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# Brief for Appellees, *Juidice v. Vail*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 75-1397**

JOSEPH JUIDICE, etc., *et al.*,

*Appellants,*

v.

HARRY VAIL, JR., *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLEES

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## BRIEF FOR APPELLEES

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## QUESTIONS PRESENTED

I. Does the Fourteenth Amendment require that the show cause order, issued pursuant to New York Judiciary Law §757, warn debtors that failure to appear at the show cause hearing might result in imprisonment?

II. Does the Fourteenth Amendment prohibit debtors from being jailed without being advised of their right to counsel or being assigned counsel if indigent, as permitted by New York Judiciary Law §§756, 757, 770, 772, 774, and 775?

III. Does the imposition of punitive rather than compensatory or remedial fines pursuant to New York Judiciary Law §§756, 770, 773, and 774 deprive appellees of their rights in violation of the Fourteenth Amendment?

IV. Does the Fourteenth Amendment prohibit the jailing of debtors without bringing them before a judge, because they have not paid a fine, as authorized by New York Judiciary Law §§756, 757, 770, 772, 773, 774, and 775?

V. Should the three-judge court have enjoined the use of procedurally unconstitutional civil contempt statutes?

VI. Did the three-judge court correctly decide to rule on the constitutionality of the New York civil contempt statutes, which were not capable of a constitutional interpretation?

VII. Should this court decline to consider appellants' *res judicata* claim when they did not raise the question in their Jurisdictional Statement or in their district court brief? Do state and federal doctrines of *res judicata* permit this action?

VIII. Did the three-judge court correctly grant partial summary judgment when the statutes were declared unconstitutional on their face and there were no issues of material fact?

IX. Did the three-judge court properly grant class relief?

X. Did the three-judge court properly grant present and prospective relief?

## STATEMENT OF THE CASE

The eight named plaintiffs are debtors who were jailed or threatened with incarceration pursuant to New York Judiciary Laws §§756, 757, 770, 772, 773, 774,

and 775 (hereinafter referred to as §756, etc.) for their noncompliance with post-judgment discovery procedures and their failure to pay a contempt fine. Each debtor initially was the subject of a default judgment.[1] (A.13a, A.20a, A.25a, A.55a, A.58a, A.64a). The creditor's attorney then served a subpoena[2] according to N.Y.C.P.L.R. §§5223 and 5224(a)(1) (McKinney 1963) requiring the debtor to appear before the attorney and a notary public for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment. (A.13a, A.20a, A.25a, A.55a, A.58a, A.64a). When the debtors did not appear for the deposition, the creditor's attorney instituted civil contempt proceedings against the debtors pursuant to N.Y.C.P.L.R. §5251 (McKinney 1975, amending McKinney 1963) and §753.

Based upon the subpoena, an affidavit of service, and an affidavit by the creditor's attorney indicating that the debtor did not appear and that his conduct was calculated to and did actually defeat, impair, and prejudice the rights and remedies of the judgment creditor, state Judge Aldrich or Juidice issued a show cause order pursuant to §757(1).[3] (A.13a, A.25a, A.59a, A.65a). In each instance, the order required the debtor to appear at a specific time and place to show cause "why he should not be punished as for contempt for violation of and non-compliance with said subpoena in that he failed to appear or respond thereto". When the debtor did not appear, Judge Aldrich or Juidice held the debtor in contempt under §§770, and 772 and issued an "Order Imposing Fine".[4] (A.14a, A.22a,

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[1] Rabasco was the only exception to this pattern. Civil contempt proceedings were instituted against him by his wife when he failed to comply with a court order of support. (A. 69a-71a).

[2] Exhibit #1 – Subpoena.

[3] Exhibit #2 – Order to Show Cause.

[4] Exhibit #3 – Order Imposing Fine.

A.26a, A.56a, A.60a, A.65a). The Order Imposing Fine commanded each debtor to pay a fine within a specific period of time or face incarceration until the fine was paid. According to §773, a fine of $250 plus costs and attorneys fees was imposed without proof of loss or injury and paid to the creditor.[5]

When each debtor failed to pay the fine within the specified period of time, Judge Aldrich or Juidice issued an *ex parte* commitment order[6] pursuant to §756 (A.16a, A.27a, A.56a, A.60a, A.65a). Each commitment order was issued based upon the papers previously submitted on the application for the order to show cause, the affidavit of the creditor's attorney stating that the debtor had not paid the full amount of the fine, and an affidavit of a process server stating that the debtor had been served with the contempt order. The statutes do not require that prior to the issuance of the commitment order a finding be made of willful refusal to obey the order imposing fine. Pursuant to §774 each commitment order directed that the debtor be arrested without further notice by the Sheriff of any county and that the debtor be committed to county jail until the fine, costs, attorney fees, sheriff's fees, and disbursements on the execution of the order were paid.

Plaintiffs Ward and Hurry were subjected to the imminent threat of incarceration as they did not pay the contempt fine. (A.23a). Plaintiff Rabasco was subjected to the threat of incarceration as a result of his wife's application for a contempt order for nonsupport. (A.71a). Plaintiffs Vail, McNair, Nameth, Humes,[7] and Harvard were arrested and incarcerated

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[5]Thus, while the underlying judgment in Ward's case was $146.84, he was fined $250 plus $20 for costs and expenses. The creditor kept the entire $250 as specified in §773.

[6]Exhibit #4 – Commitment Order.

[7]Nameth and Humes were arrested and incarcerated on February 10, 1975, in violation of a Temporary Restraining Order issued by Judge Thomas P. Griesa on January 8, 1975, to prevent their arrest. They were released 5 hours later by defendant Juidice. (A. 118a-A.124a).

pursuant to §§756 and 774. (A.18a, A.27a, A.65a, A.120a, A.123a). Plaintiffs Vail, McNair, and Harvard were held in Dutchess County Jail until they paid the fine specified by the County Court in its contempt order plus costs and sheriff fees. (A.18a, A.28a, A.66a).

On October 30, 1974, plaintiffs Vail, Ward, and McNair, individually and on behalf of all other persons similarly situated, filed a verified complaint seeking to have the court declare invalid and enjoin the enforcement of §§756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 on the basis that defendants' use and enforcement of the statutes violate plaintiffs' rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (A.7a). Plaintiffs Vail and McNair also sought damages for the wrongful imposition of a fine and imprisonment under the above cited statutes. (A.33a). Plaintiff Ward sought a temporary restraining order and preliminary injunction against the enforcement of the statutes. (A.32a-37a). On November 6, 1974, U.S. District Judge John M. Cannella issued a temporary restraining order prohibiting defendants "from arresting and imprisoning plaintiff Ward pursuant to New York State Judiciary Law Article 19 until a hearing and determination is made by the full three-judge district court or until this court revokes the temporary restraining order." (A.50a).

On January 2, 1975, U.S. District Judge Thomas P. Griesa issued a temporary order restraining the defendants from arresting and imprisoning plaintiff Hurry. On January 8, 1975, Judge Griesa issued a temporary order restraining the defendants from arresting and imprisoning plaintiffs Nameth, Humes, and Harvard and restraining Hon. W. Vincent Grady and Gladys Rabasco from proceeding with Gladys Rabasco's application for an order of contempt against Joseph Rabasco unless counsel was assigned. (A.51a-54a).

A motion to intervene Nameth, Humes, Rabasco, Harvard, and Hurry, and to add defendants was granted

by U.S. District Judge John M. Cannella on January 28, 1975. (A.3a). A motion to intervene Russell, Thorpe, and Harrell, and to add defendants was made on February 13, 1976 (A.128a) and was never ruled on.

On January 13, 1975, in a memorandum decision, 387 F. Supp. 630 (S.D.N.Y. 1975), U.S. District Judge John M. Cannella granted plaintiffs' motion to convene a three-judge court and denied the defendants' motion to dismiss. (A.101a).

On January 6, 1976, the three-judge court issued an opinion, 406 F. Supp. 951 (S.D.N.Y. 1976), declaring invalid and enjoining the enforcement of §§756, 757, 770, 772, 773, 774, and 775. (Appellants' Jurisdictional Statement 1a, hereinafter referred to as J.S.). In a separate memorandum and order, U.S. District Judge Lloyd F. MacMahon granted the class action motion. (J.S.17a). On January 23, 1976, the three-judge court issued an order granting partial summary judgment for plaintiffs and denying defendants' motion for a stay. (J.S.19a).

On February 12, 1976, Associate Justice of the Supreme Court Thurgood Marshall granted defendants' application for a stay of judgment. (J.S.23a). On March 1, 1976, Justice Marshall denied plaintiffs' application for modification of the stay. On June 21, 1976, this Court noted probable jurisdiction.

## SUMMARY OF ARGUMENT

### I.

New York civil contempt statutes violate the Fourteenth Amendment by permitting the jailing of debtors for up to ninety days without being brought before a judge, being advised of a right to counsel, or being assigned counsel if indigent. Debtors are incarcerated for noncompliance with a disclosure subpoena and nonpayment of a punitive fine.

The show cause order must clearly warn debtors that failure to appear at the show cause hearing may result in incarceration. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Otherwise, the proceedings will not achieve their objective of coercing attendance at the hearings and providing information to creditors.

As recognized by most states and federal courts, debtors must be notified of their right to counsel and assigned counsel if indigent in these adversarial proceedings where complex factual and legal defenses may be asserted. *Argersinger v. Hamlin*. 407 U.S. 25 (1972).

In civil contempt proceedings, the purpose of fines and incarceration is to compensate the party injured by the contumacious conduct and coerce compliance with a court order. Therefore, only coercive incarceration and compensatory fines may be imposed. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), *Shillitani v. United States*, 384 U.S. 364 (1966).

A judicial hearing is required prior to a finding of contempt and incarceration to insure the fairness and reliability of the decision to imprison as a coercive mechanism. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975). A hearing is needed to resolve the factual and legal issues involving questions of intent which are not susceptible to documentary proof. *Mitchell v. W.T. Grant*. 416 U.S. 600, 617 (1974). Creditors have no special interests that dictate against a prior hearing. Creditors' interests in obtaining information about debtors' assets are not served by the incarceration of indigent debtors or those with no ability to produce the information. The debtors' interests in avoiding erroneous or unwarranted jailings are protected by hearings. Prior hearings serve the public interest by insuring that indigent debtors are not jailed and forced to obtain release by paying contempt fines to creditors with income exempt from execution.

## II.

The three-judge court correctly enjoined the use of procedurally unconstitutional civil contempt statutes where the challenged statutes protect private, not public interests. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973). A policy of non-intervention undermines the power of federal courts by permitting private citizens to bar federal court involvement in consumer matters by the simple service of a state court summons.

## III.

The three-judge court correctly decided to rule on the constitutionality of the civil contempt statutes, which are unambiguous and incapable of a constitutional construction. *Procunier v. Martinez*, 416 U.S. 396 (1974). No New York court has construed the statutes to require adequate notice, assigned counsel, compensatory fines, and a hearing prior to incarceration.

## IV.

This Court should not consider the issue of *res judicata* as Appellants did not raise the question in their Jurisdictional Statement. U.S. Supreme Court Rule 15(1)(c). The three-judge court decision is not barred by state or federal *res judicata*. *Riggs v. Pursell*, 74 N.Y. 370 (1878); *Lombard v. Board of Education*, 502 F. 2d 631 (2d Cir. 1974) *cert. denied*, 420 U.S. 976 (1975).

## V.

Partial summary judgment was properly granted where the statutes were declared unconstitutional on

their face and no issues of material fact existed. *Associated Press v. United States*, 326 U.S. 1 (1945).

## VI.

Class relief was properly granted as appellees satisfied all requirements of Fed. Rule of Civ. Proc. 23.

## VII.

Read in the light of the three-judge court opinion, the court's order was appropriately present and prospective. *Goss v. Lopez*, 95 S. Ct. 729, 734 fn. 6 (1975).

# ARGUMENT

## I.

## NEW YORK JUDICIARY LAW SECTIONS 756, 757, 770, 772, 773, 774, AND 775 VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

### A. INTRODUCTION

New York civil contempt statutes permit a debtor to be jailed for up to ninety days without ever being brought before a judge for noncompliance with a disclosure subpoena issued by a creditor's attorney and nonpayment of a contempt fine. A debtor may be imprisoned without being notified of a right to counsel or being assigned counsel if indigent. Contempt orders may issue with no finding that there was a willful failure to obey a court order. A debtor may be fined up to

$250 plus costs and Attorneys' fees with no proof that the creditor suffered any loss or that the debtor has the ability to pay. The entire fine is collected and paid over to the creditor even if the fine exceeds the underlying judgment and the debtor's assets and income are exempt from creditor's claims. Even after compliance with the subpoena, the debtor may remain incarcerated for up to ninety days for nonpayment of the fine.[8] Professor Robert Alderman has concluded that "[b]oth the hearings and the issuance of the commitment order appear to be constitutionally suspect as violative of due process, equal protection, and right to counsel guarantees". Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York*, 24 Syracuse L. Rev. 1217, 1239 (1973) (footnotes omitted) [hereinafter cited as Alderman].

The three-judge court properly found that due process requires that:

(1) "A finding of contempt can be properly made only upon a hearing with both parties present" (J.S.7a) (footnote omitted);

(2) The show cause order must "[c]ontain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment" (J.S.8a) (footnote omitted);

(3) Debtors must be advised of their right to counsel and assigned counsel if indigent (J.S.8a);

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[8]Commentators who have examined the procedure have noted that "[t]he law which is rationalized as a procedure through which a debtor can disclose his assets has really become a method of imprisonment for debt. The debtor may be incarcerated for failure to pay a contract debt or attorney's fees." *Summary of Hearings on Debt Collection Practices, National Commission on Consumer Finance*, 88 Banking L.J. 291, 306 (1971).

(4) Punitives fines may not be imposed in civil contempt proceedings (J.S.8a-9a).

## B. NEW YORK JUDICIARY LAW SECTION 757 VIOLATES DUE PROCESS BECAUSE IT DOES NOT PROVIDE NOTICE TO DEBTORS THAT FAILURE TO APPEAR AT THE SHOW CAUSE HEARING MAY RESULT IN INCARCERATION AND DEPRIVATION OF PROPERTY.

