St. John's Law Review

Volume 26, May 1952, Number 2 Article 6

Civil Arrest in Equity Actions

St. John's Law Review

Notice on the basis of this list is often an empty gesture. The filing of a *lis pendens* has always been considered *theoretical* notice and, in a large city, it can hardly be said to convey actual notice. Posting a notice of foreclosure in the county courthouse and in three other places in the borough where the affected properties are situated, is an equally vain gesture. Finally, the statute requires the notice to be published in three newspapers, *viz.*, the City Record, which few people see, the New York Law Journal, which only lawyers read, and in any other newspaper, which may be one of dozens.[76]

Conclusion

The enactment of the *in rem* foreclosure statute marks the culmination of legislative attempts to devise an efficient, rapid, and inexpensive tax enforcement method and to deter tax delinquency. The latter is an evil which wreaks havoc upon the financial structures of political units which depend upon real estate taxes as their chief source of revenue. The operation of this procedure has already demonstrated its effectiveness toward achieving those ends. It is submitted, however, that since the *in rem* proceeding is so radical in nature and so drastic in its effects, more stringent safeguards for the protection of the property owner should be embodied in its provisions. A genuine attempt should be made to inform the delinquent owner of the impending foreclosure in a manner based upon reality of notice. In addition, provision should be made for a holding by the taxing authority, for the benefit of the parties entitled thereto, of any extraordinary surplus resulting from the sale of the property foreclosed.

Civil Arrest in Equity Actions

Introduction

An order of arrest is a provisional remedy which permits the incarceration of a defendant as an incident to the prosecution of a civil action. In equity actions, it is designed to insure a defendant's presence in court where that is essential for the performance of some act which the court may direct.[1] An irate student once wrote that

[76] For a recent article strongly criticizing the *in rem* procedure in New York City, see Stein, *"In Rem"—That Remarkable Remedy,* Bronx Real Estate & Building News (Oct. 1951).

[1] N. Y. Civ. Prac. Act § 827.

there is far more justice in placing at the disposal of creditors the use of penal institutions to enforce the payment of a debt, than can be ascribed to the arrest of a defendant before trial.[2] While such an impassioned statement may not be representative of judicial opinion, it does characterize the dread with which many regard a remedy that so limits personal liberty. Similar sentiments have not prevailed at all times. In 1821 a New York Chancellor, in speaking of the writ of *ne exeat,* for which an order of arrest is our modern substitute, said: "Nor can it be truly said to be more dangerous to the liberty of the citizen, than . . . any other proceeding by which the courts . . . constrain men to act contrary to their will." [3] Twenty years later, however, Chancellor Nicoll remarked: "When it is considered that the . . . writ of *ne exeat,* has not been effected by . . . the law abolishing imprisonment for debt, it becomes a matter of no ordinary interest to ascertain in what cases . . . this severe . . . remedy will be allowed." [4] These contrasting views gave indications of a changing attitude. Indeed, the writ of *ne exeat* was abolished thereafter; [5] and yet, it survives today with only a change in name to distinguish it in most respects from the antique writ which originated centuries ago. But regard for personal liberty has not been so static. Progressive concepts of individual freedom make it appear timely, therefore, to re-appraise arrest in equity actions.

History of the Ne Exeat

Under the ancient common law no power to restrain the person was known to king or court. "[T]he Common Law . . . in the freedom of its spirit, allowed every man to depart the Realm at his own pleasure." [6] The spectre of this powerful weapon made its first appearance in the Constitutions of Clarendon in 1164. It was therein decreed that ecclesiastics were not to depart the kingdom without a license from the king.[7] There is no doubt that such a drastic measure, directed as it was against a special group, was motivated by the king's fear of the Papal See. Thereafter, to insure the obedience of those subjects who still dared to defy the king, a second writ, directed at laymen, was devised.[8] Both writs have been referred to as the Writ *de securitate invenienda.*[9]

---

[2] See Note, 20 KY. L. JOUR. 478 (1932).

[3] BEAMES, A BRIEF VIEW OF THE WRIT NE EXEAT REGNO 6 (1st Am. ed., Warner, 1821) (preface).

[4] BEAMES, A BRIEF VIEW OF THE WRIT NE EXEAT REGNO (2d Am. ed., Nicoll, 1841) (preface).

[5] N. Y. CIV. RIGHTS ACT § 23. Formerly N. Y. CODE OF CIV. PROC. § 548.

[6] BEAMES, A BRIEF VIEW OF THE WRIT NE EXEAT REGNO 1 (1st ed. 1812).

[7] BL. COMM. *266.

[8] *Ibid.* The writ was directed mainly at archers and soldiers as it was feared that they might give aid to the enemy.

