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Service in Civil Contempt Proceedings

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Judge Friendly may well be correct in decrying the confusion caused by unsound and obsolete standards once promulgated by *Swift v. Tyson* and oftentimes espoused by our modern federal courts and commentators directly in the face of the *Erie* edict.[103] He states:

> The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made.[104]

Perhaps Judge Friendly thus strikes the note of harmony between federal and state laws in diversity cases which will in time prove to be the wisest and most prudent standard formulated.

SERVICE IN CIVIL CONTEMPT PROCEEDINGS

The contempt power was known and enforced by the courts at an early stage in the development of the common law.[1] Historically, the law has distinguished between two distinct types of contempt.[2] When courts employed their contempt power chiefly as a punitive measure to preserve their authority, vindicate their judicial dignity and punish the disobedience of their mandates, the act it disciplined was defined as a criminal contempt.[3] However, when utilized as a coercive instrument to safeguard the private rights of litigants and to compel obedience to decrees to which parties were entitled, the chastised act was designated as a civil contempt.[4] Although the distinction between these two contempt powers is real, one and the same act may often be considered a criminal as well as a civil contempt.[5]

In New York, the civil contempt power is embodied in Section 753 of the Judiciary Law. This statute generally defines civil

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[103] Friendly, *supra* note 97, at 92.
[104] *Ibid.*

[1] See Fox, *The Practice in Contempt of Court Cases,* 38 L.Q. REV. 185 (1923).
[2] People *ex rel.* Munsell v. The Court of Oyer & Terminer, 101 N.Y. 245, 4 N.E. 259 (1886).
[3] *In re* Nevitt, 117 Fed. 448, 458 (8th Cir. 1902).
[4] *Id.* at 453-54.
[5] United States v. United Mineworkers of America, 330 U.S. 258, 294-95 (1947).

contempt as any misconduct which might impede or defeat the right or remedy of a party to a civil action or special proceeding. The purview of the statute is quite broad, encompassing such acts as the misconduct or disobedience of court officers, witnesses and litigants. The contempt proceeding has enabled successful litigants to compel their opponents to carry out a court order or to comply with a judgment which could not be enforced by execution. Moreover, witnesses who have wilfully refused to obey subpoenas have been subject to punishment by contempt.

The civil contempt power, although often harsh, has proven to be an aid in the final settlement and subsequent enforcement of civil remedies,[6] since the courts have been granted the statutory authority to punish contemnors by the imposition of a fine, imprisonment, or both.[7] As one might expect, the requirements of due process, *i.e.*, notice and opportunity to be heard,[8] must be followed. At the outset, one must distinguish between the notice required to hold a party in contempt of court so as to enforce a decree of the court, and the service of notice to bring him before the court once the contempt of court has been committed.[9] That is, how does one serve an order or judgment to put a person in contempt of court; how does one get him before the court once he is in contempt?

Service to Enforce Judgments and Orders by Contempt

While the Judiciary Law broadly defines the civil contempt power, it leaves uncertain the method of notice required to be given a person to hold him in contempt before the court's order or judgment may be enforced by that means. Thus, upon a cursory reading of the Judiciary Law, one could conclude that an order or judgment might be enforced against a person even though he did not know of the court's determination. Certainly this would not be consonant with our deep-rooted concept of due process, the vast corpus of case law concerning civil contempt, and the myriad of statutes[10] scattered throughout the laws of

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[6] 1947 N.Y. Leg. Doc. No. 19, N.Y. Judicial Council Thirteenth Annual Report & Studies 252; 8 Carmody-Wait, Cyclopedia of New York Practice, ch. 66 § 10 (1954).

[7] N.Y. Judiciary Law § 753(A).

[8] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); People *ex rel.* Witherbee v. Supervisors, 70 N.Y. 228, 234 (1877); Goldie v. Goldie, 77 App. Div. 12, 14, 79 N.Y. Supp. 268 (4th Dep't 1902).

[9] Grant v. Greene, 121 App. Div. 756, 106 N.Y. Supp. 532 (1st Dep't 1907).