### 1. Statutory Scheme

Pursuant to §757,[9] appellees were served with an Order to Show Cause setting forth the return date of the motion and advising them that they might be held in contempt of court. The Order to Show Cause served

[9]While the writ of attachment in §757(2) was not utilized by appellants, it provides that persons may be arrested without any notice at all. Any due process violations found in §757(1) are applicable to §757(2). Even if §757(2) were found to be constitutional, it is connected with & dependent upon the rest of the statutory structure. It is reasonable to assume that the legislature intended the statutory scheme to operate as a unit. Where a statute is partially invalid and is intended to operate as a whole, the entire statute must be struck down. *Hill v. Wallace*, 259 U.S. 44 (1922); *People v. Harrison*, 170 A.D. 802, 156 N.Y.S. 679 (1915), *aff'd.* 219 N.Y. 562, 114 N.E. 1076 (1916).

on Vail is set forth in full below.[10] The show cause order is insufficient because it does not explain the consequences of a contempt order. While appellants

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[10] *At a Special Term Part of the* COUNTY *Court of the* STATE OF NEW YORK *held in and for the County of* DUTCHESS *at the Court House thereof on the* 22nd *day of* July, 1974

*PRESENT*
*Hon.* JIUDICE

*Index No.*

PUBLIC LOAN COMPANY, INC.
*Plaintiff*

*against*

HARRY VAIL, JR. AND CHARLENE VAIL
*Defendant*

*ORDER TO SHOW CAUSE TO PUNISH–JUDGMENT DEBTOR–WITNESS–FOR CONTEMPT*

*On the subpoena, the affidavit of due service of said subpoena upon the judgment debtor (witness), * * *, all of which are hereto annexed, and upon the affirmation of* CHARLES P. MORROW, ESQ. *dated* JULY 19th, 1974 *by which it appears that the person subpoenaed failed to comply with said subpoena–stipulation–and upon the notation of default appearing thereon.*

IT IS HEREBY ORDERED, *that* HARRY VAIL, JR. *appear before me or one of the justices of the* COUNTY *Court of the* DUTCHESS *County of* STATE OF NEW YORK *at a* SPECIAL *Term, * * * to be held at the Court House at* MARKET STREET, POUGHKEEPSIE, NEW YORK *on the* 13th *day of* AUGUST 1974 *at* 9:30 *o'clock in the* fore *noon of that day and show cause why* he *should not be punished as for contempt for violation of and non-compliance with the said subpoena * * * in that* he *failed to appear or respond pursuant thereto, and why* he *should not pay the costs of this motion, and why the judgment creditor herein should not have such other and further relief as may be proper.*

*Service* personnally *of a copy of this order and of the papers upon which it is based, on the said* HARRY VAIL, JR. *on or before the* 3rd *day of* AUGUST 1974 *shall be deemed sufficient.*

*Enter*

*Justice of the* COUNTY COURT

contend that any person understands the meaning of 'contempt', the law of contempt is sufficiently complex to require clarification of the term. Contempt of court has been referred to as ". . . the Proteus of the Legal World, assuming an almost infinite diversity of forms". Moskovitz, *Contempt of Injunctions, Criminal and Civil*, 43 Colum. L. Rev. 780 (1943). Contempt may be criminal or civil, direct or indirect, and judicial or legislative. In *The Contempt Power*, Ronald Goldfarb aptly describes the significance of these classifications as follows:

> With each labeling of a given contempt, a different door is opened to a different legal arena and a new association of participating procedures and characteristics. These classifications go to the heart of an accused contemnor's liberty and property rights. The decision-maker's every treatment of a contempt case involves a kaleidoscope of legal procedures. One turn, one move of position causes a swirl of new and special legal relationships between government and the individual. This aspect of the law of contempt is as reasonable as Russian roulette. R. Goldfarb, *The Contempt Power* 48 (1963).

Section 757 violates the due process clause of the Fourteenth Amendment because it does not require notice that failure to appear at the show cause hearing might result in a deprivation of property and incarceration.[11]

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[11]The disclosure subpoena issued by a creditor's attorney pursuant to N.Y.C.P.L.R. §§5223 and 5224(a)(1) (McKinney 1963) also fails to provide notice that noncompliance may result in incarceration.

**2. Due process requires that the show cause order warn debtors that failure to appear may result in loss of property and liberty.**

Due process in civil proceedings generally requires that individuals be notified of the action proposed to be taken against them.[12] *Windsor v. McVeigh*, 93 U.S. 274 (1876). Thus, a summons must contain notice of the property sought in the action, *Grannis v. Ordean*, 234 U.S. 385, 397 (1914), and a default judgment may not be entered that exceeds the relief "... prayed for in the demand for judgment". Fed. Rule Civ. Proc. 54(c). Appellees contend that when the proposed action involves grievous consequences such as loss of property and liberty, persons must be notified of this possibility.[13] *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).[14]

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[12]*Blackmer v. United States*, 284 U.S. 421 (1932) cited by the appellants, supports this contention. There, Blackmer's property was seized when he was held in criminal contempt for noncompliance with a subpoena. The show cause order provided him with adequate notice that failure to appear would result in "... seizure of his property to be held to satisfy any judgment that might be rendered against him in the proceeding." *Id.* at 443.

[13]Judge Henry J. Friendly has noted that "It is ... fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it". Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280 (1975) (footnote omitted).

[14]While *Lynch* deals with individuals alleged to be under a mental disability, the requirements of due process are based upon the threat of confinement rather than the mental abilities of the patients. Appellants' contention that only a person under a disability is entitled to the kind of notice required by the three-judge court is not supported by *Covey v. Town of Somers*, 351 U.S. 141 (1956). *Covey* merely indicates that an incompetent is entitled to more notice than was required by Article VII A, Title 3 of the New York Tax Law, and says nothing about the requirements of due process regarding competent debtors faced with incarceration.

The timing and content of the notice required by due process depends upon the nature of the case, as well as the "...appropriate accommodation of the competing interests involved". *Goss v. Lopez*, 95 S. Ct. 729, 738-39 (1975).[15] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

An analysis of the nature of the case reveals that notice is required of the possibility of incarceration and deprivation of property. Incarceration and fines in civil contempt proceedings are imposed not as punishment but are "...intended to be remedial by coercing the defendant to do what he had refused to do". *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911). The threat of incarceration and fine make the proceedings effective. Notice of this threat is essential.

The competing interests of the creditor, debtor, and public are served by requiring clear and complete notice on the show cause order that failure to appear at the show cause hearing may result in incarceration and deprivation of property. Such notice serves the creditor's interest in obtaining information about debtor's assets by increasing the probability that the debtor attends the show cause hearing.[16] By encouraging attendance, clear and complete notice serves

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[15] *See generally* Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975).

[16] The creditor may not use the procedures to collect a money judgment. Other states statutes must be used to realize this objective. *See* N.Y. Domestic Relations Law §244, *Enforcement by execution of judgment or order in action for divorce, separation or annulment* (McKinney 1964); N.Y. Domestic Relations Law §243, *Security for payments by defendant in action for divorce, separation or annulment; sequestration,* (McKinney 1964); N.Y. Domestic Relations Law §233, *Sequestration of defendant's property in action for divorce, separation or annulment where defendant cannot be personally served,* (McKinney 1964); N.Y. Personal Property Law §49-b, *Wage*

*(continued)*

the debtor's interest in avoiding a fine or jailing for an indeterminate term that is erroneous or unwarranted.

Clear and complete notice on the show cause order serves the public interest by increasing the probability that debtors attend show cause hearings so that judges are provided with sufficient information to distinguish between contumacious and noncontumacious debtors. Incarceration of indigent debtors is against the public interest as evidenced by New York statutes which exempt public assistance grants,[17] and unemployment insurance benefits[18] from creditors' claims. New York enacted these exemptions to insure that public moneys

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*(footnote continued from preceding page)*

*Assignment and deduction by court order in support cases* (McKinney 1976); N.Y. Family Court Act §429, *Sequestration of respondent's property* (McKinney 1975); N.Y. Family Court Act §457, *Order of sequestration on failure to obey support order*, (McKinney 1975); N.Y.C.P.L.R. Article 61, *Arrest*, (N.Y. Laws 1976, c. 129) (McKinney's Sess. L. News 229), amending McKinney 1975, amending McKinney 1963; N.Y.C.P.L.R. Article 62, *Attachment*, (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §5231, *Income Execution* (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §§5232 and 5233, *Levy upon and sale of personal property*, (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §§5235 and 5236, *Levy upon and sale of real property* (McKinney 1975, amending McKinney 1963); N.Y.C.P.L.R. §5250, *Arrest of judgment debtor*, (McKinney 1963).

[17]N.Y. Social Services Law §137 provides "All moneys or orders granted to persons as public assistance or care pursuant to this chapter . . . shall be exempt from levy and execution under the laws of this state". N.Y. Social Services Law §137-a provides "All wages, salary, commissions or other compensation paid or payable by an employer to a person while he is in receipt of public assistance or care supplementary to his income . . . shall be exempt from assignment, income execution or from an installment payment order. . . ." (McKinney 1976).

[18]N.Y. Labor Law §595 states that "Benefits . . . shall be exempt from all claims of creditors and from levy, execution and attachment, or other remedy for receiving or collection of a debt. This exemption may not be waived". (McKinney 1965).

are used for necessities of life. *Consumer Creditor Corp. v. Lewis*, 63 Misc. 2d 928, 929, 313 N.Y.S. 2d 879, 880 (Nassau D.C. 1970). The exemptions intend to preclude the use of moneys to satisfy creditors' claims. *See Russo v. New York State Social Services Dept.*, 68 Misc. 2d 1094, 329 N.Y.S. 2d 13 (S. Ct. Monroe 1972). New York has a strong interest in insuring that debtors appear at show cause hearings and disclose their assets so that indigent debtors are not forced to utilize public assistance grants and unemployment insurance benefits to satisfy creditors' claims.

All interests are served by the debtor's attendance at the show cause hearing. As the harm suffered through inadequate notice is imprisonment and additional notice would impose no substantial burdens on the public or the creditor,[19] the show cause order must provide the debtor with notice that failure to appear at the show cause hearing might result in imprisonment and a deprivation of property.[20]

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[19]Specific notice requirements in other New York procedures have created no burdens on private litigants. N.Y. Domestic Relations Law §232 (McKinney 1975, amending McKinney 1964) provides that a divorce summons "...shall have legibly written or printed upon the face thereof: ...Action for Divorce." A summons in an action arising out of a consumer credit transaction "...shall prominently display at the top of the summons the words 'Consumer Credit Transaction.'" N.Y.C.P.L.R. §305(a) (McKinney 1975, amending McKinney 1972).

[20]Several states require that the notice ordering the judgment debtor to appear at the disclosure or show cause hearing contain a warning which states that failure to appear may result in incarceration. In California, for example, the disclosure notice must contain the following warning, "Failure to appear may subject the party served to arrest as punishment for contempt of court". West's Ann. C.C.P. §714 (1976). *See, e.g.*, Indiana: Burns Ind. Stat. Ann. §34-4-7-8 (1973); Maine: Me. Rev. Stats. Ann. 14 §3122 (1975); Oregon: Ore. Rev. Stats. §33.040 (1975); Rhode Island: *Mills v. Howard*, 109 R.I. 75, 280 A.2d 101 (1971); Washington: Wash. Rev. Code §7.20.040 (1961); West Virginia: W. Va. Code Ann. §62-6-6 (1975).

**3. Due process requires clear and timely notice.**

Clear notice of the consequences of the contempt order is required if the notice is to be ". . . reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[21] Alderman's study of New York civil contempt procedures indicates that the percentage of judgment-debtors who understand the nature of the order to show cause is miniscule. Only 18 out of 40 individuals interviewed understood what the show cause order meant. "Few if any of the persons interviewed understood why they had been fined, and none stated that they knew how to prevent it." Alderman, *supra* at 1239. Alderman has found that only 6.9% of the

[21] The difficulties encountered in understanding legal notices are not limited to show cause orders in civil contempt proceedings. David Caplovitz's study regarding the high rate of default judgments entered in New York reveals that only 4% of the defendants surveyed appeared in response to the summons. "Fifteen percent of the New York debtors . . . told us that they did not know that they were supposed to appear in court, that, in short, they did not understand the meaning of the summons". D. Caplovitz, *Consumers in Trouble, A Study of Debtors in Default* 206 (1974). *See* Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City,* 10 Colum. J. L. & Soc. Prob. 370, 385, n. 61 (1974). In F.T.C. Hearings on debt collection practices, Caplovitz stated that ". . . the language of the summons, especially in New York, virtually defies understanding and that even a well-educated person would have difficulty understanding the message of the summons". Federal Trade Commission, *New York Regional Office Staff Report of Debt Collection Hearings*, at 119 (1973) [hereafter cited as F.T.C. Report] . Other witnesses at the hearings, including an Assistant U.S. Attorney, indicated that the language of the summons should be changed ": . . to make it easier for the average laymen to understand what the consequences of his default will be, and what steps he should take to avoid default". *Id.* at 121.

judgment debtors appeared at the show cause hearing and concluded that ". . . the show cause hearing and its supportive procedures are ineffective to inform the low income debtor either of the reason for the punishment or of what steps he could take to alleviate it". Alderman, *supra* at 1229 and 1238. It is also significant that "[m]ost subjects interviewed in this study expressed a desire to cooperate with the judgment creditor and to satisfy this judgment as fast as feasibly possible". Alderman, *supra* at 1236. As the actual show cause order served on Vail, *supra* at n. 10, is not clear, it does not effectively apprise debtors of the pendency of the civil contempt proceedings.

While appellees were notified after they had been found in contempt that they would be incarcerated if they did not pay a fine, notice at this stage is inadequate. Once appellees received the contempt order, the statutory scheme provides no opportunity for a hearing prior to incarceration. Since the purpose of notice is to afford individuals ". . . an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950),[22] notice after the opportunity for a hearing elapses is ineffective and meaningless. Notice must be provided so the debtor can appear at the show cause hearing, ". . . when the deprivation can still be prevented". *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The three-judge court correctly decided that "Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment". (J.S.8a)

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[22] Judge Friendly has noted that notice is necessary because "Otherwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided. . .", *Some Kind of Hearing*, *supra*, note 13, at 1280-81.

## C. NEW YORK CIVIL CONTEMPT PROCEDURES VIOLATE AN INDIVIDUAL'S FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

### 1. Statutory Scheme

New York civil contempt procedures violate the due process clause of the Fourteenth Amendment to the United States Constitution by subjecting debtors to imprisonment without informing them of their right to counsel, or to assigned counsel if indigent. The right to counsel is essential when persons are threatened with incarceration and must defend themselves against loss of freedom in an adjudication of factual and legal issues. The denial of assigned counsel to appellee Rabasco confirms the absence of a right to assigned counsel (A.69a-70a).[23] In the absence of a statute, New York courts have no power to "...direct the provision of counsel or to require the compensation of retained counsel..." *Matter of Smiley*, 36 N.Y. 2d 433, 330 N.E. 2d 63, 369 N.Y.S. 2d 87, 90 (1975).[24] Because

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[23]Contrary to appellants' assertions (A.B. at 7), while appellee Rabasco retained Mid-Hudson Valley Legal Services Project to represent him in the instant case, he did not retain the Project to represent him in the state court proceedings. It is evident that federally funded legal services offices are physically and financially incapable of serving the needs of all indigents who require assigned counsel. *See* Stein, Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 Fordh. L. Rev. 989, 1000-01 (1975); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. Urban L. 217 (1969); Note: *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L. J. 545, 546 (1967).

[24]This construction of the statutes is confirmed by the legislature's express provision for advising persons of their right to counsel and providing assigned counsel for indigents in the analogous non-support situation in Family Court. *See* N.Y. Family Court Act §433 (McKinney 1975). *See also* N.Y.

*(continued)*

the civil contempt procedures do not include a statutory requirement that counsel be assigned, there is no such right and the statutes are thus unconstitutional.

**2. The assistance of counsel is required for a fair hearing when a debtor is threatened with incarceration.**

A basic element of due process is the right to counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).[25] In *Argersinger v. Hamlin*, 407 U.S.

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*(footnote continued from preceding page)*

Judiciary Law §35(1)(a) (McKinney 1975); N.Y. Family Court Act §§262(a)(i-vii); 1012(a) (McKinney 1975).

While appellants assert that *Rudd v. Rudd*, 45 A.D.2d 22, 356 N.Y.S. 2d 136 (4th Dept. 1974), holds that persons faced with civil contempt for failure to pay support are to be advised of their right to counsel and assigned counsel if indigent, a closer examination of the case reveals that there the court dealt with N.Y. Family Court Act §§433 and 454 rather than the civil contempt procedures in Article 19 of the Judiciary Law. *Walker v. Walker*, 51 A.D. 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976), also cited by appellants (A.B. at 27 & 28), does not deal with the right to counsel issue.

[25]Mr. Justice Sutherland summarized why counsel is required for a fair hearing as follows: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect". *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

25 (1972), this Court decided that ". . . no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial". 407 U.S. at 37. Counsel was found to be required for a fair trial because:

> (1) "[T]he average defendant does not have the professional legal skills to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is [re] presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938), cited in *Argersinger*, 407 U.S. at 32 n. 3;
>
> (2) The legal and constitutional questions involved in a case that leads to imprisonment for a brief period are no less complex than those that involve longer terms (*See* p. 23 *infra.*);
>
> (3) ". . . [I]mprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career or his reputation." *Baldwin v. New York*, 399 U.S. 66, 73 (1970), cited in *Argersinger*, 407 U.S. at 37.

