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Harold R. Medina

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CURRENT DEVELOPMENTS IN PLEADING, PRACTICE AND PROCEDURE IN THE NEW YORK COURTS†

HAROLD R. MEDINA

As it has always been a source of peculiar pleasure to me to address this association, with many of whose activities I have so long been identified, it would be ungracious of me to enlarge upon the difficulties which have beset me in preparing this address. We lawyers are so frequently called upon to put our shoulders to the wheel, particularly in times of emergency, that we sometimes take on more than the traffic will bear. Now that I have, in the performance of what I consider to be my duty, given up my teaching activities, it has become practically impossible for me continuously to examine and test these details of procedure as I did when I was younger and my professional responsibilities were of a different character. Indeed, I should not be here now were it not for Mr. Justice Shientag. He has given of his own time and energy with such a lavish hand, and has been so generous and unselfish in his efforts throughout the years to benefit the community, and especially the members of the legal profession, jointly and severally, that I simply could not say him nay.

While the statutory changes in matters of procedure generally during the years 1943 and 1944 have been numerous, many of them relate to special conditions arising out of the war and to details affecting proceedings of an unusual character which would, in any event, require specific study by the average practitioner. Happily, those alterations in the provisions applicable to ordinary civil actions in courts of general or superior jurisdiction are relatively few, and in practically every instance these changes make a clear and substantial improvement in the law.

As on prior occasions, there will be no attempt to catalogue these recent developments in the law of procedure in any complete and comprehensive manner. Such a recital would be uninteresting and time consuming and scarcely appropriate. Fortunately, a certain continuity with former addresses can be maintained by the discussion of further developments in subjects already treated. As to the remainder, it is hoped that the most vital as well as the most interesting phases of the subject have been singled out for explanation and comment.

†This speech was given before the New York Association of the Bar on Jan. 31, 1945.

AMENDED RULES OF CIVIL PRACTICE

The much needed general revision of the Rules of Civil Practice applicable to pleadings became effective September 15, 1944.

Rules 103 and 104. It is now clear that affidavits may be used in support of all motions to strike as sham, whether addressed to a part of a pleading under Rule 103 or to an entire answer or reply under Rule 104.

The procedure is similar to that on summary judgment motions, but not identical. For example, the moving party has the entire burden on a motion to strike as sham, whereas, after a prima facie showing, the adversary on a summary judgment motion must come forward and show by evidence an arguable defense or claim.

It is likely that motions to strike a part of a complaint as sham will be used extensively, as they may be made to fit into a great variety of situations. A good illustration of a pleading set-up where this particular technique is applicable arose in *Zwerdling v. Bent*.¹ In that case the striking out of certain paragraphs of the second amended complaint as sham made the remainder of the complaint subject to a motion to dismiss under Rule 107 on the ground that the cause of action alleged therein was barred by the six-year statute of limitations.

The amendments to Rules 103 and 104 eliminate many confusing conflicts in the various departments, and the rules are now in harmony with the summary judgment procedure.

Rule 105. This rule as amended makes it clear that under Rules 102, 103 and 104, as well as Rules 106 and 107, the notice of motion must be served within twenty days of the service of the pleading to which it is addressed, but may be made returnable after the twenty-day period.

Rules 106 and 107. Because of the title of these rules, most of us have been accustomed to classify them as respectively applicable to cases where the defect does or does not appear on the face of the complaint. The present form of the rules as amended is more accurate and avoids certain technical difficulties which I shall not stop to explain. Now the distinction is between a motion made on the complaint and a motion made on the complaint and an affidavit. Certain verbal changes are also made, and there is a specific provision for the service of a notice of motion "at any time prior to trial," when the motion is addressed to lack of jurisdiction over subject matter.

Rules 109 and 110. The time element of motions addressed to the answer

¹264 App. Div. 195, 35 N. Y. S. (2d) 144 (1st Dep't 1942), *aff'd* 291 N. Y. 654, 51 N. E. (2d) 933 (1943).

is now made twenty days, as in the case of similar motions addressed to the complaint, simply for the sake of uniformity. Another useful change authorizes the court, as in the case of a motion for judgment on the pleadings under Rule 112, to dismiss the complaint where a counterclaim or defense in the answer is under attack, "even in the absence of a cross-motion." As a motion addressed to a counterclaim or affirmative defense in an answer searches the record, it is obviously in the interest of simplification to allow such a dismissal, with leave to amend in appropriate cases.

