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CPLR 202: Causes of Action by Nonresident, Time-Barred in Jurisdiction with Predominant Interest, Nevertheless Allowed in New York

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Dow Chemical Co., a Court of Appeals decision which eliminated the active-passive test for indemnification and established a system of apportionment of damages among defendants in New York. In addition and perhaps more importantly, *Dole* represents a giant step toward the adoption of a system of comparative negligence.

Other cases of special significance include *Myers v. Dunlop Tire & Rubber Corp.*, wherein causes of action by a nonresident, time-barred in the jurisdiction with the predominant interest in them, were nevertheless allowed in New York; *Dobbins v. Clifford*, wherein the court extended the *Flanagan* rule; *In re Guardianship of Ellick*, which holds that the placement of children with an adoption agency constitutes the "transaction of business" under CPLR 302(a)(1); *Prince v. Prince*, in which a court permitted substituted service under CPLR 308(5) in a divorce action; *Block v. Fairbairn*, in which a demand in a bill of particulars for identification of witnesses was permitted under special circumstances; and *Aetna Insurance Co. v. Logue*, wherein the court held that mere conclusory allegations in support of a stay of arbitration proceedings under the MVAIC statute were insufficient.

Also reported herein are eight amendments to the CPLR. It is particularly pleasing to report that the CPLR has been amended to include a Rule 327, a codification of the *Silver* case which liberalized the doctrine of *forum non conveniens*. *Silver* was examined under the *Developments in New York Practice* section in the March *Survey* of Volume 46.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to space limitations, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 202: Causes of action by nonresident, time-barred in jurisdiction with predominant interest, nevertheless allowed in New York.

To relieve its overburdened courts, New York limits the ability of nonresidents to litigate here. CPLR 202 bars an action by a nonresident

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1959 N.Y. LEG. DOC. NO. 17 ..... THIRD REP.
1960 N.Y. LEG. DOC. NO. 80 ..... FOURTH REP.
1961 FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE ..... FINAL REP.
Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committees:
1961 N.Y. LEG. DOC. NO. 15 ..... FIFTH REP.
1962 N.Y. LEG. DOC. NO. 8 ..... SIXTH REP.

on a foreign cause of action, when barred by either New York's or the foreign state's statute of limitations.[1] Whenever a motion is made to dismiss, under the statute of limitations, a cause of action with substantial foreign elements, the court must first decide the substantive governing law. The following guidelines have been suggested:

> If that determination leads to application of New York law, the case should be deemed a domestic one, the borrowing provision of CPLR Section 202 should not be applicable, and the New York statute of limitations should govern exclusively. If the determination leads to the law of State *X*, the borrowing statute should apply. . . . If State *X* has the predominant contacts, but State *Y* is also involved and has contacts equal to or greater than New York's, there should be a three-sided measurement, with the shortest statute applying.[2]

The Supreme Court, New York County, declined to follow the above guidelines in *Myers v. Dunlop Tire & Rubber Corp.*[3] Although Kentucky's one-year statute of limitations had expired, the court permitted an action against Dunlop Tire & Rubber Corporation, a New York corporation, for injuries suffered by a Kentucky resident when a tire manufactured by the defendant in New York exploded in Kentucky. Citing *Feathers v. McLucas*,[4] where the Court of Appeals held, under CPLR 302, that a tortious act was committed in the state of manufacture, the court held that the causes of action in negligence and breach of warranty had accrued in New York and therefore were not subject to Kentucky's shorter statute of limitations. The court also held that a warranty cause of action accrues where title passed.[5] The warranty cause of action was deemed to have accrued in New York since the terms of sale were "F.O.B. Buffalo" and title therefore passed upon delivery to the carrier in Buffalo. The causes of action having accrued in New York, CPLR 202 did not apply.

The *Myers* court dismissed as inapplicable *Fullmer v. Sloan's Sporting Goods Co.*,[6] where a federal district court, applying New York conflict of laws principles, dismissed, under CPLR 202, a cause of action governed by Idaho law. Therein, an Idaho plaintiff had sued a New York corporation for negligence and breach of warranty allegedly caus-

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1 *See generally* 1 WK&M ¶ 202.01. *See also The Quarterly Survey*, 41 ST. JOHN'S L. REV. 121, 126 (1966).

2 Siegel, *Conflict of Laws*, 19 SYRACUSE L. REV. 235, 255-56 (1968).

3 69 Misc. 2d 729, 330 N.Y.S.2d 461 (Sup. Ct. N.Y. County 1972).

4 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965), *discussed in The Biannual Survey*, 40 ST. JOHN'S L. REV. 125, 134 (1965).

