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"cohabitate" in or outside the home with any single or married man. Nor will it allow a state statute to prevail if it precludes payments to the child simply because a man is living with the spouse. In this type of situation, there has to be actual proof of contribution. If such proof cannot be found, then a denial would deprive the recipient of his rights to receive aid. Welfare applicants are entitled to receive payments if they meet the requirements set out in the Social Security Act. The state cannot restrict the child nor the parent of this right by imposing one-year waiting or resident requirements, see *Shapiro v. Thompson, supra,* and *Wyman v. Bowens, supra.* Generally, discrimination is not upheld by the Supreme Court when a similar act to that of the above is alleged. The United States Supreme Court in *Damico v. Californa, supra,* said that it would also be discriminating if the court denied a welfare recipient relief because he did not seek relief first under the state law. Recently, there have been a few cases decided in the United States Supreme Court regarding termination of welfare recipients' benefits. The majority of the cases decided seem to hold that before terminating any recipients there must be an evidentiary hearing before welfare authorities and that welfare officials should not terminate recipients if they refuse entry into their homes without a search warrant. *Goldberg v. Kelly, supra,* and *Wyman v. James, supra.*

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Civil Arrest in North Carolina

At common law, one's creditor had an absolute right to have him arrested and imprisoned until his debt was paid.[1] Upon his arrest before judgment, the debtor could give bail as an assurance of his appearance in court. A failure to do so resulted in his confinement in jail until judgment was rendered, and if he then failed to pay the debt, he was subject to body execution—a fate which caused the debtor to be thrown in jail until the debt was paid. More often than not the penniless debtor remained there until his death as the creditor rarely intervened since a release of the judgment constituted a satisfaction of the judgment.[2]

In order to be rid of these harsh debtor laws, English immigrants crossed the Atlantic and underwent other innumerable hardships. As a

[1] 4 Am. Jur., Arrest § 52 (1936).

[2] ———, Arrest and Imprisonment in Civil Actions in New York, 26 N.Y.U.L. Rev. 172 (1951).

result, today more than four-fifths of the state constitutions provide in some way that there will be no imprisonment for debt. Many of these have done so without restrictions; others abolished imprisonment in certain cases only.[3]

The most frequent exception of the prohibition against imprisonment for debt appearing in the constitutions omits cases where fraud is involved. Approximately one-half of the state constitutions specifically exempt such cases. Nevertheless if one relied only on an examination of state constitutions, he would be led to believe that for the most part, all remnants of the institution for debtor prisons have passed on with time; however, this is far from the truth. The old common law practice has been refined and is less often used, but is alive and with us in many states, including North Carolina.

North Carolina Debtor Imprisonment Laws

The North Carolina Constitution provides:

> There shall be no imprisonment for debt in this State except in cases of fraud.[4]

But this section of the Constitution has undergone such erosion through legislative enactment and judicial interpretation that along its side has grown an illegitimate child of the common law debtor prison system.

Statutory procedures for arrest and bail, and body execution in many North Carolina cases afford a creditor the same privileges that he could exercise at common law. The provisional remedies of arrest and bail are provided for in North Carolina General Statutes sections 1-409 through 1-439. The cases in which a defendant may be arrested are specifically set out in sec. 1-410.

> In what cases arrest allowed. . . .
> (1) . . . action not arising out of contract . . . wilful, wanton, or malicious injury to person or character . . . wilfully, wantonly, or maliciously injuring, taking, detaining, or converting real or personal property.
> (2) . . . action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by . . . person in fiduciary capacity.
> (3) . . . action to recover . . . personal property, unjustly detained,

[3] Carr v. The State, 106 Ala. 37 (1894).
[4] N.C. Const. Art. 4 § 28.

where . . . property has been concealed, removed, or disposed of . . . with the intent to deprive the plaintiff of the benefit thereof.

(4) . . . fraud in contracting the debt or incurring the obligation . . . , in concealing or disposing of the property for the taking . . . when the action is brought to recover damages for fraud and deceit.

