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Amendment of Municipal Court Code Permitting Personal Service Without the State in Lieu of Publication

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Department, on the other hand, the report must be delivered to the plaintiff as well as to the defendant.[21]

Depositions taken pursuant to the amendment which has been under discussion will not be limited in their use upon the trial of the action, to the impeaching of the witness. The legislative intent was to liken the employees and agents of partnerships and individuals to similar persons in the employ of corporations, and if this intent is recognized, the depositions will be admissible as evidence whether the witness is available or not.[22]

The recent amendment to the New York Act which has been under discussion falls far short of a complete adoption by this jurisdiction of the Federal Rules on examinations before trial. But if it is an indication of more changes to come which will tend to simplify, unify and streamline the examination before trial doctrine in New York, it should be considered as a legislative act of considerable importance.

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AMENDMENT OF MUNICIPAL COURT CODE PERMITTING PERSONAL SERVICE WITHOUT THE STATE IN LIEU OF PUBLICATION.—That no man may be deprived of life, liberty or property, without due process of law, is a principle firmly rooted in our democratic way of life.[1] But what is due process? Its definitions have been so numerous and varied that it is well nigh impossible of exact and comprehensive definition.[2] However, it has long been settled, that due process requires judicial proceedings conducted before a court of competent jurisdiction,[3] and that the person proceeded against, be entitled, as a matter of right, to notice and an opportunity to be heard.[4] Although notice is required, personal notice is not an in-

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[21] Horowitz v. B. & Q. T. Corporation, 171 Misc. 321, 12 N. Y. S. 2d 41 (N. Y. City Ct. 1939).

[22] Masciarelli v. Delaware & Hudson R. R., 178 Misc. 458, 34 N. Y. S. 2d 550 (Sup. Ct. 1942); General Ceramics Co. v. Schenley Products Co., 262 App. Div. 528, 30 N. Y. S. 2d 540 (1st Dep't 1941). N. Y. CIV. PRAC. ACT § 303.

[1] U. S. CONST. AMENDS. V, XIV; N. Y. CONST. Art. I, § 6; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940 (1934); Pratt Institute v. City of New York, 99 App. Div. 525, 91 N. Y. Supp. 136 (2d Dep't 1904); Roseman v. Fidelity and Deposit Co. of Maryland, 154 Misc. 320, 277 N. Y. Supp. 471 (N. Y. City Ct. 1935).

[2] "'Due process of law' is process due according to the law of the land." Ives v. South Buffalo Ry., 201 N. Y. 271, 300, 94 N. E. 431, 442 (1911). ". . . law in its regular course of administration through courts of justice . . ." People v. Dunn, 157 N. Y. 528, 537, 52 N. E. 572, 575 (1899). ". . . due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Westervelt v. Gregg, 12 N. Y. 202, 209, 62 Am. Dec. 160, 163 (1854).

[3] Matter of City of Buffalo, 139 N. Y. 422, 34 N. E. 1103 (1893).

[4] Jenkins v. Young, 35 Hun 565 (N. Y. 1885); People *ex rel.* Scott v.

dispensable element of due process of law. The form of notice rests largely within the legislative discretion, and the requirements of due process are met when the legislature has prescribed a kind of notice by which it is reasonably probable that the part proceeded against will be apprised of the proceedings and will be afforded an opportunity to defend.[5] Thus, provisions for substituted service on a resident,[6] service by publication,[7] and personal service without the state in lieu of publication,[8] have long been considered valid by the courts of this state, and the United States.[9] Formerly it had been well settled, as a general rule, that no service short of personal service within the jurisdiction is sufficient to support a judgment *in personam,* and that a judgment rendered upon any other service is valid only where the court may act upon a *res* within the jurisdiction, either by way of determining title, or as a result of attachment.[10] However, it is now equally well settled that personal service without the state, on a resident of the state, will give the court *in personam* jurisdiction.[11]

