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Civil Procedure—Due Process Requirement of Actual Notice to Commence Period of Limitation in Which to Demand A Jury Trial

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The Court refuted the agreement by stating that an arbitrator, when given jurisdiction and authority by the voluntary agreement of the parties themselves, may do that which a court may otherwise be unable to do by reason of the same legal restriction. For example, in *In re Ruppert (Egelhofer)*,[49] the Court held that arbitrators, under appropriate language in an agreement, could order an injunction even though a regular court of law could have been prevented by Section 876-a of the New York Civil Practice Act from issuing an injunction on the same facts. The more general answer is that if the intent of the defendant was to restrict the Committee from

> exercising the customary function of fixing damages, they probably would have said so, especially since, under an earlier but apparently identical form of arbitration agreement between these same parties, the association had sought damages and the question of damages had been tried out before arbitrators with no complaint from the union . . . .[50]

The draftsman of an arbitration clause who wishes to place some restriction upon the jurisdiction and/or authority of the arbitrators should be careful to articulate such limitation. Although the language in the present case was certainly general enough to warrant the Court in finding within its intent a mutual agreement to arbitrate the question of damages; this writer feels that the Court would have decided the same way even with less persuasive language. It appears that the present Court, or at least a majority of the present judges, has committeed itself to a definite policy of increasing the jurisdiction of arbitrators. In support of this contention, the writer cites such recent cases as *De Laurentiis v. Cinematografica, Etc.*[51] and *Exercycle Corp. v. Maratta.*[52]

Bd.

CIVIL PROCEDURE

DUE PROCESS REQUIREMENT OF ACTUAL NOTICE TO COMMENCE PERIOD OF LIMITATION IN WHICH TO DEMAND A JURY TRIAL

It has uniformly been held that where immediate action is necessary, a state, in the exercise of its police power, may temporarily confine an alleged mentally ill person.[1] The confinement may be had upon an application for an *ex parte* order with no notice being given to the person to be confined, and such a procedure is not in violation of the due process clauses of the Federal

49. 3 N.Y.2d 576, 170 N.Y.S.2d 785 (1958).
50. Publishers' Ass'n v. New York Stereo. U. No. 1, supra note 43 at 418, 208 N.Y.S.2d at 984. For a reference to the earlier case between these same parties, see In re Publishers' Ass'n of New York City (New York Stereotypers' Union), 1 A.D.2d 941, 150 N.Y.S.2d 918 (1st Dep't 1956).
51. 9 N.Y.2d 356, 214 N.Y.S.2d 374 (1961).
52. 9 N.Y.2d 329, 214 N.Y.S.2d 353 (1961).

1. Sporza v. German Savings Bank, 192 N.Y. 8, 84 N.E. 406 (1908); Matter of Andrews, 126 App. Div. 794, 111 N.Y. Supp. 417 (1st Dep't 1908).

and State Constitutions.[1a] This rule is founded both in the right of the state to protect itself from those who may be dangerous to society and to protect the unfortunate person from himself as well.

In New York, a person alleged to be mentally ill may be confined in any licensed private institution upon an order made by a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district in which the alleged mentally ill person resides.[2] The petition for the order may be made by the father, mother, brother, sister, child, husband, wife, nearest relative or friend, or by other specified persons and must be accompanied by a certificate from two examining physicians. The physicians must state that the alleged mental defective is in need of medical care and treatment.[3]

Notice that the application for an order is being made must be served personally on the alleged mental defective at least one day prior to the making of such application. This notice *may* be dispensed with by the judge if he is satisfied from all the papers presented that notice would be detrimental to the health of the alleged mentally ill person. However, notice, *must* be dispensed with if the two examining physicians state that such notice, in their opinion, would be harmful. The statute also provides for notice to certain persons if the application for the confinement order is made by anyone other than the wife, husband, mother, or father.[4]

When no application for a hearing on the issue of his sanity is made by the alleged mental defective, or on his behalf, the judge may, if he is satisfied that such person is in need of medical care and treatment, issue an order directing that such person be committeed to an institution for a period not exceeding sixty days.[5] If any relative or friend demands a hearing on the application, the judge must issue an order directing it. Also, if the judge deems it necessary, he may, upon his own motion, order a hearing on the application.[6]