These same considerations mandate the assignment of counsel in civil contempt proceedings where an individual's freedom is in jeopardy.[26]

An attorney is required to assemble and analyze the factual and legal considerations that are relevant to a

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[26]"Counsel was recognized as an important element in civil causes early in English legal history." *The Right to Counsel in Civil Litigation*, 66 Colum. O. Rev. 1322, 1325 (1966). *See generally* Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923). Assigned counsel is generally required in civil commitment proceedings. *Bell v. Wayne County General Hospital at Eloise*, 384 F. Supp. 1085, 1092-32 (E.D. Mich. 1974); *Stamus v. Leonhardt*, 414 F. Supp. 439, 448 (S.D. Iowa 1976).

debtor's defense.[27] Because the proceedings are adversarial, an attorney's knowledge of procedure and

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[27]The following are some of the defenses that may be raised:

(1) The individual did not intentionally disobey the subpoena. N.Y.C.P.L.R. 5251 (McKinney 1975);
(2) The individual's conduct was not calculated to and did not defeat, impair, impede, or prejudice the rights or remedies of a party to a civil action. *Matter of Bowling Ltd. v. Cramer*, 38 A.D. 2d 774, 327 N.Y.S. 2d 902 (3d Dept. 1972), *rev'd. on other grounds*, 41 A.D. 2d 996, 343 N.Y.S. 2d 1006 (3rd Dept. 1973);
(3) The subpoena was not served or was improperly served. *Carl v. Moyer*, 63 Misc. 2d 1052, 313 N.Y.S. 2d 936 (S. Ct. Onon. Co. 1970);
(4) The show cause hearing was commenced by a notice of motion. *Byrne v. Long Island State Park Commission*, 67 Misc. 2d 1084, 325 N.Y.S. 2d 147 (S. Ct. Nassau Co. 1971);
(5) The individual is unable to produce the information requested in the subpoena. *McPhaul v. United States*, 364 U.S. 372 (1960), *United States v. Bryan*, 339 U.S. 323, 330-31 (1950).

When the procedures are utilized pursuant to §770 to enforce orders of support or alimony, the following defenses may be raised:

(1) The divorce decree is ambiguous. *Goldstein v. Goldstein*, 47 A.D. 2d 744, 364 N.Y.S. 2d 552 (2d Dept. 1975);
(2) Visitation rights were denied. *Abraham v. Abraham*, 28 A.D. 2d 864, 281 N.Y.S. 2d 601, *aff'd.*, 22 N.Y. 2d 857, 293 N.Y.S. 2d 118, 239 N.E. 2d 743 (1968);
(3) The divorce decree is a foreign decree that cannot be enforced through New York civil contempt sanctions. *Cooperman v. Cooperman*, 62 Misc. 2d 745, 309 N.Y.S. 2d 683 (S. Ct. N.Y. Co. 1970);
(4) Payments can be enforced by sequestration of the husband's property. *Bernard v. Bernard*, 41 A.D. 2d 735, 341 N.Y.S. 2d 286 (2d Dept. 1973).

Appellants' reliance upon *Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974) (three-judge court) to support the notion that civil contempt proceedings are not complex is misplaced. In the context of New York law, the procedures are not clearcut or simple.

evidence is essential. The creditor is generally represented by an attorney and the initial subpoena must be issued by an attorney or other officer of the court pursuant to N.Y.C.P.L.R. §2302(a) (McKinney 1974). Section 757 provides that the order to show cause ". . . must be made returnable at a term of the court at which a contested motion may be heard". A formal evidentiary hearing may be held if factual issues arise at the motion term.[28] N.Y.C.P.L.R. §2218 (McKinney 1974). Laypersons cannot be expected to consider and evaluate the large number of factors that may be raised in their defense.[29] As debtors cannot obtain release on bail when the proceedings are initiated by a show cause order, the assistance of counsel is required. When individuals may be deprived of fundamental due process liberty interests, assigned counsel is required.

Appellants now concede that "[t]here may be cases where counsel should be assigned . . ." (Appellants' Brief, hereinafter referred to as A.B., at 27) and assert that this decision "[s]hould be left to the discretion of

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[28]*See Pirrotta v. Pirrotta*, 42 A.D. 2d 715, 345 N.Y.S. 2d 619 (2d Dept. 1973).

[29]As Chief Justic Traynor noted in *In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) "The civil defendant cannot be expected to understand and to present the legal obligations that may be raised in testing the validity of the arrest order. . . ." 69 Cal. 2d at 490. *See* Houle and Dubose, *The Nonsupport Contempt Hearing: Constitutional and Statutory Requirements*, 14 N.H.B.J. 165, 171-172 (1973); Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 Colum. J. L. & Soc. Prob. 370, 413 n. 208 (1974).

The Association of the Bar of the City of New York has consistently called for assigned counsel in civil consumer matters so that consumers are made aware of the defenses they have. 23 Ass'n. of the Bar of the City of New York, *The Right to a Day in Court and the Consumer Defendant* 586 (1968); 24 Ass'n. of the Bar of the City of New York, *The Right to Counsel in Civil Cases* 260 (1969). Former United States Attorney Whitney North Seymour has recommended an expanded right to counsel in civil consumer cases so that debtors can effectively present defenses. F.T.C. Report, *supra* note 21, at 133 & 140.

the state trial judge". (A.B. at 27) This concession constitutes an admission that the civil contempt statutes are unconstitutional as the statutes do not require a case-by-case approach to the assignment of counsel.[30]

Moreover, the case-by-case approach to the right to counsel is inadequate in light of the complex legal and factual questions involved in civil contempt proceedings, (*See* p. 23 *supra*), and the adversarial nature of the procedures. (*See* pp. 23-24 *supra*). These factors distinguish the instant case from *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), cited by appellants. There, a case-by-case approach to the assignment of counsel in parole revocation procedures was adopted because it was determined that ". . . the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings . . ." 411 U.S. at 790. The presence of counsel was found to be undesirable because "[t]he role of the hearing body . . . as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee". 411 U.S. at 787-88. Counsel was found to be unnecessary because: (1) the proceedings are informal and conducted without ". . . technical rules of procedure or evidence . . ." 411 U.S. at 786-87; (2) the state is represented by a parole officer interested in the rehabilitation of the offender rather than a prosecutor or lawyer; and (3) the factual questions are simple as in ". . . most cases, the probationer or parolee has been

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[30]Illiteracy was one of the special circumstances used in deciding whether or not counsel should be appointed even prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Moore v. Michigan*, 355 U.S. 155 (1957). Although appellee Hurry is illiterate, counsel was not assigned for him. Appellants omitted pleadings regarding plaintiff Hurry from their Appendix. Those papers may be found in the record.

convicted of committing another crime or has admitted the charges against him". 411 U.S. at 787.[31] In the instant case, where the civil contempt proceedings are conducted before a judge, where complex rules of procedure and evidence are used, where creditors are generally represented by attorneys, and where complex legal and factual questions are presented, the case-by-case approach to the assignment of counsel is neither appropriate nor adequate.

**3. The requirement of counsel in federal and most state civil contempt proceedings confirms the need for an attorney.**

The development of the right to assigned counsel in federal courts confirms the conclusion that individuals need counsel to present their case and receive a fair hearing. In 1925, this Court noted that "[d]ue Process of law, therefore, in the prosecution of contempt, except of that committed in open court . . . includes the assistance of counsel . . ." *Cooke v. United States*, 267 U.S. 517, 537 (1925). *See also In Re Oliver*, 333 U.S. 257, 275 (1948). All circuits that have considered the question have concluded that assigned counsel is required in civil contempt proceedings where the alleged contemnor is faced with the threat of incarceration. *See In Re DiBella*, 518 F. 2d 955, 959 (2d Cir. 1975); *In Re Kilgo*, 484 F. 2d 1215, 1221 (4th Cir. 1973);

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[31]As the issue in the instant case is whether assigned counsel should be required rather than whether counsel should be permitted in civil contempt proceedings, *Middendorf v. Henry*, 96 S. Ct. 1281 (1976), referred to by appellants, (A.B. at 27), is also not relevant here. There, counsel was not permitted in summary court-martial proceedings because counsel would "... turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military...." *Id.* at 1292.

*United States v. Sun Kung Kang*, 468 F. 2d 1368, 1369 (9th Cir. 1972).[32]

Most states have found that individuals are entitled to the assistance of counsel in the presentation of defenses in civil contempt proceedings,[33] or other civil proceedings[34] when they face possible deprivation of liberty. In *Tetro v. Tetro*, 86 Wash. 2d 252, 544 P. 2d 17 (1975), the court noted that

> We thus join the great majority of courts which have addressed the issue and hold that whenever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation. 544 P. 2d at 19-20. (footnote omitted)

Counsel is required to insure that only those debtors for whom the coercive sanction of incarceration is appropriate are jailed.

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[32]In civil contempt actions to enforce voting rights under 42 U.S.C. §1971(f) (1974), persons are provided with assigned counsel ". . . learned in the law. . .".

[33]*See, e.g.*, Alaska: *Otton v. Zaborac*, 525 P.2d 537 (Alas. S. Ct. 1974); Colorado: *Losavio v. District Court In & For Tenth Jud. Dist.*, 182 Colo. 180, 512 P.2d 266 (1973); Massachusetts: *Sodones v. Sodones*, 314 N.E. 2d 906 (Mass. Sup. Jud. Ct. 1974); Oregon: Ore. Rev. Stats. §33.095(2) (1975); Pennsylvania: *Pennsylvania ex rel Brown v. Hendrick*, 220 Pa. Super. 225, 283 A.2d 722 (1971); Rhode Island: *Mills v. Howard*, 109 R.I. 59, 280 A.2d 101 (1971); Washington: *Tetro v. Tetro*, 86 Wash. 2d 252, 544 P.2d 17 (1975).

[34]*Abbit v. Bernier*, 387 F. Supp. 57, 62 n. 12 at 63 (D. Conn. 1974) (three-judge court), *Wright v. Crawford*, 401 S.W. 2d 47, 49 (Ky. Ct. App. 1966); *Perlmutter v. DeRowe*, 58 N.J. 5, 274 A.2d 283, 289 (Sup. Ct. 1971); *In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 151-52, 72 Cal. Rptr. 340 (1968).

### 4. Appellees did not waive their right to counsel by failing to appear at the show cause hearing.

Appellees' failure to appear at the show cause hearing does not constitute a waiver of their right to counsel. As this Court has noted in the context of a civil proceeding, "[w]e do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937). Appellees did not waive their right to counsel as they did not intentionally relinquish or abandon "...a known right or privilege". *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Because New York civil contempt procedures do not require that persons be advised of a right to counsel, appellees' failure to request that counsel be assigned does not constitute waiver. "[W]here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (footnote omitted).

## D. NEW YORK JUDICIARY LAW SECTIONS 756, 770, 773 AND 774 VIOLATE DUE PROCESS BECAUSE THEY PERMIT THE IMPOSITION OF PUNITIVE FINES IN CIVIL CONTEMPT PROCEEDINGS.

### 1. Statutory Scheme

Section 773 authorizes the imposition of a contempt fine in the amount of $250 plus costs without proof of actual loss or injury and provides that the fine shall be

collected and paid over to the aggrieved party.[37] Sections 756, 770, and 774 authorize the incarceration of debtors until they have performed the required act and paid the fine irrespective of their ability to pay the fine. These sections violate the due process clause of the Fourteenth Amendment to the United States Constitution by permitting punitive fines to be imposed in civil contempt proceedings in the absence of criminal procedural safeguards.[38]

**2. Due process requires that civil contempt fines be coercive and compensatory and not punitive.**

The purposes for imposing a fine or incarceration in a civil contempt proceeding are: (1) to compensate the party injured by the contumacious conduct, and (2) to coerce compliance with the court's mandate. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911),

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[37]Appellants contend that the first sentence of §773 which mandates a fine "sufficient to indemnify the aggrieved party" is constitutional. (A.B. at 28). However the first sentence of §773 is not separable from the remainder of §773 or the statutory scheme as evidenced by the use of the term "fine" in §§770 and 774. Therefore, the entire section must be invalidated. *Hill v. Wallace*, 259 U.S. 44 (1922); *People v. Harrison*, 170 A.D. 802, 156 N.Y.S. 679, *aff'd.*, 219 N.Y. 562, 114 N.E. 1076 (1916).

[38]It is undisputed that these proceedings are civil contempt proceedings as their primary purpose is a remedial one. All of the elements identified in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-449 (1911) which distinguish civil contempt from criminal contempt are present here:

(1) the punishment is remedial;
(2) the proceeding is part of a civil action;
(3) no right to jury trial is afforded the charged parties;
(4) costs are awared the complainant; and
(5) the relief requested is directed toward the complainant.

*See* Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev. 183, 238 (1971).

*Shillitani v. United States*, 384 U.S. 364 (1966). The absence of a right to a jury trial and other criminal procedural safeguards is justified by these limited purposes. The fine is imposed to compensate the injured party rather than to punish the contemnor. *Gompers*, *supra* at 441. Incarceration is conditional and coercive and is justified by the contemnor's ability to comply with the court order to avoid incarceration or to obtain release. *Shillitani, supra* at 370-71.

Section 773 permits the imposition of a punitive fine by providing that:

> Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses,[39] and two hundred and fifty dollars in addition thereto . . .[40]

As the civil contempt fine ". . . must of course be based upon evidence of complainant's actual loss," *United States v. United Mine Workers of America*, 330 U.S. 258, 304 (1947), the fine authorized by §773 is impermissible in a civil contempt proceeding.

The fine is also not conditional. Pursuant to §§756, 770, 773, and 774,[41] individuals may be imprisoned

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[39]Costs and expenses include reasonable attorney fees. *People ex rel. Garbutt v. Rochester and State Line Railroad Company*, 76 N.Y. 294, 301, 14 Hun. 371, 376 (1879).

[40]Appellee Ward was fined $250 plus $20 for costs and expenses even though the underlying money judgment against him was $146.84.

[41]Section 774 provides in part:

> Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. (McKinney 1975).

until they perform the required act *and* pay the fine.[42] The statutes do not permit individuals to purge themselves of the contempt by compliance with the subpoena. Appellees could not end their sentence "... by doing what (they) had previously refused to do". *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911).[43]

Sections 756, 770, 773, and 774 permit the incarceration of debtors until they pay the fine imposed with no inquiry regarding the debtor's capability of paying the fine.[44] Incarceration through civil contempt procedures is not proper, unless the contemnor has the ability to comply with the court order. The "... justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order".[45] *Shillitani v. United States*, 384 U.S. 364, 371 (1966).

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[42] Appellants' assertion that appellees are unwilling to comply with the original subpoenas, (A.B. at 22), is factually erroneous. The Orders of Contempt issued by appellants Aldrich and Juidice required payment of the fine and not compliance with the subpoena.

[43] Historically, in civil contempt "... if the violation is proved the wrongdoer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong." Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 169 (1908).

[44] All appellees were incarcerated because they were unable to pay the contempt fine. The maximum fine, without proof of actual loss, is $250 plus costs and expenses. A single person's maximum *monthly* welfare grant for all needs in Dutchess County is $225. *See* 18 N.Y.C.P.L.R. 352.1-3, 352.7. There is no statutory requirement that imprisonment occur only if the individual willfully refuses to pay the contempt fine.

[45] As stated in *In Re Nevitt*, 117 F. 448 (8th Cir. 1902) "[b]ut they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets". *Id.* at 461.