Section 235 of the Civil Practice Act formerly allowed personal service out of the state without an order, in Supreme Court actions where the court had jurisdiction of the *res,* or had obtained such jurisdiction as a result of a warrant of attachment. As it now stands, it provides for personal service without the state, first, where the defendant is a resident of the state, and the complaint demands judgment for a sum of money only, and second, in any case specified in Section 232, which applies to cases where the jurisdiction sought is *in rem.* The first part of this section authorizes personal service without the state, on a resident, without the necessity of obtaining a warrant of attachment, and gives the court the power to grant a judgment *in personam.*[12] That such a provision is constitutional has

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Pitt, 169 N. Y. 521, 62 N. E. 662 (1902); Matter of Lyons v. Goldstein, 290 N. Y. 19, 47 N. E. 2d 425 (1943).

[5] Matter of Barnes, 204 N. Y. 108, 97 N. E. 508 (1912); Stuart v. Palmer, 74 N. Y. 183 (1878).

[6] N. Y. Civ. Prac. Act § 230, formerly Code Civ. Proc. § 435.

[7] N. Y. Civ. Prac. Act §§ 232, 232-a, formerly Code Civ. Proc. §§ 438, 439.

[8] N. Y. Civ. Prac. Act § 233, formerly Code Civ. Proc. § 443.

[9] Continental Nat. Bank v. Thurber, 74 Hun 632, 26 N. Y. Supp. 956 (1893); Matter of the Empire City Bank, 18 N. Y. 199 (1858) (substituted service); Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867 (1905); Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928) (service by publication); Geary v. Geary, 272 N. Y. 390, 6 N. E. 2d 67 (1936) (personal service without the state).

[10] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867 (1905); Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928).

[11] N. Y. Civ. Prac. Act § 235, as amended by Laws of N. Y. 1946, c. 144 (effective September 2, 1946).

[12] *Compare* Prashker, *New York's Statutes Governing Service of Summons by Publication: Revision of 1946,* 21 St. John's L. Rev. 12 (1946) *with* Tapley, *Jurisdiction Based on Residence,* 21 St. John's L. Rev. 135 (1947).

been decided by the Supreme Court of the United States, in an action involving a similar Wyoming statute.[13] It was there held that a state does not lose jurisdiction of its residents when they absent themselves therefrom.

In 1948, the Municipal Court Code was amended by adding a section providing for personal service without the state in lieu of publication, in all cases when publication of the summons is ordered, in the same manner as if the service were within the state.[14] This provision and the provision of the Municipal Court Code providing for service by publication,[15] in effect, substantially re-enact the provisions of Sections 232, 232-a and 233 of the Civil Practice Act, applicable to the Supreme Court of New York, and thus may be considered together. The new amendment does not, however, make applicable to the Municipal Court, the provisions of Section 235, allowing personal service without an order, and in the case of a resident, where the court has not obtained jurisdiction of the *res*.

Prior to 1931, the only types of service which were valid in a Municipal Court action were personal service within the jurisdiction,[16] and substituted service upon a resident.[17] In that year, provision was made for service by publication in actions wherein a warrant of attachment had been granted, thus giving litigants in this court, a right which had existed in the case of the state courts for many years.[18] A warrant of attachment may be granted in the Municipal Court in all cases where it would be granted in a like ac-

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[13] Milliken v. Meyer, 311 U. S. 457, 85 L. ed. 278 (1940).

[14] MUNIC. CT. CODE § 21-a, added Laws of N. Y. 1948, c. 335. "In all cases when publication of the summons is ordered, service of the copy of the summons and complaint and of any accompanying notice required by rules by the delivery thereof to the defendant personally *without the state*, in the same manner as if such service were made within the state, is equivalent to notice by publication and deposit in the postoffice. The service must be made by a resident or citizen of the State of New York, or a sheriff, undersheriff, deputy sheriff, constable, bailiff or other officer having like powers and duties of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, or an attorney and/or counsellor at law, solicitor, advocate, or barrister duly qualified to practice in the state or country where such service is made, or by a United States marshal or a deputy United States marshal. *Service without the state* must be made and proof thereof must be filed within sixty days after the order is granted; otherwise the order becomes inoperative. *Service without the state* in lieu of publication is complete ten days after proof thereof is filed." (Italics added.) (Effective September 1, 1948.)