The whole scheme of Rules 106 and 107 on the one hand and 109 and 110 on the other is harmonized by certain changes in Rules 109 and 110 to conform them to what has already been explained with respect to Rules 106 and 107; and, with the exception of lack of jurisdiction of the person, which is plainly inapplicable where defendant has served an answer, the grounds of a motion under Rule 110 are made the same as those under Rule 109, by adding to Rule 110 new subdivisions relating to lack of capacity, improper counterclaim, the statute of limitations and infancy, all of which may conceivably be made to appear by affidavit.

Another defect in the law, which I have pointed out on previous occasions, is eliminated by the provision now contained in Rules 109 and 110 that:

A person not a party to an action who is served with an answer pursuant to Section 271 of the Civil Practice Act may serve notice of motion to dismiss the counterclaim . . . as if he had been named a defendant in the action by the plaintiff.

Rule 111. The requirement that a motion addressed to the legal sufficiency of a reply be made within ten days has at last been eliminated. This requirement was flatly inconsistent with Civil Practice Act Section 279, and doubtless caused some confusion. It is now provided that the notice of motion specifying such an objection may be served at any time prior to trial.

Rule 113. The changes in the summary judgment procedure are in every way desirable, and they will be referred to briefly in a moment. The result, however, is a highly complicated mass of verbiage which I think has been patched up to such an extent that it would be much better entirely to eliminate the rule in its present form and substitute general language such as appears in Rule 38 of the Federal Rules of Civil Procedure, which, as to both plaintiffs and defendants, is applicable to all civil actions. When it was held by the Court of Appeals² that summary judgment procedure was available to a defendant in all actions, whether or not of the character set forth in the

²Lederer v. Wise Shoe Co., 276 N. Y. 459, 12 N. E. (2d) 544 (1938).

preliminary enumeration applicable to plaintiffs, provided the motion was based on documentary evidence or official record, there was reason to suppose that the stage was set for a simple rule which litigants might use generally. In this, as in so many other matters of procedure, the basic, fundamental notion of simplicity seems not to receive the consideration it deserves.

In any event, subdivision 2 has now been changed by substituting "for a sum of money" in lieu of "for a stated sum," so that summary judgment motions may now be based on claims for alimony arising out of foreign judgments. The language now makes it crystal-clear that summary judgment may be given as the proofs require, irrespective of who is the moving party, and the rule is also made applicable as between co-defendants. Other changes by way of clarification or codification have been made which do not alter the existing law.

COURT OF APPEALS PRACTICE

To conform with the amended Section 7 of Article 6 of the New York Constitution, which became effective January 1, 1944, certain changes have been made in Civil Practice Act Sections 588, 589, 592, 601, 604 and 605. The stipulation for judgment absolute practice is now applicable to special proceedings. The procedure in applying for leave to appeal to the Court of Appeals has also been improved by allowing the motion for leave to appeal to be made in the first instance in the Court of Appeals. This will be most helpful to lawyers in cases where the time element is important or where, as is generally the case, there seems little reason to hope that the Appellate Division will allow the appeal. The language of Section 589 as amended is very carefully drawn so as to make mutually exclusive the two methods of applying for leave to appeal. In other words, if a party defeated in the Appellate Division there moves for leave to appeal to the Court of Appeals, and, for some reason or other, the Appellate Division should delay decision of the motion, the applicant may not, in order to save time, or for any other reason, proceed forthwith to move in the Court of Appeals. Having adopted the traditional method of procedure, the applicant must await the decision of his motion in the Appellate Division before he can apply to the Court of Appeals. Moreover, if the motion is first made in the Court of Appeals and there denied, it is too late to move in the Appellate Division.

Quite a number of other changes in Court of Appeals practice have been made, but most of them are of a technical character. Lawyers should make it a habit to study, with care the material appearing each year in the Report of the Judicial Council. Indeed, the work of the Judicial Council in formu-

lating and recommending improvements in our procedure has been one of the most striking and significant developments of recent years.

REQUESTS FOR ADMISSIONS UNDER SECTION 322

Shortly after I left law school I met a friend who had graduated a year or two before I did. Naturally, he seemed the embodiment of all wisdom, and he was very free with his advice. The conversation drifted around to motions, and he solemnly pronounced this dictum: "Don't bother looking up a lot of law before making a motion—just rush right in and let the court do the rest. This will save you a lot of work and many a headache too." Needless to say, I very quickly found that this advice was bad on every count. And yet instances arise every day of motions which seem to have been made on the basis of my friend's theory. One would suppose that, at the very least, an examination would be made of the procedure detailed in the very Section of the Civil Practice Act or the Rule of Civil Practice applicable to the motion under consideration.

