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Civil Procedure—Official Records Admissible under C.P.A. Section 374-a Without Calling Entrant as Witness

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is not itself a final determination. As the Court of Appeals stated: "There is no question but that the judgment of permanent injunction issued in 1939 was a final determination. The order of the Appellate Division reversing the order to vacate that judgment neither adds to nor detracts from the rights of the parties as determined by such judgment—it merely adheres to the already final determination. That being so, it is non-final in character and the defendant's appeal therefrom must be discissed."[56]

OFFICIAL RECORDS ADMISSIBLE UNDER CPA SECTION 374-A WITHOUT CALLING ENTRANT AS WITNESS

Prior to the enactment of Section 374-a of the Civil Practice Act any memorandum or record of a business could not be introduced into evidence without first calling as witnesses all parties who had any part in making such memorandum or record.[57] This section allows such memorandum or record to be admitted into evidence without first calling the entrant as a witness if it was made in the regular course of such business.[58]

In *Kelly v. Wasserman*,[59] plaintiff attempted to introduce records kept by the Department of Welfare of two conversations between a representative of the department and the defendant. The records, if admitted, would have produced inconsistencies in defendant's testimony as to an oral agreement had between the defendant and plaintiff that led to a conveyance of plaintiff's house to the defendant. The trial court refused to admit the records into evidence. The Appellate Division affirmed,[60] and the Court of Appeals reversed and remanded for a new trial.[61]

It was unclear to the Court whether the records were excluded by the trial court because the statements were hearsay, or because they were put in evidence as contradictory statements made by the defendant out of court for the purpose of impeaching him. The Court noted, however, that the more probable grounds for exclusion was the former since the latter ground was dispelled in *Koester v. Rochester Candy Works*.[62]

56. *Supra* note 1 at 186, 189 N.Y.S.2d 144 (1959).
57. Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).
58. N.Y. CIV. PRAC. ACT § 374-a provides:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event 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. 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.

59. 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959).
60. 6 A.D.2d 888, 177 N.Y.S.2d 1017 (2d Dep't 1958).
61. *Supra* note 59.
62. 194 N.Y. 92, 87 N.E. 77 (1909). The court said at 194 N.Y. 97, 98, "When, however, it is said that one cannot impeach his own witness by contradictory state-

Relying upon *In re Coddington's Will*[63] the Court said that even if the statements were hearsay they were still admissible under Section 374-a of the Civil Practice Act. In *In re Coddington's Will* the Court decided that certain hospital records were admissible under Section 374-a since the purpose of this section is to overcome the objection of the hearsay rule.[64]

The objection to admitting such records into evidence, and also the primary reason behind the hearsay rule, is that such admissions deny the other party an opportunity to cross-examine the entrant of such records. The Court met this objection by relying upon *Johnson v. Lutz*,[65] which disposed of this objection, but at the same time limited Section 374-a to instances where the entrant has the duty of drawing such memoranda or records.[66] The Court then pointed out in the instant case that the Department of Welfare was required by law to keep records of all telephone calls and visits connected with their beneficiaries.[67]

The decision in this case indicates that the Court is willing to lessen the strictness of the hearsay rule by giving Section 374-a a broad construction. This means that there will be a greater infringement upon the right of cross-examination. However, with the complexity of our modern business world it seems more practical and just to admit such records into evidence where the genuineness of the records is not disputed. The hearsay rule was workable a century ago but to require the complex business world of today to abide by it would result in great hardships and oftentimes exclude the best evidence available.

THIRD PARTY PRACTICE—ACTIVE AND PASSIVE NEGLIGENCE

The right of a defendant to implead another depends upon his being able to demonstrate a right to be indemnified by the one he seeks to implead.[68] Where a defendant is alleged to be only liable for active as distinguished from passive negligence, impleader is improper as a matter of law, since an actively

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ments made out of court, this statement must be limited to the case of a witness who is not the adverse party."

63. 307 N.Y. 181, 120 N.E.2d 777 (1954).

64. 307 N.Y. 181, 195: "Section 374-a of the C.P.A., providing for the admission into evidence of records made in the regular course of business, was enacted to overcome the objection that such records were hearsay."

65. *Supra* note 57.

66. 253 N.Y. 124 at 128:

> The purpose of the Legislature in enacting Section 374-a was to permit a writing or record, made in the regular course of business, to be received in evidence without the necessity of calling as witnesses all of the persons who had any part in making it, provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information.

67. N.Y. SOC. WEL. LAW §§ 80, 132; Regulations of N.Y. State Dep't of Soc. Wel. § 1.36(9).

68. "Indemnity refers to a total shifting of economic loss to the party chiefly or primarily responsible for that loss; it is to be distinguished from contribution which means a percentage distribution of the loss among a number of responsible parties." Meriam & Thornton *"Indemnity Between Tort-feasors; An Evolving Doctrine in the New York Court of Appeals."* 25 N.Y.U. LAW REV. 845 (1950).