, 1221 OAK STREET
OAKLAND, CALIFORNIA 94612

TELEPHONE 874-1592

RICHARD J. MOORE
COUNTY COUNSEL

6541

May 31, 1972

Mr. John D. Miller
Chairman, California Law
Revision Commission
School of Law - Stanford University
Stanford, California 94305

Re: May, 1972 letter of transmittal
re Civil Arrest

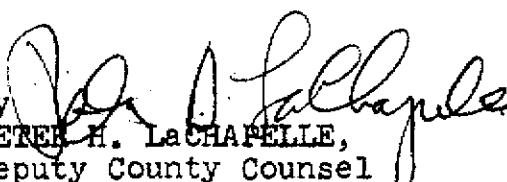
Dear Mr. Miller:

We support your tentative recommendation relative to the use of civil arrest as a collection method. The County of Alameda has never used this archaic and oppressive procedure and has no interest in having it remain on the books.

We would appreciate your continuing to send material to us in the future.

Very truly yours,

RICHARD J. MOORE,
County Counsel

By 
PETER H. LACHAPELLE,
Deputy County Counsel

PHL:cl

Apt. 453
8 Captain Drive
Emeryville, California, 94608
May 31, 1972

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

Re: Your Tentative Draft Dated 5/15/72 on
the Subject of Attachment, Garnishment,
and Exemptions from Execution

Gentlemen:

Thank you for the copies of the above materials. I agree with your recommendation that the provisions of California law which permit civil arrest and imprisonment should be repealed. However, inasmuch as CCP § 539 would have to be amended anyway, why not add further amendments to this section and other related sections to conform with the interpretations the courts are now making.

Enclosed are SB 1048 and SB 378 for your general information.

Very truly yours,

Patricia C. Remmes

Enc. - 2

Memorandum 72-43

EXHIBIT IX

HENRY C. MACK
D. BIANCO
HARVEY R. MEANS
HENRY C. MACK, JR.
DON McGILLIVRAY

TELEPHONE
324-8601

MACK, BIANCO, MEANS & MACK
ATTORNEYS AT LAW
1107 TRUXTON AVENUE
POST OFFICE BOX 1825
BAKERSFIELD, CALIFORNIA 93303

IN REPLY REFER TO:

June 1, 1972

DB:js

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

In re: Use of Civil Arrest as a
Collection Method

Attention: John D. Miller,
Chairman

Gentlemen:

I have reviewed the tentative recommendation material regarding civil arrest dated May 15, 1972. It is my feeling that your tentative recommendations are perfectly proper, cover the matter completely and that the provision for civil arrest as a collection method should be repealed.

Yours very truly,


D. BIANCO

Memorandum 72-43

EXHIBIT X

LAW OFFICES

McKENNA & FITTING

986 MILLS BUILDING
220 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94104
(415) 433-0640

June 1, 1972

WILLIAM F. McKENNA
PAUL FITTING
BERNARD KOLBON
NORMAN H. RAIDEN
MARTIN S. SCHWARTZ
DANIEL N. BELIN
LES, J. WEINSTEIN
ORVILLE W. MCCRROLL
AARON H. PECK
MARSHALL MANLEY
DENNIS D. MILL
ROBERT J. WYNNE

MICHAEL D. BERR
CHARLES G. MILLER
ELIHU M. BERLE
MARVIN S. HAIKEN
ROBERT E. MANGELS
ROBERT S. REIN
MICHAEL A. McANDREWS
PAUL M. SCHAEFFER
TERRY KINIGSTEIN
BRIAN J. STOWELL
ROGER R. HEYMAN

OF COUNSEL
MARK BRANDLER

LOS ANGELES OFFICE

TWENTY-EIGHTH FLOOR
3435 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010
(213) 388-9221

WASHINGTON, D.C. OFFICE

ALBERT H. COLE
FREDERICK F. REPETTI
C. JARED HALE
(NOT ADMITTED IN CALIFORNIA)
SUITE 418
1158 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 296-4650

John D. Miller, Chairman
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. Miller:

We have the Tentative Recommendation of the Commission on Civil Arrest in Connection With Attachment, Garnishment, and Exemptions From Execution. Despite some experience with the attachment and execution statutes, that the civil arrest provisions are still in the statute comes as a surprise. The tentative recommendation of the Commission and the recommendation of the California Constitution Revision Commission seem long overdue.