(5) . . . defendant has removed, or disposed of his property . . . to defraud creditors . . .[5]

A cursory inspection of the statute would lead one to believe that it is inconsistent and repugnant to the constitutional prohibition against imprisonment for debt. However *Moore v. Green*[6] settled this question with the decision that the constitutional prohibition against debt does not apply to causes of action involving torts, as the framers meant to restrict the clause to cases arising in contract. Therefore, though a judgment obtained in a tort case might generally be considered as a debt, it is not so considered in regard to the constitutional prohibition against debt.

Today in North Carolina a person may be arrested and held to bail in contract cases involving fraud,[7] in tort cases[8] where there is a wilful injury to person,[9] property,[10] or character,[11] and in fiduciary cases where there is a breach of trust.[12] Now, as at common law, if a judgment is rendered against him for one of the causes set out in N.C. Gen. Stat. 1-410, the provisions of sec. 1-311 authorize an execution against the judgment debtor's person, after a return of the execution against his property wholly or partially unsatisfied.[13] The judgment debtor then is entitled to discharge without payment, only by surrendering all of his property in excess of fifty dollars. Such action amounts to a deprivation of his homestead exemption and of any personal property exemption over fifty dollars.[14]

With the slightest imagination, a vengeful creditor can have his debtor, even in contract cases, subjected to the hardships and inconvenience permitted by statute. In order to secure the provisional rights of arrest and bail, it is only necessary that a creditor obtain an order of arrest from the court, by his submission of an affidavit setting forth the existence of, or

[5] N.C. Gen. Stat. § 1-400 (1969).
[6] Moore v. Green, 73 N.C. 398 (1875).
[7] McNeely v. Haynes, 76 N.C. 122 (1877).
[8] Long v. McLean, 88 N.C. 3 (1883).
[9] Bridgers v. Taylor, 102 N.C. 86 (1889).
[10] Oakley v. Lasoter, 172 N.C. 96 (1916).
[11] Michael v. Leach, 166 N.C. 223 (1914).
[12] Powers v. Davenport, 101 N.C. 292 (1888).
[13] Allred v. Graves, 261 N.C. 37 (1963).
[14] Raisin Fertilizer Co. v. Grubbs, 114 N.C. 473 (1894).

grounds for his belief that, a cause of action exists under G.S. 1-410.[15] The Court will then decide whether an order will be issued.[16] Before the order is given though, the creditor must put up a bond of at least one hundred dollars as a surety for paying damages to the defendant, should the latter prevail.[17] After judgment a creditor may obtain body execution against the judgment debtor by showing a lawful arrest under G.S. 1-410, or by alleging facts in his complaint or affidavit[18] that would justify such an arrest.

In defense of the creditor's statutory rights, the accused may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He also has the right to demand the issue raised by the creditor's affidavit be submitted to a jury.[19]

Case Against Civil Arrest and Imprisonment

Civil arrest and imprisonment as it exists in North Carolina is an anachronism inconsistent with modern jurisprudence.[20] At the beginning of this century, Justice Hughes wrote:

> Statutes permitting arrest and imprisonment in civil cases, except cases of contempt of court, are a constant menace to the innocent, they are the occasion for wrongs even more serious because committed under the guise of legal process, than those they were designed to prevent and to punish.[21]

The argument may be put forth that there are several safeguards in the civil arrest statutes designed to protect the debtor. The first, that the order of arrest will be issued only by a judge or the court. However, judicial discretion is at best an uncertain safeguard when viewed in the context of the procedural means available to a creditor seeking personal vengeance.[22] Then it could be argued that the debtor may move to vacate the order for his arrest or to reduce the amount of his bail. But, justice can never be done by placing a man where he is forced to take the initiative in a fight for justice and his freedom. Such a burden is not placed upon offenders against the public law.[23]

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[15] Harris v. Sneedey, 101 N.C. 278 (1888).
[16] *Id.*
[17] N.C. Gen. Stat. § 1-412 (1969).
[18] Nunn v. Smith, 270 N.C. 378 (1967).
[19] N.C. Gen. Stat. § 1-417 (1969).
[20] See note 2, *supra.*
[21] N.C. Gen. Stat. § 1-412.
[22] See note 2, *supra* at 180.
[23] Finley, J.C., Arrest of Defendant in Civil Action, 20 Ky. L.J. 479 (1931-32).