Incarceration without a finding that the contemnor has the ability to do the act and pay the fine[46] is not permissible in civil contempt proceedings.[47]

## E. NEW YORK JUDICIARY LAW SECTIONS 756, 757, 770, 772, 773, 774, AND 775 VIOLATE DUE PROCESS BECAUSE THE DEBTOR IS NOT BROUGHT BEFORE THE COURT PRIOR TO A FINDING OF CONTEMPT AND IMPOSITION OF FINE OR INCARCERATION.

### 1. Statutory Scheme

Pursuant to §§770 and 772, the state court fined a debtor who failed to appear at the show cause hearing with no finding that the person willfully failed to appear. The court then directed that if the fine was not paid within a specified period of time, imprisonment without further notice would follow. Upon the failure to pay the fine and with no finding of willful refusal or ability to pay, the creditor's attorney obtained *ex parte*

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[46]While all jailed debtors paid the fine to obtain release, they borrowed money from friends or relatives or used their welfare check, exempt from execution. *See* p. 17, *supra.* The abusiveness of this practice has been noted in *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) where the court stated:

> ...no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

[47]In many states incarceration is only permitted where the court makes a finding that the individual is able to comply. *See e.g., Noorthoek v. Superior Court*, 269 Cal. App. 2d 600, 609, 75 Cal. Rptr. 61, 67 (1969); *Yoder v. County of Cumberland*, 278 A.2d 379, 390 (Me. Sup. Ct. 1971).

warrants of commitment from the state courts as authorized by §756. Thus, fines and incarceration were imposed in *ex parte* proceedings without bringing the debtor before the court.[48] The three-judge court correctly found that §§756, 757,[49] 770, 773, and 774 violate the due process clause of the Fourteenth Amendment because they authorize incarceration "... on the basis of a creditor's affidavit of service and an ex parte proceeding". (J.S.7a). The court held that "[a] finding of contempt can be properly made only upon a hearing with both parties present. The defect is not cured by providing a hearing within 90 days of incarceration". (J.S.7a-8a).[50] (footnote omitted).

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[48]Appellants cite the first sentence of 6 Weinstein-Korn-Miller, §5251.03 for the proposition that New York has a long standing policy against enforcing money judgments by contempt because it would be tantamount to imprisonment for debt. However, the second sentence of the treatise specifically notes that "[t]his policy does not apply to contemptuous conduct committed in the course of the enforcement of a money judgment. . . ." *Id.* at 52-747.

[49]Use of §757(2) alone would not be constitutional as it fails to meet the notice, counsel, and fine deficiencies in the statutes. Similarly, the fact that some lower New York City courts cited by appellant have indicated that it is better to bring the debtor before the court by attachment does not eliminate the constitutional objections. None of these cases state that it is unconstitutional to make a finding of contempt in the absence of the debtor. They simply state it is better to have the person in court. Moreover, none of these cases address the notice or counsel questions.

[50]Contrary to appellants' assertions, (A.B. at 18-19), *Agur v. Wilson*, 498 F.2d 961 (2d Cir. 1974), *cert. denied*, 419 U.S. 1072 (1974), does not preclude the three-judge court's decision here. In that case, Agur had at least four different attorneys and presented one hundred motions in state court proceedings. The Second Circuit decided that under the facts of the case no substantial question of federal law was involved because Agur had many opportunities for a hearing.

**2. Appellants concede that due process may require a hearing prior to incarceration.**

Appellants now concede that "An interpretation of Judiciary Law §757 to obviate any constitutional problems would require a court to first follow §757(1) and then if there was no appearance proceed under §757(2)". (A.B. at 23). Appellants' suggestion would solve the constitutional problems in the statutes if due process protections were provided as follows: (1) assigned counsel when the procedure reached the §757(2) non-appearance stage and the debtor was threatened with incarceration; (2) adequate notice; and (3) compensatory fines.

**3. Historically, persons were brought before a judge prior to a finding of contempt.**

Historically, in civil and indirect contempts, a person was brought before the court to show cause why he should not comply with the court order. As noted in 4 Blackstone Commentaries, 286-87, cited in *Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968):

> [I]n matters that arise at a distance, and of which the court cannot have so perfect a knowledge, . . . if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt the attachment issues in the first instance.

The purpose of the writ of attachment was to bring the person before the court, not to punish him. As noted in 4 Blackstone Commentaries, 287, cited in *In Re Verdon*, 89 N.J. Law 16, 97 A. 783 (1916), it was

> . . . merely intended to bring the party into court; and when there he must either stand committed or put to bail in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt.

*See* Beale, *Contempt of Court, Criminal and Civil*, 21 Harv. L. Rev. 161, 172 (1908).

**4. Due process requires a hearing with both parties present prior to a finding of contempt and incarceration.**

The three-judge court correctly required that debtors be brought before a court prior to a finding of contempt and incarceration to insure the fairness and reliability of the decision to imprison as a coercive mechanism. As the purpose of the proceeding is to coerce compliance with a private party's disclosure subpoena and compensate the party injured by the contumacious conduct, incarceration and fines are only effective if the debtor has the ability to do the required act. A hearing is required prior to incarceration to determine ". . . whether petitioner has in fact behaved in a manner that amounts to contempt . . ." and whether the debtor has the ". . . present ability to comply". *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1972).

A hearing is also required as *ex parte* affidavits are an unreliable basis for decision-making ". . . where credibility and veracity are at issue. . . ." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Factual and legal issues are not susceptible to documentary proof when they involve questions of intent such as whether: (1) the debtor has committed the offense charged and willfully disobeyed a subpoena; and (2) the offense was calculated to and did defeat the rights of a party. As this Court noted in *Mitchell v. W.T. Grant*, 416 U.S.

600, 617 (1974) "[t]he broad 'fault' standard is inherently subject to factual determination and adversarial input".

A hearing is needed to prevent erroneous jailings. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process. . . ." *Mathews v. Eldridge*, 96 S. Ct. 893, 907 (1976). The risk of error in the New York civil contempt statutory scheme is high when debtors are incarcerated without judicial inquiry to determine whether:

(1) the debtor believes that the fine has been paid or arranged to be paid, (*See* p. 41 *infra*);

(2) the debtor is unable to pay the fine;[51]

(3) the creditor has suffered actual loss;

(4) the debtor's assets are exempt from execution;

(5) the debtor received actual notice of the show cause and contempt order;[52]

(6) the debtor is able to read; or

(7) other mitigating circumstances are present.[53]

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975) this Court found the Georgia garnishment statutes unconstitutional because they did not provide for adequate procedures ". . . to guard against the risk of initial error". 95 S. Ct. at 723. In this case, ". . . only a hearing will elucidate all the facts

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[51] In *Yoder v. County of Cumberland*, 278 A.2d 379, 386 (Me. Sup. Jud. Ct. 1971) the court noted that there is ". . . the need of an additional hearing as to *the reasons for nonpayment*, especially when the nonpayment can, as here, be the result of inability to pay".

[52] False affidavits of service and "sewer service" are problems in New York. F.T.C. Report, *supra* note 21, at 98-105. *See also* Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 Colum. L. Rev. 847 (1972).

[53] "Studies indicate that the great majority of contemnors who appear at show cause hearings are able to show some mitigating circumstances and avoid imprisonment." Alderman *supra* at 1229.

and assure a fair administration of justice".[54] *Harris v. United States*, 382 U.S. 162, 167 (1965).

The interests of the creditor, debtor, and public mandate that a judicial hearing occur prior to a finding of contempt and incarceration. The creditor has no special interests that preclude a prior hearing. In *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974), a prior hearing was not required when the creditor's interest in the sequestered property and the risk that the buyer would conceal or transfer the merchandise was coupled with the safeguards of a prompt post-seizure hearing and a bond requirement. In this case, the creditor has no interest in the debtor's body and does not use the procedures to prevent the debtor from damaging property.[55] There are also no safeguards as the creditor is not required to post any bond and a post-seizure hearing is required only after ninety days of incarceration. The creditor's interest in obtaining information about a debtor's assets is not served by the incarceration of a debtor who is indigent or who has no ability to produce the requested information. The creditor's interest in obtaining information is not

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[54]One consequence of failing to require that the debtor be brought before the court is evidenced in the experience of appellees Nameth and Humes. Although temporary restraining orders were issued on January 8, 1975 by District Court Judge Thomas P. Griesa to prevent their arrest and incarceration, they were arrested and incarcerated on February 10, 1975, based upon *ex parte* warrants of commitment, in direct violation of the restraining orders.

[55]The civil contempt power is utilized to protect the rights and remedies of parties in civil actions, not to prevent debtors from leaving a jurisdiction or disposing of assets as are garnishment and attachment. *See North Georgia Finishing, Inc. v. Di-Chem. Inc.*, 95 S. Ct. 719, 724 (1975) (Powell, J., concurring). While summary procedure may meet due process requirements in extraordinary situations, such circumstances are not present here. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972).

hampered by requiring the attendance of both parties at a hearing prior to a finding of contempt. Because most consumer lawsuits result in default judgments, the hearing requirement is not overly burdensome to creditors.[56]

The debtor's liberty interest is served by a hearing prior to a finding of contempt and incarceration so that the severe consequences of incarceration may be avoided. In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), this Court recognized that ". . . prejudgment garnishment[57] of the Wisconsin type may as a practical matter drive a wage-earning family to the wall". 395 U.S. at 341-42. The consequences of incarceration are even more disruptive, particularly when debtors, such as appellees Thorpe (A.138a), and Harrell (A.145a), are arrested at their places of employment.

A hearing serves the public interest by insuring that debtors remain free from coercive civil contempt sanctions if they are unable rather than unwilling to comply. A hearing also insures that debtors will not be forced to use exempt income to pay creditor's claims.

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[56]All debtors in the instant case had default judgments entered against them in the underlying action. Ninety percent of the consumer suits brought in New York City Civil Court result in default judgments. A study of 23 New York City collection attorneys revealed that 15 of the 23 obtained default judgments in 100% of the actions they brought over a 3 month period. One attorney ". . . estimated that he instituted 7000 suits annually of which 90% resulted in defaults". F.T.C. Report, *supra* note 21, at 116, 164-165. *See Thompson v. Chemical Bank*, 84 Misc. 2d 721, 724, 375 N.Y.S. 2d 729, 734 (Civil Ct. City of N.Y. 1975); Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 Colum. J. L. & Soc. Prob. 370, 413 n. 208 (1974).

[57]Congress has recognized that garnishment ". . . frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden in interstate commerce". 15 U.S.C. §1671(a)(2) (1974).

(*See* p. 17 *supra.*) In many states, a finding of contempt can only be made when both parties are present.[58]

The experiences of Maine and Connecticut show that all interests are served by requiring a hearing prior to incarceration.[59] In *Desmond v. Hachey*, 315 F. Supp. 328 (D. Me. 1970) a three-judge court found §3505 of the Maine Debtor Disclosure Law to be violative of due process because it permitted:

> . . . the arrest and incarceration, without a hearing,[60] of a judgment debtor who ha[d] failed to obey a subpoena for his appearance and examination at a disclosure hearing . . . (315 F. Supp. at 333).

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[58]*See, e.g.*, Alaska: Alas. Civ. Rule 90(d); Arizona: *Ex Parte Quan*, 39 Ariz. 13, 3 P.2d 522 (1931); Arkansas: Ark. Stats. 1947 Ann. §28-514 (1962); California: West's Ann. C.C.P. §1217 (1976); Colorado: Colo. Rev. Stat., Rules of Civ. Proc. R. 107(c) (1953); Connecticut: *Remington Rand v. Typewriter Assemblers Lodge of International Ass'n. of Machinists*, 4 Conn. Supp. 150 (1936); Idaho: Idaho Code §7-609 (1947); Iowa: Code of Iowa §665.7 (1950); Maine: Me. Rev. Stats. Ann. 14 §3134-35 (1975); Massachusetts: Anno. Law of Mass., c. 224 §18 (1974); Minnesota: *Clausen v. Clausen*, 250 Minn. 293, 84 N.W. 2d 675 (1957); Minn. S. A. 38 §588.08 (1961); Montana: Mont. Rev. Code of 1947, Mont. Civ. Pro. 93-9809 (1964); North Dakota: No. Dak. §27-10-13 (1974); Oregon: Ore. Rev. Stats. §33.070 (1975); Rhode Island: *Mills v. Howard*, 109 R.I. 25, 280 A.2d 101 (1971); Utah: U.C.A. §78-32-9; 78-32-13 (1953); Washington: Wash. Rev. Code 7.20.40 (1961).

[59]Caplovitz has noted the similarities between the New York procedure and the former law in Maine:

> The tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison . . . this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences had occurred in his area. D. Caplovitz, *Debtors In Trouble, A Study of Debtors in Default* 226 (1974).

[60]Appellants' assertion that *Desmond* is inapplicable, (A.B. at 24), is erroneous because the court in *Desmond* required a hearing rather than the mere opportunity for a hearing.

The court required a hearing because

> Such a drastic infringement upon personal liberty cannot be tolerated unless the procedure is hedged about with sufficient safeguards to assure that one who is innocent of any wrongdoing will not be punished.
> (315 F. Supp. at 333).

Statutes enacted after the *Desmond* decision provide that if the debtor fails to comply with a disclosure subpoena,[61] the court may issue a capias which authorizes the sheriff to arrest the debtor on a specific day and bring him before the court. The ". . . sheriff shall not incarcerate the judgment debtor but shall deliver the judgment debtor to the District Court". Me. Rev. Stats. Ann. 14 §3135 (1975). If the debtor does not show good cause for failure to respond to the subpoena, he may be ordered to pay the costs of issuing and serving the capias. Maine's new procedural safeguards insure that ". . . those debtors who can afford to pay are distinguished from those who cannot". Note, *Postjudgment Procedures for Collection of Small Debts: The Maine Solution*, 25 Maine L. Rev. 43, 53 (1973).

In Connecticut, a three-judge court declared the body execution statute, Conn. Gen. Stat. Ann. §52-369, unconstitutional on equal protection grounds and noted that the obvious cure was to ". . . provide hearings prior to incarceration to determine a debtor's ability to pay the judgment debt". *Abbit v. Bernier*, 387 F. Supp. 57, 62 (D. Conn. 1974).

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[61] The disclosure subpoena contains the following warning: FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR ARREST. Me. Rev. Stats. Ann. 14 §3122 (1975).

**5. Appellees' failure to appear at the show cause hearing does not constitute a waiver of their right to a hearing prior to incarceration.**

Because civil contempt statutes provide for no notice that failure to appear may result in incarceration and no assignment of counsel, the failure to appear is not a clear waiver of rights. "[A] waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972). As the statutes permit incarceration without a finding that the debtor willfully refused to appear at the show cause hearing or pay a contempt fine, the failure to appear may not even be intentional. Alderman's study, confirmed by the experiences of appellees Vail (A.16a), Ward (A.21a), and Harvard (A.67a), indicates that most debtors fail to appear because they believe that they have arranged a settlement with the creditor's attorney so that no appearance is necessary. Alderman *supra* at 1238.[62] Many debtors also do not understand the show cause order. (*See* p. 19 *supra*). Individuals have a right to be present at contempt hearings unless this right is knowingly and intelligently waived.