[10] *E.g.*, N.Y. Alco. Bev. Control Law § 123; N.Y. Debt. & Cred. Law § 15(16); N.Y. Dom. Rel. Law § 130; N.Y. Lab. Law § 808; N.Y. Nav. Law § 140; N.Y. Pers. Prop. Law § 15-a(4); N.Y. Real Property Actions & Proceedings Law §§ 211, 221, 1521(5).

New York prescribing the punishment of specific acts and the enforcement of certain decrees by civil contempt proceedings.

The New York courts have held that due process requires that before a judgment or order may be enforced against a person by contempt, he must have notice of the order or judgment. However, they disagree as to what constitutes adequate notice to satisfy these requirements. Some cases, as will be discussed later, require personal delivery of the court's decree sought to be enforced, while others require somewhat less in the way of notice.

A number of cases have held that so long as the person has knowledge of the court's determination, service of the order or judgment upon him is unnecessary.[11] This was the court's determination in *Livingston v. Swift*,[12] where a party's knowledge of an injunction against him through his presence in court when the order was issued was sufficient notice to put him in contempt for his wilful disobedience of the injunction. Similarly, in *Underhill v. Schenck*,[13] where the defendant was not personally served with the decree, but was fully aware of it, the court held that his knowledge of the decree and his refusal to comply was adequate notice to put him in contempt of court.

Another view considers notice to a party's attorney who is representing him as notice to the party himself. Thus, it was held that if a copy of the order or judgment is served upon the attorney of the defendant against whom it was rendered, such service would satisfy the notice requirement so as to put the defendant in contempt of court for his subsequent refusal to comply.[14]

However, prior to the enactment of Section 5104 of the Civil Practice Law and Rules [hereinafter referred to as CPLR], the majority of cases held that before a person could be in contempt of court for disobeying an order or judgment, a certified copy thereof had to be delivered to him personally.[15] The case most

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[11] *E.g.*, People *ex rel.* Platt v. Rice, 144 N.Y. 249, 39 N.E. 88 (1894); Shakun v. Shakun, 11 App. Div. 2d 724, 204 N.Y.S.2d 694 (2d Dep't 1960); Application of Belanoff, 277 App. Div. 1056, 100 N.Y.S.2d 851 (2d Dep't 1950); Koehler v. Farmers' & Drovers' Nat'l Bank, 6 N.Y. Supp. 470 (Sup. Ct.), *aff'd*, 117 N.Y. 661, 22 N.E. 1134 (1889); Hull v. Thomas, 3 Edw. Ch. 236 (N.Y. 1838); People *ex rel.* Morrison v. Brower, 4 Paige Ch. 405 (N.Y. 1834); Stafford v. Brown, 4 Paige Ch. 360 (N.Y. 1834).

[12] 23 How. Pr. 1 (N.Y. Sup. Ct. 1861).

[13] 205 App. Div. 182, 199 N.Y. Supp. 611 (2d Dep't 1923).

[14] United States v. Sumner, 127 Misc. 907, 217 N.Y. Supp. 645 (Sup. Ct. 1926). See also Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 N.Y. Supp. 741 (2d Dep't 1909), *aff'd mem.*, 198 N.Y. 586, 92 N.E. 1105 (1910).

[15] See, *e.g.*, Tebo v. Baker, 77 N.Y. 33 (1879); In the Matter of McCullock, 1 App. Div. 2d 968, 150 N.Y.S.2d 531 (2d Dep't 1956); Curtis v. Powers, 146 App. Div. 246, 130 N.Y. Supp. 914 (4th Dep't 1911); McCaulay v. Palmer, 40 Hun 38 (N.Y. Sup. Ct. 1886); McComb v. Weaver, 11 Hun 271 (N.Y. Sup. Ct. 1877).

