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NOTES

ACQUISITION OF JURISDICTION OVER FOREIGN EXECUTORS AND ADMINISTRATORS IN ARBITRATION PROCEEDINGS

Introduction

In granting a motion to set aside service of process, a New York court recently decided that it could not compel a foreign executrix to proceed with an arbitration that had been consented to by her testator.¹ The holding that the court lacked jurisdiction deserves consideration because it points up what might prove to be a serious defect in the arbitration law of New York.

At common law the courts expressed their disapproval of agreements to arbitrate future disputes by refusing to enforce them.² This disfavor resulted from the apprehension that widespread utilization of these agreements would diminish the need for judicial services.³ In 1920, New York became the first state to legislate effectively to encourage arbitration agreements.⁴ The change in public policy thus manifested was the consequence of overcrowded court calendars and the more modern attitude towards litigation which favors out of court settlements between the parties to a dispute.⁵ Another ground for the legislation was the recognition that businessmen arbitrators possess a greater degree of expertise than the courts in factual commercial disputes.⁶ Today, under the New York statute, an aggrieved party may petition the supreme court to compel the recalcitrant party to honor

¹ Appeal of Gantt, 286 App. Div. 212, 141 N.Y.S.2d 738 (1st Dep't 1955).

² See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-21 (1924); *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 293, 169 N.E. 386, 389 (1929); *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 271, 130 N.E. 288, 290 (1921); *President, Managers and Company of the Del. and H. Canal Co. v. Pennsylvania Coal Co.*, 50 N.Y. 250, 258 (1872); *Horton v. Sayer*, 4 H. & N. 643, 649, 157 Eng. Rep. 993, 996 (1859); *Scott v. Avery*, V H.L.C. 811, 825, 10 Eng. Rep. 1121, 1127 (1856); *Simpson, Specific Enforcement Of Arbitration Contracts*, 83 U. PA. L. REV. 160 (1934).

³ See *President, Managers and Company of the Del. and H. Canal Co. v. Pennsylvania Coal Co.*, *supra* note 2 at 258; *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868); PRASHKER, *NEW YORK PRACTICE* 835 (3d ed. 1954).

⁴ Laws of N.Y. 1920, c. 275. See *Simpson, supra* note 2, at 166.

⁵ See Note, *Time Limitations Under The Arbitration Law*, 28 ST. JOHN'S L. REV. 47 (1953).

⁶ See Schoengold, *The Merchant—Today and Yesterday*, 5 ARB. J. (n.s.) 130 (1950).

the agreement;⁷ or, if an arbitration proceeding has been entered into, the award made by the arbitrators can be entered as a judgment in the supreme court.⁸

Matter of Gantt

The instant case illustrates how ineffectual this legislative approval may be, given a not unusual factual situation. The decedent, a resident of North Carolina, contracted in that state to purchase lumber from a Nicaraguan company. The parties agreed that:

Any controversy or claims arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by the arbitrators or a majority of them may be entered in any Court having jurisdiction. The arbitration shall be held in New York, N. Y.⁹

After a dispute arose, the seller commenced an action in New York to compel the buyer (decedent) to enter into arbitration proceedings. The defendant thereupon obtained a temporary stay so that the validity of the contract could be tested in a jury trial. Instead of proceeding with the action to determine the contract's validity, defendant sought, and was denied, a permanent injunction restraining the plaintiff from enforcing the agreement.¹⁰ The defendant subsequently died. Seven years after denial of the permanent injunction, the plaintiff moved to set aside the temporary stay and to compel the decedent's executrix to enter into arbitration proceedings. On a cross-motion to set aside service of process, the executrix prevailed; the court held that because there was no property of the estate in New York, and because the executrix was an officer of a foreign state, it lacked jurisdiction to grant the relief requested. It can thus be seen that if a

⁷ N.Y. CIV. PRAC. ACT § 1450.

⁸ *Id.* § 1461.

⁹ *Matter of Gantt*, 297 N.Y. 433, 436, 79 N.E.2d 815, 816-17, *cert. denied*, 335 U.S. 843 (1948).