[15] MUNIC. CT. CODE § 21, amended Laws of N. Y. 1931, c. 642, adding to the provision which provided for personal service, and prohibited service by publication, a further provision that in an action wherein a warrant of attachment had been granted by the court, unless the summons is served within thirty days after the granting of the warrant, an order of the court may be obtained providing for service by publication.

[16] MUNIC. CT. CODE § 21 prior to amendment, Laws of N. Y. 1931, c. 642.

[17] MUNIC. CT. CODE § 23.

[18] MUNIC. CT. CODE § 21.

tion in the Supreme Court,[19] against all persons named in Section 40, subdivision 2 of the Municipal Court Code,[20] the fact that the defendant comes within that section to be shown by affidavit.[21] In the Supreme Court, a warrant of attachment may be granted upon the plaintiff's application in any action for the recovery of a sum of money only,[22] and consequently, an order for service by publication in the Municipal Court, or for personal service without the state in lieu thereof, after September 1, 1948, can only be granted in actions where the complaint demands judgment for a sum of money only.

Comparing the prerequisites of service by publication and personal service without the state in lieu thereof, in the Municipal Court, with those of the Supreme Court, we find two types of actions where such service is permitted in the latter court, while not permitted in the former. These are, first, actions for annulment, divorce and separation,[23] and second, actions to exclude another from an interest or lien in specific real or personal property within the state, or to enforce such a lien, or have it regulated, defined or limited.[24] The first type was properly left out of the Municipal Court Code, since that court does not have jurisdiction over such actions. However, it is submitted that there is no reason for having excluded the second type. The Municipal Court has jurisdiction in an action to foreclose a lien on a chattel,[25] or to recover a chattel whose value does not exceed $1,000.[26] While comparative statistics are not available it is submitted that the overwhelming majority of replevin actions in New York City are brought in the Municipal Court rather than in the Supreme Court. Having jurisdiction of the *res,* in an action which is strictly *in rem,* it is just as proper for the court to order service by publication, or personally without the state in lieu thereof, in such an action, as in an action where the court has obtained jurisdiction of the *res* by means of a warrant of attachment. Actually, the only thing necessary to give a court power to order either of these two methods of service, is that it be able to render a judgment that will

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[19] MUNIC. CT. CODE § 39.

[20] MUNIC. CT. CODE § 40(2) providing for a warrant of attachment where (a) defendant is a foreign corporation or a non-resident, (b) defendant is a natural person and a resident of N. Y. City, and has departed or is about to depart therefrom to defraud creditors, or avoid service, or keeps himself concealed with like intent, (c) defendant is a natural person or domestic corporation removing or about to remove property from the city to defraud creditors, or has assigned, disposed of, or secreted property with like intent, (d) defendant has made a false financial statement to procure credit, (e) defendant is a natural person, and a resident of the state, but has been outside the state for six months or more.

[21] MUNIC. CT. CODE § 40(1).

[22] N. Y. CIV. PRAC. ACT § 902.

[23] N. Y. CIV. PRAC. ACT § 232(1).

[24] N. Y. CIV. PRAC. ACT § 232(2).

[25] MUNIC. CT. CODE § 6(1).

[26] MUNIC. CT. CODE § 6(2).

be enforceable against the *res,* in the absence of the defendant.[27] Since the need for liberal and inexpensive methods of service is more apparent in the lower courts, it would be sound public policy to extend, so far as possible, the liberal rules on service of process applied in the Supreme Court. There is no reason, therefore, why such service should not be allowed, and even personal service without the jurisdiction could be permitted where only *in rem* jurisdiction is sought.

As to persons against whom such an order may be granted, the Supreme Court rule[28] allows the plaintiff greater leeway than the Municipal Court rule.[29] In the former court, in addition to those cases where such service is permitted in the Municipal Court, provision is made for either form of service where the plaintiff is unable to determine whether the defendant is a domestic corporation,[30] or a resident of the state,[31] or where the defendant is an infant, and personal service cannot be effected within the state, after due diligence, upon those persons required by statute to be served.[32]

On the whole, there should be little difficulty in the construction of this new section, since sections for all practical purposes the same as these, have been applied to actions in the Supreme Court for so many years. It is submitted, however, that there is one serious difficulty arising from the wording of this section, which cannot be resolved by resort to cases construing like sections of the Civil Practice Act, owing to the difference in jurisdiction between the two courts.

The effect of Municipal Court process is limited to the environs of New York City,[33] and it has been held that it has no power to direct service of a summons outside of the city.[34] The new section must therefore be held to modify this rule, in that, in certain cases where the court has jurisdiction of the *res,* it provides for personal service without the state, thus allowing an *in rem* judgment where process was not served within the city. But what of the person against whom an order for publication may be granted, who leaves the city, but remains within the state? It would appear that this section does not apply to him, since it specifically provides only for

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[27] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877); Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867 (1905); Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73 (1928).

[28] N. Y. CIV. PRAC. ACT § 232-a.

[29] MUNIC. CT. CODE § 40(2).

[30] N. Y. CIV. PRAC. ACT § 232-a(4).

[31] N. Y. CIV. PRAC. ACT § 232-a(6).

[32] N. Y. CIV. PRAC. ACT § 232-a(9).

[33] MUNIC. CT. CODE § 14. "The court shall have power to send its process and other mandates in an action or special proceeding of which it has jurisdiction to any part of the city of New York for service or execution, and to enforce obedience thereto, and the power and authority of said court extends to the whole of said city of New York, except as otherwise expressly prescribed in this act."

[34] Tannenbaum v. Wehrle, 133 Misc. 577, 233 N. Y. Supp. 316 (Munic. Ct. 1929).

"personal service *without* the state in lieu of publication," so that by merely driving outside of the city limits, he can accomplish what another could not by going to California, namely, evasion of personal service in lieu of publication. It is apparent that the new section was designed to relieve a plaintiff from the expenses of publication where there is only a small sum involved, the Municipal Court having jurisdiction only of actions where the amount involved is under $1,000,[35] by providing a cheaper means of service upon elusive defendants whose property is within the jurisdiction of the court. The publication statute was intended to apply to a large degree to defendants, departing or removing property from the *city*, with intent to evade service or defraud creditors. It is therefore quite probable that the new section, since it allows such personal service in all cases where publication is ordered, was intended to apply to persons without the city, whether within the state or not, there being no reason for any such restriction on its use. It is apparent, however, that the section as it now stands cannot apply to persons who remain within the state. Where words of a statute are as clear and unambiguous as they are here, no interpretation other than a strictly literal one can be given, especially in view of the many decisions which hold that provisions for methods of service other than personally within the jurisdiction are in derogation of the common law, and must be strictly construed.[36]

It is submitted that the effect of the section as it now stands is improperly and unnecessarily limited and that it should be amended by replacing the words *"without the state"* with the words *"without the city or without the state."*

MORTON S. ROBSON.

AMENDMENT TO THE GENERAL CONSTRUCTION LAW RELATIVE TO QUORUM AND MAJORITY.—Effective March 21, 1948, Section 41 of the General Construction Law defining the terms "quorum" and "majority" was amended on the recommendation of the Law Revision Commission [1] to read as follows:

> QUORUM AND MAJORITY. Whenever three or more public officers are given any power or authority, or three or more per-

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[35] MUNIC. CT. CODE § 6.

[36] Korn v. Lipman, 201 N. Y. 404, 406, 90 N. E. 861, 862 (1911), wherein it is said: "The general rule in regard to the service of process . . . is that process must be served personally within the jurisdiction . . . . Substituted service when provided by statute is in derogation of such general rule, and, consequently, the directions thereof must be strictly construed . . . ." Erikson v. Macy, 231 N. Y. 86, 131 N. E. 744 (1921); Rome Trust Co. v. Cummings, 123 Misc. 884, 206 N. Y. Supp. 728 (Sup. Ct. 1924).

[1] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65(H) (1948).