often cited for this view is *Pittsfield Nat'l Bank v. Bayne*[16] wherein the court stated that "the contempt itself, however, can only be predicated of the client's own act; that is, of his refusal or neglect to obey the judgment after personal service of a certified copy thereof upon him. . . ."[17] While reaffirming this position, the court in *Goldie v. Goldie*[18] went a step further by requiring that a personal demand to comply should be made with a subsequent refusal by the contemnor. In fact, the court in *McCaulay v. Palmer*[19] went to the extreme of requiring that in addition to personal delivery of the copy, the contents of the original judgment or order should be exhibited to the person before he could be in contempt of court for refusal to obey. However, *Basch v. Associated Features Booking Co.*,[20] held that while a judgment should be personally delivered to put a person in contempt, this notice requirement did not hold true for an order. Thus, the pre-CPLR cases were in disagreement as to what degree of notice was sufficient to satisfy due process.

Notice Under Section 5104 of the CPLR

This section provides for the enforcement by contempt of any interlocutory or final judgment or order which is not enforceable under Article 52 of the CPLR (enforcement of money judgments by execution) or under section 5102 (enforcement of judgment or order awarding possession of real property or chattel). Thus, any judgment or order not for money or requiring the payment of money or the delivery of real property or a chattel, may be enforced under this section. The revisers state that the authority for enforcing orders other than those directing the payment of money stems from Section 753 of the Judiciary Law.[21] Moreover, the Civil Practice Act had failed to make provision for the enforcement of non-money orders, although it did provide

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[16] 21 N.Y. Supp. 561 (Sup. Ct. 1892).

[17] *Id.* at 562. "Service upon a party's attorney is not sufficient to bring him into contempt. The well known case of Pitt v. Davidson [*sic*], 37 N.Y. 242, is cited in support of the opposite doctrine, but that case merely holds that the papers upon a motion to punish for a civil contempt may, when so directed by the court, be served upon the attorney for the party who is proceeded against. . . ." *Ibid.*

[18] 77 App. Div. 12, 79 N.Y. Supp. 268 (4th Dep't 1902). "The offense cannot be committed until the order . . . has been brought to the attention of the defendant and demand has been made upon him personally . . . and he is not guilty of contempt of court until after that demand has been refused or neglected." *Id.* at 15-16, 79 N.Y. Supp. at 270. See Bradbury v. Bliss, 23 App. Div. 606, 48 N.Y. Supp. 912 (1st Dep't 1897).

[19] 40 Hun 38 (N.Y. Sup. Ct. 1886).

[20] 92 Misc. 450, 156 N.Y. Supp. 162 (Sup. Ct. 1915).

[21] 1959 N.Y. Leg. Doc. No. 17, Third Preliminary Report of the Advisory Committee on Practice and Procedure 223.

a remedy for the enforcement of non-money interlocutory judgments.[22]

Section 5104 is founded upon Section 503(3) of the Civil Practice Act which treated the enforcement of non-money interlocutory judgments. There are two CPLR exceptions to section 5104, both of which are found in section 5105. This section provides that execution or contempt is available for: (1) orders requiring the payment of money into court or to an officer or receiver appointed by the court, except money due on an express or implied contract; or (2) orders requiring a trustee or fiduciary to pay a sum of money for wilful default or dereliction of duty.

For the most part section 5104 will be employed to enforce equity decrees not requiring payment of money, *e.g.*, a decree ordering any of the following: removal of an encroachment, abatement of a nuisance, transfer of stock certificates, an accounting, execution and delivery of a bond and mortgage, specific performance of a contract, injunction mandating the doing or the not doing of an act.

Section 5104 requires that the service of a certified copy of the judgment or order should be made upon the party or other person required by law to obey it. His wilful refusal or neglect to do so will result in punishing him for a contempt of court. Basically, this is a codification of prior case law which required service on the person himself rather than upon his attorney.[23] Some commentators believe that CPLR Rule 2103(c) might also be available for service of a section 5104 order or judgment.[24] Rule 2103(c) states that when a party's attorney cannot be served, service may be made upon the party himself, either: (1) by personally delivering the paper to him, or (2) by mailing the paper to him, or (3) by leaving it at his residence within the state with a person of suitable age and discretion. Whether rule 2103(c) will in fact govern will have to be determined by the courts, for the revisers are silent on this point.[25]

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[22] *Ibid.*

[23] Pittsfield Nat'l Bank v. Bayne, 21 N.Y. Supp. 561, 562 (Sup. Ct. 1892).