¹⁰ *Ibid.* In view of the holding of the instant case, it is interesting to note that in denying the permanent injunction, the Court of Appeals held that the non-resident's contractual consent to be bound by New York law was sufficient to give New York jurisdiction. This is in line with prior authority. The Court of Appeals has declared that: "[f]ew arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. . . . Consent is the factor which imparts power." *Gilbert v. Burnstine*, 255 N.Y. 348, 354-55, 174 N.E. 706, 707 (1931). See *Prosperity Co. v. Am. Laundry Machinery Co.*, 271 App. Div. 622, 67 N.Y.S.2d 669 (4th Dep't 1947).

non-resident contracts to arbitrate in New York, and later dies, the agreement may be nullified, and the policy of the state as expressed by the arbitration law frustrated.¹¹

Jurisdictional Considerations

Basic to the problem of this weakness in the arbitration law is the common-law concept of jurisdiction. Jurisdiction means power.¹² Juridically, it is the power of a sovereign to create rights which will be recognized by other sovereigns.¹³ Of the various theories of jurisdiction,¹⁴ "territorial jurisdiction" is the one that has been developed to the greatest extent by the common law. Territorial jurisdiction can best be explained by noting that each state has exclusive power only over persons and property within its geographical boundaries. The Supreme Court has stated that, "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."¹⁵ The necessary corollary of which is that no state

¹¹ The effect of the decision can be more readily appreciated if a New York resident is imagined to be in the position of the Nicaraguan company.

¹² See *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 356 (1913); cf. *Giles v. Harris*, 189 U.S. 475 (1903). "The foundation of jurisdiction is physical power. . . ." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). See Prashker, *Service Of Summons On Non-Resident Natural Persons Doing Business In New York*, 15 ST. JOHN'S L. REV. 1, 21 (1940).

¹³ Cf. *Michigan Trust Co. v. Ferry*, *supra* note 12 at 353, 355-56; *Kimball v. St. Louis & S.F. Ry.*, 157 Mass. 7, 31 N.E. 697, 698 (1892); 1 BEALE, *CONFLICT OF LAWS* § 42.1 (1935); GOODRICH, *CONFLICT OF LAWS* 167 (3d ed. 1949); *RESTATEMENT, CONFLICT OF LAWS* § 42 (1934).

¹⁴ Besides territorial, there are other concepts of jurisdiction:

(1) The injured sovereign: this idea embraces the thought that a state may punish anyone who does it harm, no matter where they act. See Berge, *Criminal Jurisdiction And The Territorial Principle*, 30 MICH. L. REV. 238, 265-66 (1931); II BORCHARD, CHAMBERLAIN, DUGGAN, *THE COLLECTED PAPERS OF JOHN BASSETT MOORE* 305 (1944).

(2) Citizenship: this concept, borrowed from the civilians, proposes that a state has jurisdiction over its citizens, no matter where they are. *E.g.*, 18 U.S.C. § 2381 (1952); 18 U.S.C. § 1019 (1952); 57 GEO. 3, c. 53 (1817). See Beale, *The Jurisdiction Of A Sovereign State*, 36 HARV. L. REV. 241, 253 (1923); Berge, *supra* at 265; II BORCHARD, CHAMBERLAIN, DUGGAN, *op. cit. supra* at 304-05.

(3) Cosmopolitan: according to this idea, every state has jurisdiction over everyone, wherever they may be. See Berge, *supra* at 268. In addition, there is the extension of the injured sovereign theory which holds that an injury to a citizen of the state, without its territory, is an injury to the state itself. See Berge, *supra* at 266-67, n.85. There is also the theory that certain acts are punishable by every sovereign no matter where they take place, *e.g.*, piracy. See Berge, *supra* at 265, II BORCHARD, CHAMBERLAIN, DUGGAN, *op. cit. supra* at 305.