[9] FITZHERBERT, NATURA BREVIUM 188, 193 (9th ed. 1793). There is a

Although the Magna Charta of King John reaffirmed the common law freedom of movement,[10] and despite the absence of statutory regulations, legal writers, by the time of Edward I (1239-1307), were referring quite casually to the "king's license." Some justification for the exercise of this royal prerogative is found in the common law duty of every man to defend the king.[11] In fact, the application of the writ, at this time, was limited to affairs of state wherein the safety of the kingdom was involved.[12]

In the reign of Richard II (1367-1400), a statute finally was enacted conferring upon the king the right he had been freely exercising for so many years.[13] But whereas the former restraints were based primarily upon political motives, the new act sought to control the transfer of personal property out of the realm.[14] The history of this period, unfortunately, is enveloped in obscurity, and as a result, the effect of the statute upon the writs is largely unknown. Despite this shroud of uncertainty, however, it appears to have become settled that ". . . no person whatever, let his rank or station be what it might, . . . possessed a right of quitting the Realm, without the king's license previously obtained." [15]

What circumstances led to the disuse of the writ pertaining to laymen remains unexplained. That fact, nevertheless, was true, and produced an anomalous situation in that the writ which related to the clergy was thereafter considered the prototype of the writ *ne exeat regno*.[16] How it happened that this writ, of all the others, should be the one to prevent debtors from escaping their creditors is a matter of conjecture. Beames surmised that "[i]t can be no otherwise accounted for, than by its previously existing as a prohibitory process, and being found admirably adapted to that end." [17] The same thought was registered in Lord Eldon's comment that "[t]he application of this high prerogative writ to these purposes can only be justified by usage and practice." [18]

The office of the writ of *ne exeat* was to secure a defendant's presence in court, either by detaining him or by causing him to give security, where that was essential for the effective performance of a

---

certain resemblance between the two writs, but it was never accurate to treat them as one and the same identical writ. See BEAMES, *op. cit. supra* note 6, at 14.

[10] BEAMES, *op. cit. supra* note 6, at 4n.

[11] 10 HOLDSWORTH, A HISTORY OF ENGLISH LAW 390 (1931).

[12] BL. COMM. *266.

[13] 5 RICH. II, c. 2, § 2 (1381). The statute is said to have forbade ". . . all persons whatever to go abroad without license *except* only the lords and other great men of the realm, and true and notable merchants, and the kings soldiers." BL. COMM. *266.

[14] BEAMES, *op. cit. supra* note 6, at 8.

[15] *Ibid.*

[16] See Read v. Read, 1 Ch. 115, 22 Eng. Rep. 721, 722 (Ch. 1668).

[17] BEAMES, *op. cit. supra* note 6, at 11.

[18] Etches v. Lance, 7 Ves. Jr. 417, 32 Eng. Rep. 169 (Ch. 1802).

duty personal to the defendant. Although resort to the writ as a civil remedy was gradual, its use as a means of enforcing private rights had become established as early as the reign of Queen Elizabeth.

Deterred by the unfavorable political origin of the writ, the English courts exhibited a pronounced reluctance to extend its application at the expense of personal liberty. Meticulous adherence was shown, therefore, to the rule that *ne exeats* will issue only for the enforcement of equitable,[19] liquidated, pecuniary[20] demands, which were presently payable.[21] The same law was adopted in New York.[22]

To this rather arbitrary rule, however, two exceptions were recognized. In the case where alimony had been decreed, the English courts granted the writ where it appeared that the husband contemplated leaving the jurisdiction to evade future payments.[23] The inability of the ecclesiastical courts to enforce alimony decrees has been advanced as a justification for allowing the writ in this instance.[24] The exception, nevertheless, was not engrafted without some misgiving.[25] In New York, the exception was given a more enthusiastic reception. In *Denton v. Denton*,[26] for example, Chancellor Kent granted the writ before alimony had even been decreed, thus extending the English alimony exception to suits for sums not yet ascertained. Although this case is still followed in New York,[27] the English authorities clearly did not support such a doctrine.[28]

---

[19] Jackson v. Petrie, 10 Ves. Jr. 164, 32 Eng. Rep. 807 (Ch. 1804); Atkinson v. Leonard, 3 Bro. 218, 29 Eng. Rep. 491 (Ch. 1791); *Ex parte* Bruncker, 3 P. Wms. 312, 24 Eng. Rep. 1079 (Ch. 1734).

[20] Sherman v. Sherman, 3 Bro. 370, 29 Eng. Rep. 539 (Ch. 1791); Rico v. Gualtier, 3 Atk. 501, 26 Eng. Rep. 1088 (Ch. 1747).

[21] De Carriera v. De Calonne, 4 Ves. Jr. 578, 31 Eng. Rep. 297 (Ch. 1799); *cf.* Dawson v. Dawson, 7 Ves. Jr. 173, 32 Eng. Rep. 71 (Ch. 1803).

[22] The writ issues only for equitable demands. Brownell v. Akin, 6 Hun 378 (N. Y.), *appeal dismissed*, 66 N. Y. 617 (1876); Palmer v. Van Doren, 2 Edw. Ch. 425 (N. Y. 1834). The demand must be pecuniary. Cowdin v. Cram, 3 Edw. Ch. 231 (N. Y. 1837). The debt must be a sum certain and due. Allen v. Hyde, 2 Abb. N. C. 197 (N. Y. 1876); Seymour v. Seymour, 1 Johns. Ch. 1 (N. Y. 1814).

