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Civil Contempt: Defendant May Immediately Allege Ill-Health or Inability to Pay

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earlier judgment was rendered by a Mexican court,[113] nevertheless distinguished this case from *Statter*. While the litigant in *Statter* could directly attack the first judgment, the plaintiff here had already tried and failed to vacate the Mexican decree. Thus, his only remedy was collateral attack in New York. Furthermore, the Court noted that since Mexico would have permitted a collateral attack on the decree our courts should permit such an attack.

Judge Burke, dissenting,[114] agreed with the majority in principle but thought that the Mexican lawyer's affidavit, submitted to show that collateral attack was possible in Mexico, was too flimsy to allow the Court to take judicial notice of that fact.

Since *Rosenstiel v. Rosenstiel* [115] recognized the validity of the bilateral Mexican divorce, the problem has arisen as to when such a decree could be attacked. In determining what effect a foreign judgment will have here,[116] resort usually is made to the law of res judicata in the foreign forum. In fact, New York now appears to compare the decree of Mexico with that of a sister state and applies the same rules as to res judicata.[117] Thus, for the purpose of collateral attack of a Mexican decree, it need only be established that the decree could be collaterally attacked there. From the Court's treatment of the *Statter* case, the fact that Mexico does or does not allow direct attack does not appear to be operative, so long as collateral attack is permitted. The Court's basic position appears to be that, "[g]enerally, there is no reason to give more conclusive effect to a foreign judgment than it would be accorded by the courts of the jurisdiction that rendered it." [118]

ARTICLE 51 — ENFORCEMENT OF JUDGMENTS AND ORDERS GENERALLY

Civil Contempt: Defendant may immediately allege ill-health or inability to pay.

In *In re Hildreth*,[119] the appellate division, first department, held that on application to punish for civil contempt, it is within

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[113] Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

[114] 20 N.Y.2d at 886, 230 N.E.2d at 642, 283 N.Y.S.2d at 886.

[115] 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

[116] Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. REV. 44, 63 (1962).

[117] Both the majority and the dissents cited, with approval, Magowan v. Magowan, 19 N.Y.2d 296, 226 N.E.2d 304, 279 N.Y.S.2d 513 (1967), which held that a party could collaterally attack a sister state's decree only if the sister state would allow it.

[118] Schoenbrod v. Siegler, 20 N.Y.2d 403, 409, 230 N.E.2d 638, 641, 283 N.Y.S.2d 881, 885 (1967).

[119] 28 App. Div. 2d 290, 284 N.Y.S.2d 755 (1st Dep't 1967).

the court's discretion, irrespective of post imprisonment relief, to consider the defendant's alleged ill-health or inability to pay as a justifiable excuse for not complying with the court order.

While the public policy of this state is vigorously opposed to imprisonment for debt,[120] CPLR 5105 expressly confers upon a court two instances in which contempt may be imposed for failure to pay a directed sum of money.[121] This power to cite for civil contempt, however, is one of discretion which a party cannot compel the court to exercise.[122]

In a controversial decision, *Schmohl v. Phillips*,[123] the appellate division, first department, limited the court's discretion when a post conviction remedy was available. Since Section 775 of the Judiciary Law allows release from imprisonment when there is a showing of ill health or inability to pay, the court considered this the exclusive remedy of the defendant.

Realizing, however, that *Schmohl* was at variance with the policy favoring elimination of unnecessary motions and procedural steps wherever possible, subsequent events have attempted to limit it in effect. Section 84 of the Surrogate's Court Act has rendered the rule inapplicable in the Surrogate's Court.[124] Similarly, it has been held at special term that the rule should no longer be considered binding in supreme court contempt proceedings.[125]

Consequently, upon considering these challenges, the appellate division, first department, in *In re Hildreth*, has concluded that "*Schmohl v. Phillips* . . . should not be followed insofar as it may be authority for limiting the proper exercise of the discretionary powers of a court in determining an application for a civil contempt adjudication." [126]

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[120] *See* N.Y. CIV. RIGHTS LAW § 21; *cf.* Burns v. Newman, 274 App. Div. 301, 83 N.Y.S.2d 285 (1st Dep't 1948).

[121] CPLR 5105 provides that a court can punish by civil contempt where a defendant refuses or willfully neglects to pay money directed to be paid by him pursuant to a judgment or order which "(1) requires the payment of money into court or to an officer of, or receiver appointed by, the court, except where the money is due upon an express or implied contract or as damages for the non-performance of a contract; or (2) requires a trustee or a person acting in a fiduciary relationship to pay a sum of money for a willful default or dereliction of his duty."

[122] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5104.08 (1967). *See* Nelson v. Hirsch, 264 N.Y. 316, 190 N.E. 653 (1934). There are situations, however, where there is little room for court discretion. *See* People *ex rel.* McGoldrick v. Douglas, 286 App. Div. 807, 141 N.Y.S.2d 353 (1st Dep't 1955) (mem.); Victor v. Turetz, 266 App. Div. 311, 42 N.Y.S.2d 33 (1st Dep't 1943).

[123] 138 App. Div. 279, 122 N.Y.S. 974 (1st Dep't 1910).

[124] *See In re* Lent, 159 Misc. 411, 287 N.Y.S. 848 (Surr. Ct. Kings County 1936).

[125] *In re* Chassman, 1 Misc. 2d 766, 147 N.Y.S.2d 765 (Sup. Ct. N.Y. County 1955). *See* Harris Investing Corp. v. Sil-Gold Corp., 38 Misc. 2d 549, 552, 237 N.Y.S.2d 210, 215 (Sup. Ct. Queens County 1962).

[126] 28 App. Div. 2d 290, 294, 284 N.Y.S.2d 755, 759-60 (1st Dep't 1967).