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CPLR 325(a): Lack of Jurisdiction No Bar to Removal

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*Sacks v. Sacks*³⁹ involved an action brought by the first wife, a New York domiciliary, to have the marriage between her husband and his second wife, both non-domiciliaries, declared invalid. The court reasoned that since it was the marital status of the defendants that was being primarily affected, it was necessary that their marital res be within the state. Since defendants were non-domiciliaries, the marital res was in a foreign state. Therefore, the court lacked jurisdiction to adjudicate their marital status. The court noted, however, that under the *Chittenden* rule, jurisdiction existed to declare the nullity of the Mexican divorce because in such a case, the marital status of plaintiff, a New York domiciliary, would be primarily affected.⁴⁰ In addition, *Chittenden* appreciates the second wife's interest in the action and treats her as a necessary party, requiring that she be given notice.

Thus, the validity of service without the state under CPLR 314(1) depends on whether the court has jurisdiction over the cause of action. Where the cause of action primarily affects a domiciliary's marital status, the location of that marital res within the state gives the courts in rem jurisdiction upon which service can be based. Where the cause of action primarily affects a non-domiciliary's marital status, the courts do not have in rem jurisdiction, since that marital res is not within the state. Therefore, since the court does not have an in rem basis, service outside the state on the non-domiciliary is without effect.

It can be seen, however, that by declaring invalid the husband's Mexican divorce, the court is, for all practical purposes, voiding the second marriage. It would seem, then, that since the result would be the same in either case, the court instead of dismissing the complaint as to the non-domiciliary second wife, should have allowed the plaintiff-first wife to amend the pleadings.⁴¹

CPLR 325(a): Lack of jurisdiction no bar to removal.

Under CPA § 110, no action was to be dismissed on the ground of a mistake in the choice of court. In such a case, a justice of the supreme court could order the removal of the action to a proper court.

There were, however, conflicting constructions of this section. Some courts dismissed for lack of jurisdiction unless there was at least a semblance of jurisdiction,⁴² while others held that removal was proper even where the court completely lacked jurisdiction.⁴³

³⁹ 47 Misc. 2d 1050, 263 N.Y.S.2d 891 (Sup. Ct. N.Y. County 1965).

⁴⁰ *Id.* at 1052, 263 N.Y.S.2d at 895.

⁴¹ CPLR 3025(b).

⁴² Application of Yaras, 283 App. Div. 214, 219, 126 N.Y.S.2d 733, 738 (3d Dep't 1953), *aff'd*, 308 N.Y. 864, 126 N.E.2d 306 (1955); McCarthy v. Rocklin, 25 Misc. 2d 991, 206 N.Y.S.2d 853 (Sup. Ct. N.Y. County 1960).

⁴³ Taylor v. Goodrich, 284 App. Div. 928, 134 N.Y.S.2d 202, 203 (4th

Under CPLR 325(a), the successor to CPA § 110, the problem remains as to whether it is necessary that the original court have some semblance of jurisdiction before removal can be obtained.⁴⁴

It would seem that this problem has been resolved to some extent by the judiciary article of the state constitution⁴⁵ which grants the courts express power to transfer cases over which they lack jurisdiction. While there might be some doubt as to the interpretation of the term "lack of jurisdiction," authorities have recognized that it encompasses those situations wherein the court had no jurisdiction whatever over the case.⁴⁶

However, since the CPLR was drafted prior to the amendment of the judiciary article, some inconsistencies have resulted. Under CPLR 325(a), a motion to remove the action must be made in the supreme court. Section 19 of the judiciary article, however, directs the court of first instance to make the transfer. Moreover, under section 19, the court may transfer on its own initiative.

In *Weiser v. Burick*,⁴⁷ the county court held that it lacked jurisdiction to dissolve a partnership or provide for an accounting. Despite the absence of any semblance of jurisdiction, the court did not dismiss. Rather, it stayed the proceedings for thirty days so that either party could make an application for removal to a proper forum under CPLR 325.

Thus, the court followed that line of CPA § 110 cases and the judiciary article, which hold that even where the lower court does not have jurisdiction, removal is available. In effecting removal, the court utilized CPLR 325's procedure, and required that a motion be made to the supreme court. However, under the provisions of the judiciary article, it seems that the county court, by its own motion, could have removed the case to a proper forum.

ARTICLE 4—SPECIAL PROCEEDINGS

CPLR 403(c) and (d): Care required to fulfill court's specifications as to service of an order to show cause.

CPLR 304 provides for the commencement of a special proceeding by service of a notice of petition or an order to show cause. A notice of petition must be served in the same manner as

Dep't 1954); *Colliesion v. Colliesion*, 2 Misc. 2d 10, 154 N.Y.S.2d 345 (Westchester County Ct. 1955).

⁴⁴ See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 325.06 (1965).

⁴⁵ N.Y. CONST. art. VI, § 19.

⁴⁶ *Weiser v. Burick*, 47 Misc. 2d 962, 263 N.Y.S.2d 506 (Westchester County Ct. 1965); 7B MCKINNEY'S CPLR 325, commentary 623 (1963).

⁴⁷ *Supra* note 46.