I do hope that the Commission will shortly be in a position to make recommendations on amendments to the attachment, garnishment, and execution statutes to meet the problems raised by Randone and related cases.

Very truly yours,

McKENNA & FITTING

Paul Fitting

PF:msb

Memorandum 72-43

EXHIBIT XI

JAMES B. DAVIS
H. THEODORE CRAIG, III
C. RICHARD BARTALINI
SAMUEL P. YOUNG
DANIEL E. CUMMINS
ROBERT L. YOUNG II

LAW OFFICES OF
DAVIS, CRAIG & BARTALINI
TIMES STAR BUILDING
1515 OAK STREET
ALAMEDA, CALIFORNIA 94501

TELEPHONE
(415) 681-1211
IN REPLY PLEASE
REFER TO FILE #

June 2, 1972

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

Re: Tentative Recommendation -- Use of Civil Arrest
as a Collection Method

Gentlemen:

In my opinion, very little comment can be made as to your tentative recommendation relating to the use of civil arrest as a collection method.

As very well expressed in your tentative recommendation and the study prepared by Mr. Sterling, civil arrest is an archaic, outdated and, for all practical purposes, useless procedure.

Although I have been frequently involved in attempts to enforce civil payment obligations, I have never used nor attempted to use civil arrests. I can think of no circumstances under which I would attempt to use civil arrest, not only for the reason stated in the materials I received from you but because of the potential for a damage suit against my client if civil arrest is used.

I heartily concur in the tentative recommendation.

Very truly yours,



DANIEL E. CUMMINS

DEC:MN

Memorandum 72-43

EXHIBIT XII

COURT OF APPEAL OF CALIFORNIA
SECOND DISTRICT—DIVISION FOUR

GORDON L. FILES
PRESIDING JUSTICE

EDWIN L. JEFFERSON
ASSOCIATE JUSTICE

ROBERT KINGSLEY
ASSOCIATE JUSTICE

906 STATE BUILDING
217 WEST FIRST STREET
LOS ANGELES 90012

June 2, 1972

John D. Miller, Esq.,
Chairman,
California Law Revision Commission,
School of Law,
Stanford University,
Stanford, California 94305

Dear Sir:

I have received, and read, the papers on the proposed legislation to repeal the law permitting civil arrest. I concur in the proposed recommendation.

Sincerely,


Robert Kingsley

RK:eb

LAW OFFICES OF
LEGAL AID FOUNDATION OF LONG BEACH

HARBOR AREA OFFICE
363 W. SIXTH STREET • SAN PEDRO, CALIFORNIA 90731 • 831-0653

June 2, 1972

IN REPLY PLEASE REFER TO:

Mr. John D. Miller, Chairman
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94302

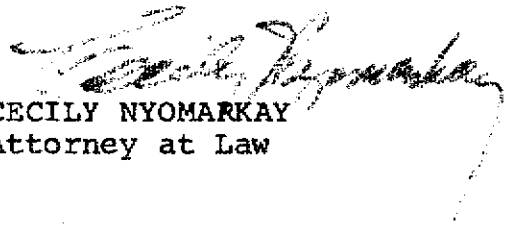
Re: Recommendations Relating to
Civil Arrest

Dear Mr. Miller:

We would like to express our approval of the proposed recommendations of the Commission with respect to the civil arrest provisions as they are now found in the California statutes.

We would also like to express our appreciation for receiving information from the California Law Revision Commission on the area of attachment, garnishment and exemptions since we are particularly interested in this field. We have been and will continue to convey our comments, suggestions and opinions concerning Commission recommendations on these topics through our Legislative Lobbyist, Mr. Brian Paddock. Under these circumstances, we would appreciate continuing to receive the Commission recommendations with respect to these areas.

