

Memorandum 72-60

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

The Recommendation Relating to Civil Arrest (July 1972) is in the final printing process. We have received a letter from the State Bar Committee on Attachments (attached pink) raising two questions regarding this recommendation. Changes, if any, in the proposed legislation will have to be made by amending the bill introduced to effectuate the recommendation.

I.

The first question concerns the recommended repeal of Code of Civil Procedure Sections 1143-1154 dealing with discharge of persons imprisoned on civil process. As the Comment to these sections indicates, habeas corpus is thought to be an adequate remedy for those imprisoned for contempt of court for failure to pay court-ordered support and alimony. The State Bar Committee questions whether the repeal of Code of Civil Procedure Sections 1143-1154 is necessary since those sections may be used to purge a person of civil contempt. Furthermore, the committee asks whether habeas corpus is as expeditious as the statutory remedy. (See copy of letter attached as Exhibit I.)

In addition to its application in cases where persons are imprisoned on execution and contract cases involving fraud, the procedure provided in Code of Civil Procedure Sections 1143-1154 has been held applicable to release persons imprisoned for contempt for failure to obey a court order directing them to pay alimony for support. In re Wilson, 75 Cal. 580, 17 P. 698 (1888); Ex parte Johnson, 92 Cal. App.2d 467, 207 P.2d 123 (1949). The civil arrest ~~discharge~~ procedure does not appear from the cases to have been used in any other manner.

With the repeal of the civil arrest remedy, the only apparent application of the civil arrest discharge procedure would seem to be in the alimony and support cases where the defendant seeks to raise the question of his ability to pay. See Code Civ. Proc. § 1146.

The procedure provided by Code of Civil Procedure Sections 1143-1154 is as follows: The petitioner for discharge must give written notice to the plaintiff that he will apply for discharge in the court where the order issued at a certain time and place. (Code Civ. Proc. § 1144) Such notice must be served at least one day before the hearing on the application. (Code Civ. Proc. § 1145) At the time specified for the hearing, the petitioner is examined under oath concerning his property and his ability to pay the judgment. (Code Civ. Proc. § 1146) In addition, the judge may hear "any other legal and pertinent evidence" produced by petitioner or plaintiff. (Id.) At the hearing, the plaintiff may propose interrogatories to the petitioner which may be required to be answered in writing. (Code Civ. Proc. § 1147) If the judge finds that the petitioner is entitled to discharge, the petitioner must take the pauper's oath to the effect that he does not have property worth \$50 not exempt from execution, and that he has not attempted to dispose of his property to defraud his creditors. (Code Civ. Proc. § 1148) Then, the judge must issue an order that the petitioner be discharged, whereupon he is to be discharged "forthwith." (Code Civ. Proc. § 1149) The petitioner may reapply for discharge under the statute every 10 days, and "the same proceedings must thereupon be had." (Code Civ. Proc. 1150) After being discharged, the petitioner is exempt from imprisonment on that debt unless he swore falsely before the judge or on the pauper's oath. (Code Civ. Proc. § 1151) However, the judgment against him remains in force, and the plaintiff may seek execution again. (Code Civ.

Proc. § 1152) In cases of civil arrest on execution, the plaintiff may have the defendant released. (Code Civ. Proc. § 1153)

Habeas corpus, which has been termed "the most effective remedy known to the law for securing release from unlawful restraint" (In re Elias, 209 Cal. App.2d 262, 263, 25 Cal. Rptr. 739, 740 (1962)), is clearly applicable to test imprisonment in cases of civil contempt for failure to pay court-ordered alimony or support. In re Johnson, 92 Cal. App.2d 467, 207 P.2d 123 (1949); Penal Code §§ 1485 and 1487(2); Code Civ. Proc. § 1219. Habeas corpus may also be used to test the validity of the contempt order. Thueson v. Superior Court, 215 Cal. 572, 12 P.2d 8 (1932); In re Wilson, 123 Cal. App. 601, 11 P.2d 652 (1932); Penal Code § 1487.