[24] 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5104.13 (1964).

[25] It will be interesting to note whether the courts will permit service to be made under rule 2103(c). Section 5104 prescribes no other service than "on the party or other person required by law to obey." Given the inclination of the court, one may not be sure that CPLR R. 2103(c) will be applied to service of a judgment or order as a basis for later contempt proceedings. Applying that provision in such instance would permit *mailed* service of the judgment or order to furnish the contempt foundation, and the weight of authority in New York has required personal delivery of the judgment or order to the defendant. The courts may prove hesitant to find authority for service by mail in the (at best) ambiguous language of § 5104.

However, if the 2103(c) method of service is applied to the area, previous case law will be expanded. As discussed above, the majority of cases held that personal *delivery* of the decree to the party was a condition precedent to enforcement by contempt of court. Because those cases also held that an agent's activities cannot make his principal guilty of contempt, it would seem that service under section 308(2) would not be available.[26] On the other hand, since section 308(2) is expressly available for the service of a summons on the designated agent, the courts could, on that fact alone, make the provision available for service of the judgment or order that is to be a contempt foundation.

Under section 5104 a person need not have been a party to the action; the decree may be enforced against anyone required by law to obey it. This would be in harmony with the holding of *Daly v. Amberg*.[27] In this case the defendant fled the jurisdiction in order to evade service of an order to show cause. While without the state, a temporary injunction was issued against him and copies thereof served upon his agents. When the agents performed acts forbidden by the injunction they were held to be in contempt, although they had not been parties to the original action.

However, section 5104 leaves unanswered the question of whether a demand for compliance need be made upon the party or person served as a condition to enforce an order or judgment by contempt. And, if a demand be necessary, the further question exists as to whether it must be in writing. Apart from the conflicting case law,[28] the only statutory authority requiring such a demand is Section 756 of the Judiciary Law which states:

> Where the offense consists of a neglect or refusal to obey an order of the court requiring payment of costs or a specified sum of money, and the court is satisfied . . . that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison. . . .

One case has construed this section to apply only where the offense is the refusal to make payment of money pursuant to a court order.[29] Since section 5104 concerns judgments and orders other than those directing the payment of money, it would seem that a demand need not be made for the purpose of

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[26] See Pittsfield Nat'l Bank v. Bayne, 21 N.Y. Supp. 561 (Sup. Ct. 1892).

[27] 126 N.Y. 490, 27 N.E. 1038 (1891).

[28] See Goldie v. Goldie, 77 App. Div. 12, 79 N.Y. Supp. 268 (4th Dep't 1902).

[29] People *ex rel.* Hayes v. Pope, 231 App. Div. 279, 247 N.Y. Supp. 393 (3d Dep't 1931).

enforcement by way of contempt.[30] In fact, because the judgment or order itself is a command to comply with the court's determination, it would seem superfluous to require that an additional demand be made.

Service of Subpoena Under Section 2303 of the CPLR

Subdivision 5 of Section 753 of the Judiciary Law states that it is contempt of court for a person to cause injury to a litigant by refusing or neglecting to obey a subpoena.[31] Since the failure to comply with a subpoena is contemptuous, the question again arises as to what notice of it is sufficient to satisfy the requirements of due process.