Very truly yours,



CECILY NYOMARKAY
Attorney at Law

Memorandum 72-43

EXHIBIT XIV

ERNEST A. WILSON
KENNETH L. JONES
JAMES T. MORTON
JOHN E. LYNCH
PHILIP G. ABBAS
PEGGY L. McELIGOTT
NORMAN W. KAWAUAUGH
SHENROD S. DAVIS
THOMAS C. MURPHY
LAWRENCE C. JENSEN
ROBERT G. AUWEREY
RICHARD H. HANCOCK
ANDREW C. HALL, JR.
ROBERT J. HILL
ROBERT A. PRIOR
PAUL E. BASTY

RICHARD F. RAYMOND
GERALD A. LASTER
JEREMIAH J. LYNCH

RICHARD G. RANDOLPH
MAYER A. DANIEL
MICHAEL R. HAVE
JOHN G. CLARK
JAMES L. COPELAND
PHILIP H. SHEETER
JOAN E. BRIDG
THOMAS S. ADAMS
THEODORE H. ROBEY, JR.

WILSON, JONES, MORTON & LYNCH

ATTORNEYS AND COUNSELLORS AT LAW

630 NORTH SAN MATEO DRIVE

P. O. BOX 182

SAN MATEO, CALIFORNIA 94401

(415) 342-3523

June 5, 1972

CHARLES N. KIRKBRIDE

1884-1911

KIRKBRIDE & GORDON

(JOSEPH S. GORDON)

1911-1922

KIRKBRIDE & WILSON

1922-1947

KIRKBRIDE, WILSON, HANSEFELD & WALLACE

1947-1961

OF COUNSEL

ARTHUR J. HANSEFELD

JAMES M. WALLACE

RICHARD J. DOLWIG

A.A. KAPLAN (NO. ONLY)

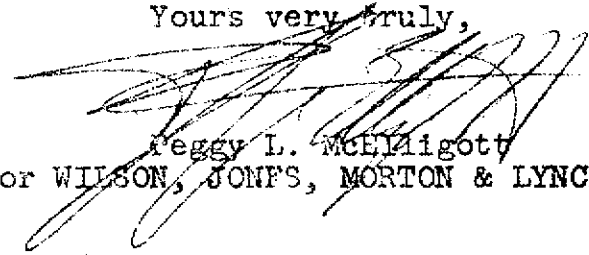
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Tentative Recommendation Relating to
Attachment, Garnishment and Exemptions
From Execution - Civil Arrest

Gentlemen:

We have reviewed the tentative recommendation #39.80 dated May 15, 1972 which proposes final repeal of the present provisions authorizing civil arrest. Very frankly, we feel that this proposed legislation is long overdue and would tend to go directly along with the present tenor of the law, particularly in the equal protection questions now coming to the forefront. In view of the use of so-called O. R. in criminal cases where the defendant is unable to raise bail, to leave these provisions on the books creates an anomaly which makes little or no sense. We would, therefore, urge that the Commission proceed with its final recommendation in connection therewith.

Yours very truly,


Peggy L. McEligott
for WILSON, JONES, MORTON & LYNCH

PLMcE:sg

Memorandum 72-43

EXHIBIT XV
LAW OFFICES OF
LEGAL AID FOUNDATION OF LONG BEACH

DOWNTOWN OFFICE
236 E. THIRD STREET • LONG BEACH, CALIFORNIA 90812 • 437-0901

6 June 1972

IN REPLY PLEASE REFER TO:

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

Re : Study No. 39.80

Gentlemen:

Thank you for sending me a copy of your tentative recommendations regarding civil arrest, and the background study on that subject. After reviewing the proposed recommendation, it is my feeling that this is ~~as much needed~~ change in the California Statutes. The existence of a civil arrest and bail procedure in this day and age seems to me highly anachronistic.

I hope that you are able to proceed quickly to present your recommendations to the Legislature and that they act quickly to adopt them.

Please keep me on your list to receive any further recommendations on this subject or, in general, on the subjects of attachment, garnishment, and exemptions from execution.

Sincerely,


TOBY J. ROTHSCHILD
Attorney at Law

TJR:ej

Memorandum 72-43

EXHIBIT XVI

MM METROMEDIA, INC.
5740 SUNSET BOULEVARD
LOS ANGELES, CALIF. 90028
TEL: 213-462-7111

RICHARD COLBY/ASSISTANT GENERAL COUNSEL

May 24, 1972

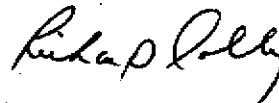
John D. Miller, Esq.
Chairman
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Mr. Miller:

I refer to the Commission's tentative recommendations on civil arrest.

As a personal comment, I wish to express my agreement with the proposed repeal. May I also note my appreciation for the Study, which I found to be very informative.