**6. The availability of a motion to vacate the contempt order under N.Y.C.P.L.R. §5015 does not cure the due process violations.**

At the show cause hearing, the creditor must show to "... a reasonable certainty ..." that the debtor did not

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[62]In the analogous default judgment situation Caplovitz's studies indicate that:

> ... the most common reason for not appearing in court was that the debtor ... presumably stimulated by the initiation of the law suit, has arranged for some kind of settlement with the creditor's attorney.... These debtors, where judgment was in fact entered, were under the mistaken impression that the court action was discontinued and they need not appear. (F.T.C. Report *supra note* 21 at 118).

comply with the subpoena. *Pereira v. Pereira*, 35 N.Y. 2d 301, 308, 361 N.Y.S. 2d 148, 154, 319 N.E. 2d 413, 418 (1974). Once the *ex parte* contempt order has been imposed, the burden of proof shifts and the debtor must present a valid excuse and meritorious defense to vacate the contempt order and obtain a hearing. *Gunther v. America Label Co., Inc.*, 243 A.D. 528, 275 N.Y.S. 861 (2d Dept. 1934); *Wall v. Bennett*, 33 A.D. 2d 827, 305 N.Y.S. 2d 728 (3rd Dept. 1969). After the debtor has been jailed, he has the burden to show inability to endure imprisonment. *Vought v. Vought*, 42 Misc. 2d 16, 247 N.Y.S. 2d 468 (S. Ct. N.Y. Co. 1964). A hearing must occur prior to the finding of contempt and concomitant shift in the burden of proof,[63] because "...the burden of proof...may be decisive of the outcome". *Speiser v. Randell*, 357 U.S. 513, 525 (1958).

**7. Section 775 does not vitiate the due process violations.**

Although §775 authorizes release from incarceration in the discretion of the court upon proof of inability to pay the fine, it fails to provide for a *prior* hearing on the issue of indigency or impose a mandatory duty

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[63]In *United States v. Wiseman*, 445 F.2d 792 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971) professional process servers were convicted of filing false affidavits of service in the office of the Clerk of New York City Civil Court, which resulted in the entry of many default judgments without notice. The Second Circuit rejected the defendant's argument that persons could move to vacate the default judgments and cure the lack of notice. The court stated "...persons...have a federal right...to be accorded proper notice before the entry of judgments against them, since after judgment the burden is on defendant to seek such further relief as may be available." *Id.* at 797.

upon the court to release the indigent debtor. It also does not provide that the debtor be notified of the right to apply for release on account of indigency.[64]

**8. The procedural due process protections in New York Family Court Act do not cure the deficiencies in Article 19 civil contempt proceedings.**

The debtors' problems in the instant case did not involve support matters in Family Court. Therefore, the procedural protections in the Family Court procedure were not utilized.

According to the N.Y. Family Court Act, when a spouse files a support petition, a summons is issued requiring the respondent to appear. The summons generally contains a warning that failure to appear may result in the issuance of an arrest warrant. *Blouin v. Dembitz*, 489 F. 2d 488, 489 (2d Cir. 1973). If the respondent does not respond to the summons, the court may issue a warrant directing that he be arrested and brought before the court. N.Y. Family Court Act §428 (McKinney 1975). Once the Family Court issues a support order and the spouse fails to obey the order, the court may "... issue a warrant directing that the respondent be arrested and brought before the court". N.Y. Family Court Act §453 (McKinney 1975). If the respondent is arrested when Family Court is not in session, he must be taken before

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[64] In declaring the California civil arrest statutes violative of due process, the California Supreme Court noted:

> The provision that the arrested defendant may apply to the court at any time before trial or judgment to vacate the arrest order or to reduce bail ... does not afford him a fair opportunity to challenge his imprisonment, for the Legislature has not required that he be given notice of his right to make the application. [*In Re Harris*, 69 Cal. 2d 486, 446 P.2d 148, 151, 72 Cal. Rptr. 340, 343 (1968)].

a magistrate for arraignment. The magistrate may "... hold such respondent ... admit to, fix or accept bail, or parole him for hearing before the family court". N.Y. Family Court Act §155 (McKinney 1975). When the respondent is brought before the court, he is "... informed of the contents of the petition, advised of his right to counsel, and ... given an opportunity to be heard and to present witnesses". N.Y. Family Court Act §433 (McKinney 1975). N.Y. Family Court Act §262 (McKinney 1975) further provides that the judge shall inform the respondent of "... his right to have an adjournment to confer with counsel, and of his right to ..." assigned counsel if indigent.

Therefore, appellants' reliance upon cases dealing with the Family Court procedure such as *Blouin, supra,* and *Rudd v. Rudd,* 45 A.D. 2d 22, 356 N.Y.S. 2d 136 (4th Dept. 1974) is misplaced. Furthermore, the three-judge court decision had no effect upon the Family Court's ability to punish non-support cases by imprisonment. *See* N.Y. Family Court Act §156 (McKinney 1975).

**9. Endicott-Johnson Corp. does not preclude the three-judge court's decision.**

In *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), a writ of garnishment, issued without notice to a judgment debtor, was held to comport with due process. That decision is inapplicable to the requirements of due process where liberty interests are at stake.[65] As this case involves the jailing

[65] Appellants' reliance upon *Blackmer v. United States*, 284 U.S. 421 (1932) is misplaced for similar reasons. In that case, Blackmer was fined for noncompliance with a subpoena. An individual facing incarceration requires more elaborate due process protections than an individual subject to a deprivation of property.

of debtors rather than the garnishment of wages, due process must attach. U.S. Const. Amend. 14 §1.[66]

*Endicott-Johnson Corp.* also deals with mechanisms to enforce judgments rather than civil contempt proceedings. The satisfaction of a judgment is a mechanical step that may not require additional fact finding. As a supplementary proceeding, civil contempt procedures do require an adjudication of new factual and legal issues prior to incarceration. *Desmond v. Hachey*, 315 F. Supp. 328, 332 (D. Me. 1970); *Yoder v. County of Cumberland*, 278 A. 2d 379, 387 n. 5 (Me. Sup. Jud. Ct. 1971).

Finally, *Endicott-Johnson Corp.* must be viewed in light of the expansion in the scope of due process that has occurred since 1924. As early as 1946, this court found in *Griffin v. Griffin*, 327 U.S. 220 (1946) that due process required post-judgment notice. The court decided that before proceedings are initiated to enforce a divorce decree,

> . . . further notice of the time and place of such further proceedings, [is required] inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not. (327 U.S. at 229).

This Court's decisions in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975) indicate that procedures are required " . . .to prevent unfair and mistaken deprivations of property". *Fuentes, supra* at 97. The same rationale requires the application of due process protections to post-judgment

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[66]While a judgment may put a debtor on notice that further steps may be taken ". . . to reach his property in satisfaction of the judgment," *Endicott, supra* at 288, it does not put a debtor on notice that he may be subject to incarceration.

proceedings,[67] where deprivation of liberty is involved. As one commentator has noted "... the mere possibility of an invalid seizure in the post-judgment area should call for notice and hearing". Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing,* 21 So. Dak. L. Rev. 78, 96 (1976).

## F. CONCLUSION

The three-judge court correctly determined that the danger of error where incarceration is possible requires substantial procedural protections. In 1898, the use of body execution in debt collection was condemned as follows:

> The method charged upon this man is that he instituted such writs by the hundred in trying to collect debts;... In most cases the debtor, who did not understand the perils of an action in tort, paid no attention to the suit and let judgment go against him by default. Then, armed with an execution which ran against the body the lawyer proceeded to make it quite unpleasant for the defendant, and of course in many cases extorted money from parties, who thought commitment to jail inconvenient and undesirable. This practice, whether or not carried on by this man, who denies it, is said to be not infrequently used by miscreants who get into the profession. Can we purge the community of such offenses by

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[67]In *Brown v. Liberty Loan Corp. of Duval*, 392 F. Supp. 1023 (M.D. Fla. 1974) the court applied due process to post-judgment garnishment because "... the notice provided in initially obtaining the judgment does not serve to provide sufficient constructive notice of the issuance of the writ of garnishment for purposes of procedural due process." *Id.* at 1037.

> occasionally hunting down a shining example of wickedness and disbarring him? We think a more comprehensive remedy should be sought. [Robinson, *Attachment of the Body Upon Civil Process*, 4 Yale L. J. 295 (1898)].

The comprehensive remedy provided by the three-judge court should be affirmed.

## II.

## THE THREE-JUDGE COURT CORRECTLY ENJOINED THE USE OF PROCEDURALLY UNCONSTITUTIONAL CIVIL CONTEMPT STATUTES.

### A. INTRODUCTION

The three-judge court properly issued orders to restrain the use of civil contempt statutes because:

(1) the state court remedy is inadequate;

(2) comity and federalism demand intervention, not deference to private litigants;

(3) non-intervention would impose an unwarranted limitation on federal court power;

(4) the statutes are flagrantly and patently unconstitutional; and

(5) the creditors utilized the statutes in bad faith.

As appellees Vail and McNair sought only damages, no injunctions issued as to them. When considering the propriety of injunctive relief, each appellee must be viewed separately. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975).

## B. INTERVENTION IS APPROPRIATE AS THE STATE COURT REMEDY IS INADEQUATE.

The inadequacy of the state court remedies renders imperative the availability of the federal forum.[68] *See generally Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975). The remedies are inadequate because the highest court in New York has decided that it does not have the power to require public compensation of assigned counsel for indigents even if a constitutional right to counsel exists. In *Matter of Smiley*, 36 N.Y. 2d 433, 330 N.E. 2d 53, 369 N.Y.S. 2d 87 (1975), the court stated:

> There are no . . . statutory provisions to cover public provision or compensation of counsel in private litigation. Nor under the State Constitution may the courts of this State arrogate the power to appropriate and provide funds . . .
>
> * * * *
>
> The appropriation and provision of authority for the expenditure of public funds is a legislative and not a judicial function, both in the Nation and in the State. It is correlated, of course, with the taxing power (see N.Y. Const., art. XVI, §1; U.S. Const., art. I §8, cl. 1). (36 N.Y. 2d at 438-439; 330 N.E. 2d at 56; 369 N.Y.S. 2d at 91-92).

Appellees were therefore effectively foreclosed from asserting in state court a cornerstone of their contention under the due process clause: that they should not face the threat of incarceration without assigned counsel. As New York courts are bound by principles of *stare decisis* to follow the rulings of the

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[68]The deficiencies in the state court remedies distinguish this case from *Cousins v. Wigoda, application for stay denied*, 409 U.S. 1201 (1972) (Rehnquist, Circuit Justice) where there was no challenge to the adequacy of the state court procedures.

New York Court of Appeals, the debtors were precluded from obtaining relief in state court on their right to assigned counsel claim.

## C. COMITY AND FEDERALISM DEMAND INTERVENTION IN CIVIL CONTEMPT PROCEEDINGS, NOT DEFERENCE TO PRIVATE LITIGANTS.

While comity requires deference to state criminal law enforcement,[69] *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), comity does not require the same deference to procedurally unconstitutional state court civil contempt statutes.[70] *Joiner v. City of Dallas*, 380 F. Supp. 754,

[69]Historically, while the ban against intervention in criminal proceedings has been strict, many implied exceptions to 28 U.S.C. §2283 (1965) have been developed by this Court in civil matters. *French v. Hay*, 89 U.S. 250 (1874); *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880); *Marshall v. Holmes*, 141 U.S. 589 (1891). *See generally Mitchum v. Foster*, 407 U.S. 225, 235 (1972). If the original Anti-Injunction Statute of 1793 was passed as part of the "...then prevailing prejudices against equity jurisdiction," as suggested by commentators, the statute was not intended to include injunctions of civil proceedings. Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1171 (1933). *See also Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 130-32 (1941).

[70]Lower courts have found intervention in state civil proceedings appropriate where the adequacy of the state court procedures were challenged. *See Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974) (three-judge court); *Desmond v. Hachey*, 315 F. Supp. 328 (D. Me. 1971) (three-judge court); *Owens v. Housing Authority of City of Stamford*, 394 F. Supp. 1267 (D. Conn. 1975).

In *New Haven Tenants' Representative Council, Inc. v. Housing Authority of the City of New Haven*, 390 F. Supp. 831 (D. Conn. 1975) the court noted that "*Gibson* indicates that comity considerations need not dissuade a federal court from acting where the state court's proceedings will not afford the plaintiffs due process of law." *Id.* at 832-33.

759 (N.D. Tex.) (three-judge court), *aff'd. mem.*, 420 U.S. 1042 (1974).

When a state initiates a criminal prosecution or a proceeding in aid of and closely related to criminal statutes, deference and non-interference is mandated. First, as Mr. Justice Stewart noted in his concurring opinion in *Younger v. Harris*, 401 U.S. 37 (1971), "[a] State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law." 401 U.S. at 55 n. 2. Second, a pending state court criminal prosecution ". . . provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights[,]" *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) for the following reasons:

> (1) the defendant has a right to counsel and assigned counsel if indigent, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1972);
>
> (2) the prosecution is invoked upon a ". . . fair and reliable determination of probable cause . . ." *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), and;
>
> (3) the criminal process is ". . . an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." 420 U.S. at 125, n.27.

None of the assumptions underlying the doctrine of non-interference in state criminal proceedings exist in civil[71] contempt proceedings. Criminal proceedings

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[71] The civil contempt procedures are clearly civil proceedings even though they utilize incarceration. §753 is entitled "Power of courts to punish for civil contempts" and defines civil contempt as ". . . misconduct, by which a right or remedy of a party to a civil action or special proceeding . . . may be defeated. . . ." New York courts have historically and consistently viewed civil contempt as civil and have distinguished it from criminal contempt. In *People v. Oyer*, 101 N.Y. 245, 4 N.E. 259 (1886), the New York Court of Appeals noted that the

*(continued)*

vindicate public concerns, while civil proceedings focus on private relationships. In the instant case, private citizens used the statutes to obtain remedial relief when debtors did not respond to disclosure subpoenas.[72] Incarceration may be ordered after a finding of willful disobedience of the disclosure subpoena, with no finding of willful disobedience of a court order. The state is not a party to the proceedings. The procedures are not related to the enforcement of state criminal laws as in *Huffman.*[73] Neither the state nor the public

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*(footnote continued from preceding page)*
distinction between civil and criminal contempt is "exhaustive and clear." While civil contempt involves the "vindication of private rights", criminal contempt involves "a violation of the rights of the public." *Id.* at 247-48, 4 N.E. at 259-60. *See also King v. Barnes*, 113 N.Y. 476, 21 N.E. 182 (1889).

*Matter of Carlson v. Podeyn*, 12 A.D. 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961) and *Dwyer v. Town of Oyster Bay*, 28 Misc. 2d 852 217 N.Y.S. 2d 392 (Sup. Ct. Nassau Co. 1961), cited by appellants, (A.B. at 13), do not hold to the Contrary. *Matter of Carlson* notes that punishment for contempt may involve loss of liberty and *Dwyer* appears to deal with a criminal contempt proceeding.

[72]"The offense to state interests is likely to be less in a civil proceeding." *Younger v. Harris*, 401 U.S. 37, 55 n.2 (1971). *See also The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 201, 217 (1972); Note, *Younger Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U.L. Rev. 870 (1975).

[73]This factor distinguishes this case from those in which the civil proceedings were used in connection with criminal law enforcement, *Duke v. Texas*, 477 F.2d 244 (5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974) or where injunctions were issued regarding internal police procedures. *Rizzo v. Goode*, 423 U.S. 362 (1976). In *Lessard v. Schmidt*, 421 U.S. 957 (1975), *on remand* No. 71 C602 (E.D. Wis. May 28, 1976) the court held that *Huffman* permitted intervention where the civil commitment statutes were not in aid of or closely related to criminal statutes, and stated that "[n]o crime must be committed for commitment, nor does the statute require a showing that the patient is a danger to society." *Id.* at 3.

has any independent interest in the information sought, the punishment, or the incarceration of the debtor. Only private interests are protected by the civil contempt statutory scheme.[74]

While elaborate procedural protections surround criminal prosecutions, not even minimal safeguards exist in civil contempt proceedings[75] which may also result in incarceration.[76] Civil contempt proceedings may commence by the service of a summons by a private party in the underlying action,[77] not after a determination of

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[74] In *Doe v. Maher*, 422 U.S. 391 (1975), *on remand*, 414 F. Supp. 1368 (D. Conn. 1976) (three-judge court) the court decided that intervention was appropriate in civil contempt proceedings because "[r]ather than a criminal prosecution, the action is instead more in the nature of a civil debt collection." *Id.* at 1373.