A very recent case, which need not be identified, relating to admissions practice under Section 322 will serve as an illustration. It will be recalled that the procedure under this Section was discussed at some length in my last address. My purpose then and my purpose now is to make the Bar more familiar with this very useful procedural device. The language of the Section is general. It provides "At any time after the pleadings are closed *in an action*. . . ." The party desiring the admission then serves his demand and the admission is deemed to have been made unless the party upon whom the demand was served: (a) obtains an extension of time by motion on notice; or (b) serves a sworn statement specifically denying the matters in question; or (c) serves a sworn statement giving the reasons why he cannot truthfully deny or admit, or setting forth some qualification, explanation or claim of privilege or disqualification.

The case I have in mind arose in the Municipal Court of the City of New York. It was a negligence case, and one of the parties had served a demand for admissions under Section 322. It occurred to the adversary party to contend that Section 322 was not applicable to negligence actions. Accordingly, a motion was made to vacate the demand. Strangely enough, the motion was granted, and I understand an appeal was taken to the Appellate Term.

There seems no reason to doubt that Section 322 is applicable to actions generally, and it would seem to be particularly useful both to plaintiffs and defendants in negligence cases. Furthermore, Section 322, as above indi-

cated, contemplates no motion addressed to the sufficiency of the demand; it obviously contemplates a simple exchange of documents, the determination of questions relating to the reasonableness or unreasonableness of the refusal to make the admission being reserved until the trial "or immediately following the trial."³ Thus, a reversal will probably follow, and the case will then be in one of those procedural messes which cause so much dissatisfaction with the law.

HOSPITAL RECORDS

Much confusion has resulted from use of the word "hearsay" in the various opinions written on this subject. The term is unfortunate because it has so many different meanings. From a technical legal standpoint, every writing is "hearsay"; oral testimony of a conversation with the adversary party is "hearsay"; but admissions generally constitute an exception to the hearsay rule of exclusion, and numerous documents, when properly authenticated, become admissible in evidence under various other exceptions. I suppose one might say that "hearsay" thus made admissible for one reason or another is no longer "hearsay." This approach, however, is not merely confusing and apt to lead one into considerable circular reasoning; the real difficulty is that Section 374-a simply will not bear an interpretation which makes an entry admissible if it does not contain hearsay but not admissible if it does contain hearsay.

The test of admissibility is "if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter." Section 374-a continues, "*all other circumstances* of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility." Accordingly, it seems plain that the test of admissibility cannot be whether the entry records something said by a party to the action or by some third party, such as a bystander or otherwise unidentified volunteer. If such were the test and, as often is the case, the hospital record gives no inkling of the source of the information recorded, the court would be required to exclude the record despite proof that it had been made in the regular course of business and that it was the regular course of such business to make the entry.

³Cf. *Banca Nazionale Di Credito v. Equitable Trust Co.*, 221 App. Div. 555, 224 N. Y. S. 617 (1st Dep't 1927); 2 MOORE, FEDERAL PRACTICE UNDER THE NEW FEDERAL RULES (1938) 2660-1.

True it is that in the police blotter cases, which first presented the problem, the courts made reference to the fact that "The policeman who made it was not present at the time of the accident."⁴ But the decision would have been no different had it so happened that the particular officer who made the blotter entry was an eye-witness to the event he recorded. The test and the ground of decision was "The memorandum in question was not made in the regular course of any business, profession, occupation or calling."⁵ In so holding, the Court of Appeals, in *Johnson v. Lutz*, was called upon to interpret the statute, as it was contended that the making of such blotter entries by policemen as required by police regulations, was a making of an entry in "the regular course of any business."

This, it seems to me, as I indicated in my last address before this association, must be the sound method of approach, unless we are completely to disregard the language of the statute and say that the courts should decide the matter in the way they consider most expedient and just.⁶

In *Del Re v. City of New York*,⁷ Mr. Justice Steinbrink laid down the rule which I think should prevail. The infant plaintiff in that case had been injured in the subway. He claimed the train had made an "unusual" stop, and defendant claimed that plaintiff was pushed by another boy in the course of a little roughhousing. Specific objection was made to the portion of the hospital record which stated "patient was riding in subway, when it came to a sudden stop, at 25th Ave. & 86th St." The trial court overruled the objection, and the judgment for plaintiff entered on the jury's verdict was reversed by the Appellate Term on the ground that this portion of the hospital record should have been excluded. This result is placed squarely on the proper ground, namely, that

It was the business of the hospital to diagnose the patient's condition and to treat him, not to record a statement derived from an unidentified source describing the manner in which the patient's injuries were sustained.