At any time prior to the expiration of sixty days from the date of the commitment order, the director of the institution to which the patient has been committed may file in the county clerk's office a certificate stating that continued care and treatment of the patient are necessary. Upon this filing, although no notice has been given to the patient or anyone in his behalf, the temporary commitment order becomes final and the patient must remain in the hospital until discharged in accordance with the provisions of the Mental Hygiene Law.[7]

At this point, if the person committed

> be dissatisfied with the final order of a judge or justice certifying him, he may, within thirty days after the making of such order, obtain a

1a. Ibid.
2. N.Y. Mental Hygiene Law § 74 (1).
3. N.Y. Mental Hygiene Law § 74 (2); See N.Y. Mental Hygiene Law § 70 for qualifications of the certifying physicians.
4. N.Y. Mental Hygiene Law § 74 (3).
5. N.Y. Mental Hygiene Law § 74 (4).
6. N.Y. Mental Hygiene Law § 74 (5).
7. N.Y. Mental Hygiene Law § 74 (7).

> rehearing and a review of the proceedings already had and of such certification, upon a petition to a justice of the supreme court other than the justice making such certification, who shall cause a jury to be summoned . . . and shall try the question of the mental illness of the person so certified.[8]

In *In re Coates*,[9] Doris Coates was committed to the Rochester State Hospital by order of a county judge made upon the petition of Mrs. Coates' husband. The petition was accompanied by a statement from two examining physicians, which stated that notice of the application for the order would be harmful, and no notice was given to Mrs. Coates.

Fifteen days after Mrs. Coates was committed, the director of the hospital filed a certificate in the county clerk's office stating that she was in need of continued care and treatment. Mrs. Coates received no notice of the filing of this certificate. A few days later, Mrs. Coates was released by the hospital to the custody of her mother with the requirement that she report back to the hospital once every month.

Forty-six days after the filing of the certificate, Mrs. Coates made an application for a jury trial under Section 76. Her petition was denied because it was not made within thirty days of the filing of the certificate. Petitioner then moved to vacate the original order and the other proceedings on the grounds that Section 76 was unconstitutional. This motion was denied and petitioner appealed as of right directly to the Court of Appeals, contending that the original order and proceedings were violative of the notice requirement of the due process clauses of the Federal and State Constitutions.[10] This appeal was dismissed on the ground that there was a question of statutory construction and not constitutionality involved.[11] Petitioner then appealed from the denial of a jury trial to the Appellate Division which affirmed the denial of the motion to vacate the original order but reversed the order denying petitioner a jury trial.[12] This court ruled that inasmuch as the hospital authorities had sixty days within which to file the certificate making the temporary order final, petitioner should have at least thirty days from the expiration of this period, or a total of ninety days from the date of the commitment order, in which to make an application for review. The Appellate Division felt that the patient should be presumed to know the law and that once the sixty days temporary confinement expired, the patient would know from his continued confinement that a certificate, making the temporary order final, had been filed.

The Appellate Division did not consider it necessary to pass upon the constitutionality of the statute but merely quoted from *People ex rel Morriale*

8. N.Y. Mental Hygiene Law § 76.
9. 9 N.Y.2d 242, 213 N.Y.S.2d 74 (1961).
10. N.Y. Const. art. VI, § 7 (2); N.Y. Civ. Prac. Act § 588 (4). See Powers v. Porcelain Insulator Corp., 285 N.Y. 54, 32 N.E.2d 790 (1941). (If there are other questions than the constitutionality of a statute involved, the Court of Appeals must dismiss the appeal).
11. In re Coates, 5 N.Y.2d 917, 183 N.Y.S.2d 96 (1959).
12. 8 A.D.2d 444, 188 N.Y.S.2d 400 (4th Dep't 1959).

v. Branham.[13] "Unless the statute provides expressly or by necessary implication that an adjudication may be made without notice to the person whose detention . . . is sought, we may reasonably find implicit in the statute a direction that the judicial decision and decree shall be made only in accordance with due process of law after notice and opportunity to be heard."[13a]

But in *People ex rel Morriale v. Branham,*[14] the relator, Charles Morriale, had been sentenced to prison on a plea of guilty to a charge of attempted robbery. Once in prison, he was transferred to an institution for male defective delinquents. Just prior to the expiration of his term of confinement, the director of the institution, in accordance with the terms of Section 440 of the Correction Law, applied to a county judge for an *ex parte* order for the continued detention of the relator on the grounds that he was a mental defective. No notice of the application for the order was given to the relator and he challenged the order on the grounds that it violated the due process requirement of notice. The Court of Appeals refused to strike down the statute as unconstitutional, holding that unless the statute expressly or by necessary implication requires that no notice be given, it must be construed as requiring notice. But relator's challenge was upheld on the ground that he had no actual notice of the proceedings. This decision would appear to be directly in point with the facts of the *Coates'* case.