Very truly yours,



Richard Colby

RC/jc

Memorandum 72-43

EXHIBIT XVII

PETER R. STROMER

ATTORNEY AT LAW

515 NORTH FIRST STREET, SUITE 201

SAN JOSE, CALIFORNIA 95112

TELEPHONE (408) 295-4430

May 25, 1972

John D. Miller, Chairman
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

RE: Tentative Recommendation relating
to Attachment, Garnishment, etc.,
Civil Arrest

Dear Mr. Miller:

I have read the above tentative recommendation and fully concur in recommending that those provisions of California law permitting civil arrest and imprisonment be repealed.

It would appear that the current legislation is a clear denial of due process when used as a pre-judgment remedy and the limited use of the civil arrest procedure as a post-judgment remedy warrants repeal without further delay.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter R. Stromer".

Peter R. Stromer

PRS:pab

BUDGET FINANCE PLAN
8434 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90048
653-9550

RICHARD JAY GOLDSTEIN
ASST. SECRETARY AND ASSOCIATE COUNSEL

May 25, 1972

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

Attention: Mr. John D. Miller,
Chairman

Re: Comments on Commission's Tentative
Recommendations Relating to the Use
of Civil Arrest as a Collection Method

Gentlemen:

I have reviewed your tentative recommendations dated May 15, 1972, regarding the above subject matter and pursuant to your request, submit the following comments.

For a long time, many practitioners in the State of California, myself included, have considered the Code of Civil Procedure's provisions regarding civil arrest to be of little or no value and fraught with danger to the unwary practitioner who advises a client to use the provisions as a collection device in a civil matter.

If, as the California Supreme Court has held in *Randone* and *Blair*, our attachment and claim and delivery statutes are violative of the constitutionally guaranteed rights of defendants to due process, civil arrest would seem to be even more constitutionally infirmed than those provisions, due to the severity of the remedy (arrest) in light of the nature of the matter giving rise to its use (an unpaid debt). The Code of Civil Procedure section, in effect, provide for arrest in civil actions prior to judgment and also prior to a meaningful hearing to determine to any degree, the validity of plaintiff's cause of action.

Based upon what I consider inherent due process problems with civil arrest, this provisional remedy has been, for all intents and purposes, disregarded by most creditors' attorneys and of little practical value and therefore, rarely, if ever, used.

Mr. John D. Miller

May 25, 1972

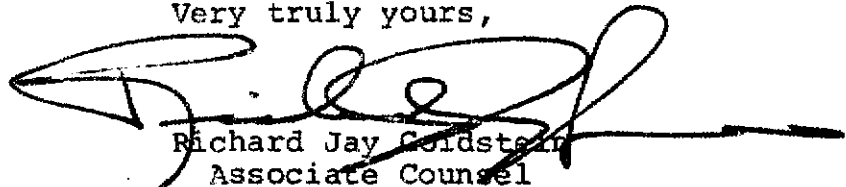
Page Two

I am therefore in accord with your tentative recommendations on the subject but would like to make one comment regarding the proposed addition of Section 478 to the Code of Civil Procedure with particular attention to the last sentence of the proposed section which, at the present itme, reads as follows:

"Nothing in this Section shall affect the power of a Court to enforce its orders."

Although I understand the reason for this sentence as set forth in your comment to the section, I have some doubt that the sentence makes clear the Commission's intention to protect the Court's contempt power in the family law area listed in your comment and would possibly suggest that the Commission attempt to re-word the last sentence of the proposed section to clearly point out the continued availability of arrest and jail in divorce and other family law proceedings in connection with violation and contempt of a Court's validly made order.

Very truly yours,



Richard Jay Goldstein
Associate Counsel

RJG:cc

Memorandum 72-43

EXHIBIT XIX

NEIL A. COLWELL
ATTORNEY AT LAW
RMCS ((SS)) USN RET
2187 ULRIC STREET, SUITE A
SAN DIEGO, CALIFORNIA 92111
(714) 277-0142
P. O. Box 11397

7 June 1972

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

Re: Report of Law Revision Committee
relating to civil arrest

Dear Sir:

Since the whole subject of civil arrest is archaic and relates back to the days of debtors' prisons and imprisonment until the debt was paid, the tentative recommendations merit support by all attorneys in California. I fully agree with the commissions recommendations as to the changes in the Civil Code, and hope that the legislature will see fit to make the amendments as suggested.