In passing, it is interesting to note that even so scholarly and precise a jurist as Mr. Justice Steinbrink could not resist the temptation to bolster up the result by reference to the "unidentified source" of the information recorded. It would have made no difference, as I read the statute, whether

⁴*Needle v. New York Railways Corp.*, 227 App. Div. 276, 237 N. Y. S. 547 (1st Dep't 1929); *Johnson v. Lutz*, 253 N. Y. 124, 170 N. E. 517 (1930).

⁵*Johnson v. Lutz*, 253 N. Y. 124, 127, 170 N. E. 517, 518 (1930).

⁶An inquiry in each class of cases into the "trustworthiness of the records" amounts to the same thing. See Note (1943) 43 Col. L. Rev. 392.

⁷180 Misc. 525, 42 N. Y. S. (2d) 825 (Sup. Ct. 1943).

or not the identity of the source was established or whether that source was the patient himself. And this result must be the same whether the entry is offered by one party or the other, whether it be in the nature of an admission or a self-serving declaration. The question is, "Was the entry made in the regular course of business and was it the regular course of business to make such entry?"

The *Del Re* decision is significant and helpful because it rests upon a sound reading of the statute and upon a sound basis of fact, as everyone knows that it is not the business of the hospital to make a record of the manner in which accidents occur.⁸

The balance of the opinion is interesting. Three leading cases are cited: *Palmer v. Hoffman*,⁹ in which Mr. Justice Douglas, in affirming a ruling which excluded a written statement by the engineer of a train when interviewed after an accident by a representative of the railroad and a representative of the Massachusetts Public Utilities Commission, as "not a record made for the systematic conduct of the business as a business," made a classic analysis of the similar federal statute, and *People v. Kohlmeyer*,¹⁰ and *Meiselman v. Crown Heights Hospital*,¹¹ both discussed by me in my last address.

One other case of considerable importance is mentioned, but not discussed at length, in the opinion of Mr. Justice Steinbrink, doubtless because it had little bearing on the specific issue presented in the *Del Re* case. I refer to *Roberto v. Nielson*.¹²

In the *Roberto* case the hospital records contained the two following statements, described in the record in that case as defendant's Exhibits B and C for identification:

C. C. Auto accident. The patient is too limited in vocabulary, and too groggy from drink and paralydehide to give a very good story, but evidently, after a day of beer and wine drinking, he was somehow involved in an auto accident. The actuality of the coma was not elicited, but the patient was brought in by police. (Ital. the Court's.)

Pt [patient] is very inco-operative. Adequate determination of mental state is impossible (states that he has been drunk and says that he has had an injection in arm).

⁸Cf. *Constantinides v. Manhattan Transit Co.*, 264 App. Div. 147, 34 N. Y. S. (2d) 600 (1st Dep't 1942).

⁹318 U. S. 109, 63 Sup. Ct. 477 (1943).

¹⁰284 N. Y. 366, 31 N. E. (2d) 490 (1940).

¹¹285 N. Y. 389, 34 N. E. (2d) 367 (1941).

¹²262 App. Div. 1035, 30 N. Y. S. (2d) 334 (2d Dep't 1941), *aff'd without opinion*, 288 N. Y. 581, 42 N. E. (2d) 27 (1942), Loughran, Rippey and Conway, JJ., dissenting.

The Appellate Division reversed a judgment entered on a verdict in plaintiff's favor and directed a new trial on the ground that both exhibits were erroneously excluded, with the exception of the italicized portion of defendant's Exhibit B for identification above set forth. Mr. Justice Hagarty concurred in the result, and Mr. Justice Close dissented and voted to affirm. The affirmance and entry of judgment absolute in the Court of Appeals was by a 4 to 3 vote.

What is it about these particular hospital records that makes the question so difficult? Why did not the Court of Appeals make this case the occasion for a definitive opinion settling the various questions of the interpretation of Section 374-a, which have so perplexed the Bar and the trial courts?