[23] Haffey v. Haffey, 14 Ves. Jr. 261, 33 Eng. Rep. 521 (Ch. 1807); Dawson v. Dawson, 7 Ves. Jr. 173, 32 Eng. Rep. 71 (Ch. 1803); Shaftoe v. Shaftoe, 7 Ves. Jr. 172, 32 Eng. Rep. 70 (Ch. 1802).

[24] Read v. Read, 1 Ch. 115, 22 Eng. Rep. 721 (Ch. 1668); Sir Jerom Smithson's Case, 2 Vent. 345, 86 Eng. Rep. 477 (Ch. 1679).

[25] "It was a very strong thing to apply this writ to alimony: but it has been done." Dawson v. Dawson, 7 Ves. Jr. 173, 32 Eng. Rep. 71 (Ch. 1803).

[26] 1 Johns. Ch. 364 (N. Y. 1815); *accord*, Forrest v. Forrest, 10 Barb. 46 (N. Y. 1850).

[27] Schnabel v. Schnabel, 179 Misc. 620, 39 N. Y. S. 2d 972 (Sup. Ct. 1943); McPartland v. McPartland, 146 Misc. 674, 261 N. Y. Supp. 847 (Sup. Ct. 1932).

[28] See note 24 *supra*.

The second exception arose in actions for an account wherein the debtor admitted a balance due the creditor but disputed the amount owed thereon.[29] This latter case represented an example of equity's exercise of concurrent jurisdiction with the courts of law. Although the writ was allowed here, it formed an exception to the general rule that the relief obtainable must be within the exclusive cognizance of equity. Similarly, a *ne exeat* issued against a vendee to compel the specific performance of a contract to purchase land,[30] despite the availability to the vendor of a somewhat similar remedy at law. Conversely, a demand by the vendee for specific performance was not a money demand, and therefore not a case for *ne exeat*.[31]

As previously mentioned, the writ *ne exeat regno* was founded upon the supposed prerogative of the king to restrain his own subjects from departing the realm. Strictly speaking, it would seem that it could not issue to prevent foreigners from quitting the kingdom.[32] This principle was initially applied by Lord Hardwicke [33] who thought that the parties should seek to have justice done where they resided.[34] But where it appeared that the parties were residents of different countries having different laws, this reasoning was not applicable, and the writ was allowed.[35] The theory of these early cases was ultimately rejected however.[36] The decision in *De Carriera v. De Calonne* [37] apparently established the precedent for issuing the writ against a foreigner at the suit of another nonresident, although it was therein said: "It is very delicate to interfere as against foreigners, . . . by an application of the writ to them." [38] Lord Eldon, nevertheless, tenaciously clung to his opinion that the writ should not issue where the plaintiff resides out of the jurisdiction,[39] despite his prior admission that "I was bound by decision." [40] While the later cases leave no doubt that the writ would issue against foreigners,[41] these early decisions exemplify the refinements by which

---

[29] Jones v. Sampson, 8 Ves. Jr. 593, 32 Eng. Rep. 485 (Ch. 1803).

[30] Boehm v. Wood, 1 Turn & Russ. 332, 37 Eng. Rep. 1128 (Ch. 1823); Brown v. Haff, 5 Paige Ch. 235 (N. Y. 1835).

[31] Blaydes v. Calvert, 2 J. & W. 212, 37 Eng. Rep. 608 (Ch. 1820); Cowdin v. Cram, 3 Edw. Ch. 231 (N. Y. 1837).

[32] BEAMES, *op. cit. supra* note 6, at 44.

[33] Pearne v. Lisle, 1 Amb. 76, 27 Eng. Rep. 47 (Ch. 1747).

[34] *Cf.* Robertson v. Wilkie, 1 Amb. 177, 27 Eng. Rep. 119 (Ch. 1753).

[35] *Ibid.*

[36] Flack v. Holm, 1 J. & W. 406, 37 Eng. Rep. 430 (Ch. 1820); Stewart v. Graham, 19 Ves. Jr. 313, 34 Eng. Rep. 533 (Ch. 1815); Howden v. Rogers, 1 Ves. & Bea. 129, 35 Eng. Rep. 51 (Ch. 1812).

[37] 4 Ves. Jr. 578, 31 Eng. Rep. 297 (Ch. 1799) (although the writ was ultimately discharged it was not for this reason).

[38] *Id.* at 591, 31 Eng. Rep. at 303.

[39] *See* Hyde v. Whitfield, 19 Ves. Jr. 341, 344, 34 Eng. Rep. 544, 545 (Ch. 1815).

[40] Stewart v. Graham, 19 Ves. Jr. 313, 315, 34 Eng. Rep. 533, 534 (Ch. 1815).