Upon this ruling, petitioner then appealed to the Court of Appeals and asserted the unconstitutionality of the statute in question as it was construed by the Appellate Division. The Court of Appeals unanimously affirmed the order granting petitioner her trial but rejected the Appellate Division's construction of the statute.

There can be no denying that the Appellate Division located the proper rule of construction when they quoted from the *Morriale* case, but their blind adherence to the rule without analyzing it in terms of due process requirements leaves one with the feeling that they were more concerned with form than substance. As Judge Froessel, in his very excellent opinion, pointed out, "To imply such notice from the mere provisions of the statute by virtue of the presumption that the confined person knows the law is, in our judgment, highly unrealistic." For what the Appellate Division was really saying, stated in simple terms, was that petitioner should have known from her continued confinement, that after sixty days had expired, a certificate had been filed by the institution which made her temporary commitment order final. And this statement, of course, was in the face of petitioner's initial confinement being without notice which made it highly likely that she did not know under what sections of the law she had been confined, if indeed she realized at all that her confinement was according to law.

13. 291 N.Y. 312, 52 N.E.2d 881 (1943).
13a. Id. at 317, 52 N.E.2d at 882.
14. Supra note 13.

Due process is a concept of law that cannot be exactly defined, it is true,[15] but all authorities agree that there are at the very least two essential requirements.[16] These are notice and an opportunity to be heard. And, in determining whether these basic requirements have been met, the courts must look to the substance of things and not to mere form.[17] For as it was pointed out in *Mullane v. Central Hanover and Trust Company*,[18] "When notice is a person's due, process which is a mere gesture is not due process." In fact, this Court felt that the presumption that one knows the law falls short of being even the mere gesture which was held to be insufficient in the *Mullane* case.

In its opinion, the Appellate Division also spoke of notice to persons other than petitioner being sufficient to start the running of the thirty day period of limitation within which she had to apply for review. This was not made a requirement, however, for the Appellate Division did not state who these persons might be. Therefore, the Court of Appeals did not pass upon this question. However, in *Matter of Blewitt*,[19] (a petition to set aside a commission and proceedings in lunacy), the Court stated that if the presiding judge was satisfied that notice to the alleged mentally ill person would be useless or harmful to his health, notice to relatives in lieu of personal service would be sufficient. Therefore, by analogy, it would seem that if notice to a relative or friend of Mrs. Coates had been given, it probably would have been sufficient to satisfy due process requirements. However, as was stated earlier, this was not made a requirement and so the Court did not pass upon it. The precise issue here was, (in view of the Appellate Division's construction of Section 76), whether adequate notice had been given to this petitioner that the thirty day period of limitation within which she had to make a demand for a jury trial had commenced. And in view of the unrealistic proposition that someone in petitioner's place should be presumed to know the law, the Court concluded that nothing short of actual personal notice upon the petitioner would serve to commence the running of the thirty day period of limitation after which she would lose her right to demand a jury trial.

J. S. M.

RELATIONSHIP BETWEEN VOUCHING IN AND IMPLEADER

At common law a defendant having a third party liable over to him could vouch him into the litigation and bind him by the conclusiveness of the judgment by giving him proper notice of the pendency of the suit.[20] In

15. Stuart v. Palmer, 74 N.Y. 183, 191 (1878).
16. E.g., Dohany v. Rogers, 281 U.S. 362 (1930); Inter Chemical Corp. v. Mirabelli, 269 App. Div. 224, 54 N.Y.S.2d 522 (1st Dep't 1945).
17. Louisville and Nashville Railroad Co. v. Schmidt, 177 U.S. 230 (1900).
18. 339 U.S. 306 (1949).
19. 131 N.Y. 541, 30 N.E. 587 (1892).
20. See Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N.Y. 663, 39 N.E. 360 (1895); The Village of Port Jervis v. The First National Bank of Port Jervis, 96 N.Y. 550 (1884); City of Rochester v. Montgomery, 72 N.Y. 65 (1878).