Perhaps one person's guess is as good as another's. It is my thought that there would probably be no difference of opinion whatever among the judges of the Court of Appeals were the statement in the hospital record a mere recital of how the accident occurred. The difficulty is that it is the business of those connected with hospitals to make some ascertainment of facts bearing upon the nature of the injuries which the patient has sustained to guide the doctors in their diagnosis and treatment. The exhibits in the *Roberto* case are on the borderline; they may be interpreted either way by reasonable men. If the true rule is that a mere recording of the way in which the accident occurred is to be ruled out and a recital of facts bearing upon the patient's condition and the nature of his injuries is to be ruled in, it is easy to understand why the *Roberto* case was not a very good one in which to formulate any rule. Another circumstance of no mean importance is that there is never any way of telling how much some individual member of the Court of Appeals may be influenced by the stipulation for judgment absolute, which leaves the court no alternative, in the event of affirmance, than to enter final judgment against the appellant.

All this leads me to a case decided in May, 1944, in the Supreme Court of Kings County. In *Cerniglia v. City of New York*,¹³ Mr. Justice Swezey had under consideration a motion by plaintiffs to set aside a verdict and for a new trial on the ground of the admission of the following portion of a hospital record:

Plaintiff states that she fell down as she was getting off a street car. She doesn't recall how she fell but thinks her heels slipped on the street.

The motion was denied, and the court, in holding that the above quoted portion of the hospital record had been properly admitted, based the decision

¹³182 Misc. 441, 49 N. Y. S. (2d) 447 (Sup. Ct. 1944).

upon the *Kohlmeyer* case, the *Meiselman* case and the *Roberto* case, to which I have already referred.

It seems to me that the *Cerniglia* case is not properly decided. It is certainly at direct variance with the *Del Re* case, in which Mr. Justice Steinbrink wrote for the Appellate Term. The hospital record in the *Cerniglia* case was a mere recital of how the accident occurred, and it should not have been admitted unless the courts are prepared to say that it is the business of a hospital to make a record of the manner in which accidents occur. Nor do I see anything in the *Roberto* case, much less in the *Kohlmeyer* or *Meiselman* cases, to require the decision made in the *Cerniglia* case.

Before leaving this subject it may be well to emphasize a point which is referred to in almost every one of the cases in some form or another. It will not suffice, when a hospital record is offered in its entirety, for the other side merely to object in general terms as incompetent, irrelevant and immaterial. The objection should be specific and should be addressed to the particular portion of the hospital record which it is claimed is not admissible under Section 374-a. Incidentally, this is the practice which was followed in the *Del Re* case, and in the *Cerniglia* case as well.

ATTACHMENTS

With every passing day more grief is piling up in connection with the "streamlining" of the attachment procedure in 1940 and 1941. I need not repeat the criticisms which I have voiced here on previous occasions. Perhaps one of the obstacles to changes in this unsatisfactory state of the law is that it is hard to figure out changes which should not further complicate liens and other interests in property running into millions of dollars. With the continuance of the war and the freezing of the assets of individuals and corporations located in many of the countries of Continental Europe, it must be admitted that the requirement of the bringing of an action within 90 days after the attachment or the obtaining of an extension of time has worked great hardship.

There are two points, however, which may now perhaps be discussed with some profit. The first of these relates to the procedure in obtaining extensions under Section 922. In *Garey v. Tobey*,¹⁴ an extension for a comparatively short period was obtained on plaintiff's behalf during the 90-day period. Later, and after the expiration of the 90-day period, plaintiff obtained another *ex parte* extension. On a motion to vacate the second exten-

¹⁴49 N. Y. S. (2d) 612 (Sup. Ct. 1944).

sion, Mr. Justice Koch granted the motion on the ground that Section 922 contained the clause "provided that a certified copy of the said order is, prior to the expiration of the said 90 days, served. . . ." He also referred to somewhat similar language in the same paragraph of Section 922, which contained the words "prior to the expiration of said 90 days." This unnecessarily strict interpretation of the section was rejected by the Appellate Division.¹⁵ The reversal in the Appellate Division was by a unanimous court, the memorandum decision reading in its entirety:

Civil Practice Act Section 922 does not limit the extensions which may be granted to a single period of 90 days.

This seems to be a sound interpretation of the legislative intent.¹⁶ To hold otherwise would certainly put plaintiffs in a sad predicament.