Yours truly,


NEIL A. COLWELL

NAC/cmc

Memorandum 72-43

EXHIBIT XX

TOBIAS COSKEY
HAL L. COSKEY
SANDOR T. BOXER

COSKEY & COSKEY
ATTORNEYS AT LAW
SUITE III WESTWOOD CENTER
1100 GLENDON AVENUE
LOS ANGELES, CALIFORNIA 90024

AREA CODE 213
TELEPHONES
477-5505 AND 579-9555

June 7, 1972

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

Re: Study relating to civil arrest in
California

Gentlemen:

The comments of Nathaniel Sterling leave very little to add about your study relating to civil arrest in California. All other considerations aside, the potential liability to a plaintiff who invoked the remedy and, thereafter, lost the case in chief would be sufficient to dissuade the use of the remedy of arrest even if it were available.

The last sentence in Section 478 may not serve the purpose indicated in the comment. It is possible the language could be tortured by some attorney arguing against the right of the court to enforce a bench warrant in a civil action. If consistent with proper draftsmanship of statutory law, the section should reaffirm the power of the court as set forth in the examples of the comment.

It is hoped that the time spent by the commission in the consideration of the subject of civil arrest in California will not detract it from the extremely important task of drafting a new attachment law for this state.

Very truly yours,


HAL L. COSKEY
OF COSKEY & COSKEY

HLC/bh

Memorandum 72-43

EXHIBIT XXI

LAW OFFICES

FRANCIS M. ARNOLDY

1418 COVILLAUD STREET

MARYSVILLE, CALIFORNIA 95801

June 9, 1972

TELEPHONE 216 742-0808

SUBJECT:

Recommendation relating to Attachments, Garnishment,
and Exemption from Execution

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Dear Mr. DeMouilly:

I am in complete accord with the recommendations
of the Law Revision Commission in connection with
the above subject action.

Very truly yours,

Francis M. Arnoldy

FMA/bmm

Memorandum 72-43

EXHIBIT XXII

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

HNB:an

UNITED STATES ATTORNEY

CENTRAL DISTRICT OF CALIFORNIA
U. S. COURT HOUSE
312 NO. SPRING STREET
LOS ANGELES, CALIFORNIA 90012

Claims & Judgments
Section

June 9, 1972

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Re: California Law Revision Commission
tentative Recommendation relating to
Attachment, Garnishment, and Exemptions
from Execution

Dear Mr. DeMouilly:

Pursuant to your recommendation and study relating to Civil Arrest in California, I can only state that in my more than four years of experience in enforcing all types of judgments for the United States Attorney's office for the Central District of California, I have never found it necessary to utilize the provisions of Civil Arrest and can only add my name to those who urge its appeal for the reasons stated in your excellent study.

Very truly yours,


HUGH W. BLANCHARD

Assistant United States Attorney

W.A.	
C.A.	
A.C.	
A.L.	

EXHIBIT XXIII
RUTAN & TUCKER
ATTORNEYS AT LAW

THE BANK OF CALIFORNIA BUILDING
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(714) 835-2200

June 12, 1972

LOS ANGELES OFFICE
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CITY NATIONAL BANK BUILDING
808 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014
TELEPHONE (213) 820-0482

LAGUNA HILLS OFFICE
23551 PASO DE VALENCIA, SUITE 300
LAGUNA HILLS, CALIFORNIA 92653
TELEPHONE (714) 835-2200

ANAHEIM OFFICE
SUITE 812 BANK OF AMERICA BUILDING
300 SOUTH HARBOR BOULEVARD
ANAHEIM, CALIFORNIA 92805
TELEPHONE (714) 835-2200

