Buffalo Law Review

Volume 9 | Number 1 Article 21

10-1-1959

Civil Procedure—Notice Required in Default Judgment for Support Payment Arrears

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Lykes Bros.,[35] that a statute which permits a seaman to recover two days' pay for each day's wages withheld does not impose a penalty. The statute there involved, however, specifically declares the extra compensation to be "recoverable as wages."[36] Cardozo, J., although recognizing this language to be decisive of the case, went on to observe that "delay (in payment of wages to a seaman) means loss of opportunity to ship upon another vessel. It means hardship during the term of waiting, the sufferer often improvident, and stranded far from home."[37] Such a loss was difficult of measurement and Congress had therefore fixed upon the formula of double wages to insure adequate compensation.[38] Again, the conclusion of the court was supported by statutory language and a reasonable relationship between the loss suffered and the recovery permitted.

If Section 205-a provides no such language and if recovery of a sum exceeding proven damages is possible, on what basis did the Court of Appeals decide in the *Sicolo* case that the purpose of the act was to provide compensation and not punishment? The court explained only that "It is the intrinsic nature of the exaction that counts and a Section 205-a suit is essentially one for compensation to a person injured through a defendant's fault."[39] It is submitted that the question is not so much one of the "intrinsic nature of the exaction" as it is one of the appropriateness of the length of time during which the injured fireman should be allowed to bring suit against the regulation violator. The court admitted that under *Gannon v. Royal Property*,[40] "a Section 205-a suit is 'quasi-penal' since in one sense the recovery 'penalizes' the violator of a safety law. But the *Gannon* case had nothing to do with the statute of limitations applicable to such suits."[41] Perhaps the question before the Court of Appeals in the *Sicolo* case might be phrased, "Is it unreasonable for a prospective defendant to have the possibility of a Section 205-a suit hanging over his head for six years rather than for three years?" The court found that it was not.

NOTICE REQUIRED IN DEFAULT JUDGMENT FOR SUPPORT PAYMENT ARREARS

Section 1171-b of the New York Civil Practice Act states that "Where the husband in an action for divorce, separation, annulment, or declaration of nullity of a void marriage . . . makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears . . . ; the application for such order shall be upon such notice to the husband or other person as the court may direct."

In 1950, respondent, who was appellant's wife, secured a judgment for an annulment wherein the appellant was directed to make weekly support pay-

35. 237 N.Y. 376, 143 N.E. 226 (1924).
36. 38 STAT. 1164, 46 U.S.C. § 596 (1915).
37. *Supra* note 35 at 379, 227.
38. *Ibid.*
39. *Supra* note 20 at 258, 184 N.Y.S.2d 100, 103.
40. Gannon v. Royal Properties, 285 A.D. 131, 136 N.Y.S.2d 129 (1st Dep't 1954), *aff'd* 309 N.Y. 819, 130 N.E.2d 616 (1955).
41. *Supra* note 20 at 258, 103.

ments for their son. Seven years later she instituted proceedings pursuant to Section 1171-b by way of a show cause order, seeking money judgment against the former husband for the arrears due.

The judge signed the show cause order, directing notice of the application to be served upon defendant or his attorney. Service was effected on the defendant's attorney of record in the annulment action, who submitted an affidavit in partial opposition urging that he no longer represented defendant, and asked to relieved of all further responsibility. After an adverse decision and before entry of an order thereon, the attorney moved for reargument and communicated with the defendant who lived out of state. Another attorney who had represented the defendant in another matter appeared in chambers in relation to the motion for reargument under the guise of being from the first attorney's office. An order was granted entering judgment in favor of the wife.

In an appeal from this order, the Court of Appeals in *Haskell v. Haskell*[42] held that Special Term had the power to find that the husband was duly represented by counsel and that no service of new process was necessary to acquire jurisdiction over the husband's person. Two concurring judges would grant leave to defendant to apply at Special Term to move for leave to interpose any defense that he might have on the merits.

In an application under Section 1171-b, it may be assumed that the court will direct that the service shall be made in a manner in keeping with the particular circumstances which may be involved.[43] As this motion was merely another means for the effective enforcement of the support provisions of an annulment decree, no additional personal service of original process was necessary.[44] The parties, by virtue of the annulment decree, remained subject to the continuing jurisdiction of the court as to all ancillary matters,[45] so that the motion is one in the action.

Although personal notice is dispensed with, the manner of notice which the court directs should be such as to give a defendant an opportunity to be heard.[46] It has been held to be sufficient if the person directed to be served be one through whom it is likely that the defendant will obtain adequate notice of the application.[47] In the instant case, the defendant was apprised of the action being taken against him and chose not to exercise his right to contest. In allowing a default to be entered, he was not deprived of his day in court. *Haskell v. Haskell*[48] may be characterized as a case in which the particular fact situation fitted into the confines of settled law.

42. 6 N.Y.2d 79, 188 N.Y.S.2d 475 (1959).
43. Muller v. Muller, 184 Misc. 587, 54 N.Y.S.2d 462 (Sup. Ct. 1945); Thus in DeJongh v. DeJongh, 13 Misc.2d 882, 177 N.Y.S.2d 53 (Sup. Ct. 1958), service of notice was by registered mail directed to defendant at his out-of-state address as well as to his employer which was a New York corporation.
44. Ageloff v. Ageloff, 207 Misc. 804, 140 N.Y.S.2d 424 (Sup. Ct. 1955).
45. Fox v. Fox, 263 N.Y. 68, 188 N.E. 160 (1933).
46. Griffin v. Griffin, 327 U.S. 220 (1945).
47. Muller v. Muller, *supra* note 2.
48. *Supra* note 42.