This brings me to the collateral question of how long an extension the court may grant, in the exercise of its discretion. I have received information about a large number of these *ex parte* extensions, most of which are for periods of days or a few months. Several of these orders, however, have extended the time to a period of months after the termination of the war,¹⁷ or after postal communications are reinstated with the country in which the interested party resides.¹⁸ I see no reason to doubt the validity and propriety of these orders.

On the other hand, in one case where no extension whatever had been procured during the ninety-day period, an extension was given *nunc pro tunc* until six months after the war. In my opinion this order is a nullity, as subdivision 2 of Section 922 seems clearly to provide that if no extension has been obtained and no action begun, as provided in subdivision 1, "the levy shall be void." Perhaps the courts may take a more lenient view, but I do not see how the validity of *nunc pro tunc* orders can be reconciled with the Section as it now reads.

There is another matter which may conceivably cause serious difficulty. If a warrant of attachment is levied by the service of a certified copy of the warrant upon some third person claimed to be indebted to the defendant,

¹⁵268 App. Div. 853 (1944).

¹⁶The first extension obtained in *Garey v. Tobey* was obtained within the ninety-day period prescribed in Section 922 and was for ninety additional days. The second extension, obtained before the expiration of the time granted in the first extension order, but after the expiration of the ninety-day period prescribed in Section 922, was for an additional one hundred and twenty days.

¹⁷See, for example, the order granted on September 13, 1943, in *Savatie v. Bergerat*, N. Y. County Clerk's Index No. 11515 (1943).

¹⁸See order granted in *Bendiks v. De Gruyter*, N. Y. County Clerk's Index No. 17542 (1943).

the levy is, according to the plain provisions of Section 922, void unless an action is brought within the ninety-day period or an extension of time obtained, as explained above. I am informed that the number of instances where, either through inadvertence or neglect or ignorance of the law or for some other reason, attachment proceedings have thus become void is quite large, and the amounts involved run into the millions. The sheriff claims to be entitled to poundage fees, but in no instance known to me has the matter been brought to an issue.

Section 1558, subdivision 18, provides in substance that where a levy has been made under a warrant of attachment and the warrant of attachment is vacated or set aside or otherwise discharged by order of the court, the sheriff is entitled to poundage upon the value of the property attached, with certain limitations. Thus far no order has been made which could be construed as vacating or setting aside or otherwise discharging any one of these warrants of attachment or the levies made thereunder. This is what apparently is a source of some discomfiture to the sheriff, who vigorously asserts that orders should be entered in all these cases and that, even in the absence of an order, he still has a lien for his poundage fees. Perhaps some day someone will accommodate the sheriff by making a motion for an order vacating, setting aside or otherwise discharging one of these attachments. In the meantime, the matter rests in *nubibus*.

JUDICIAL NOTICE OF MATTERS OF LAW

Upon the recommendation of the Judicial Council a new Section of the Civil Practice Act, Section 344-a, became effective September 1, 1943. It represents an immense amount of research and study and is a carefully integrated treatment of the entire subject of judicial notice of matters of law. It represents one of the finest pieces of procedural draftsmanship that has come to my attention. In substance it abolishes most of the confusing exceptions which so delighted the hearts of Bar examiners as far back as I can remember. For example, the court may now take judicial notice of a private act of the New York Legislature or of the Congress of the United States; it may also take judicial notice of the city ordinances of any city, county, town or village in the State of New York, and it may take judicial notice of any "law, statute, proclamation, edict, decree, ordinance, or the unwritten or common law of a sister state, a territory or other jurisdiction of the United States, or of a foreign country or political subdivision thereof."

One of the most significant provisions of this new section is subdivision (D), which provides:

The failure of either party to plead any matter of law specified in this Section shall not be held to preclude either the trial or appellate court from taking judicial notice thereof.

While Section 391, relative to proof of statutes, decrees and decisions of another state and country, remains, that Section has been amended so as specifically to provide that the books of reports of cases must be admitted as presumptive evidence "of the unwritten or common law thereof." It would seem that most, if not all, of the old technicalities have been eliminated.

While the Section in general terms merely provides that the court may in its discretion take judicial notice of the matters enumerated, it is interesting to observe that the general preliminary paragraph to this effect is qualified by the well-known phrase "except as otherwise expressly required by law." This qualification was added to avoid conflict with Section 982-8.0 of the Administrative Code of the City of New York, which reads as follows:

Judicial Notice. a. All courts shall take judicial notice of all laws contained in this code, the charter, local laws, ordinances, the sanitary code, resolutions, and of all rules and regulations adopted pursuant to law.

b. The supplements to the charter and code published pursuant to Section three hundred ninety-seven of the charter and the compilation of rules and regulations published pursuant to Section eight hundred eighty-five of the charter shall be prima facie evidence in all courts of the authenticity of the provisions contained therein.