[75] Appellants' reliance upon *Walker v. Birmingham*, 388 U.S. 307 (1967) is misplaced. *Walker* stands for the proposition that one may not willfully disobey a court order and then seek to challenge the underlying substantive statute in criminal contempt proceedings when the constitutionality of the substantive statute may be tested before disobeying the court order. *See United States v. Ryan*, 402 U.S. 530, 532 n.4 (1971). *Walker* does not deal with a direct challenge to the constitutionality of civil contempt procedures. In *Emergy Air Freight Corp. v. Local Union 295*, 449 F.2d 586 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972) the court distinguished *Walker* on this basis and held that the contempt order had to be set aside because "... the finding of contempt in the Final Contempt Order and fine were both imposed without proper regard for ... procedural rights. ..." *Id.* at 592.

[76] The threat of incarceration distinguishes the instant case from *Lynch v. Snepp*, 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) where the court noted that "... requiring the plaintiffs to first seek vindication of their rights in the pending state court proceeding will not expose them to the risk of possible loss of liberty." *Id.* at 776.

[77] The "[c]ontempt proceedings are taken in the action itself, and do not constitute a separate special proceeding." *Drinkhouse v. Parka Corp.*, 3 N.Y. 2d 82, 90, 143 N.E. 2d 767, 771, 164 N.Y.S. 2d 1, 7 (1957). *See also Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911).

probable cause by a state official. Intervention is appropriate where the only state remedy is the challenged statutes. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973). Comity and federalism do not require deference to permit private litigants to utilize constitutionally deficient procedures.

## D. NON-INTERVENTION WOULD IMPOSE AN UNWARRANTED LIMITATION ON FEDERAL COURT POWER.

The consequences of applying the non-interference doctrine to civil contempt proceedings will not serve the interests of state and federal governments. Private citizens will be able to bar federal court involvement in consumer matters and determine the power and business of federal courts by the simple service of a state court summons.

If injunctive relief is barred in pending civil proceedings, the scope of 42 U.S.C. §1983 (1970) is seriously undercut.[78] In *Mitchum v. Foster*, 407 U.S. 225 (1972), this Court determined that §1983 came within the "expressly authorized" exception of the anti-injunction statute because it was "... an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, (which) could be given its intended scope only by the stay of a state court proceeding". 407 U.S. at 238. The purpose of §1983 was to "... interpose the federal courts between

[78]No person will have standing to obtain injunctive or declaratory relief before the civil proceeding begins. As one commentator has noted, "... the plaintiff must be able to assert the deprivation of a federally protected right to establish standing, and in a civil case not involving the state this may be impossible." Elsberry, *The Anti-Injunction Statute: A Damoclean Sword Blunted, Sharpened, Broken And...!* 22 J. Pub. L. 407, 428-29 (1973).

the States and the people, as guardians of the people's federal rights . . ." 407 U.S. at 242. This purpose is defeated if injunctions against pending state court civil proceedings are barred.[79]

## E. INTERVENTION IS APPROPRIATE WHERE STATUTES ARE FLAGRANTLY AND PATENTLY UNCONSTITUTIONAL.

The three-judge court properly intervened because the civil contempt statutes are ". . . flagrantly and patently violative of express constitutional prohibitions . . ." *Watson v. Buck*, 313 U.S. 387, 402 (1941); *Younger v. Harris*, 401 U.S. 37, 53 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975). To be incarcerated by default, *in absentia* and without the assistance of counsel is antithetical to basic due process.

## F. INTERVENTION IS APPROPRIATE WHERE CREDITORS USED CIVIL CONTEMPT STATUTES IN BAD FAITH.

If this Court finds intervention inappropriate, this case should be remanded to the three-judge court for a determination that the creditors used the civil contempt statutes in bad faith. *See generally Dombrowski v. Pfister*, 380 U.S. 479 (1965). The statutes are intended to coerce debtors, through fines and incarceration, to disclose information about their assets. With respect to

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[79]It has been noted that "[i]f that rule were applied, much of the rigidity of §2283 would be reintroduced, the significance of *Mitchum* for those seeking relief from state civil proceedings would largely be destroyed, and the recognition of §1983 as an exception to the Anti-Injunction Statute would have been a Pyrrhic victory." *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 201, 217-18 (1972). This Court has stated that repeals of statutes by implication are not favored. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972).

appellees Vail,[80] Ward, and Harvard, creditors used the procedures to collect fines from indigent debtors who had disclosed information about their assets to the creditor and whose assets were exempt from creditors' claims under New York law. *See* p. 17 n.17 *supra.*

Appellee Ward provides one example of bad faith use of the statutes. Ward appeared pursuant to a disclosure subpoena at the appointed time and place. (A.20a). The creditor's attorney, Jeffrey Graham, did not appear. (A.21a). After a court clerk phoned Graham to inform him that Ward had appeared, Graham instructed Ward on the telephone to come to his office. (A.21a). Ward went to the office. He told the lawyer he would produce the information at the court, as the subpoena ordered him to appear in court, but he would not produce the information in the attorney's office. (A.21a). On May 15, 1974, Ward was served with a notice of motion for order to find him in contempt of court, which ordered him to appear in court on May 28, 1974, and he did not appear. (A.45a). In June 1974, Ward contacted the creditor's attorney and arranged to pay $10 a week to the attorney to satisfy the judgment (A.21a). On July 4, 1974, Ward lost his job and notified the attorney that he would not be able to continue making the payments. (A.21a). The attorney became angry and told him "I'll get the money from you one way or another". The contempt motion was adjourned to July 16 and July 23, 1974 and Ward did not appear. (A.45a). On October 1, 1974, Ward passed the attorney in the street and the attorney stated: "Some people don't pay their bills and are going to jail". (A.46a). On October 3, 1974, Ward was served with an order of contempt requiring him to pay $250

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[80]The cases of Vail and Harvard are outlined at A.16a-18a and A.64a-68a, respectively, and will not be summarized here.

plus costs and attorneys fees within 30 days or be subjected to incarceration until the fine was paid. (A.22a). (The underlying judgment against Ward was for $146.84.) (A.20a). At that time, Ward's sole source of income was unemployment insurance benefits (A.23a), exempt from creditor's claims pursuant to N.Y. Labor Law §595 (McKinney 1965). These allegations are uncontroverted as defendant Goran never answered the complaint. On November 6, 1974, U.S. District Judge John M. Cannella issued a temporary restraining order to prevent the arrest and incarceration of Ward. (A.50a).

## III.

## THE THREE-JUDGE COURT CORRECTLY DECIDED TO RULE ON THE ISSUES IN THIS CASE AND NOT TO ABSTAIN.

New York's civil contempt statutes were enacted in 1909, have been construed by state courts, and are not ambiguous on their face. The New York Court of Appeals has upheld the constitutionality of the statutes. *Reeves v. Crownshield,* 274 N.Y. 74, 8 N.E. 2d 283 (1937); *In Re Barnes,* 204 N.Y. 108, 97 N.E. 508 (1912). Abstention is not warranted. As this Court noted in *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), ". . . the naked question . . . is whether that Act on its face is unconstitutional . . . Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim". 400 U.S. at 439.

An analysis of the civil contempt statutes reveals that ". . . no reasonable interpretation . . . would avoid or modify the federal constitutional question . . ." *Procunier v. Martinez,* 416 U.S. 396, 404 (1974). Section 757 fails to require that the show cause order

or warrant of attachment contain a warning that failure to appear may result in incarceration. *See* p. 13 *supra.*[81] No New York court has interpreted §757 as requiring notice that would avoid the constitutional deficiencies.[82] Section 773 permits the imposition of a fine of up to $250 and costs when no actual loss or injury has been shown. Appellants do not dispute this interpretation of the statute. *See e.g., Matter of Guyet Const. Corp.*, (Sup. Ct. N.Y. Co. August, 1976), in N.Y.L.J. Sept. 2, 1976, at 5, col. 2. *Busch v. Berg*, 384 N.Y.S. 2d 301 (4th Dept. 1976); *Joseph Riedel Glass Works, Inc. v. Kurtz & Co., Inc.*, 287 N.Y. 636, 39 N.E. 2d 276 (1941). Neither the statutes nor case law provides that individuals be notified of their right to counsel and assigned counsel if indigent. *See* p. 21 *supra.* Sections 756, 757, 770, 773, and 774 permit a finding of contempt and order of imprisonment without an actual hearing.[83] In *Darbonne v. Darbonne*, 85 Misc. 2d 267, 379 N.Y.S. 2d 350 (Sup. Ct. Kings Co. 1976) the court confirmed that *ex parte* commitment orders were generally issued in Kings County. Aside from New York City Civil Court, a hearing is generally required only where affidavits reveal factual disputes. *Pirrotta v. Pirrotta*, 42 A.D. 2d 715, 345 N.Y.S. 2d 619 (2d Dept.

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[81] Appellants did not question this interpretation in the district court. (See Defendant's District Court Brief at 20). While appellants now contend that the statute does not prohibit notice of incarceration, they do not dispute that the statute does not require such notice.

[82] *Walker v. Walker*, 51 A.D. 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976), referred to by appellants, dealt with N.Y. Domestic Relations Law §245 and not §757. After and based upon the three-judge court decision, a New York City lower court, in *Darbonne v. Darbonne*, 85 Misc. 2d 267, 379 N.Y.S. 2d 350 (Sup. Ct. Kings Co. 1976) found the statutory scheme for contempt proceedings pursuant to N.Y. Domestic Relations Law §245 unconstitutional.

[83] At the district court, appellants did not dispute this interpretation and asserted that due process did not require that debtors be brought before a judge prior to incarceration.

1973).[84] Section 774 indicates that the first time the contemnor must personally appear before the court is 90 days after the incarceration commences. *See generally People ex rel. Oppenheimer v. Rosoff,* 82 Misc. 2d 199, 368 N.Y.S. 2d 969 (Sup. Ct. N.Y. Co. 1975).

Because the statutes are inter-related and not separable, they must be viewed as a statutory scheme. *See* cases cited p. 12 note 9 *supra.* No New York court has construed the statutes to require adequate notice, assigned counsel, compensatory fines, *and* a hearing prior to incarceration. This fact distinguishes the case from *Carey v. Sugar,* 96 S. Ct. 1208, 1210 (1976), where this Court abstained because New York courts had construed N.Y.C.P.L.R. §6223 (1963) to require an adequate hearing. The three-judge court correctly decided not to abstain, noting that "... defendants [have not] suggested a limiting construction by which a state court could resolve the constitutional claim". (J.S.5a).

Appellants now contend in their brief[85] that abstention is warranted because some New York City lower courts have held that it is the "better procedure" to initiate the proceedings by the writ of attachment. *See Uni-Serv Corp. v. Linker,* 62 Misc. 2d 861, 311 N.Y.S. 2d 726 (Civil Ct. City of N.Y. 1970). The "better procedure" does not obviate the constitutional deficiencies relating to notice, counsel, and the fine and is not mandated by the statutes. The "better procedure" does not warrant abstention.

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[84] Even where affidavits reveal factual disputes, a hearing may not be granted if the affidavits are based upon hearsay. *Frigidaire Division, General Motors Corp. v. Sunset Appliance Stores, Inc.*, 46 A.D. 2d 616, 359 N.Y.S. 2d 789 (1st Dept. 1974).

[85] Appellants did not suggest a limiting construction to the three-judge court or to this Court in their Jurisdictional Statement. Question #2, (A.B. at 2), was not raised in the Jurisdictional Statement.

Abstention also should not be invoked in light of the delay and irreparable injury that will occur if the constitutional adequacy of the civil contempt statutes is not resolved. *Zwickler v. Koota*, 389 U.S. 241, 252 (1967). In *Bellotti v. Baird*, 96 S. Ct. 2857 (1976), this Court noted that:

> The practice of abstention is equitable in nature, *see Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 500-501, 61 S. Ct. 643, 645, 85 L. Ed. 971, 974-975 (1941), and it would not be improper to consider the effect of delay caused by the State's failure to suggest or seek a constitutional interpretation, Cf. *Baggett v. Bullitt*, 377 U.S. 360, 379, 84 S. Ct. 1316, 1326, 12 L. Ed. 2d 377, 389 (1964). (96 S. Ct. at 2864 n.10).

The appellants presented no limiting construction of the statutes to the three-judge court that would avoid the constitutional deficiencies. As the interpretations now suggested do not cure the constitutional deficiencies, they should not be permitted to delay the resolution of this serious consumer problem in New York.[86]

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[86]The problem has been recognized by the New York State Consumer Protection Board in their Amicus Curiae Brief and the New York State Legislature. On June 29, 1976, the New York State Legislature passed Assembly Bill No. 10319/Senate Print No. 12063 to amend the civil contempt laws. The Memorandum which accompanied the bill notes that its purpose was to "... conform to due process standards the procedure set forth in Article 19 of the Judiciary Law for punishment of civil contempts of courts". The bill was recalled on July 20, 1976 by the sponsor. Exhibit #5—Assembly Bill No. 10319/Senate Print No. 12063 and Memorandum.

## IV.

## THE THREE-JUDGE COURT DECISION IS CONSISTENT WITH REQUIREMENTS OF FULL FAITH AND CREDIT AND RES JUDICATA.

### A. U.S. SUPREME COURT RULE 15(1)(c) BARS CONSIDERATION OF APPELLANTS' RES JUDICATA AND FULL FAITH AND CREDIT ARGUMENTS.

This Court should not consider the third question raised in appellants' brief regarding full faith and credit and *res judicata*, (A.B. at 2), as that question was not set forth in appellants' Jurisdictional Statement. U.S. Supreme Court Rule 15(1)(c), 28 U.S.C.A. (1976) states that "[o]nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court". *See also* U.S. Supreme Court Rule 40(1)(d)(2), 28 U.S.C.A. (1976), *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).[87]

### B. THE THREE-JUDGE COURT DECISION IS CONSISTENT WITH NEW YORK STATE RES JUDICATA.

Pursuant to the U.S. Constitution Art. 4 §1, and 28 U.S.C. §1738 (1966), a federal court may give a state judgment the same effect it would have in state courts. In the civil contempt proceedings, state courts issued contempt orders and warrants of commitment. They did not issue judgments. In New York, principles of *res*

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[87]While appellants mentioned the words full faith and credit and *res judicata* in their Motion to Dismiss (A.164a), they never briefed or otherwise presented those issues to the three-judge court.

*judicata* do not apply to orders made on motions. *See Riggs v. Pursell,* 74 N.Y. 370, 378 (1878); *Hill v. United States,* 298 U.S. 460, 466 (1936). Therefore, the three-judge court was not bound to give *res judicata* effect to the state court orders.

## C. THE THREE-JUDGE COURT DECISION IS CONSISTENT WITH FEDERAL RES JUDICATA.

Even if New York courts would give *res judicata* effect to the state court orders, federal courts are not bound to state interpretations of *res judicata* if other important federal policies are involved. *American Mannex Corp. v. Rozands,* 462 F. 2d 688 (5th Cir.), *cert. denied,* 409 U.S. 1040 (1972). Where state court procedures violate federal constitutional rights to counsel and procedural due process, principles of *res judicata* do not preclude federal action. *See Ney v. California,* 439 F. 2d 1285 (9th Cir. 1971). *See also* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 U. Va. L. Rev. 250, 276-77 (1974).

When procedural due process violations are alleged, the Second Circuit has indicated that the question is "... whether the appellant has 'waived' his constitutional rights" rather than whether *res judicata* applies. *Lombard v. Board of Education,* 502 F. 2d 631, 636 (2d Cir. 1974), *cert. denied,* 420 U.S. 976 (1975). The court noted that "[i]t is not quite fair to say that he 'waived' his right to assert in the administrative agency itself that the process afforded was not 'due process' ". 502 F. 2d at 636.

