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Arrest of Defendant in Civil Action

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NOTES

ARREST OF DEFENDANT IN CIVIL ACTION

Early in the practice of law the question of the justice of the arrest of the defendant in a civil action for an unliquidated claim presented itself to this writer. This problem, which is existent in but a few of the states, must, however, not be confused with the old practice of imprisonment for non-payment of a civil debt. It has been universally held that similar provisions in the codes of various states do not violate the constitutional provisions forbidding deprivation of liberty without due process of law (5 C. J. 438).

Hence it is unnecessary to relate the background of human experiences, decisions, customs and reforms which have contributed to and guided the development of our laws since the time when men were arrested, persecuted and their personal liberties taken from them for debt. Suffice it to say that the practice became so abhorrent to freedom-loving, thinking Englishmen that it is axiomatic and fundamental in our present day jurisprudence that man may not be deprived of his freedom as punishment for non-payment of a civil debt, no matter how just or overdue the claim may be, and irrespective of that man's ability to pay.

But, it is submitted, there is far more justice in the practice of placing at the disposal of a civil creditor the use of the institutions which the state maintains for punishment of offenders against the public decorum to enforce the payment of a debt willfully withheld, than can be ascribed to the arrest of the defendant as early as at the beginning of the action, before the claim can properly be called a debt, and before a trial on the merits of an unliquidated claim for a money judgment, which the defendant may yet deny. And in some states it is provided that the relief will not lie in an action for debt upon a contract.

The procedure in procuring the order of arrest is much the same as in the attachment of the property of the defendant. The affidavit upon which it is issued must state facts in strict compliance with the statutory grounds, sec. 152 and 153, Kentucky Civil Code (*Fonda and Sons* v. *Field,* 6 R. 439, Sup. Ct.),

and must be accompanied by a bond of indemnity to the defendant so arrested, to an amount not exceeding double the amount of the plaintiff's claim (S. 154 Ky. Civil Code), and the defendant will be held to bail in the amount stated in the plaintiff's petition.

Theoretically, the provision is intended as a relief against a possible fraud by prohibiting the defendant from departing from the state and fraudulently concealing his property, or removing it so that process upon plaintiff's probable judgment can not be executed, or in prohibiting him from leaving the state, having property in the possession of himself, or in the possession of someone for him, without leaving enough in the jurisdiction of the state to satisfy plaintiff's claim. The distinction, practically, between these two statements of the grounds for the order is hard to understand when, under Sec. 18, Kentucky Constitution, the same element of fraudulently removing or concealing his property by the defendant must be shown under each, and such implication of fraud would certainly be negatived by the fact that the property of the defendant in his or the possession of another for him is already in another state, and was not placed there in contemplation of the plaintiff's action, and has never been subject to the process of the court in which the action is pending.

Further, as to property within the jurisdiction of the court when the action is commenced, attachment, together with the means the court may have of enforcing its orders, will more nearly accomplish the plaintiff's end than will the arrest of the defendant, which arrest carries with it no power of search or to take from defendant's possession whatever property he may have, and no power over his property already out of the jurisdiction of the court, in another state.

It is not difficult to imagine the extent to which this law, intended to prohibit fraud, may be practiced as a "squeezing" process, or revenge, nor does the requirement of a bond in double the amount of the plaintiff's claim insure against the injustice which may be accomplished in this "legal" manner. A plaintiff may bring a defendant into court to answer for an unliquidated claim, the amount of which has been arbitrarily set at an unreasonable sum, held to bail in that amount until judgment, and the liability of the plaintiff on his bond, should the defend-

ant later, perhaps years later, receive the verdict, is no more than the actual injury sustained by the defendant because of his arrest, and would be the same if the plaintiff's arbitrary claim had been not so great and the defendant held to bail in a smaller amount, which he, perhaps, could have executed at the start.

But, it is said, the defendant may move to vacate the order for his arrest, or to reduce the amount of his bail, Sec. 177 Kentucky Civil Code. It is submitted that justice can never be done by placing a man where he is forced to take the initiative in a fight for justice, with the burden upon himself to allege and prove his grounds for asking his freedom—a limit to which the state has not dared to go in the punishment of offenders against the public law.

Even more pronounced are the latent evils of this relic of an antiquated practice, when its peculiar method of doing justice is relied upon in a suit by a wife against her husband for alimony. Under Sec. 2124 Kentucky Statutes, no bond is required of her, and here a vicious, irate wife, who has quarrelled with her husband, over a matter of family interest, and before the triviality of her complaint can be known, may, for the purpose of avenging her feminine wrath, have a defenseless, loving husband arrested, bound and incarcerated in the bastile of the thief and the murderer, set the amount of his bail at whatever she may choose, incur no liability for her own acts, and for months to come see him languish in the dungeon, breathe the breath of the criminal, bereft of his freedom, to wallow in the mire of the lawless, when he has committed no crime, yet imposed with the burden of proving his own defense—and well may we ask, if this is the equity for which a Kentucky Court of Equity may be recognized.

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