[41] See note 36 *supra.*

the chancellors sought to justify an apparent extension of the writ. As an additional safeguard, moreover, the English courts adopted the salutary practice of discharging the writ where the defendant gave security to abide by the decree.[42]

Early New York Use of the Ne Exeat

Unfettered by the ominous political environment which surrounded the growth of the writ in England, the New York courts were unaffected by the subtle niceties to which the English Chancellors had become so sensitized. The English idea that the writ of *ne exeat* was a prerogative writ was held inapplicable here. To the contrary, a *ne exeat* was considered as any ordinary process in equity. When a proper case was presented, it had to be granted.[43] The mere fact of the parties' nonresidency, therefore, offered no obstacle to the writ's issuance if the cause otherwise had sufficient equity.[44] Notwithstanding, the English practice of discharging the writ when the defendant posted security was imitated.[45]

The tolerance with which the New York courts viewed imprisonment as an incidence to civil action was severely modified by the passage of the Stilwell Act of 1831 abolishing imprisonment for debt.[46] Commensurate with the enlightened purpose of this legislative enactment, the judiciary undertook to scrutinize more minutely those processes which tended to restrain personal liberty. So strong, in fact, was the belief that the Stilwell Act abolished the writ, that the courts were constrained to emphasize the contrary.[47] The Act, nonetheless, achieved a notable result in that it provided a check on the unreserved issuance of the writ. The admonition voiced in *Pratt v. Wells,*[48] that the writ of *ne exeat* is in the discretion of the court and should always be granted with extreme caution, characterized the prospectus entertained by a more beneficent judiciary. The prac-

---

[42] Atkinson v. Leonard, 3 Bro. 218, 29 Eng. Rep. 499 (Ch. 1791); *accord,* Flack v. Holm, 1 J. & W. 406, 37 Eng. Rep. 430 (Ch. 1820); Howden v. Rogers, 1 Ves. & Bea. 129, 35 Eng. Rep. 51 (Ch. 1812).

[43] *Cf.* Mitchell v. Bunch, 2 Paige Ch. 606, 617 (N. Y. 1831); Gilbert v. Colt, 1 Hopk. Ch. 496, 500 (N. Y. 1825).

[44] Mitchell v. Bunch, 2 Paige Ch. 606 (N. Y. 1831); *see* Woodward v. Schatzell, 3 Johns. Ch. 412, 413 (N. Y. 1818).

[45] Mitchell v. Bunch, 2 Paige Ch. 606 (N. Y. 1831); *see* Gleason v. Bisby, 1 Clarke Ch. 551, 557 (N. Y. 1841).

[46] Laws of N. Y. 1831, c. 300, § 1.

[47] *Cf.* McNamara v. Dwyer, 7 Paige Ch. 239, 241 (N. Y. 1838); Brown v. Haff, 5 Paige Ch. 235, 239 (N. Y. 1835). *But cf.* Gleason v. Bisby 1 Clarke Ch. 551, 558-559 (N. Y. 1841). "It is true, . . . that this Act does not affect the power of the court to issue a *ne exeat* in any case of equitable cognizance . . . . But I apprehend they will confine its exercise to cases where they can . . . enforce their decrees . . . by attachment or execution."

[48] 1 Barb. 425, 426 (N. Y. 1847).

tice of such judicial self-restraint was not universally followed.[49] The more immediate consequence of the Stilwell Act, therefore, was to point up sharply the existing difference of opinion as to whether the writ issued of right or as a matter of discretion.

With the passage of the New York Code of Procedure in 1848 a more direct attack was launched to abrogate the writ.[50] Section 153 of the Code expressly provided that ". . . no person shall be arrested in a civil action except as prescribed by this act." [51] It would seem that the legislature, by so providing, actually intended to abolish the writ; indeed, the Superior Court of New York City consistently held that the writ no longer existed.[52] The Supreme Court of the State, however, was just as insistent in allowing the writ to issue.[53]

The question of the status of the writ was still open when the New York Code of Civil Procedure was drawn in 1877.[54] To dispel all doubts the new statute stated unequivocally: "The writ of ne exeat is hereby abolished." [55] Yet it was not the object of the legislature to abrogate civil arrests in equity actions, and Sections 550 (subd. 4) and 551 were therefor enacted as a substitute for the writ.[56] Today, those sections are included in and comprise Section 827 of the Civil Practice Act.[57]

In his explanatory notes to the Code, Montgomery Throop provides an interesting insight into the legislative intent behind the enactment of these sections. After studying the divergent opinions and practices in the state as to whether an order of arrest was a matter of discretion or right, the commission undertook to settle the question by rendering it a matter of right.[58] Accordingly, a provision was inserted to the effect that an order be granted in a proper case.[59] The discretionary power of the court to fix bail was deemed sufficient to prevent frivolous applications for an arrest. The legislature dis-

---

[49] See note 47 *supra.*

[50] Laws of N. Y. 1848, c. 379, § 153.

[51] N. Y. CODE OF CIV. PROC. § 153.