5 69 Misc. 2d at 731, 330 N.Y.S.2d at 463. *See* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). For a symposium on *Mendel*, see 45 ST. JOHN'S L. REV. 62 *et seq.* (1970).

6 277 F. Supp. 995 (S.D.N.Y. 1967).

ing the injuries incurred when ammunition distributed by a New York corporation exploded in his face in Idaho. Under Idaho law, "the tortious act was committed in Idaho. . . ."[7]

The New York conflict of laws test is known as the "grouping of contacts" or "center of gravity" test, and applies to both contract[8] and tort[9] actions. Under this test, the place where an injury occurs is not necessarily the place where the cause of action for that injury accrues. In the *Myers* case, Kentucky is apparently the jurisdiction most intimately concerned with the causes of action. Kentucky was the residence of the plaintiff and the place where his injuries were suffered. New York was merely the state in which title passed and the residence of the defendant. In applying the substantive law of New York to determine where the causes of action accrued, the *Myers* court has failed to apply settled principles of conflict of laws. Unfortunately, CPLR 202, which was intended to preclude litigation in New York of foreign causes of action after they have become barred in more related jurisdictions, has been impeded by this decision.

The more enlightened approach would hold that a cause of action in negligence accrues in the jurisdiction most intimately connected with it.

> [U]nder a grouping of contacts, [where] foreign law has been chosen for application substantively . . . the claim is . . . a foreign one, which . . . , for CPLR Section 202 purposes, . . . "accrued" elsewhere. Here the borrowing statute should be applicable, and the shorter of the foreign versus domestic statutes of limitation should be applied.[10]

The fairness of this approach is even more obvious in the converse situation, *i.e.*, where New York is the jurisdiction most interested in a cause of action, but where such cause of action may be said to technically accrue in another jurisdiction.

> To say that the borrowing statute would then apply, leading to the possible application of a shorter foreign period of limitations to the cause, invites this: that which New York has "substantively" (by grouping of contacts) given, a foreign state has "procedurally" (by application of its shorter period of limitations) taken away. Such a result is inconsistent with the policy underlying CPLR Section 202. . . .[11]

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[7] *Id.* at 997, *citing* B.B.P. Ass'n. v. Cessna Aircraft Co., 91 Idaho 259, 420 P.2d 134 (1966).

[8] Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[9] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[10] Siegel, *supra* note 2, at 254-55.

[11] *Id.* at 254. For an excellent discussion of the motives behind CPLR 202, see George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

The same cause of action may accrue in New York for jurisdictional purposes and in another jurisdiction for statute of limitations purposes.[12] For purposes of CPLR 202, a cause of action should be deemed to accrue in the state with the most substantial contacts with it.

CPLR 203(a): Extension of the Flanagan *rule.*

Generally, the statute of limitations commences to run at the time of injury in malpractice actions.[13] Two exceptions to this rule have been created. The first — the "continuous treatment" doctrine — was enunciated in *Borgia v. City of New York.*[14] Under this doctrine, the statute does not begin to run until the services of the physician for the same or related illnesses or injuries are terminated.[15] The second — the *Flanagan* rule[16] — applies to "foreign objects." This doctrine provides that "where a foreign object has negligently been left in the patient's body, the Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice."[17]

Dobbins v. Clifford[18] was a malpractice action initiated against three physicians who operated on the plaintiff on March 10, 1966. Although the operation entailed the removal of the spleen, it was discovered in January, 1970, that the plaintiff's pancreas had been severely injured during the operation. At issue was the time the cause of action accrued.

The Appellate Division, Fourth Department, held that the plaintiff's cause of action did not accrue until discovery of the injury. It indicated that the case fell within the scope of the "foreign object" exception:

> [A]n act of malpractice [was] committed internally so that discovery [was] difficult; real evidence of the malpractice in the form of the hospital record [was] available at the time of suit; professional diagnostic judgment [was] not involved, and there is no danger of false claims.[19]

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12 It certainly does not follow that, if the "place of wrong" for purposes of conflict of laws is a particular state, the "place of the commission of a tortious act" is also that same state for purposes of interpreting a statute conferring jurisdiction, on that basis, over nonresidents. Feathers v. McLucas, 15 N.Y.2d 443, 463, 209 N.E.2d 68, 79, 261 N.Y.S.2d 8, 23 (1965).

13 *See* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1962).

14 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

15 *Id.* at 156, 187 N.E.2d at 778, 237 N.Y.S.2d at 321.

16 Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), *discussed in The Quarterly Survey,* 45 ST. JOHN'S L. REV. 500, 508 (1971).

17 *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.

18 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972).

19 *Id.* at 4, 330 N.Y.S.2d at 746-47.