The procedure for obtaining release on a writ of habeas corpus is as follows: The petitioner must file a verified petition in the superior court having physical jurisdiction over him (Cal. Rules of Court 56(a)(1); In re Quitman, 116 Cal. App. 59, 2 P.2d 41 (1931)) stating that he is unlawfully restrained, the nature of the illegality, where he is restrained, and by whom. (Penal Code § 1474) The petitioner must indicate the nature and disposition of any prior petitions for habeas corpus relief. (Penal Code § 1475, ¶ 2) The Judicial Council has approved a form which must be used for habeas corpus petitions. (See 2 California Criminal Law Practice §§ 21.14-21.23 at 361-369 (Cal. Cont. Ed. Bar 1969); Cal. Rules of Court, Appendix, 354-358 (1972).) The petition must be served on the district attorney (or the city attorney in some cases) at least 24 hours before the time the writ is made returnable. (Penal Code § 1475, ¶ 3 & 4) If the petition is sufficient, the court must issue the writ "without delay." (Penal Code § 1476) The writ is then to be served by the clerk or the sheriff "without delay." (Penal Code § 1476; Penal Code § 1503 says "forthwith.") The writ commands the person having custody of the petitioner to bring him before the court at the time the writ is made returnable. (Penal Code § 1477, except as in § 1482.) In his return, the officer must show his authority for holding

the petitioner. (Penal Code § 1480) A summary hearing must be held immediately. (Penal Code § 1483) At the hearing, the burden of proof is on the petitioner and witnesses may be produced. (Penal Code § 1484) At the close of the hearing, if no legal cause has been shown for petitioner's imprisonment or its continuation, he must be discharged. (Penal Code § 1485) The petitioner cannot again be imprisoned for the same cause unless a defect in the original process is properly corrected. (Penal Code § 1496) If the writ is granted, but relief is denied after the hearing, no court of the same general jurisdiction can discharge the petitioner unless on some new ground not existing at the time of the prior writ. (Penal Code § 1475) The petitioner must petition a higher court in order to urge a point of law not raised in the prior petition or hearing. (Id.) If the petition for the writ has been denied, the petitioner may apply again to the same court since the dismissal is not res judicata, but the court has discretion to deny the petition if it shows no change in the facts or law. In re Chessman, 43 Cal.2d 391, 274 P.2d 645 (1954).

From this outline of civil arrest discharge and habeas corpus procedures, it is apparent that habeas corpus procedures are more detailed, but it is doubtful that habeas corpus is any less expeditious for that reason. It might be argued that, since habeas corpus is more detailed, it is more difficult to utilize. But, since a petition form is provided, and the statute is relatively clear, that should not be the case. It might just as well be argued that judicial familiarity with habeas corpus petitions will result in expeditious handling of such petitions, and that the probable infrequency of civil arrest discharge petitions might cause delay because of unfamiliarity. On the other hand, it might be found that, because of the inundation of some courts by habeas corpus petitions, the petitioner's case would meet with delay which would not occur if he used the more rarely used civil arrest discharge procedure. No statistics on the average times for consideration and disposition

of habeas corpus or civil arrest discharge petitions have been found. An examination of the fact situations of several appellate cases does not indicate any significant difference in the time taken to process habeas corpus petitions as opposed to civil arrest discharge petitions.

Habeas corpus seems to offer some slight advantages over the civil arrest discharge procedure. By way of habeas corpus, the petitioner may raise not only the question of continuing ability to pay, but also the validity of the contempt order. It is possible to get a hearing faster by habeas corpus since a court may require the petitioner to wait 10 days after the contempt order before allowing a civil arrest discharge petition. (See Spencer v. Lawler, 79 Cal. 215, 21 P. 742 (1889).) One may bring successive habeas corpus petitions to higher courts, whereas civil arrest discharge is limited to the trial court. Habeas corpus is a more familiar remedy, and has the virtue of some certainty through use of the official form. There is no filing fee for habeas corpus petitions. (Govt. Code § 6101)

The civil arrest discharge procedure offers the apparent advantage of mandatory hearings approximately every 10 days if the petitioner so desires. (Code Civ. Proc. § 1150) Of course, repeated habeas corpus petitions may be filed whether previously the writ has been refused, or the writ has been granted but relief was denied. However, under habeas corpus procedures, each application must contain a recital of the details of former applications and the action taken thereon, which is a slight burden on the petition draftsman.

It must be concluded that the civil arrest discharge procedure offers no distinct advantages over the writ of habeas corpus to a person seeking to test his imprisonment for contempt of court for failure to make court-ordered alimony or support payments. Habeas corpus appears to be at least as expeditious

as civil arrest discharge. Accordingly, the staff recommends no change in the approved recommendation that includes the repeal of the civil arrest discharge procedure. We see no benefit to retaining two procedures designed to accomplish the same objective.

II.

The State Bar Committee's second question concerns the recommended amendment of Government Code Section 202 to strike subdivision (b). The committee recommends that Section 202(b) be amended to read: "For the purpose of enforcing the process of the courts." (See letter attached as Exhibit I.) As the Comment to Government Code Section 202 indicates, subdivision (b) is recommended to be repealed in order to avoid any implication that civil arrest is still available to individuals in civil actions. The Comment points out that "civil arrest may be used as a means to enforce the process of the courts." The committee recommendation would put the sense of this Comment into the statute. However, this is inadvisable since the language might be thought to authorize imprisonment for purposes not now allowed. By its reference to Code of Civil Procedure Section 478 (new) and Comment, the Comment to Section 202 indicates that imprisonment for contempt is still authorized for certain purposes. The detail of the Comment to Code of Civil Procedure Section 478 (new) could be brought into the Comment to Government Code Section 202, but the reference as it now stands should be adequate to make it clear that the repeal of Section 202(b) does not indicate an intent to remove the power of the courts to imprison for civil contempt.

If the committee is reacting from a concern that the repeal of Government Code Section 202(b) might affect the power of the courts to enforce their orders, perhaps the last substantive sentence of the Comment to Section 202(b)

should be reworded to read: "Arrest and imprisonment may still be used as a means to enforce the process of the courts as otherwise authorized by law." This rewording and the reference to Code of Civil Procedure Section 478 and Comment should make it clear that no change other than the repeal of all authority for arrest and bail and arrest on execution is intended. Government Code Section 202(b) is not necessary as authority for any other statutes dealing with court enforcement of its process by arrest and imprisonment; hence its repeal will not undermine such other statutes.

Respectfully submitted,

Stan G. Ulrich
Legal Assistant

Memo 72-60

EXHIBIT I

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September 6, 1972

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

Re: Attachment, Garnishment, Execution (Civil Arrest)

Dear Mr. DeMouilly:

At an earlier time you transmitted the Law Revision Commission's tentative recommendation regarding civil arrest and bail to the State Bar's Ad Hoc Committee on Attachments.

I realize that it is rather late to be commenting on your proposal, but, as you know, the scope of our committee was not expanded until August 25, 1972.

The committee is in favor of eliminating the code sections, which presently allow for imprisonment for debt. However, we have comments on two small matters:

(1) The committee questions whether the repeal at page 17 of Section 1143 through Section 1154 of the Code of Civil Procedure is necessary. Those sections are used for the purpose of purging civil contempts, as we understand it. The commission has indicated that habeas corpus will still be available, but this committee is not positive that the habeas corpus remedy is as expeditious as the statutory remedy outlined in those sections. Perhaps the commission has already analyzed this point and has decided that habeas corpus does work as speedily and that it is just as good, or better, procedurally. Nevertheless, we thought we should question this one point.

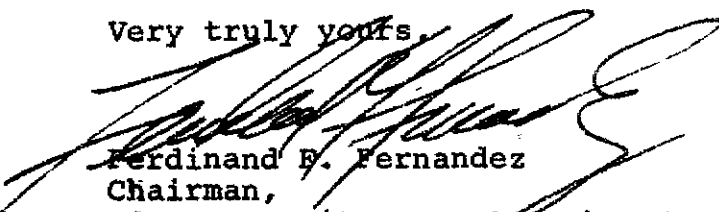
(2) The commission proposes that Section 202 of the Government Code be amended to strike out language indicating that the state may imprison or confine an individual for the

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Mr. John DeMouilly
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"purpose of enforcing civil remedies." The commission indicates that it is making this change since civil arrest is no longer proper. It also proposes to put a statement in the footnote that civil arrest may be used as a means to enforce the process of the courts. Nevertheless, the Ad Hoc Committee believes that it would be better to change present Section 202(b) to read: "For the purpose of enforcing the process of the courts."

