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CPLR 202: Interplay Between Long-Arm Jurisdiction and Tolling of the Statute of Limitations

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ARTICLE 2 — LIMITATIONS OF TIME

CPLR 202: Interplay between long-arm jurisdiction and tolling of the statute of limitations.

CPLR 202, known as the "borrowing" statute, provides that a cause of action accruing in favor of a nonresident without the state is barred if the period of limitations has expired either in New York or in the state in which the action arose. This provision is intended to prevent bringing suit in New York in an attempt to revive a dead cause of action.[1] When a statute is "borrowed," the time limitation is accompanied by all of its local qualifications regarding tolling and extensions.[2] Thus, the court in *Cellura v. Cellura* [3] relied on Texas law which provided that the Texas statute had been tolled due to the defendant's absence from Texas despite the availability of personal jurisdiction via a "long-arm" statute. Therefore, the New York action was not barred. In *Burris v. Alexander Mfg. Co.*,[4] the court reached an opposite conclusion because the applicable Tennessee statute of limitations was not tolled during defendant's absence from the state when "long-arm" jurisdiction was available.

Apart from merely illustrating how an opposite result is reached by applying the *Cellura* rationale, the *Burris* case marks a new development in that approach. The *Burris* cause of action accrued prior to the effective date of Tennessee's "long-arm" provision. As Tennessee had not yet adjudicated the question of retroactivity, the court applied New York law [5] to hold the jurisdictional provision retroactive.

The case indicates New York's disposition to apply its own law, in this case hostile to plaintiff, where the law of the accrual state is unresolved. This approach permits a situation to arise where a later and more favorable interpretation by the foreign state could not benefit the plaintiff. The New York adjudication would give the defendant a res judicata defense to subsequent actions both in New York [6] and in the foreign jurisdiction.[7] Since

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[1] 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 202.01 (1966).

[2] 7B McKINNEY'S CPLR 202, commentary 60 (1963).

[3] 24 App. Div. 2d 59, 263 N.Y.S.2d 843 (4th Dep't 1965).

[4] 51 Misc. 2d 543, 273 N.Y.S.2d 542 (Sup. Ct. N.Y. County 1966).

[5] Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964), wherein the CPLR was held to be applicable to all actions pending as of its effective date.

[6] Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937); Hull v. Hull, 225 N.Y. 342, 122 N.E. 252 (1919).

[7] Fauntleroy v. Lum, 210 U.S. 230 (1908).

this possibility occurs only when the law of another state is unsettled, the practitioner is advised to refrain from bringing suit in New York until the issues of retroactivity and tolling are resolved in a foreign suit.

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

CPLR 302(a)(1): Section held applicable to non-commercial transactions of business.

A distinct conflict has developed as to whether the transaction of business of a non-commercial character lies within the ambit of CPLR 302(a)(1). In *Willis v. Willis*,[8] the supreme court, New York County, held that as a matter of legislative intent the execution of a separation agreement in New York did not confer jurisdiction on the courts of this state under CPLR 302(a)(1). The court construed the word "business" in the statute to apply solely to "commercial" transactions.

The supreme court, Nassau County, has not acceded to this view of the statute. In *Todd v. Todd*,[9] the court, while holding service under CPLR 308 invalid, indicated by way of dictum that "there may well be a basis for maintaining the action in New York, for the separation agreement was apparently entered into in New York. . . ." [10] In a more recent case, *Kochenthal v. Kochenthal*,[11] the court directly confronted this issue and refused to adhere to the *Willis* decision. The court stated that it did "not hold to the belief that the statute . . . must be so narrowly construed as to be applicable only to pecuniary transactions of a commercial nature." [12]

The court in *Kochenthal* attempted to distinguish *Willis* on the basis of the fact that the defendant in *Kochenthal* was a resident of New York at the time of the execution and negotiation of the agreement and had subsequently left the state, whereas *Willis*

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[8] 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964).

[9] 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966). See also *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 644, 646 (1967).

[10] Todd v. Todd, 51 Misc. 2d 94, 96, 272 N.Y.S.2d 455, 456 (Sup. Ct. Nassau County 1966). The supreme court, Monroe County, while dismissing a suit based on a separation agreement for failure to state a cause of action, has also stated in dictum that it is not convinced of the validity of the *Willis* decision. Raschitore v. Fountain, 52 Misc. 2d 402, 275 N.Y.S.2d 709 (Sup. Ct. Monroe County 1966).

[11] 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966).

[12] *Id.* at 441, 275 N.Y.S.2d at 954.