[52] Johnston v. Johnston, 16 Abb. Pr. 43 (N. Y. 1863); Fuller v. Emeric, 2 Sandf. Ch. 626 (N. Y. 1849); *cf.* Fellows v. Heermans, 13 Abb. N. S. 1, 6 (N. Y. 1870).

[53] Bushnell v. Bushnell, 7 How. Pr. 389 (N. Y. 1853); Forrest v. Forrest, 10 Barb. 46 (N. Y. 1852); *cf.* Collins v. Collins, 80 N. Y. 24, 25 (1880) ("These provisions [laws of 1877] impliedly concede that the writ had not been abolished previously.").

[54] Laws of N. Y. 1877, c. 422, § 3.

[55] N. Y. CODE OF CIV. PROC. § 548.

[56] THROOP, EXPLANATORY NOTES ON THE CODE OF CIVIL PROCEDURE 238 (1877).

[57] Prior to the amendment of the Code made by the Laws of N. Y. 1886, c. 672, § 1, there were, under § 550 of the Code, which corresponds with the Civil Practice Act § 827, a number of actions at law under which an arrest might be obtained. These were transferred by the amendment of that year to § 549 of the Code, which corresponds with § 826 of the Civil Practice Act.

[58] THROOP, EXPLANATORY NOTES ON THE CODE OF CIVIL PROCEDURE 238 (1877).

[59] *Ibid.*

approved, however, for it substituted the word *"may"* for the commission's *"must"* and thereby removed all doubts as to public policy pertaining to an order of arrest. It was thought that this doctrine was more in accordance with the temper of the profession and the public.[60]

Current Use in New York

The provisions embodied in statutory form in 1877 are substantially the derivatives of those elements required for the issuance of the common law writ of *ne exeat.*[61] Section 827 of the Civil Practice Act authorizes an arrest whenever a defendant's departure from the state would render ineffective an order of the court that the defendant perform some act, provided however, that disobedience to the order would be punishable as a contempt. The order is dependent upon proof that the defendant is either a nonresident or a resident about to leave the state, and that by reason of such nonresidency or prospective departure, there is danger that the judgment will be rendered ineffectual. The order can be granted only by the court, and lies solely within its discretion. Where an order of arrest is available, the defendant may be held in custody, before or after judgment, unless he procures bail.[62] The filing of a bail bond, however, in no sense secures the payment of any judgment that may be rendered. It simply provides that the defendant shall render himself amenable to proceedings to punish him for disobedience of the court's mandate.[63]

An order of arrest can be granted only where the existence of a cause of action and facts sufficient to authorize the order are shown to the satisfaction of the court.[64] It is, then, the office of the affidavits to present the evidence to the court from which it, and not the affiant, is to draw the inferences and conclusions.[65] The affiant should state the specific and particular facts essential to his action.[66] Affidavits based upon allegations of information and belief without identifying the source thereof are insufficient.[67] Mere allegations that

---

[60] THROOP, *op. cit. supra* note 60, at 238.

[61] The statute is a substitute for the writ of *ne exeat.* See Muffatt v. Fulton, 132 N. Y. 507, 514, 30 N. E. 992, 994 (1892); Boucicault v. Boucicault, 21 Hun 431, 435 (N. Y. 1880).

[62] N. Y. CIV. PRAC. ACT § 847.

[63] N. Y. CIV. PRAC. ACT § 849.

[64] N. Y. CIV. PRAC. ACT § 833.

[65] Plotnick v. Plotnick, 185 App. Div. 15, 172 N. Y. Supp. 584 (1st Dep't 1918); Thompson v. Best, 4 N. Y. Supp. 229 (1st Dep't 1889); Dreyfus v. Otis, 54 How. Pr. 405 (N. Y. 1877).

[66] Markey v. Diamond, 19 N. Y. Supp. 181 (N. Y. City Ct. 1892), *aff'd,* 1 Misc. 972, 20 N. Y. Supp. 847 (C. P. 1893); De Weerth v. Feldner, 16 Abb. Pr. 295 (N. Y. 1863); Whitlock v. Roth, 5 How. Pr. 143 (N. Y. 1863).

[67] Boyle v. Semenoff, 201 App. Div. 426, 194 N. Y. Supp. 309 (1st Dep't 1922); Banque Agricoli of Roumania v. Ungureanu, 53 App. Div. 254, 65

the defendant intends to leave the jurisdiction likewise are not sufficient of themselves. It must clearly appear that the plaintiff will be prejudiced thereby.[68] In the usual case the application for an order of arrest is made *ex parte*. However, when made on notice, and when conflicting affidavits are equally creditable, the court will refuse the order, for justice is not done by placing the burden on the defendant.[69] Since the court, in effect, must study the facts and prognosticate the final result in advance of trial, it must be judicially satisfied.