Very truly yours,



Ferdinand B. Fernandez
Chairman,
Ad Hoc Committee on Attachments

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Civil Arrest

Background

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

Civil arrest in California is available only in certain cases involving fraud and is rarely used. It is ineffective as a collection remedy, and existing California law provides other more effective means of achieving the ends served by civil arrest. It is likely that the civil arrest procedure denies due process of law to defendants. The arrest on execution procedure is anomalous in imposing a criminal consequence upon a civil judgment. The requirement that the indigent defendant be provided counsel at public expense imposes an economic burden on the taxpayers that is out of all proportion to the value of civil arrest.

Recommendation

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

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

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

³ CODE CIV. PROC. §§ 1143-1154.

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

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

Civil Code
Section 340(4)
and

Proposed Legislation

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

An act to amend Sections 340, 515, 539, 667, 682, 684, 804, and 1014 of, to add 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, to amend Sections 202, 27823, and 71265 of, and to repeal Sections 26681, 26682, 26683, 26684, and 26686 of, the Government Code, relating to civil arrest and bail.

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

Code of Civil Procedure § 340 (amended)

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

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).

Technical addition

SEC. 2. 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 Procedures §§ 478–505 (repealed)

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

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

Code of Civil Procedure § 478 (added)

SEC. 4. 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 affects any power a court may have to imprison a person who violates a court order.

Comment. Section 478 prohibits the arrest of a defendant in a civil action. The provisional remedy of arrest and bail and the remedy of body execution were previously permitted in California. See former Chapter 1 (commencing with Section 478) of Title 7 of Part 2 of the Code of Civil Procedure, provisions formerly found in Sections 667, 682, and 684 of the Code of Civil Procedure, and Section 15 of Article I of the California Constitution. See also *Recommendation and Study Relating to Civil Arrest*, 11 CAL. L. REVISION COMM'N REPORTS 201 (1973).

The last sentence of Section 478 makes clear that the prohibition of prejudgment attachment of the body of the defendant in a civil action does not affect the power of a court to enforce a court order by 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), 614 (examination), 921-922 (render accounting). Cf. GOVT. CODE §§ 9405-9409 (contempt of Legislature).

Code of Civil Procedure § 515 (amended)

SEC. 5. Section 515 of the Code of Civil Procedure is amended to read:

515. The qualification of sureties under any written undertaking referred to in this chapter shall be such as are ~~prescribed by this code, in respect to bail upon an order of civil arrest, provided in Chapter 7 (commencing with Section 1041) of Title 14 of Part 2.~~ Either party may, within two days after service of an undertaking or notice of filing an undertaking under the provisions of this chapter, give written notice to the court and the other party that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When a party excepts, the other party's sureties shall justify on notice within not less than two, nor more than five, days, in like manner as ~~upon bail on civil arrest, provided in Chapter 7 (commencing with Section 830) of Title 10 of Part 2.~~ If the property be in the custody of the levying officer, he shall retain custody thereof until the justification is completed or waived or fails. If the sureties fail to justify, the levying officer shall proceed as if no such undertaking had been filed. If the sureties justify or the exception is waived, he shall deliver the property to the party filing such undertaking.

Comment. Section 515 is amended to delete the references to civil arrest. See CODE CIV. PROC. § 478 (civil arrest repealed).

With respect to the qualification of sureties, Section 515 incorporates the qualifications from Code of Civil Procedure Section 1057 (qualifications of sureties in any civil case in which undertaking required or permitted), which are basically similar to those formerly provided for arrest and bail. With respect to the justification of sureties, Section 515 incorporates the justification procedures from Code of Civil Procedure Sections 832 and 833 (actions for libel and slander), which are basically similar to those formerly provided for arrest and bail.