Prior to the enactment of Section 2303 of the CPLR, case law indicated that a person was not subject to contempt of court unless the subpoena was personally delivered to him.[32] Section 2303 expands the method of subpoena service, allowing a subpoena to be served in the same manner as a summons. Thus, all the techniques of service prescribed by sections 308 through 312 are available. The requirement of personal delivery has not been abandoned, but if after due diligence the subpoena cannot be personally served pursuant to any of the first three subdivisions of section 308 (one of which is personal delivery), service may be effected in accordance with section 308(4), in such a manner as the court directs. By reading section 2303 with section 308(4), effective service might be sustained by mailing, telegraphing or even telephoning the subpoena to the witness. Some jurisdictions have considered this as good service.[33]

In the light of a few pre-CPLR cases, it does not seem surprising that the CPLR has taken a liberal approach by

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[30] However, a demand for compliance with the order or judgment may be relevant under § 5105 which authorizes enforcement of certain judgments and orders by contempt. There is disagreement as to whether such a demand is necessary for the enforcement of such judgments and orders by contempt. *Compare* Matzke v. Matzke, 185 App. Div. 533, 173 N.Y. Supp. 244 (1st Dep't 1918) and General Elec. Co. v. Sire, 88 App. Div. 498, 85 N.Y. Supp. 141 (1st Dep't 1903), *with* Potter v. Emerson-Stueben Corp., 162 Misc. 392, 294 N.Y. Supp. 970 (Sup. Ct.), *aff'd mem.*, 251 App. Div. 841, 296 N.Y. Supp. 684 (2d Dep't 1937).

[31] CPLR § 2308 provides that the failure to comply with a subpoena issued by a court as well as one returnable in a court shall be punishable as a contempt of court. This section also provides that the subpoenaed person shall be liable to the party on whose behalf the subpoena was issued, and his disobedience of the subpoena will result in his being committed to jail.

[32] In the Matter of Depue, 185 N.Y. 60, 77 N.E. 798 (1906); Broderick v. Shapiro, 172 Misc. 28, 14 N.Y.S.2d 542 (Sup. Ct. 1939). See 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 2303.03 (1963).

[33] See cases cited in WEINSTEIN, KORN & MILLER, *op. cit. supra* note 32.

authorizing substituted service of a subpoena in lieu of personal delivery when with due diligence the latter cannot be effected. For example, in a recent case[34] a subpoena was served in an unusual manner. The process server, not having been able to effect personal delivery, affixed the paper to the petitioner's door and, employing a portable loudspeaker, announced its contents a dozen or more times from various positions about the petitioner's dwelling. The court held this to be good service.

This innovation with respect to the service of a subpoena under the new practice will pose some difficulties. In view of the harsh penalties of contempt of court, is service other than by personal delivery constitutional? It has been held that the legislature may provide for any method of service necessary to give notice, provided due process of law is observed.[35] It has also been stated that although due process is not limited to actual notice, it requires at least that mode of service which is reasonably calculated to give notice and an opportunity to be heard.[36] This poses an interesting question. How will the courts deal with the problem of a subpoenaed witness who technically is in contempt of court, but who had no actual notice of the subpoena, *e.g.*, where he was served by substituted service, and where the contents of the subpoena were never communicated to him? A case where this defense proved successful is *In the Matter of Depue*[37] where the court held that since the subpoena was served upon the petitioner's attorney and since the petitioner had no knowledge of its existence, there could be no contempt of court.

A further difficulty is encountered when reading the second sentence of section 2303 which provides: "Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee." The courts have held that in the absence of the payment of such fees and expenses, a witness has not been lawfully subpoenaed and therefore cannot be punished for his nonattendance.[38] If such a requirement is a *sine qua non* for the effective service of a subpoena, it is difficult to see how substituted service can be adequate where the subpoena is served upon the agent of a witness, or is telephoned or telegraphed. Certainly in view of the previous decisions concerning the service of a subpoena, the courts will

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[34] In the Matter of Barbara, 14 Misc. 2d 223, 180 N.Y.S.2d 924 (Sup. Ct. 1958), *aff'd.* 7 App. Div. 2d 340, 183 N.Y.S.2d 147 (3d Dep't 1959). For a discussion of the case see Note, 10 Syracuse L. Rev. 363 (1959); Note, 25 Brooklyn L. Rev. 348 (1959).

[35] Gutierrez v. Middle Rio Grande Conservancy Dist., 280 U.S. 610 (1930).

[36] Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928).

[37] 185 N.Y. 60, 77 N.E. 798 (1906).

