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## Civil Procedure—Poor Person—Notice to Satisfy Due Process

Thomas T. Basil

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The majority of this Court reversed the Appellate Division, holding that as the only obligation of the husband had been completely performed, he was relieved of no duty. Moreover, the rights accrued, to demand half of a non-existent income or move back into the house, do not appear beneficial. In any event, these questionable benefits were never acted upon and the right to claim certain benefits, without acceptance, does not result in a waiver of the right of appeal.

Although the dissent believed that the evaluation of the benefits was improper, the majority approach appears preferable. There was no change in the wife's position because of the delay of the appeal. To deny the husband the important privilege of appeal without the evaluation of possible benefits to determine their actual worth, would appear to be an unnecessarily harsh decision.

### Poor Person—Notice To Satisfy Due Process

Under the provisions of the Civil Practice Act, there is granted leave to prosecute or defend as a poor person during the progress of an action or special proceeding.<sup>41</sup> The definition of the term, poor person, is set forth,<sup>42</sup> as are provisions for transferring the cost of furnishing any transcript of litigation relevant to the question whether the person fits the statutory definition.<sup>43</sup> Such cost is in effect transferred by an order directing the clerk of the county in which the action is commenced to furnish the transcript, and place the charge for the work done upon the county.

In *Smith v. Smith*,<sup>44</sup> defendant-appellant made timely motion and complied with the statutory requirements described above. No notice was given at that time to the county in which the application was sought, but a later order compelling payment of transcript fees was attacked by the county and a hearing given. The county contended that the defendant-appellant had failed to meet the statutory requirements, and also that the statute in question denied it due process in that it did not require notice to be given to the party to be charged.

The Court rejected the reasoning of the county by declaring, first, that the term, "available property," meant property on hand, ready to use, and not such property as had to be sold and the proceeds applied to the payment of the tran-

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41. N. Y. CIV. PRAC. ACT §198-a.

42. N. Y. CIV. PRAC. ACT §199 provides:

A poor person . . . shall be a person who is not worth three hundred dollars in cash or available property besides the wearing apparel and furniture necessary for himself and his family, and the subject matter of the action or proceeding.

43. N.Y. CIV. PRAC. ACT §1493. See *People v. Sutliff*, 1 A.D.2d 985, 150 N.Y.S.2d 86 (3rd Dep't 1955).

44. 2 N.Y.2d 120, 157 N.Y.S.2d 456 (1956).

script.<sup>45</sup> In reply to the due process argument, the Court treated the remedial statute in question by stating that some type of notice, although not expressly stated in the statute, was given to the county in the form of a hearing when it moved to vacate that part of the order directing it to pay the costs of the minutes.

Upon the facts of the instant case, the Court could reasonably conclude that there had been no deprivation of due process, but intimated that, had there been no hearing as was accorded the county in its motion to vacate, or no notice given, a county could effectively challenge the constitutionality of the section. Even then, there would arise no substantial question until there had been a taking of property in the form of a payment by the county of public moneys.<sup>46</sup> In the case at hand, the action of the county could properly be viewed as an acknowledgment that it had notice of the claims of defendant-appellant and challenged the claim before making any payment.

#### Per Curiam

*Summary Judgment*—The Court, in *Friedman v. Marco*,<sup>47</sup> found enough questions of fact in the question of whether an agreement of sale violated the Insurance Law, as to preclude granting summary judgment.

*Administrative Review*—In *Drew v. State Liquor Authority*,<sup>48</sup> the Court refused to consider the effect of a Liquor Authority decision until another hearing, ordered by the Appellate Division,<sup>49</sup> had been held, in order to make further findings in regard to the rescission of a grant of a liquor license.

*Injunction*—The Court sustained the reversal of Special Term, and grant of a new trial, by the Appellate Division<sup>50</sup> in *Kraus & Bros. v. Bergman*,<sup>51</sup> where the trial judge had granted an injunction in a labor dispute without proof or findings of fact in regard to damage.

*Statute of Limitations*—The Court determined, in *McDermott v. Johnson*,<sup>52</sup> that section 1286 of the Civil Practice Act, which imposes a four month limitation period on commencing actions against governmental officers upon refusal to perform a duty, became effective upon the refusal of a superintendent of the Department of Public Works to allow certain seasonal barge employees to return to work.

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45. *Id.* at 122, 157 N.Y.S.2d at 548.

46. *Id.* at 124, 157 N.Y.S.2d at 549.

47. 2 N.Y.2d 593, 161 N.Y.S.2d 882 (1957).

48. 2 N.Y.2d 624, 162 N.Y.S.2d 23 (1957).

49. 2 A.D.2d 75, 153 N.Y.S.2d 444 (1st Dep't 1956).

50. 285 App. Div. 611, 139 N.Y.S.2d 624 (1st Dep't 1956).

51. 2 N.Y.2d 155, 157 N.Y.S.2d 947 (1956).

52. 2 N.Y.2d 608, 162 N.Y.S.2d 9 (1957).