There is an excellent discussion of the scope and effect of the new Section by Leonard S. Saxe, Executive Secretary of the New York State Judicial Council, in an article, "New York Extends Judicial Notice to Matters of Law," appearing in the October, 1944, issue of the *Journal of the American Judicature Society*,¹⁹ which will amply repay a careful reading.

LIMITATIONS OF TIME AFFECTING NON-RESIDENTS

To students and law teachers who would otherwise be required to go through the mental anguish of attempting to understand and reconcile the conflicting and obscure provisions of Sections 13, 19 and 55 of the Civil Practice Act, relative to non-residents and causes of action arising out of the state, the amendments to Sections 13 and 19 and the new Section 55, all of which were passed in 1943 upon recommendation of the Law Revision Commission, will come as a great relief. Without going into any lengthy explanation, it may suffice to say that one of the things accomplished by

¹⁹(1944) 28 J. AM. JUD. SOC. 86.

these sections in their present form is to incorporate the effect of the decisions in *Meyers v. Credit Lyonnais*,²⁰ *Kirsch v. Lubin*,²¹ and *National Surety Company v. Ruffin*.²² The effect of these decisions is now apparent upon the face of the Sections as they appear in the Civil Practice Act.

In addition, to overcome the effect of *Maguire v. Yellow Taxi Corporation*,²³ to the effect that the statute of limitations was not tolled against a non-resident because of the right to serve the Secretary of State under Section 52 of the Vehicle and Traffic Law, it is now provided in Section 19 that the section is inapplicable while a "voluntary or involuntary" designation made in pursuance of law remains in force. Certain other excellent changes were made in Section 19, which I will not take the time to discuss, as the subject is fully reviewed in the 1943 Report of the Law Revision Commission.²⁴

Another change of considerable practical importance was made in Section 19. The old provision that if, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for a space of one year or more, the time of his absence is not part of the time limited for the commencement of the action, has been amended so that instead of one year the period has now been reduced to four months. In this connection there is a curious discrepancy between the Section as it now appears and the reviser's notes as published in the standard editions of the Civil Practice Act. The note describes the present period as "60 days," whereas the section reads "4 months." This discrepancy is due to the fact that the Law Revision Commission recommended the sixty-day period, but the bill was amended in the Legislature to provide for a period of four months.

MISCELLANEOUS

Of the remaining changes made by the Legislature I have selected, as in the past, the four in 1943 and the four in 1944 which seem to me to be the most important from a purely practical standpoint.

They are as follows:

1. There is a new Article 79 of the Civil Practice Act (Sections 1307-18)

²⁰259 N. Y. 399, 182 N. E. 61 (1932).

²¹131 Misc. 700, 228 N. Y. S. 94 (Sup. Ct. 1927), *aff'd* 223 App. Div. 826, 228 N. Y. S. 825 (1st Dep't 1928), *aff'd* 248 N. Y. 645, 162 N. E. 560 (1928).

²²242 N. Y. 413, 152 N. E. 246 (1926).

²³253 App. Div. 249, 1 N. Y. S. (2d) 749 (1st Dep't 1938), *aff'd* 278 N. Y. 576, 16 N. E. (2d) 110 (1938).

²⁴1943 REPORT, RECOMMENDATIONS AND STUDIES OF THE LAW REVISION COMMISSION [Legis. Doc. (1943) No. 65 (F)] 127 *et seq.*

which creates and outlines the procedure of an alternative manner of proceeding in the Supreme Court with respect to express trusts. The new special proceeding by order to show cause may be used for accountings and constructions of inter vivos trusts in lieu of proceeding as before by action. This will simplify and expedite the disposition of this increasingly important phase of legal practice.

2. Section 110-a as amended now permits removal to a court having jurisdiction (generally the Supreme Court) where it appears "that the title to real property will come in question" and the court in which the action or proceeding is pending is without jurisdiction.