Policies underlying the Civil Rights Act, 42 U.S.C. §1983, also require that *res judicata* not be utilized to "... deny a full, federal hearing to persons who cannot be considered to have elected to litigate their section

1983 claims in state court". Comment, 88 Harv. L. Rev. 453, 460 (1974).[88] Federal res judicata permits consideration of the federal constitutional issues of this case by the three-judge court.

## V.

## THE THREE-JUDGE COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO APPELLEES.

The three-judge court properly granted partial summary judgment as no genuine issue of fact existed and appellees were entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56; *Graham v. Richardson*, 403 U.S. 365 (1971); *Roe v. Wade*, 410 U.S. 113 (1973). Because the three-judge court found the statutes unconstitutional on their face, the only material facts involved the application of the statutes against the debtors. *Associated Press v. United States*,

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[88] Appellants' references to *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913) and *Central National Bank v. Stevens*, 169 U.S. 432 (1898) are of questionable relevance. In *Porto Rico*, *supra*, this Court decided that Puerto Rico cannot be sued without its consent. In *Central National Bank*, *supra*, this Court decided that a state court could not enjoin enforcement of a federal court decision.

326 U.S. 1 (1945). The creditors,[89] sheriff,[90] and judges[91] admitted that the civil contempt statutes were applied to all the debtors.

Indigency was not a material fact as the three-judge court held the statutes unconstitutional on their face. If it was, it was also a matter of public record as Vail,

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[89]As defendant Goran never answered, all allegations are deemed admitted as to him. Fed. Rule Civ. Proc. 8(d); *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Fannin*, 257 F. Supp. 1017 (S.D. Ohio 1966); *Campbell v. Campbell*, 170 F.2d 809 (D.C.C. 1948); 2A Moore's Federal Practice §8.29, p. 1875 (1975). As defendant Montgomery failed to respond to paragraphs 17-61 of the complaint (A.162a-163a), dealing with the use of the procedures against Vail and Ward, those paragraphs are deemed admitted. Defendant Redl admitted that the statutory scheme was used against Nameth (A.157a ¶16).

While some creditors denied knowledge or information sufficient to form a belief as to whether the procedures were used against specific debtors, [A.150a B(1); A.150a C(1); A.163a (3); A.156a (1)], the use of the procedures was a matter of public record. Defendants "... may not assert lack of knowledge or information as to matters of public record...." *Porto Transport v. Consolidated Diesel Electric Corp.*, 20 F.R.D. 1, 2 (S.D.N.Y. 1956); 2A Moore's Federal Practice §8.22, p. 1822 (1975).

[90]Sheriff Quinlan admitted:

(1) that *ex parte* commitment orders were issued by the state judges (A.149a-VII A(2) ¶¶29, 30, 31);

(2) that his deputies arrested debtors pursuant to the warrants of commitment; (Vail – A.149a-VII A(2) ¶¶32, 33; McNair – A.150a-VII C(2); Humes – A.153a-XIII B(2) ¶¶4, 6, 7, & 10; Harvard – A.153a-XV (2) ¶¶11 & 12; Nameth – A.152a-XII B(2) ¶¶4, 6, 7, & 8);

(3) that the debtors were held pursuant to §774 until they paid their respective contempt fines; (Vail – A.149a-VII A(3) & (4); McNair – A.150a-VII E(3); Harvard – A.154a-XV (3).);

(4) and that the fines were delivered to the creditors pursuant to §773 (Vail – A.149a-VII A(4); McNair – A.150a-VII C(4); Harvard – A.154a-XV (4).

[91]The Judges never disputed the use of the statutes. (*See* A.B. at 6 & 7.)

Ward, Humes, and Harvard were recipients of various public assistance grants. As such, it was not proper for some defendants to deny knowledge or information with respect to that fact. *Porto Transport v. Consolidated Diesel Electric Corp.*, 20 F.R.D. 1, 2 (S.D.N.Y. 1956); 2A Moore's Federal Practice §8.22, p. 1822 (1975). In addition, defendant Goran never answered and thus admitted all allegations regarding indigency as to Vail and Ward. Defendant Montgomery admitted allegations with respect to indigency as to Vail and Ward.

The three-judge court had the power to grant summary judgment *sua sponte*. In *Briscoe v. Campagnie Nationale Air France*, 290 F. Supp. 863, (S.D.N.Y. 1968), the court noted:

> [n]o motion has been made by Air France for summary judgment but it is evident that such a judgment should be entered and the Court has authority to direct entry of such judgment even though there is no motion. 6 Moore's Federal Practice (2d ed.) 2241-46. (290 F. Supp. at 867)

*See also Sibley Memorial Hospital v. Wilson*, 488 F. 2d 1338, 1343-44 (D.C.C. 1973); *White v. Flemming*, 374 F. Supp. 267 (E.D. Wis. 1974), *aff'd*, 522 F. 2d 730 (7th Cir. 1975); *Federal Deposit Insurance Corp. v. Sumner Financial Corp.*, 376 F. Supp. 772 (M.D. Fla. 1974).

The granting of summary judgment was proper even though appellants had not answered. Defendants Redl, Quinlan, Montgomery, and Public Loan had answered. (A.156a, A.148a, A.162a, A.160a). At the time the action came before the three-judge court, appellants' motion to dismiss had been denied for three months, as it was denied in the opinion and order convening the three-judge court on January 13, 1975. (A.112a) Pursuant to Fed. Rule of Civ. Proc. 12(a), appellants had ten days to serve their answer after the denial of

the motion to dismiss. Fed. Rule of Civ. Proc. 56(a) also indicates that summary judgment may be granted before defendants answer. *See generally Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition*, Annot., 85 A.L.R. 2d 825 (1962).

## VI.

## CLASS ACTION RELIEF WAS PROPERLY GRANTED.

Class action relief was properly granted as appellees satisfied all requirements of Fed. Rule of Civ. Proc. 23. Appellants do not dispute that the following elements of Rule 23 have been met:

1) Joinder of all persons subject to the civil contempt procedures would be impracticable. *Korn v. Franchard Corp.*, 456 F. 2d 1206 (2d Cir. 1972);

2) Appellees' claims are typical of the claims of the class and appellees have no interests "... antagonistic to or in conflict with those they seek to represent". *Cannon v. Texas Gulf Sulphur Co.*, 47 F.R.D. 60, 63 (S.D.N.Y. 1969);

3) Appellees will fairly and adequately protect the interests of the class. *Serritella v. Engelman*, 339 F. Supp. 738, 748 (D.N.J.), *aff'd.*, 462 F. 2d 601 (3d Cir. 1972);

4) Rule 23(b)(2) class status is appropriate as appellants have enforced and utilized civil contempt procedures and thus acted on grounds generally applicable to the class. *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd.*, 406 U.S. 913 (1972).

Appellees also meet the requirements of Rule 23(a)(2) as the common question of law is the constitutionality of the civil contempt statutes. Because the three-judge court held the statutes unconstitutional

on their face, the questions of law are common. *Gesicki v. Oswald, supra* at 374. Furthermore, Rule 23(a)(2) requires that the questions of law be common and not identical. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) *aff'd.*, 390 U.S. 333 (1968). Contrary to appellants' assertion, the fact that some individuals retain counsel in civil contempt proceedings or are aware of the consequences of contempt does not eliminate the common legal questions. *See generally United States ex rel. Sero v. Preiser*, 506 F. 2d 1115, 1127 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975). The Advisory Committee Notes to Rule 23(b)(2) indicate that a (b)(2) class is appropriate where

> Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class. (Proposed Rules of Civ. Proc., Rule 23, Advisory Comm. Note, 39 F.R.D. 95, 102 (1966)).

Class relief was appropriately granted by the single district judge according to 28 U.S.C. §2284(5) (1965).

Contrary to appellants' assertions, the scope of the class was not responsible for local sheriffs' decisions to stop executing contempt fine orders in matrimonial non-support cases. The effect of the three-judge court order was to prevent the use of incarceration for nonpayment of support and alimony orders pursuant to §770 and N.Y. Domestic Relations Law §245 (McKinney 1975, amending McKinney 1964), as those statutes authorize the use of civil contempt statutes in Article 19 of the Judiciary Law as an enforcement mechanism for nonpayment of alimony and support orders. The three-judge court order had no effect on the use of incarceration in the Family Court Act procedures for nonpayment of support orders. N.Y. Family Court Act §156 (McKinney 1975). (*See* p. 44 *supra*).

## VII.

## THE THREE-JUDGE COURT ORDER WAS PRESENT AND PROSPECTIVE.

The three-judge court order which declared invalid and enjoined the operation of the statutes as to ". . . all persons who have been or are presently subject to civil contempt proceedings . . ." (A.174a) was not retroactive. The fact that the court used the terms "have been" rather than "had been" confirms the present and prospective nature of the relief. The order also must be read in light of the language in the court's opinion. *See Goss v. Lopez*, 95 S. Ct. 729, 734 fn. 6 (1975). The opinion clearly states that: ". . . we declare unconstitutional and enjoin *further* application of Sections 756, 757, 770, 772, 773, 774 and 775 of Article 19 of the New York Judiciary Law". (emphasis added) (J.S.9a) The relief is appropriately present and prospective.

## CONCLUSION

For the reasons stated, the three-judge court order should be affirmed.

Respectfully submitted,

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DATED: Poughkeepsie, New York
September 28, 1976

# APPENDIX

## EXHIBIT #1 – SUBPOENA

COUNTY COURT
COUNTY OF DUTCHESS

*Index No.*

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PUBLIC LOAN COMPANY, INC.

*Plaintiff*

*against*

HARRY VAIL, JR. AND CHARLENE VAIL

*Defendant*

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*SUBPOENA (Duces Tecum)*
*To Take Deposition of Judgment Debtor*

**THE PEOPLE OF THE STATE OF NEW YORK**

TO

*The Judgment Debtor* HARRY VAIL, JR.
*Address:* CORNER OF MAIN AND WHITE STREETS POUGHKEEPSIE, NEW YORK.

GREETING:

WHEREAS, *in an action in the* CITY *court of* THE CITY OF POUGHKEEPSIE *county of* DUTCHESS *between* PUBLIC LOAN COMPANY, INC. *as plaintiff and* HARRY VAIL, JR. AND CHARLENE VAIL *as defendant who are all the parties named in said action, a judgment was entered on* JANUARY 18th, 1974 *in*

*favor of* PUBLIC LOAN COMPANY, INC. *judgment creditor and against* HARRY VAIL, JR. AND CHARLENE VAIL *judgment debtor in the amount of* $534.63 *of which* $534.63 *together with interest thereon from* JAN. 18th, 1974 *remains due and unpaid; and*

WHEREAS, *the above named judgment debtor resides; is regularly employed; has an office for the regular transaction of business in person; in* DUTCHESS *county;*

NOW, THEREFORE, WE COMMAND YOU *to appear and attend before* CHARLES P. MORROW *at* 40 Cannon Street Poughkeepsie, New York *on the* 28th *day of* May 1974 *at* 10:30 *o'clock in the* fore *noon and at any recessed or adjourned date for the taking of a deposition under oath upon oral or written questions on all matters relevant to the satisfaction of such judgment;*

AND WE FURTHER COMMAND YOU *to produce for examination at such time and place the following books, papers and records:*

ALL TAX RETURNS FROM THE YEARS 1972, 1973
ALL SAVINGS ACCOUNTS NOW ACTIVE
ALL CHECKING ACCOUNTS NOW ACTIVE
ANY LOAN BOOKS YOU MAY HAVE

*and all other books, papers and records in your possession or control which have or may contain information concerning your property, income or other means relevant to the satisfaction of the judgment;*

TAKE NOTICE *that false swearing or failure to comply with this subpoena is punishable as a contempt of court.*

WITNESS, *Honorable* ULDRICH *one of the justices of our said Court, at the Court House in the County of* DUTCHESS *the* 19th *day of* April 1974.

/s/Charles P. Morrow
Charles P. Morrow

GILDAY & MORROW, ESQS
*Attorney(s) for Judgment Creditor*
*Office and Post Office Address*
40 Cannon Street
Poughkeepsie, New York

## EXHIBIT #2 – ORDER TO SHOW CAUSE

*At a Special Term Part of the* COUNTY *Court of the* STATE OF NEW YORK *held in and for the County of* DUTCHESS *at the Court House thereof on the* 22nd *day of* July, 1974

*Index No.*

*PRESENT*
*Hon.* JIUDICE

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PUBLIC LOAN COMPANY, INC.

*Plaintiff*

*against*

HARRY VAIL, JR. AND CHARLENE VAIL

*Defendant*

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*ORDER TO SHOW CAUSE TO PUNISH–JUDGMENT DEBTOR–WITNESS– FOR CONTEMPT*

*On the subpoena, the affidavit of due service of said subpoena upon the judgment debtor (witness), * * * all of which are hereto annexed, and upon the affirmation of* CHARLES P. MORROW, ESQ. *dated* JULY 19th, 1974 *by which it appears that the person subpoenaed failed to comply with said subpoena–stipulation–and upon the notation of default appearing thereon.*

IT IS HEREBY ORDERED, *that* HARRY VAIL, JR. *appear before me or one of the justices of the* COUNTY *Court of the* DUTCHESS *County of* STATE OF NEW YORK *at a* SPECIAL *Term, Part to be held*

*at the Court House at* MARKET STREET, POUGHKEEPSIE, NEW YORK *on the* 13th *day of* AUGUST 1974 *at* 9:30 *o'clock in the* fore *noon of that day and show cause why* he *should not be punished as for contempt for violation of and non-compliance with the said subpoena* * * * *in that* he *failed to appear or respond pursuant thereto, and why* he *should not pay the costs of this motion, and why the judgment creditor herein should not have such other and further relief as may be proper.*

*Service* personnally *of a copy of this order and of the papers upon which it is based, on the said* HARRY VAIL, JR. *on or before the* 3rd *day of* AUGUST 1974 *shall be deemed sufficient.*

*Enter*

*/s/ [illegible]*
*Justice of the* COUNTY COURT

## EXHIBIT #3 – ORDER IMPOSING FINE

*At a Special Term Part of the* COUNTY *Court of the* STATE OF NEW YORK *held in and for the County of* DUTCHESS *at the Court House thereof on the* 30th *day of* August 1974

*Index No. 15643*

*PRESENT*
*Hon.* JIUDICE *Justice*

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PUBLIC LOAN COMPANY

*Plaintiff*

*against*

HARRY VAIL, JR.

*Defendant*

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*ORDER IMPOSING FINE*

*On reading the subpoena* * * * *dated* 19th of April 1974 *which directed* HARRY VAIL, JR. *to* APPEAR AND ANSWER QUESTIONS IN SUBPEONA *the affidavit* VIRGINIA TRAVER *verified the* 23 *day of* April 1974 *showing due service thereof.*

*the order to show cause why* HARRY VAIL, JR. *should not be punished for contempt of court, dated the* 22nd *day of* July 1974, *the affirmation of* CHARLES P. MORROW, ESQ. *dated the* 19th *day of* July 1974 *in support of said order; the affidavit of* VIRGINIA TRAVER *dated the* 24th *day of* July 1974 * * * *

NOW ON MOTION *of the attorney(s) for the judgment creditor, it is*

ORDERED *that this motion to punish for contempt is granted and* HARRY VAIL, JR. *is adjudged guilty of contempt of court in having wilfully disobeyed said subpoena* * * * *in that he failed to* comply therewith *and failed to satisfactorily excuse or explain said contempt; and it is*

ADJUDGED *that said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor; and it is*

ORDERED *that* HARRY VAIL, JR. *be and hereby is fined for said contempt the sum of* $250 *together with* $20 *costs of these proceedings making a total of* $270 *to be paid to the judgment creditor at the offices of the attorney(s) for the judgment creditor at* 40 Cannon Street Poughkeepsie, New York *in installments of* $10 *commencing on* week received this order *and continuing on each* week *thereafter until said total fine is paid and when paid,* $270 *thereof shall be applied toward the satisfaction of the judgment herein, and it is*

ORDERED *that a copy of this order be served upon* HARRY VAIL, JR. *personally, and it is*

ORDERED *that upon failure to pay said fine as aforesaid, the entire amount imposed shall immediately fall due and a committment order issue without further notice to the said person directed to the* * * * *Sheriff of any county within the State of New York wherein said person may be apprehended, commanding him forthwith to arrest said person without further process, and commit him to the county jail of said county and hold him in close custody until he shall pay said fine or is discharged according to law.*

*Enter*

*/s/ [Illegible]*
*Justice of the* COUNTY COURT

## EXHIBIT #4 – COMMITMENT ORDER

*At a Special Term, Part* COUNTY COURT *of the* STATE OF NEW YORK *County of* DUTCHESS, *held at the Courthouse, No.* CITY OF POUGHKEEPSIE, NEW YORK *on the* 23 *day of* Sept., 1974.