IN REPLY PLEASE REFER TO

JAMES E. TUCKER, SR. (1898-1980)
MILFORD W. DAHL
NORMAN H. SHEDDEN
N. ROGER HOWELL
JAMES E. TUCKER
GARY E. SHALDENBERG
JAMES R. MOORE
HERBERT W. WALKER
ROBERT L. RIBLEY
NICK E. VOCCA
FRITZ R. STRADLING
HARRY J. KEATON
PAUL FREDERICK MARK
EDWARD L. MCGOWAN, JR.
EDMUND R. SABRY
HOWARD F. HARRISON
JAMES E. CRICKSON
JOHN M. VINCENT
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RICHARD A. CURNUTT
LEONARD A. HANDEL
JOHN B. MURPHY, JR.
MICHAEL W. HANELL
MILFORD W. DAHL, JR.
THOMAS R. BURKE
J. NICHOLAS COUNTER II
THEODORE J. WALLACE, JR.
WILLIAM C. DEARS
COLLEEN M. CLAIRE
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C. CRAIG CARLSON
JOHN J. MURPHY
WILLIAM R. SMITH II
H. STEPHEN GOONTE
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ROBERT C. BRAUN
GERALD M. WALLISAN
DAVID E. ROSENBAUM
EDWARD O. STEDMAN, JR.
ALEX JEFFREY GLASSER

OF COUNSEL
R. W. RUTAN
W. L. LINDSEY
EVERETT A. HART

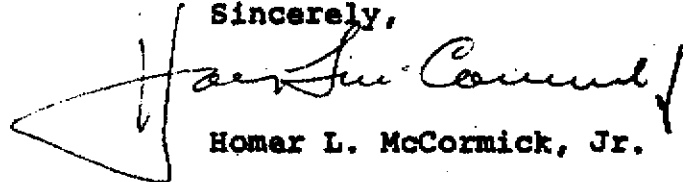
John D. Miller, Chairman
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. Miller:

I have reviewed your recommendations concerning civil arrest and the study relating thereto which was also transmitted to me. I have had an opportunity to discuss the matter with other attorneys involved in litigation including collection matters in this area.

I personally, and all the other attorneys that I have discussed the matter with, concur fully in the Commission's recommendations. We believe civil arrest is an adjunct of the attachment or execution provisions of our Code of Civil Procedure, represents the vestiges of an obsolete system, and should be eliminated.

Sincerely,


Homer L. McCormick, Jr.

HLM:ehs

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
Stanford University
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.

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.

This tentative 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.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-3300, EXT. 3479

JOHN D. MILLER
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MARC SANDSTROM
Vice Chairman
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ASSEMBLYMAN CARLOS A. MOOREHEAD
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HOWARD R. WILLETANS
GEORGE H. MURPHY
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 study was prepared by Nathaniel Sterling, a member of the Commission's staff. Only the recommendation (as distinguished from the background study) expresses the views of the Commission.

Respectfully submitted,

John D. Miller
Chairman

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

-
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.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 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 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. References to arrest and bail in Code of Civil Procedure Sections 513, 515, and 516 (claim and delivery) are left unchanged in the recommended legislation since the claim and delivery procedure has been held unconstitutional. Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

5. 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 539, 667, 682, 684, 804, and 1014 of, to add a chapter heading to Title 7 of Part 2 of, to add Section 478 to, to repeal Chapter 1 (commencing with Section 478) of Title 7 of Part 2 of, Chapter 3 (commencing with Section 1143) of Title 3 of Part 3 of, and to repeal 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. A person may not be imprisoned in a civil action for debt or tort, whether before or after judgment. Nothing in this section shall affect the power of a court to enforce its orders.

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 Attachment, Garnishment, and Exemptions From Execution: Civil Arrest, ___ Cal. L. Revision Comm'n Reports ___ (19).

The last sentence of Section 478 makes clear that the prohibition of pre-judgment attachment of the body of the defendant in a civil action does not affect the power of the court to enforce its orders 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). Cf. Govt. Code §§ 9405-9409 (contempt of Legislature).

Code of Civil Procedure § 539 (amended).

Sec. 4. 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.

Code of Civil Procedure § 667 (amended)

Sec. 5. 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. § 478 and Comment thereto.

Code of Civil Procedure § 682 (amended)

Sec. 6. 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. § 478 and Comment thereto.

Code of Civil Procedure § 684 (amended)

Sec. 7. Section 684 of the Code of Civil Procedure is amended to read:

604. 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. 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. § 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 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 of 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

§§ 1143-1154

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 ~~C~~omment 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.~~

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. Civil arrest may be used as a means to enforce the process of the court. See Code Civ. Proc. § 478 and ~~Comment~~ thereto.

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

* 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 (*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

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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 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 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 meane 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).