

#39.80

7/3/72

First Supplement to Memorandum 72-43

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

The staff has come across further provisions related to civil arrest and imprisonment that should be repealed in connection with the repeal of the civil arrest provisions. Exhibit I contains the proposed repealers with Comments.

Respectfully submitted,

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EXHIBIT I

An act to amend Sections 340, 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 Sections 202, 27823, and 71265 of, and to repeal Sections 26681, 26682, 26683, 26684, and 26686 of the Government Code.

Code of Civil Procedure § 340 (amended)

Section .5. Section 340 of the Code of Civil Procedure is amended to read:

340. Within one year:

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

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

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

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

5.

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

6.

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

Comment. Section 340 is amended to reflect the fact that arrest and imprisonment in a civil action is no longer permitted. See Code Civ. Proc. § 478 and Comment thereto. See also former Govt. Code § 26681 et seq. (liability of sheriff for escape of person held upon civil arrest). Cf. former Code Civ. Proc. § 501 (liability of officer for escape).

Government Code § 26681 (repealed)

Sec. 13. Section 26681 of the Government Code is repealed.

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

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

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

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

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

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

Government Code § 26682 (repealed)

Sec. 14. Section 26682 of the Government Code is repealed.

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

Comment. See Comment to former Section 26681.

Government Code § 26683 (repealed)

Sec. 15. Section 26683 of the Government Code is repealed.

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

Comment. See Comment to former Section 26681.

Government Code § 26684 (repealed)

Sec. 16. Section 26684 of the Government Code is repealed.

~~26684. An action cannot be maintained against the sheriff for a rescue or for an escape of a person arrested upon an execution or commitment, if, after his rescue or escape and before the commencement of the action, the prisoner returns to the jail or is retaken by the sheriff.~~

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Comment. See Comment to former Section 26681.

Government Code § 26686 (repealed)

Sec. 17. Section 26686 of the Government Code is repealed.

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

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

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

Government Code § 27823 (amended)

Sec. 18. Section 27823 of the Government Code is amended to read:

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

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

Government Code § 71265 (amended)

Sec. 19. Section 72165 of the Government Code is amended to read:

71265. All provisions of Government Code Sections 26600-26602, 26604, 26606-26608.1, 26609, 26611, 26660-26664, 26680, ~~26681, 26682~~, and Code of Civil Procedure Sections 262, 262.1, 262.2, 262.3, 262.4, and 262.5, apply to marshals and constables and govern their powers, duties, and liabilities. 2

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