*Index No. 15643*

*Present*
*Hon.* JOSEPH JIUDICE
*Justice*

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PUBLIC LOAN

*Plaintiff(s)*

*against*

HARRY VAIL, JR.

*Defendant(s)*

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*COMMITMENT ORDER*

*On reading the subpoena* *,*,* *dated* APRIL 19th, 1974 *which directed* HARRY VAIL, JR. *to* appear and answer for examination and supplementary proceedings, *the affidavit of* Virginia Traver *verified* April 23rd 1974 *showing due service thereof. the order to show cause why* HARRY VAIL, JR. *should not be punished for contempt of court, dated* JULY 22nd, 1974, *the affirmation of* CHARLES P. MORROW, ESQ. *dated* JULY 19th 1974 *in support of said order; the affidavit of* VIRGINIA TRAVER *dated* July 24th, 1974 *showing due service of a certified copy of said order to show cause,* * * * *

AND *on reading and filing the order entered herein on* August 30th 1974 *fining the said the sum of* $270 *and directing the payment of said fine in instalments of* $10 *each commencing on* September 9th 1974 *and on reading and filing the affidavit of* George Traver *verified* September 4th 1974 *showing the service of a certified copy of said order with notice of entry thereof on said* Harry Vail, Jr. *and the* AFFIDAVIT OF NON-COMPLIANCE *dated* SEPTEMBER 16th 1974 *showing that said order has not been complied with.*

NOW ON MOTION OF GILDAY & MORROW, ESQS. *attorney(s) for* PUBLIC LOAN *judgment creditor, it is*

ORDERED, *that the motion to punish said* HARRY VAIL, JR. *for contempt is granted; and it is*

ADJUDGED, *that he is guilty of contempt of Court in having willfully disobeyed said order* * * * *dated* AUGUST 30th 1974 *in that he* failed to comply *pursuant thereto, and that he has failed to satisfactorily excuse or explain said contempt; it is*

ADJUDGED, *that his misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment creditor herein; it is*

ADJUDGED, *that he has failed to purge himself of said contempt and has failed to pay the fine imposed by said order entered on* AUGUST 30th 1974 *herein imposed on him for his said contempt, to wit, the total sum of* $270; *it is therefore*

ORDERED, *that without further notice to said* HARRY VAIL, JR. *the Sheriff of any County within the State of New York—wherein he may be apprehended shall forthwith arrest him without further process, and commit him to the County Jail of said County and hold him in close custody until he shall have paid said fine of* $270 *together with said Sheriff's*

*fees and the disbursements on the execution of this order, or is discharged according to law.*

*ENTER*

*/s/ Joseph Jiudice*
*Justice of the* COUNTY COURT

# EXHIBIT #5 – ASSEMBLY BILL NO. 10319/SENATE PRINT NO. 12063 AND MEMORANDUM

## STATE OF NEW YORK

Cal. No. 970 21063

## IN SENATE

February 26, 1976

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Assembly Bill No. 10319 introduced by Messrs. THORP, COOPERMAN–Multi-Sponsored by–Mr. DiFALCO–read twice and referred to the Committee on Judiciary–substituted for Senate Bill No. 8104 by Sen. Gordon–reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

## AN ACT

**to amend the judiciary law, the family court act and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Sections seven hundred fifty-six, seven hundred fifty-seven, seven hundred fifty-nine, seven hundred sixty-two, seven hundred sixty-three, seven hundred sixty-four, seven hundred sixty-five, seven

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EXPLANATION–Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

hundred sixty-six, seven hundred sixty-eight and seven hundred sixty-nine of the judiciary law are hereby repealed.

§2. Such law is hereby amended by adding thereto two new sections, to be sections seven hundred fifty-six and seven hundred fifty-seven, to read, respectively, as follows:

*§756. Application to punish for contempt; procedure. An application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense; or by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. The application shall be noticed, heard and determined in accordance with the procedure for a motion on notice in an action in such court, provided, however, that, except as provided in section fifty-two hundred fifty to the civil practice law and rules or unless otherwise ordered by the court, the moving papers shall be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:*

*WARNING:*
*YOUR FAILURE TO APPEAR*
*IN COURT MAY RESULT IN*
*YOUR IMMEDIATE ARREST*
*AND IMPRISONMENT FOR*
*CONTEMPT OF COURT*

*§757. Application to punish for contempt committed before referee. Where the offense is committed*

habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must[, except in a case where the production of the accused under a warrant of attachment would be dispensed with,] bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

§6. Section seven hundred seventy of such law, as amended by chapter three hundred ten of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§770. Final order directing punishment; exception. *Upon the return of an application to punish for contempt, or upon a hearing held upon a warrant of commitment issued pursuant to section seven hundred seventy-two or seven hundred seventy-three, the court shall inform the offender that he has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him.* If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except *as hereinafter provided.* [where] *Where* an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge

before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may, in its or his discretion, deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

*Where an application is made to punish an offender for an offense committed with respect to an enforcement procedure under the civil practice law and rules, if the offender appear and comply and satisfy the court or a judge before whom the application shall be pending that he has at the time no means or property or income which could be levied upon pursuant to an execution issued in such an enforcement procedure, the court or judge shall deny the application to punish the offender without prejudice to the applicant's rights and without prejudice to a renewal of the application upon notice and after proof that the financial condition of the offender has changed.*

§7. Section seven hundred seventy-two of such law, as amended by chapter two hundred ninety of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

§772. Punishment upon return of [order to show cause] *application.* Upon the return of an [order to show cause] *application to punish for contempt*, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. [Upon a certified copy of the order so made, the offender may be committed, withour further process.]

*Except as hereinafter provided, the offender may be committed upon a certified copy of the order so made, without further process. Where the commitment is*

*ordered to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and the defendant has not appeared upon the return of the application, the final order directing punishment and commitment of the offender shall include a provision granting him leave to purge himself of the contempt within ten days after personal service of the order by performance of the act or duty the omission of which constitutes the misconduct for which he is to be punished, and the act or duty to be performed shall be specified in the order. Upon a certified copy of the order, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the act or duty specified has not been performed, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such further disposition as the court in its discretion shall direct.*

§8. Section seven hundred seventy-three of such law is hereby amended to read as follows:

§773. Amount of fine. If an actual loss or injury has been [produced] *caused* to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury.

Where it is not shown that such an actual loss or injury has been [produced] *caused*, a fine [must] *may* be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

*If a fine is imposed to punish an offense committed with respect to an enforcement procedure under the civil practice law and rules or pursuant to section two hundred forty-five of the domestic relations law, and it has not been shown that such an actual loss or injury has been caused and the defendant has not appeared upon the return of the application, the order imposing fine, if any, shall include a provision granting the offender leave to purge himself of the contempt within ten days after personal service of the order by appearing and satisfying the court that he is unable to pay the fine or, in the discretion of the court, by giving an undertaking in a sum to be fixed by the court conditioned upon payment of the fine plus costs and expenses and his appearance and performance of the act or duty, the omission of which constitutes the misconduct for which he is to be punished. The order may also include a provision committing the offender to prison until the fine plus costs and expenses are paid, or until he is discharged according to law. Upon a certified copy of the order imposing fine, together with proof by affidavit that more than ten days have elapsed since personal service thereof upon the offender, and that the fine plus costs and expenses has not been paid, the court may issue without notice a warrant directed to the sheriff or other enforcement officer of any jurisdiction in which the offender may be found. The warrant shall command such officer to arrest the offender forthwith and bring him before the court, or a judge thereof, to be committed or for such other disposition as the court in its discretion shall direct.*

§9. Section seven hundred seventy-five of such law, as amended by chapter three hundred ten of the laws of nineteen hundred sixty-two, is hereby amended to read as follows:

§775. When court may release offender. Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or preformed, in order to entitle him to be released, the court, judge, or referee[, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued,] may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

*Where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, and the offender has purged himself of contempt as provided in section seven hundred seventy-two or seven hundred seventy-three of this article, the court out of which the execution was issued shall make an order directing him to be discharged from the imprisonment.*

§10. Section seven hundred seventy-seven of such law is hereby amended to read as follows:

§777. Proceedings when accused does not appear. Where a person[, arrested by virtue of a warrant of attachment,] has given an undertaking for his appearance, as prescribed in this article and fails to appear, on the return day of the [warrant] *application* the court may either issue [another] *a* warrant *of commitment* or make an order, directing the undertaking to be prosecuted; or both.

§11. Section two hundred forty-five of the domestic relations law, as amended by chapter four hundred ninety-seven of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§245. Enforcement by contempt proceedings of judgment or order in action for divorce, separation or annulment. Where the husband, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment or declaration of nullity of a void marriage rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced [by resorting to the security, if any, given as prescribed by statute, the court, in its discretion, may make an order requiring the husband to show cause before it at a time and place therein specified why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court other than a criminal contempt] *pursuant to section two hundred forty-three or two hundred forty-four of this chapter or section forty-nine-b of the personal property law, the wife may make application pursuant to the provisions of section seven hundred fifty-six of the judiciary law to punish the husband for contempt*, and where the judgment or order directs the payment to be made in installments, or at stated intervals, failure to make such single payment or installment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish him as for a contempt for his failure to pay subsequent installments, but for such purpose he may be proceeded against under the said order in the same manner and with the same effect as though such installment payment was directed to be paid by a separate and distinct order, and the provisions of the civil rights law are hereby superseded so far as they are in conflict

therewith. Such [order to show cause] *application* may also be made without any previous sequestration or direction to give security where the court is satisfied that they would be ineffectual. No demand of any kind upon the husband shall be necessary in order that he be proceeded against and punished for failure to make any such payment or to pay any such installment; personal service upon the husband of an uncertified copy of the judgment or order under which the default has occurred shall be sufficient.

§12. Section four hundred fifty-four of the family court act, as amended by chapter ten hundred ninety-seven of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

§454. Powers on failure to obey order. *1.* If a respondent is brought before the court for failure to obey any lawful order issued under this article and if, after hearing, the court is satisfied by competent proof that the respondent has failed to obey any such order, the court may

(a) commit the respondent to jail for a term not to exceed six months, if the failure was willful. Such commitment may be served upon certain specified days or parts of days as the court may direct, and the court may, at any time within the term of such sentence, revoke such suspension and commit the respondent for the remainder of the original sentence, or suspend the remainder of such sentence. Such commitment does not prevent the court from subsequently committing the respondent for failure thereafter to comply with any such order; or

(b) place the respondent on probation under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law; or

(c) proceed under part seven of this article concerning undertakings; or

(d) issue an order of sequestration under section four hundred fifty-seven.

*2.* The court in its discretion may use any or all of the powers conferred by this section.

*3. The respondent shall not be committed to jail pursuant to this section unless the court makes an order requiring such respondent to show cause at a time and place specified therein why he shall not be punished for contempt for his failure to obey any such lawful order. Such order to show cause shall be personally served upon the respondent and shall contain a clear statement of the purpose of the hearing and a warning that failure to appear may result in contempt of court and imprisonment in accord with the notice provision of section seven hundred fifty-six of the judiciary law.*

§13. This act shall take effect immediately.

# EXHIBIT #5 – MEMORANDUM

INTRODUCED BY: MR. THORP

TITLE: AN ACT to amend the judiciary law, and the domestic relations law, in relation to contempts generally and to repeal certain provisions thereof pertaining thereto

PURPOSE: The purpose of the bill is to conform to due process standards the procedure set forth in Article 19 of the Judiciary Law for the punishment of civil contempts of court.

SUMMARY OF PROVISIONS: The bill repeals the existing procedure for the punishment of contempt of court, which is initiated by order to show cause or warrant of commitment, which may be issued without notice. Under the revised procedure, an application to punish an offender for contempt will be brought on by order to show cause or notice of motion, and a hearing will be held at least ten but no more than thirty days after service of notice on the offender. If the offender fails to appear at the hearing, and the case involves supplementary proceedings to enforce a money judgment or failure to make payments for alimony or child support, the offender will be arrested and brought before the court prior to commitment for a hearing on his ability to pay.

JUSTIFICATION:

In *Vail v. Quinlan*, decided January 7, 1976 by the U.S. District Court for the Southern District of New York, a three-judge court unanimously declared unconstitutional the provisions of the New York Judiciary Law relating to punishment for civil contempts of court. The case involved a judgment debtor who had been incarcerated in the Dutchess County Jail for failure to pay a fine imposed for failure to comply with a subpoena issued pursuant to Article 52 of the CPLR. The judgment of the court, however, enjoined the enforcement of the relevant sections of the Judiciary Law without limiting the injunction to cases arising in enforcement proceedings.

Almost immediately, law enforcement officers announced that the decision in *Vail v. Quinlan* prohibited the execution of any order or warrant for civil arrest, with the minor exception of arrests ordered pursuant to CPLR Article 61. (N.Y. Law Journal, 1/12/76). Subsequently, the District Court denied an application for a stay and declared that its judgment extended to all persons committed or sought to be committed for civil contempt. (N.Y. Law Journal 1/12/76). On January 27, 1976, Supreme Court, Kings County, declared unconstitutional related provisions of the Domestic Relations Law which provide for the enforcement of

alimony and support orders by civil contempt proceedings. *Darbonne v. Darbonne* (N.Y. Times, 1/30/76).

As a result of these decisions, there exists no enforceable procedure for the civil punishment of contempts in New York State. Because the efficacy of all civil procedure depends ultimately on the power of the court to compel obedience to its orders, judgments and process, the situation threatens to deprive countless litigants of their legal remedies. Especially vulnerable are the wives and children of husbands who fail to make court-ordered alimony and support payments; many of these dependents may be forced to seek public assistance.

The provisions of the bill are designed to meet the objections raised by *Vail* and *Darbonne*, while modernizing a procedure that has existed in its present form since 1909. The bill repeals §756, which provides for the issuance of a warrant of attachment without notice where the offender has refused or neglected to obey a court order requiring the payment of a fine or other sum of money. Also repealed are nine other sections of Article 19 which relate to procedure upon warrant of attachment.

The revised procedure for punishment of contempt is set forth in a new §756, which provides for personal

service upon the offender of moving papers containing a notice warning that contempt is punishable by fine or imprisonment. The offender will not be punished if he appears and shows that he is unable to pay support or satisfy the judgment: if he fails to appear, the court may make an order of commitment granting the offender leave to purge himself of the contempt within ten days. Thereafter, the sheriff must arrest the offender and bring him before the court prior to committing him to prison. Because a hearing will precede all committments in cases arising under §245 of the DRL and Article 52 of the CPLR, no change in the procedure for periodic review set forth in §774 is necessary.

These provisions eliminate *ex parte* proceedings to punish for civil contempt, and ensure adequate notice and hearing before an offender will be committed to prison. The bill also includes a related amendment to DRL §245, which would require a wife to exhaust alternative procedures for the enforcement of support orders before resorting to contempt proceedings.