The order, if signed by the court, is delivered to the sheriff who executes it by arresting the defendant. Failure of the sheriff to serve upon the defendant a copy of the order nullifies the arrest, however, for it is only by reference to the affidavits that the defendant can ascertain the reason for his detention.[70] The defendant may obtain his release at any time by posting bail,[71] or he may, within twenty days from the arrest, make a motion to vacate the order or to reduce the amount of the bail.[72]

At present, an order of arrest under Section 827 is applied for in relatively restricted instances. It is most frequently requested in actions for an accounting [73] and for alimony.[74] The order is also available in actions for specific performance of a contract,[75] and, in an unusual case, it was allowed in an action for damages and an injunction for breach of an employment contract.[76] Even in these instances, the courts have given themselves a wide berth in which to exercise their discretion. A recent case on arrest serves to illustrate the present attitude of the courts on the matter.

N. Y. Supp. 892 (1st Dep't 1900); Ammon v. Kellar, 21 Misc. 442, 47 N. Y. Supp. 595 (Sup. Ct. 1897).

[68] N. Y. Civ. Prac, Act § 827; Stroub v. Henly, 1 How. Pr. N. S. 400 (N. Y. 1885); De Rivafinola v. Corsetti, 4 Paige Ch. 265 (N. Y. 1883).

[69] Burns v. Newman, 274 App. Div. 301, 83 N. Y. S. 2d 285 (1st Dep't 1948); Levy v. Bernhard, 2 App. Div. 336, 37 N. Y. Supp. 849 (1st Dep't 1896); *cf.* Corwin v. Freeland, 6 N. Y. 560 (1852). See also 62 Harv. L. Rev. 689 (1949). *But see* McClure v. Levy, 22 N. Y. Supp. 1006 (1st Dep't 1893); Frost v. M'Carger, 14 How. Pr. 131 (N. Y. 1857).

[70] Klenoff v. Goodstein, 268 App. Div. 510, 51 N. Y. S. 2d 919 (1st Dep't 1944); *cf.* Van Den Bos v. Van Den Bos, 103 N. Y. S. 2d 579 (Sup. Ct. 1951).

[71] N. Y. Civ. Prac. Act § 847.

[72] Rules of Civ. Prac. Rule 83.

[73] Ensign v. Nelson, 1 N. Y. Supp. 685 (1st Dep't 1888), *aff'd mem.*, 112 N. Y. 674, 20 N. E. 416 (1889); Klenoff v. Goodstein, 268 App. Div. 510, 51 N. Y. S. 2d 919 (1st Dep't 1944); Montgomery v. Shear, 182 App. Div. 238, 169 N. Y. Supp. 395 (1st Dep't 1918).

[74] Matter of Kaufman, 272 App. Div. 323, 70 N. Y. S. 2d 763 (1st Dep't 1947), *aff'd mem.*, 297 N. Y. 814, 78 N. E. 2d 611 (1948); Schnabel v. Schnabel, 179 Misc. 620, 39 N. Y. S. 2d 972 (Sup. Ct. 1943); McPartland v. McPartland, 146 Misc. 674, 261 N. Y. Supp. 847 (Sup. Ct. 1932); Sturges v. Sturges, 114 Misc. 475, 186 N. Y. Supp. 693 (Sup. Ct. 1921).

[75] Gordon v. Fox, 11 N. Y. Supp. 5 (Sup. Ct. 1890).

[76] General Explosive Co. v. Hough, 63 Misc. 337, 116 N. Y. Supp. 1114 (Sup. Ct. 1909).

Recent Application

In *Bata v. Bata* an order of arrest had been granted to compel a nonresident defendant to account for and deliver to the plaintiffs, also nonresidents, the indices of ownership in companies located in twenty-seven different countries. It appeared that the cause of action arose seventeen years before in Czechoslovakia, and that the defendant had few assets within the state. The Appellate Division [77] vacated the order on the basis that the affidavits did not warrant detaining the defendant to guarantee performance by him of any judgment with respect to his assets which were primarily in other countries, especially when such a judgment ordinarily would be effectuated only through principles of comity. This determination has been criticized.[78]

It is well settled that an order of arrest will issue for any cause arising outside this state whenever the case is otherwise a proper one in which to grant the order.[79] The circumstance of the parties' nonresidence does not change the rule,[80] and it prevails although an arrest may not have been available in the jurisdiction where the parties resided.[81] There are instances, however, where doubt has been expressed as to the propriety of granting the order under these circumstances.[82] In *Hyers v. Ayers,*[83] the court discharged an order of arrest and forewarned that "[w]here a nonresident comes into this jurisdiction for the purpose of prosecuting a nonresident, under circumstances seemingly oppressive, or indicating a desire to . . . subject him to unusual inconveniences, the court will scrutinize the case more closely . . . ." [84] Somewhat more emphatic was the assertion of the court in *Boyle v. Semenoff* wherein it was said: "Were it not for the fact that the defendant . . . thus happened to be passing through the country, plaintiff would be obliged to rely for any redress

---

[77] 277 App. Div. 335, 100 N. Y. S. 2d 191 (1st Dep't 1950), *appeal dismissed,* 302 N. Y. 213, 97 N. E. 2d 757 (1951). No appeal lies from an order vacating an arrest. The granting of the order is discretionary and the exercise of such discretion is not the subject of review. Clarke v. Lourie, 82 N. Y. 580 (1880); Liddell v. Paton, 67 N. Y. 393 (1876).