[38] In the Matter of Depue, 185 N.Y. 60, 77 N.E. 798 (1906); People v. DeValdor, 234 App. Div. 50, 254 N.Y. Supp. 116 (1st Dep't 1931).

be required to modify the requirements of the CPLR, or construct a new line of case law heretofore rejected.

Service to Bring the Contemnor into Court

After the contempt of court has been committed, the next step is the commencement of the civil contempt proceeding to punish the contemnor. The institution of the civil contempt proceeding is governed by Section 757 of the Judiciary Law. This section provides that once the court has been satisfied by affidavit that the contempt has been committed, it may:

(1) Issue an order to show cause why the accused should not be punished for the alleged offense; or
(2) Issue a warrant of attachment to the sheriff of the particular county where the accused may be found and order that the sheriff arrest him and bring him before the court to answer the alleged offense.

This section is consistent with due process; as it affords the alleged offender an opportunity to prepare a defense indicating why he should not be punished for the contempt.[39] If, for example, the proceeding is to enforce an order or judgment pursuant to CPLR Section 5104, the alleged contemnor might interpose defenses that a certified copy thereof was not duly served upon him, or that service was not made in accordance with rule 2103(c) (assuming service may be so made), or that an averment of the petitioner's affidavit was incorrect.

Service of Order to Show Cause

The early cases were in disagreement as to whether the contempt proceeding was itself a special proceeding, or whether it was equivalent to a motion in the original action or proceeding to punish the contemnor or to enforce an order or judgment of the court.[40] The cases construing the contempt proceeding as separate and distinct from the original action or proceeding held that the order to show cause should be served personally upon the offender after the entry of judgment. They also held that service on the attorney who appeared for the contemnor in the original cause was insufficient notice to the offender[41] since there was no presumption that the attorney

[39] Ward v. Ward, 70 Vt. 430, 41 Atl. 435 (1898).
[40] Davidowitz v. Hamroff, 196 Misc. 209, 90 N.Y.S.2d 38 (Sup. Ct. 1949). For a profitable treatment of this area see Annot., 60 A.L.R.2d 1244, 1247 (1956).
[41] *E.g.*, Stark v. Kessler, 277 App. Div. 1122, 100 N.Y.S.2d 872 (2d Dep't 1950); Keller v. Keller, 100 App. Div. 325, 91 N.Y. Supp. 528 (1st Dep't

had the authority to appear for him in any subsequent proceeding.[42] However, those cases which regarded the contempt proceeding as a motion in the original action or proceeding held that the order to show cause was equivalent to a notice of motion, and that service of the order on the contemnor's attorney of record was sufficient notice to the contemnor,[43] since it was usual to serve the attorney with a notice of motion, rather than the party himself.[44]

As originally enacted, Section 761 of the Judiciary Law appeared to resolve conflicting case law. The statute stated: "An order to show cause is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein." However, this section did not clear up the confusion. In fact, it added to it. In 1946 the following addition to the statute was recommended: "In a civil contempt proceeding, such order to show cause may be served upon the attorney of the accused, unless service upon the accused is ordered by the court or judge." [45] This recommendation was not adopted. In 1947 the following addition was recommended and in this instance adopted: "In a civil contempt proceeding, such order to show cause shall be served upon the accused, unless service upon the attorney for the accused be ordered by the court or judge." [46] As the statute now reads, even though an order to show cause is equivalent to a notice of motion in an action or proceeding, service of the order must be made personally upon the accused and not his attorney. The only *caveat* is that the court may order it to be served upon the accused's attorney as, *e.g.*, where personal service upon the accused is difficult, or where he is purposely evading service.[47] A recent case [48] construing this statute held that "attorney" refers solely to the accused's attorney who appeared for him in the original cause.

1905); Goldie v. Goldie, 77 App. Div. 12, 79 N.Y. Supp. 268 (4th Dep't 1902); Wulff v. Wulff, 74 Misc. 213, 133 N.Y. Supp. 807 (Sup. Ct. 1911), *aff'd*, 151 App. Div. 22, 135 N.Y. Supp. 289 (2d Dep't 1912).