Code of Civil Procedure § 539 (amended)

SEC. 6. Section 539 of the Code of Civil Procedure is amended to read:

539. (a) Before issuing the notice and order pursuant to Section 538.1 or the writ pursuant to Section 538.5, the plaintiff must file with the clerk or judge a written undertaking with two or more sufficient sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking, and that if the restraining order or the attachment is discharged on the ground that the plaintiff was not entitled thereto under Sections 537 to 537.2, inclusive the plaintiff will pay all damages which the defendant may have sustained by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking. The sum specified in the undertaking shall be one-half (½) of the principal amount of the total indebtedness or damages claimed, excluding attorneys' fees. Nothing herein shall be construed to preclude the acceptance of an undertaking in which a larger sum is specified, if such undertaking be offered. The court on ex parte application of the plaintiff, may by written order, direct the issuance of the restraining order or the writ on the filing of an undertaking in a lesser sum, if the court is satisfied that the defendant will be adequately protected thereby. The damages recoverable by the defendant pursuant to this section shall include all damages proximately caused by the service of the restraining order or the levy of the writ of attachment.

At any time after the issuing of the restraining order or the attachment, but not later than five days after actual notice of the levy of the writ of attachment, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When excepted to, the plaintiff's sureties, within five days from service of written notice of exception, upon notice to the defendant of not less than two nor more than five days, must justify before the judge or clerk of the court in which the action is pending, in the same manner as upon bail on arrest, like manner as pro-

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

(b) The liability of any surety furnishing a bond pursuant to this section, if any, may be enforced on motion in the trial court without the necessity of an independent action. Notice of the motion shall be served on the persons whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. The notice shall state the amount of the claim and shall be supported by an affidavit or affidavits setting forth the facts on which the claim is based. Such notice and affidavit may be served in accordance with any procedure authorized by Chapter 5 (commencing with Section 1010), Title 14, Part 2. Judgment may be entered in accordance with the notice against the person or persons served therewith, unless such person or persons shall serve and file an affidavit or affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such showing is made, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery. The surety shall not obtain a stay of the proceedings pending the determination of any third-party claims. Affidavits filed pursuant to this section shall conform to the requirements prescribed for affidavits filed pursuant to Section 437c.

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

Code of Civil Procedure § 667 (amended)

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

667. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery can not be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return can not be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in

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

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

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

Code of Civil Procedure § 682 (amended)

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

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

1. If it be against the property of the judgment debtor, it must require such officer to satisfy the judgment, with interest, out of the personal property of such debtor, or if it is against the earnings of such debtor, such levy shall be made in accordance with Section 682.3, and if sufficient

personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the abstract of judgment was filed as provided in Section 674 of this code, or at any time thereafter.

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

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

~~4.~~

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

~~5.~~

4. If it be for the delivery of the possession of real or personal property, it must require such officer to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require such officer to satisfy any cost, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof

cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

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

Code of Civil Procedure § 684 (amended)

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

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

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

Code of Civil Procedure § 804 (amended)

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

804. Whenever such action is brought, the Attorney-General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a

statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Justice of the Supreme Court, or a Judge of the Superior Court, for the arrest of such defendant and holding him to bail; and thereupon he may be arrested and held to bail in the same manner and with the same effect and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest.

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

Code of Civil Procedure § 1014 (amended)

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

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

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

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

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

Comment. Sections 1143–1154, providing for discharge of persons imprisoned on civil process, are repealed since

execution may no longer issue against the person of the judgment debtor in a civil action. See CODE CIV. PROC. § 478 and Comment thereto.

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

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

Code of Civil Procedure § 1168 (repealed)

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

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

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

Government Code § 202 (amended)

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

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

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

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

Government Code § 26681 (repealed)

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

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

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

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

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

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

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

Government Code § 26682 (repealed)

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

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

Comment. See Comment to former Section 26681.

Government Code § 26683 (repealed)

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

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

Comment. See Comment to former Section 26681.

Government Code § 26684 (repealed)

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

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

Comment. See Comment to former Section 26681.

Government Code § 26686 (repealed)

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

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

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

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

Government Code § 27823 (amended)

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

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

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

Government Code § 71265 (amended)

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

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

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