[78] 51 COL. L. REV. 394 (1951).

[79] Johnson v. Whitman, 10 Abb. Pr. N. S. 111 (N. Y. 1871); Yates v. Blodgett, 8 How. Pr. 278 (N. Y. 1853); McNamara v. Dwyer, 7 Paige Ch. 239 (N. Y. 1838).

[80] Mitchell v. Bunch, 2 Paige Ch. 606 (N. Y. 1831); *see* Woodward v. Schatzell, 3 Johns. Ch. 412, 413 (N. Y. 1818).

[81] Stern v. Schlessinger, 5 N. Y. Supp. 1 (City Ct. 1889); City Bank v. Lumley, 28 How. Pr. 397 (N. Y. 1865); Smith v. Spinola, 2 Johns. Ch. 198 (N. Y. 1807).

[82] "Whether it would not be a better exercise of discretion to refuse to grant the order of arrest in an action between parties residing in the same, but not in this State, is a subject upon which judges may differ." Johnson v. Whitman, 10 Abb. Pr. N. S. 111, 114 (N. Y. 1871).

[83] 2 E. D. Smith 211 (N. Y. 1841).

[84] *Id.* at 215.

. . . upon the courts . . . where the alleged conversion took place." [85]

Surely no one can disagree that an order of arrest ought not be made an instrument of harassment and annoyance. Righteous difference of opinion may arise, however, where a concept, such as oppression, must be measured by degrees of circumstance. Justice, nevertheless, precludes any determination not predicated upon a common sense appraisal of the particular merits of each case wherein each individual factor is evaluated in its contextual relationship to the whole. Clearly, the prospects of there being a judgment of doubtful efficacy, such as there existed in the *Bata* case, is not a circumstance which alone will justify an order of arrest, particularly if consideration ought to be given to the defendant's liberty. Even historically the plaintiff was without authority, for, while *ne exeats* had been granted where there was danger that a defendant would abscond with the assets,[86] no authority appears to sustain their issuance in actions involving nonresident parties in the absence of property within the jurisdiction.[87] To be sure, equity has jurisdiction to act whenever the parties are before the court, but "[i]t is a power which in the interest of comity must be sparingly exercised." [88]

In addition to this question of jurisdiction, the Court was presented not only with conflicting affidavits but also with affidavits of doubtful efficacy. It has been said: "A clear case for arrest should be established . . . and especially should this be so where the application is made after years of delay. . . ." [89] In the *Bata* case, the allegations were based on a course of conduct which occurred seventeen years before in Czechoslovakia. Furthermore, while the plaintiffs alleged a conversion, the defendant directly countered with a purported transfer of title. The onus of dispelling, by a preponderance of proof, the doubt which thereupon arose was upon the plaintiffs. This they failed to do. Certainly, the passage of time, the distance of the situs, and the intervening world conflict were not circumstances which aided the plaintiffs in marshalling facts which

---

[85] 201 App. Div. 426, 431, 194 N. Y. Supp. 309, 314 (1st Dep't 1918).

[86] Baker v. Dumaresque, 2 Atk. 67, 26 Eng. Rep. 438 (Ch. 1740); McNamara v. Dwyer, 7 Paige Ch. 239 (N. Y. 1839).

[87] In Mitchell v. Bunch, 2 Paige Ch. 606, 608-611 (N. Y. 1831), the defendant's counsel argued that there was no property within the jurisdiction of our court. The counsel for plaintiff countered that it was not necessary in these cases, but that the bill was so framed, as to compel a discovery of all the defendant's property (arguments of counsel). Certainly, the bill as framed does not justify citing the case as authority for the proposition that *ne exeats* will issue in the absence of assets. In Smedberg v. Marks, 6 Johns. Ch. 138 (N. Y. 1822), the writ was discharged as the defendant did not appear to possess any assets. *Cf.* 51 COL. L. REV. 394, 395 (1951).

[88] Westchester Mortgage Co. v. Grand Rapids & Ionia R. R., 246 N. Y. 194, 200, 158 N. E. 70, 73 (1927).

[89] Griswold v. Sweet, 49 How. Pr. 171, 177 (N. Y. 1875); *accord*, Cormier v. Hawkins, 69 N. Y. 188 (1877); Mulry v. Collett, 26 Super. Ct. 716 (N. Y. 1865).

tended to inspire confidence in their veracity. All elements considered, a resolution of the doubt in favor of the defendant Bata could hardly be considered to have been without the court's discretion.[90]

Comments

The infrequent resort to arrest in equity actions today is noticeable in contrast to the comparatively more common recourse had to arrest in actions at law. But whether at law or in equity, an order of arrest is an awesome remedy, especially frightening to the poor who are thereby punished for their poverty since inability to furnish bail results in continued incarceration.[91] Moreover, rich and poor alike suffer from the social stigma of civil imprisonment, for unfortunately, the public generally does not realize the difference between civil and criminal arrest. Then, too, this legal refinement offers little comfort to the defendant who is as truly imprisoned as if arrested on criminal process. Indeed, the accused in a criminal action, discounting the preliminary incarceration, is jailed before trial only after he has been informed of the charges against him, has been afforded an opportunity to confront witnesses, and has been given the benefit of counsel. In civil arrest, no such rights are accorded the defendant.[92] No hearing is had. The first notice the defendant receives of the charges against him is the appearance of the sheriff with the order for his arrest. If unable to post bail, he is immediately imprisoned. The defendant's only relief is to apply to the court, upon affidavits, to vacate the order.