[42] Keller v. Keller, *supra* note 41; Wulff v. Wulff, *supra* note 41; *cf.* Goldie v. Goldie, *supra* note 41.

[43] *E.g.*, Pitt v. Davison, 37 N.Y. 235 (1867); Curtis v. Powers, 146 App. Div. 246, 130 N.Y. Supp. 914 (4th Dep't 1911).

[44] Lederer v. Lederer, 47 Misc. 471, 95 N.Y. Supp. 934 (Sup. Ct.), *rev'd on other grounds*, 108 App. Div. 228, 95 N.Y. Supp. 623 (1st Dep't 1905).

[45] 1946 N.Y. Leg. Doc. No. 17, N.Y. Judicial Council Twelfth Annual Report & Studies 249.

[46] 1947 N.Y. Leg. Doc. No. 19, N.Y. Judicial Council Thirteenth Annual Report & Studies 45.

[47] *Id.* at 46.

[48] Patillo v. Patillo, 12 Misc. 2d 645, 178 N.Y.S.2d 154 (Sup. Ct. 1958).

It is interesting to note that the New York Surrogate's Court Act and the Federal Rules of Civil Procedure are in disagreement with section 761. The Surrogate's Court Act provides: "The application to punish for contempt of court may be commenced by service of an order to show cause either upon the respondent personally or upon his attorney."[49] The Federal Rules of Civil Procedure state: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."[50]

Section 761 authorizes service of the order upon the accused and precludes service on his attorney except under extraordinary circumstances. As to how service is to be effected, it has apparently been left to the court to provide the method on a case by case basis, limited only by the constitutional requirements of due process. That conclusion is implicit in the statute's requirement that a show cause order be employed to commence the contempt proceeding. The order to show cause itself should direct the method of service, and the court, in selecting the method, should be restricted only by the due process requirement that the mode used give the alleged contemnor adequate notice of the proceeding.

Warrant of Attachment

The second and more unusual method of instituting a civil contempt proceeding is the issuance by the court of a warrant of attachment ordering the sheriff to arrest the contemnor and to bring him before the court to answer the contempt of court charges. This method is employed only when the court has reason to believe that the accused might conceal himself or flee the state in order to evade the contempt proceeding. It should be understood that the arrest itself is not the punishment of the contempt of court,[51] rather it is the method of bringing the accused before the court in order to secure the rights of the petitioner.

Although at the time of the attachment a copy of the warrant and the affidavit upon which it is issued are required by the statute to be delivered personally to the accused, there is no requirement that he be given notice of the issuance of the warrant.[52] This would defeat the purpose of the at-

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[49] N.Y. SURR. CT. ACT § 84.
[50] FED. R. CIV. P. 5(b).
[51] Sonn v. Kenny, 63 Misc. 251, 116 N.Y. Supp. 613 (Sup. Ct. 1909).
[52] Pitt v. Davison, 37 N.Y. 235 (1867); Pond v. Tamsen, 15 Misc. 364, 37 N.Y. Supp. 407 (Sup. Ct. 1895).

tachment which is to arrest the accused before he has the opportunity of fleeing the jurisdiction.

Conclusion

Since the CPLR has not required personal delivery of a judgment or order enforceable by contempt of court, whether that will be necessary must await court construction. The courts may also be occupied with cases challenging the substituted service of a subpoena under section 2303.

This article has highlighted only some of the difficulties. Both bench and bar have been aware for some time of the need for corrective legislation in the contempt sphere. That such legislation may not be too long in coming is indicated by the recent promulgation by the Judicial Conference of its 1964 rules amendments. The CPLR Committee of the Judicial Conference has listed the overhaul of New York's contempt provisions, as contained in the Judiciary Law, as a subject for study and possible future action.[53]

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53 TOPIC NO. 18 N.Y. JUDICIAL CONFERENCE REPORT TO THE 1964 LEGISLATURE ON THE POSSIBLE AMENDMENTS IN THE JUDICIARY LAW.