

## CPLR 302(a): Third Department Refuses To Extend Long-Arm Statute in Matrimonial Action

St. John's Law Review

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in a second letter, that the grant was conditioned upon its execution of the release as drawn.

The instant proceeding, commenced within four months after receipt of the second letter but more than four months after receipt of the first, was brought to compel the respondent to deliver the grant without the covenant. However, the action was dismissed because it had not been timely brought pursuant to CPLR 217, and the appellate division unanimously affirmed.<sup>13</sup>

The Court of Appeals, reversing, held that the second letter, rather than the first, constituted the final and binding determination contemplated by CPLR 217 since its receipt was the first occasion upon which the conditional nature of the covenant was conveyed to petitioner. Moreover, the Court declared that in dealing with such a dilatory defense courts should resolve any ambiguity against the public body responsible for it. In this manner questionable cases may be determined on their merits and parties will not be denied a day in court. This conclusion is in accord with standards of fairness and due process. When a petitioner has only four months within which to act, he should not be required to guess as to when a determination of an administrative body may have become final and binding.

#### ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

*CPLR 302(a): Third department refuses to extend long-arm statute in matrimonial action.*

It has been held that the execution of a separation agreement in New York is not a "transaction of business" for the jurisdictional purposes of CPLR 302(a)(1), since such an act is not "commercial" in nature.<sup>14</sup> This holding apparently enjoys continued vitality in New York<sup>15</sup> even though some decisions have seriously undermined it<sup>16</sup> and even though it has been criticized by notable authority.<sup>17</sup>

<sup>13</sup> 29 App. Div. 2d 16, 284 N.Y.S.2d 900 (3d Dep't 1967).

<sup>14</sup> *Willis v. Willis*, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964). See *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 642, 646 (1967).

<sup>15</sup> See *Whitaker v. Whitaker*, 56 Misc. 2d 625, 289 N.Y.S.2d 465 (Sup. Ct. Ulster County 1968) (dictum).

<sup>16</sup> E.g., *Van Wagenberg v. Van Wagenberg*, 241 Md. 154, 215 A.2d 812, cert. denied, 385 U.S. 833 (1966) (New York judgment jurisdictionally based upon separation agreement given full faith and credit); *Kochenthal v. Kochenthal*, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966); *Raschitore v. Fountain*, 52 Misc. 2d 402, 275 N.Y.S.2d 709 (Sup. Ct. Monroe County 1966) (dictum); *Todd v. Todd*, 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966) (dictum). See *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 309 (1968); *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 132 (1967).

<sup>17</sup> Professor McLaughlin sees no reason why the execution of a separation agreement

The question still remains, however, whether, in the absence of this tenuous jurisdictional predicate, jurisdiction can be obtained over a spouse who is a non-domiciliary merely because the marriage occurred in New York and the parties thereafter resided in the state. In *Venizelos v. Venizelos*,<sup>18</sup> a separation action, the Appellate Division, Second Department, in an alternate holding,<sup>19</sup> suggested that jurisdiction could indeed be acquired over an absent spouse under such circumstances because of both the nature of the contacts with the state and the interests of the state in the litigation. But, in *Whitaker v. Whitaker*,<sup>20</sup> the third department recently rejected this view.

In *Whitaker*, the plaintiff-wife sought temporary and permanent alimony in a separation action. The parties had been married in New York in 1961, and, after encountering marital difficulties in 1967, the defendant-husband established a domicile in Florida, where he subsequently obtained a divorce. The husband was personally served in Florida, and the wife contended that the New York court thereby acquired jurisdiction over him. The court squarely rejected this contention.<sup>21</sup>

The facts in *Whitaker* differ only slightly from the facts in *Venizelos*, the marital domicile in the latter case being maintained in New York for nine years instead of six. However, it would not appear that the different result in *Venizelos* was prompted by the slightly longer period of domicile; assuming that it was not, it is submitted that *Whitaker* reaches the more sound conclusion.

Although expansion of our long-arm statute is welcome when it is justified, violence is done to both its letter and spirit when the act of marriage is viewed as either the transaction of business or a tortious act, notwithstanding the opinion of the spouse seeking to obtain jurisdiction.

Moreover, such a major extension of the long-arm statute would be best accomplished by the legislature. However, until such action is forthcoming, authoritative decisions from the Court of Appeals regarding both this question and the nature of separation agreements are warranted.

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is not the transaction of business. 7B MCKINNEY'S CPLR 302, supp. commentary 106, 107 (1968).

<sup>18</sup> 30 App. Div. 2d 856, 293 N.Y.S.2d 20 (2d Dep't 1968).

<sup>19</sup> The defendant in *Venizelos* was found to have waived objection to personal jurisdiction. See *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 498, 503 (1969).

<sup>20</sup> 32 App. Div. 2d 595, 299 N.Y.S.2d 482 (3d Dep't 1969), *aff'g* 56 Misc. 2d 625, 289 N.Y.S.2d 465 (Sup. Ct. Ulster County 1968). See *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 309 (1968).

<sup>21</sup> 32 App. Div. 2d at 595, 299 N.Y.S.2d at 483: