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CPLR 302(a)(4): Jurisdiction Predicated upon Ownership of Property Before Cause of Action Accrued

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The decision in *Parker* is not beyond criticism. In New York, the Surrogate's Court Procedure Act (SCPA) confers jurisdiction over the recipient of a bequest from an estate²¹ and was intended to fill in specific gaps left by CPLR 302.²² If, as the Fourth Department has held, 302 is broad enough to encompass gifts, why was the SCPA provision needed?²³

In any event, before the requirement of commerciality can be disposed of, further analysis is needed.

CPLR 302(a)(4): Jurisdiction predicated upon ownership of property before cause of action accrued.

Under CPLR 302(a)(4), a nondomiciliary may be subjected to personal jurisdiction in New York if he owns, uses or possesses any real property in the state. Although the jurisdictional possibilities under this subsection are potentially broad,²⁴ there have been only a few cases to base jurisdiction under it.²⁵ Nevertheless, it has been held that at the time of service the defendant need not have any interest in the realty; it is sufficient if jurisdiction is grounded in "the relationship existing between the defendant and the realty . . . at the time the cause of action accrues."²⁶

In *Karrat v. Merhib*,²⁷ the plaintiff sued to recover brokerage commissions due under a contract for the sale of property in New York. In opposition, the defendants asserted that the cause of action accrued subsequent to the disposition of the property and, therefore, jurisdiction could not be predicated upon CPLR 302(a)(4). Nonetheless, the court ruled that by their ownership and sale of the land, the defendants had transacted business in the state.²⁸

²¹ Surr. Ct. Proc. Act § 210(2)(b) (McKinney 1967).

²² 58A MCKINNEY'S Surr. Ct. Proc. Act 210, commentary at 290 (1967).

²³ The SCPA provision has been said to include gifts *causa mortis* if the disposition of decedent's property came under the surrogate court's jurisdiction. *Id.*, commentary at 296. Thus, in *Parker*, this line of reasoning might have been followed to secure jurisdiction over the donees for the Chautauque County Surrogate's Court.

²⁴ CPLR 302(a)(4) covers any interest in real property: fee, leasehold or easement. 1 WK&M ¶ 302.12. The only limitation appears to be that the cause of action must be reasonably related to the property. 7B MCKINNEY'S CPLR 302, commentary at 433-34 (1963).

²⁵ See *Tebedo v. Nye*, 45 Misc. 2d 222, 256 N.Y.S.2d 235 (Sup. Ct. Onondaga County 1965); *Hempstead Medical Arts Co. v. Mille*, 150 N.Y.L.J. 111, Dec. 9, 1963, at 18, col. 6 (Sup. Ct. Nassau County).

²⁶ *Tebedo v. Nye*, 45 Misc. 2d 222, 223, 256 N.Y.S.2d 235, 236 (Sup. Ct. Onondaga County 1965).

²⁷ 62 Misc. 2d 72, 307 N.Y.S.2d 915 (Sup. Ct. Oneida County 1970).

²⁸ But see *Glassman v. Hyder*, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1969).

Without specifically deciding when the cause of action accrued, or if indeed the cause of action must arise at the time of ownership, the court also intimated that jurisdiction could be sustained under CPLR 302(a)(4). However, a prerequisite to jurisdiction under this subsection would appear to be that defendant has some relationship to the land at the time the cause of action accrues.²⁹ Thus, it is conceivable that other courts will adopt a stricter approach, especially when it is established that defendant has not transacted any business,³⁰ or that a number of years have passed between the disposition of the property and the accrual of the cause of action.³¹

CPLR 303: Agent for service of process relationship exists only as long as the action is pending.

The commencement of an action in New York by one who is not subject to personal jurisdiction³² is an automatic designation of his attorney in the action as his agent for service of process.³³ Consequently, a defendant who wishes to assert a cause of action in the nature of a counterclaim against the nonresident plaintiff may do so by serving the initiatory papers upon the attorney.³⁴ However, this mode of service is permissible only as long as the original action is pending,³⁵ *i.e.*, from the service of process to the entry of final judgment.³⁶

In *Banco Do Brasil v. Madison Steamship Corp.*,³⁷ the plaintiff commenced an action to recover an amount allegedly received by defendants in excess of the amount of judgment in a prior action, by serving the attorneys who had represented the defendants. Since judgment had already been entered in the original action, the court correctly held that service upon the defendants' attorneys did not secure personal jurisdiction over the defendants.

²⁹ See note 26 and accompanying text *supra*.

³⁰ See, *e.g.*, *Glassman v. Hyder*, 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1969).

³¹ See, *e.g.*, *Murphy v. Indovina*, 384 Pa. 26, 119 A.2d 258 (1956).

³² The section is not limited to nonresidents. It applies to any plaintiff over whom the defendant cannot acquire personal jurisdiction. 7B MCKINNEY'S CPLR 303, commentary at 440 (1963).

³³ CPLR 303.

³⁴ It should be noted that substituted service on the attorney rather than personal delivery is ineffective. *Twentieth Century-Fox Film Corp. v. Dupper*, 33 App. Div. 2d 682, 305 N.Y.S.2d 918 (1st Dep't 1969).

³⁵ CPLR 303. Similar statutory schemes have been upheld as a proper exercise of the state's jurisdiction. See, *e.g.*, *Adam v. Saenger*, 303 U.S. 59 (1938).

³⁶ See *Concourse Super Serv. Station, Inc. v. Price*, 33 Misc. 2d 503, 226 N.Y.S.2d 651 (Sup. Ct. Bronx County 1962). See also 7B MCKINNEY'S CPLR 303, commentary at 441 (1963).

³⁷ 61 Misc. 2d 1028, 307 N.Y.S.2d 344 (Sup. Ct. N.Y. County 1970).