In civil arrest and imprisonment, the state deprives a debtor of his liberty through the process of its courts executed by its law enforcement officers, even though the action is set in motion by a private creditor.[24] Yet the anomaly exists of imposing a criminal consequence upon a civil judgment based on a trial of the issues wherein the charges need be proved merely by a preponderance of the evidence, and not, as in other cases where criminal consequences follow beyond a reasonable doubt.[25] Justice Traynor recognized this in a recent case in which he held that a defendant arrested under civil process is entitled under due process to have the statutes insure that he be told of his rights under the statutory codes as is necessary when a criminal arrest takes place.[26]

The principle of enforcing criminal process in civil actions upon a debtor where none of the safeguards attendant upon that process are available to him is inconsistent with present day concepts of punishment. If the punishment set out in the civil arrest statutes is desirable, then it should be provided for by amending the criminal statutes.[27]

Adequate reform of North Carolina civil arrest statutes would require that their statutory purpose be confined to the original historical concept of providing an auxiliary remedy designed to keep the debtor within the reach of the court's final process.[28] A number of states have made such a change as Ind. Stat. sec. 3-302 through 3-953 shows:

> . . . Plaintiff's right to recover an existing debt from defendant, and stating that he believes the defendant is about to leave the state, taking with him property subject to execution or money or effect which should be applied to the payment of the plaintiff's damages, with intent to defraud the plaintiff.[29]

Even where statutes have limitations such as the Indiana statutes, provisions need to be made for the prevention of abuse by a vengeful creditor. The North Carolina provision that a minimum bond of one hundred dollars be put up by the plaintiff is wholly inadequate for this purpose. A more realistic deterrent against abuse would be an allowance of treble damages to the defendant in the event that he recovers with a requirement that before the order of arrest is granted, the plaintiff provide a bond of

[24] *In re* Harris, 72 Cal. Rptr. 340 (1968).
[25] Parnass, Imprisonment for Civil Obligations, 15 Ill. L. Rev. 571, 572 (1920-21).
[26] *In re* Harris, *supra* at note 24.
[27] See note 2 *supra* at 180.
[28] 6 CJS Arrest § .23 (1937).
[29] Ind. Stat. § 3-302/953 (1968).

three times the amount he seeks as a recovery. Such safeguards appear no more than reasonable when considered in the context that a plaintiff may call on the penal machinery of the state in order to insure the satisfaction of a civil judgment.

Conclusion

A similar process to the common law debtor prison system exists in many states today, including North Carolina, despite a provision in many state constitutions that there will be no imprisonment for debt. Today in North Carolina statutory provisions for arrest and bail and body execution allow civil arrest and imprisonment where a judgment is returned wholly or partly dissatisfied in contract cases involving fraud, in cases of intentional or wilful torts, and in fiduciary cases where there is a breach of trust.

The statutory remedies may be secured by a creditor through the filing with the court a complaint or an affidavit alleging a statutory right to have a defendant civilly arrested or alleging the grounds for a belief that such right exists, along with the necessary bond set by the court. If the court issues the order, a defendant has the right to move that it be vacated, that the bail be reduced and that the issues be submitted to a jury.

Civil arrest and imprisonment statutes are penal in nature without criminal safeguards, structured for vengeance by a creditor, and represent an anachronism inconsistent with modern jurisprudence. An adequate reform of North Carolina statutes would require that they be restricted to cases in which the debtor is fraudulently attempting to abscond from the jurisdiction and that they permit a greater recovery of damages by the defendant in order to deter would-be vengeful plaintiffs.

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Legal Kidnapping: A look at recent decisions involving the validity of criminal commitments to state hospitals

In a recent Pennsylvania case, *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 313 F. Supp. 653 (1970), the proceeding was a class suit brought by seven plaintiffs, individually and on behalf of all inhabitants of Farview State Hospital situated like unto them. The complaint alleges the unconstitutionality of the confinement