3. It will be recalled that Section 485 permits the entry of a default judgment by the clerk in actions based upon contracts to pay a sum of money fixed by the terms of the contract or capable of being ascertained by computation only, and certain other enumerated cases of a similar character where the complaint demands judgment for a sum of money only. Sections 230, 231, 486, 489 and 493 have been amended so as to permit the entry of judgment by the clerk in the instances specified in Section 485 where there has been substituted service of the summons. Formerly this procedure was not available where personal jurisdiction depended upon substituted service.

4. Section 1490 now gives an appellate court in actions at law the same right as previously existed in equity cases, in its discretion to withhold costs from the successful party on an appeal.

5. Section 577 has been repealed. Section 616 has been amended and a new Section 170-a was added, all in 1944, so that where the adversary attorneys refuse or fail to stipulate waiving certification, an affidavit by the attorney furnishing the papers on appeal shall take the place of a certificate. This will effectively put a stop to a practice which has become all too common with a few attorneys to make some pretext for refusing to waive certification and thus put the other side to the unnecessary expense of having the record certified by the clerk.

6. On the recommendation of the Executive Committee of the Surrogates Association of the State of New York, Section 354 has been amended so as to permit an attorney or his employees to testify "as to the revocation of a will" in addition to the provisions already contained in that section relative to testimony as to the preparation and execution of a will, indenture or deed of trust.

7. Another very excellent innovation is contained in the new Section 578-a, which provides that where an appeal is taken within five days before the time when the time of the party upon whom the notice of appeal is

served will expire, the time of the party so served to appeal shall be extended ten days after such service. Where a party has been partially successful in the court of original jurisdiction, the occasion frequently arises where one party has decided that he will appeal only if the other side appeals. As this state of mind is frequently anticipated by the adversary, there has been a certain amount of jockeying in the past in an attempt to serve the notice of appeal at the very last moment in the hope that through some slip-up the service of notice of the cross-appeal will come too late or will not be filed in time or be subject to some other defect. The new Section will eliminate the necessity for any worry on this score.

8. Section 1450 now provides that the making of a contract or submission for arbitration, providing for arbitration in this state, shall be deemed a consent of the parties to the jurisdiction of the Supreme Court of this state to enforce the contract or submission. Further amendments of the Section relate to the manner of service and include, after enumerating personal service and substituted service, the general clause "or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the court or judge may direct." Some doubt has been expressed as to the validity of this provision, but it seems likely to be sustained except in cases where the notice directed by the court or judge would plainly not constitute due process.

CONCLUSION

No person of ripe experience in litigated matters in the State of New York can examine the changes made in the past two years in matters of pleading, practice and procedure without being struck by the combination of practical wisdom, scholarly research and dislike of technicalities which has brought about these salutary reforms. Great credit is due to the Judicial Council, which has been responsible for most of them. One cannot escape the conviction that, whatever may have been the case in the past, our judges to-day are painstaking and alert to make our rules and regulations of procedure and practice a well-oiled and up-to-date machine capable of administering justice with a minimum of error.

One of the very natural effects of the war has been a considerable lessening of the amount of tinkering with the Civil Practice Act and other statutes affecting procedure by the Legislature, which has been a more or less common experience in the past. Fortunately, there is now, and has been for some years, an increasing demand for placing the rules of procedure under the

control and supervision of the Court of Appeals. This is where the power to make such rules should reside. The experience with the Federal Rules of Civil Procedure, adopted by the Supreme Court after the most careful and exhaustive study, and then at infrequent intervals amended in an orderly and systematic fashion, is a most valuable and reassuring guide.

It is my hope that the Bar, as a whole, will place itself solidly behind this most desirable and substantial reform.

Doubtless some voices may be heard in opposition. The Bar is never unanimous on any subject, nor would it be a healthy state of affairs if such were the case. I trust, however, that none of those here present will be induced to lend their influence in opposition because they may be led to believe that there is some sinister and hidden motive behind the movement to place the control and supervision of court procedure in the Court of Appeals, or that the movement is designed to bring about some particular new procedure which he may dislike. The demonstrable fact is that the movement now under way has for its sole purpose the placing of this power in the Court of Appeals. No human being can foretell, nor could any man or group of men have the influence to bring about, any particular changes in the existing procedure. If this power is given to the Court of Appeals, the court will then appoint, as did the Supreme Court of the United States, a group of distinguished and competent lawyers, and, I hope, judges as well, who will in the course of time produce for submission to the court proposed rules of procedure with their recommendation that these rules be adopted. It is fair to assume that such a group will approach the task with an open mind and a determination to do the best they can.