

## Dom. Rel. Law § 243: Motion for Sequestration Subsequent to Separation Action in Which Defendant Has Appeared Held "a Motion in the Action"

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The court held that this postponement was a clear case of arbitrary action resulting in inordinate delay since respondent's action was based solely upon the contents of the letter, which was not authenticated, and which failed to specify the nature or degree of the defendant's illness. The court ordered the case to be tried on a specific date unless the defendant could supply affidavits relating to the nature, extent and duration of the illness. It expressly noted that mandamus will lie to compel an inferior tribunal to perform a ministerial act.

#### DOMESTIC RELATIONS LAW

*Dom. Rel. Law § 243: Motion for sequestration subsequent to separation action in which defendant has appeared held "a motion in the action."*

In *Robinson v. Robinson*,<sup>200</sup> a recent first department case, defendant-husband appeared in and contested a judicial action for separation. Subsequent to a judgment for plaintiff which provided for periodic payments of alimony, defendant defaulted, announced his intention not to comply with the terms of the judgment and departed to Denmark. Plaintiff thereupon moved, pursuant to Section 243 of the Domestic Relations Law, for an order of sequestration. Service was made in New York upon defendant's attorneys and in Denmark upon defendant personally. In reversing special term, the first department did not decide the extent of the authority of defendant's attorneys to represent him as agents after final judgment,<sup>201</sup> but found the personal service in Denmark to be sufficient to bring him before the court for the purposes of plaintiff's motion. The court held that since the defendant appeared in the separation action, no further original process was necessary to enforce the judgment.<sup>202</sup> With a valid basis for jurisdiction, the mode of service was within the discretion of the trial court,<sup>203</sup> and since the defendant was advised of the relief sought and was given

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<sup>200</sup> 24 App. Div. 2d 138, 264 N.Y.S.2d 816 (1st Dep't 1965).

<sup>201</sup> Service upon the attorneys who represented a defendant in a matrimonial action has been held insufficient for the purposes of subsequent contempt proceedings. *Rosenthal v. Rosenthal*, 201 App. Div. 27, 193 N.Y. Supp. 702 (1st Dep't 1922); *Keller v. Keller*, 100 App. Div. 325, 91 N.Y. Supp. 528 (1st Dep't 1905).

<sup>202</sup> *Accord*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932); *Karpf v. Karpf*, 260 App. Div. 701, 703, 23 N.Y.S.2d 745, 748 (1st Dep't 1940).

<sup>203</sup> See *Burstein v. Burstein*, 12 Misc. 2d 521, 523, 155 N.Y.S.2d 288, 290 (Sup. Ct. Bronx County 1956), *aff'd*, 2 App. Div. 2d 879, 156 N.Y.S.2d 996 (1st Dep't 1957); see also *Pitt v. Davison*, 37 N.Y. 235, 241 (1867).

a reasonable opportunity to be heard, all constitutional safeguards were adequately met.<sup>204</sup>

Prior to the holding in the instant case, it had been settled in New York that where the defendant has appeared in a matrimonial action, no further original process was required to bring him before the court upon a motion to punish for contempt.<sup>205</sup> Now, this "continuing jurisdiction" doctrine has been expanded to include applications for sequestration.<sup>206</sup>

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<sup>204</sup> See, *e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940).

<sup>205</sup> *E.g.*, *Karpf v. Karpf*, 260 App. Div. 701, 23 N.Y.S.2d 745 (1st Dep't 1940).

<sup>206</sup> A lower court previously reached the same conclusion in applying CPA § 1171. *Burstein v. Burstein*, *supra* note 203, at 523, 155 N.Y.S.2d at 291. The doctrine of continuing jurisdiction has been applied in matrimonial proceedings to amend the decree as well as to secure enforcement of it. See *Hoops v. Hoops*, 292 N.Y. 428, 55 N.E.2d 488 (1944).