It is not surprising, therefore, that the judicially discreet have sought the abolition of arrest in actions at law.[93] No corresponding appeals have been voiced concerning arrests in equity actions.[94] While many factors relevant to both actions are substantially similar,[95] there is a basic difference. The right to an order of arrest in

---

[90] Burns v. Newman, 274 App. Div. 201, 83 N. Y. S. 2d 285 (1st Dep't 1948); McPartland v. McPartland, 146 Misc. 674, 261 N. Y. Supp. 847 (Sup. Ct. 1932); Flour City Nat. Bank v. Hall, 33 How. Pr. 1 (N. Y. 1862).

[91] See discussion in 28 REP. OF N. Y. STATE BAR ASS'N 151, 169 (1905).

[92] See 12 REP. JUDICIAL COUNCIL OF STATE OF N. Y. 337, 342 (1946); 28 REP. OF N. Y. STATE BAR ASS'N 151, 172 (1905).

[93] 12 REP. JUDICIAL COUNCIL OF STATE OF N. Y. 337 (1946); Medina, *Shall New York Surrender Leadership in Procedural Reform*, 29 COL. L. REV. 158 (1929); PRASHKER, N. Y. PRACTICE § 355 (2d ed. 1951). The recommendation of the Judicial Council was tabled in 14 REP. JUDICIAL COUNCIL OF STATE OF N. Y. 174 (1948). For a criticism of the motion tabling the proposal, see Note, 26 N. Y. U. L. Q. REV. 172 (1951); Note, 12 ALB. L. REV. 17 (1948).

[94] The proposed abolition of the order of arrest in actions at law would not affect arrests in equity actions. PRASHKER, N. Y. PRACTICE § 355 (2d ed. 1951).

[95] The competency of the proof submitted in affidavits is the same as when made under Section 826. 7 CARMODY, N. Y. PRACTICE § 85 (2d ed. 1932). An order of arrest in equity actions takes the same form as an order in ac-

law actions generally depends upon the nature of the action.[96] To obtain the order the affiant need only allege a proper cause of action; whereas, in equity actions, the extrinsic fact of the defendant's non-residency or pending departure must be shown.[97] While arrests in actions at law also are discretionary,[98] this has not been deemed a satisfactory safeguard. Failure of the judge to inquire into the veracity of affidavits has been thought to render faith in the discretion of the court a mere substitute for reliance upon the mythical universally honest plaintiff.[99] That criticism is not equally applicable to equity actions. Proof of the existence of the extrinsic facts appears to provide the protection necessary to supplant any failings in the discretionary power of the court. The wisdom of a statute which leaves to the court an area in which to exercise its discretion, flexible enough to provide bona fide petitioners with the redress permitted by law, and yet at the same time, staunch enough to uphold justice, would seem to be unquestionable. Its lawful use should be spared for the exceptional case which demands its application.

TORT LIABILITY OF THE TRUST ESTATE: TOWARD DIRECT RECOVERY

The Problem

Recently, because of a negligent act, a man lost the tip of his nose. The negligence was committed by an employee of an executor of a decedent's estate. Several persons were sued for damages but, upon final adjudication of the action, only one person was held liable, namely, the faultless executor in his individual capacity.[1] One of the intermediate courts, which heard the case, commented as follows: "This is a strange case. The real owner of the business in which the accident occurred, the estate, was never brought in as a party to the action. The real negligent party . . . has been absolved. . . . [T]he executor . . . who was admitedly not personally negligent has been made solely responsible merely because he happened to be one of the

---

tions at law except that in equity actions the order can be granted only by the court. PRASHKER, N. Y. PRACTICE § 343 (2d ed. 1951).

[96] N. Y. CIV. PRAC. ACT § 826.

[97] N. Y. CIV. PRAC. ACT § 827.

[98] Frank v. Tuthill, 241 App. Div. 720, 270 N. Y. Supp. 28 (1st Dep't 1934); Gelles v. Rosenbaum, 141 Misc. 588, 252 N. Y. Supp. 827 (Sup. Ct. 1931).

[99] See 12 REP. JUDICIAL COUNCIL OF STATE OF N. Y. 337, 342 (1946); Note, 12 ALB. L. REV. 17, 37 (1948). The failure of the judiciary properly to perform its function hardly can be ascribed as a defect in the statute.

[1] Johnston v. Long, 30 Cal. 2d 54, 181 P. 2d 645 (1947).