

## **SUBCHAPTER XIII. PROVISIONAL REMEDIES.**

### Article 34.

#### Arrest and Bail.

#### **§ 1-409. Arrest only as herein prescribed.**

No person may be arrested in a civil action except as prescribed by this Article, but this provision shall not apply to proceedings for contempt. (C.C.P., s. 148; Code, s. 290; Rev., s. 726; C.S., s. 767.)

#### **§ 1-410. In what cases arrest allowed.**

The defendant may be arrested, as hereinafter prescribed, in the following cases:

- (1) In an action for the recovery of damages on a cause of action not arising out of contract where the action is for willful, wanton, or malicious injury to person or character or for willfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.
- (2) In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.
- (3) In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.
- (4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.
- (5) When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term "creditors" shall include, but not by way of limitation, a dependent spouse who claims alimony. The term "creditors" shall include, but not by way of limitation, a minor child entitled to an order for support. (1777, c. 118, s. 6, P.R.; R.C., c. 31, s. 54; C.C.P., s. 149; 1869-70, c. 79; Code, s. 291; 1891, c. 541; Rev., s. 737; C.S., s. 768; 1943, c. 543; 1961, c. 82; 1967, c. 1153, ss. 4, 6.)

#### **§ 1-411. Order and affidavit.**

An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this Article. (C.C.P., ss. 150, 151; Code, ss. 292, 293; Rev., ss. 728, 729; C.S., s. 769.)

**§ 1-412. Undertaking before order.**

Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars (\$100.00), with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (C.C.P., s. 152; 1868-9, c. 277, s. 7; Code, s. 294; Rev., s. 730; C.S., s. 770.)

**§ 1-413. Issuance and form of order.**

The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. The order shall include a statement that if the person arrested is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and preliminary release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. (C.C.P., s. 153; Code, s. 295; Rev., s. 731; C.S., s. 771; 1977, c. 649, s. 3; 2000-144, s. 15.)

**§ 1-414. Copies of affidavit and order to defendant.**

The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (C.C.P., s. 154; Code, s. 296; Rev., s. 732; C.S., s. 772.)

**§ 1-415. Execution of order.**

The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (C.C.P., s. 155; Code, s. 297; Rev., s. 733; C.S., s. 773.)

**§ 1-416. Vacation of order for failure to serve.**

The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (C.C.P., s. 153; Code, s. 295; Rev., s. 734; C.S., s. 774.)

**§ 1-417. Motion to vacate order; jury trial.**

A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner

as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (C.C.P., s. 174; Code, s. 316; 1889, c. 497; Rev., s. 735; C.S., s. 775.)

**§ 1-418. Counter affidavits by plaintiff.**

If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (C.C.P., s. 175; Code, s. 317; Rev., s. 736; C.S., s. 776.)

**§ 1-419. How defendant discharged.**

The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (C.C.P., s. 156; Code, s. 298; Rev., s. 737; C.S., s. 777.)

**§ 1-420. Defendant's undertaking.**

The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amendable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the Article entitled Claim and Delivery. (C.C.P., s. 157; Code, s. 299; Rev., s. 738; C.S., s. 778.)

**§ 1-421. Defendant's undertaking delivered to clerk; exception.**

Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within 10 days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (C.C.P., s. 162; Code, s. 304; Rev., s. 739; C.S., s. 779.)

**§ 1-422. Notice of justification; new bail.**

On the receipt of notice of exception to the bail, the sheriff or defendant may, within 10 days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court or judge, at a specified time and place; the time to be not less than five nor more than 10 days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C.C.P., s. 163; Code, s. 305; Rev., s. 741; C.S., s. 780; 1971, c. 268, s. 26.)

**§ 1-423. Qualifications of bail.**

The qualifications of bail must be as follows:

- (1) Each of them must be a resident and freeholder within the State

- (2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (C.C.P., s. 164; Code, s. 306; Rev., s. 740; C.S., s. 781.)

**§ 1-424. Justification of bail.**

For the purpose of justification, each of the bail shall attend before the court or judge, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, or judge, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C.C.P., s. 165; Code, s. 307; Rev., s. 742; C.S., s. 782; 1971, c. 268, s. 27.)

**§ 1-425. Allowance of bail.**

If the court or judge finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (C.C.P., s. 166; Code, s. 308; Rev., s. 743; C.S., s. 783; 1971, c. 268, s. 28.)

**§ 1-426. Deposit in lieu of bail.**

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (C.C.P., s. 167; Code, s. 309; Rev., s. 744; C.S., s. 784.)

**§ 1-427. Deposit paid into court; liability on sheriff's bond.**

Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (C.C.P., s. 168; Code, s. 310; Rev., s. 745; C.S., s. 785.)

**§ 1-428. Bail substituted for deposit.**

If money is deposited, as provided in G.S. 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the court or judge shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C.C.P., s. 169; Code, s. 311; Rev., s. 746; C.S., s. 786; 1971, c. 268, s. 29.)

**§ 1-429. Deposit applied to plaintiff's judgment.**

When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any

surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (C.C.P., s. 170; Code, s. 312; Rev., s. 747; C.S., s. 787.)

**§ 1-430. Defendant in jail, sheriff may take bail.**

If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (R.C., c. 11; s. 8; Code, s. 318; Rev., s. 748; C.S., s. 788.)

**§ 1-431. When sheriff liable as bail.**

If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (C.C.P., s. 171; Code, s. 313; Rev., s. 749; C.S., s. 789.)

**§ 1-432. Action on sheriff's bond.**

If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (C.C.P., s. 172; Code, s. 314; Rev., s. 750; C.S., s. 790.)

**§ 1-433. Bail exonerated.**

At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (C.C.P., s. 161; Code, s. 303; Rev., s. 751; C.S., s. 791.)

**§ 1-434. Surrender of defendant.**

At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

- (1) A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.
- (2) Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal

property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the Article entitled Claim and Delivery. (C.C.P., s. 158; Code, s. 300; Rev., s. 752; C.S., s. 792.)

**§ 1-435. Bail may arrest defendant.**

For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over 21 years of age to do so. (C.C.P., s. 159; Code, s. 301; Rev., s. 753; C.S., s. 793.)

**§ 1-436. Proceedings against bail by motion.**

In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on 10 days' notice to them. (C.C.P., s. 160; Code, s. 302; Rev., s. 754; C.S., s. 794.)

**§ 1-437. Liability of bail to sheriff.**

The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (C.C.P., s. 173; Code, s. 315; Rev., s. 755; C.S., s. 795.)

**§ 1-438. When bail to pay costs.**

When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (R.C., c. 11, s. 10; Code, s. 319; Rev., s. 756; C.S., s. 796.)

**§ 1-439. Bail not discharged by amendment.**

No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (R.C., c. 11, s. 11; Code, s. 320; Rev., s. 757; C.S., s. 797.)