¹⁵ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877). "Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within

can directly exercise its power over persons and property without its territory. ". . . [T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity; and . . . no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."¹⁶ Any attempt to do so ". . . would necessarily be brutum fulmen in its result, and unconstitutional in its inception."¹⁷

The above principles have been applied to situations wherein jurisdiction over foreign representatives has been sought.¹⁸ Judge (later Mr. Justice) Holmes pointed out that at one time the executor of an estate took the decedent's property in his own right;¹⁹ there was then no reason for not permitting actions to be brought against him wherever he could be found.²⁰ However, since executors and administrators have attained the position of court-appointed fiduciaries,²¹ a different rule has obtained as to the maintenance of suits by or against them. The New York courts, as well as the federal judiciary, have long been guided by the principle that foreign executors and administrators lack the capacity to sue²² or be sued²³ in

the territory; for, otherwise, there can be no sovereignty exerted. . . ." STORY, CONFLICT OF LAWS § 539 (3d ed. 1846).

¹⁶ *Pennoyer v. Neff*, *supra* note 15 at 722. "On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." STORY, CONFLICT OF LAWS § 539 (3d ed. 1846).

¹⁷ *Thorburn v. Gates*, 225 Fed. 613, 616 (S.D. N.Y. 1915). "Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." STORY, CONFLICT OF LAWS § 539 (3d ed. 1846).

¹⁸ See notes 22 and 23 *infra*.

¹⁹ See Holmes, *Executors*, 9 HARV. L. REV. 42 (1895).

²⁰ Pound, J., in *McMaster v. Gould*, 240 N.Y. 379, 386, 148 N.E. 556, 558 (1925).

²¹ See *McMaster v. Gould*, *supra* note 20; *Matter of Chichester*, 185 Misc. 5, 6, 55 N.Y.S.2d 544, 545 (Surr. Ct. 1945); *Matter of May*, 172 Misc. 137, 140-41, 14 N.Y.S.2d 730, 733 (Surr. Ct. 1939); *Matter of Vosburg*, 167 Misc. 611, 613, 5 N.Y.S.2d 804, 807 (Surr. Ct. 1938).

²² *Dixon's Executors v. Ramsay's Executors*, 7 U.S. (3 Cranch) 319 (1806); *Fenwick v. Sears's Administrators*, 5 U.S. (1 Cranch) 259 (1803); *Baldwin v. Powell*, 294 N.Y. 130, 61 N.E.2d 412 (1945); *Vroom v. Van Horne*, 10 Paige's Ch. 549 (N.Y. 1844); *Morrell v. Dickey*, 1 Johns. Ch. 153 (N.Y. 1814); *Kerr v. Moon*, 22 U.S. (9 Wheat.) 565, 571 (1824) (dictum); *Doe v. M'Farland*, 13 U.S. (9 Cranch) 151, 152 (1815) (dictum); *cf.* *Moore v. Mitchell*, 281 U.S. 18 (1930); see STORY, CONFLICT OF LAWS § 513 (3d ed. 1846); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 445 (2d ed. 1951).

²³ *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1 (1841); *Burrows v. Goodman*, 50 F.2d 92 (2d Cir. 1931); *McMaster v. Gould*, *supra* note 20; *Lyon v. Park*, 111 N.Y. 350, 18 N.E. 863 (1888); *German-American Coffee Co. v. Johnston*, 168 App. Div. 31, 153 N.Y. Supp. 866 (1st Dep't 1915); *McGrath v. Weiller*, 98 App. Div. 291, 90 N.Y. Supp. 420 (2d Dep't 1904); *Field v. Gibson*, 20 Hun 274 (N.Y. Gen. T. 1st Dep't 1880); *Matter of Webb*, 11 Hun 124 (N.Y. Gen. T. 1st Dep't 1877); *Bennett v. Harrisville Combing Mills*, 204 Misc. 279, 111 N.Y.S.2d 462 (Sup. Ct. 1952); see RESTATEMENT, CONFLICT OF LAWS § 512 (1934).

their official status in any state outside of that which granted them their powers. There have been several bases asserted for so holding. In not permitting them to bring an action without first obtaining ancillary letters, it has been said that the foreign executor or administrator has obtained his authority from a foreign state; that state's laws having no operation without its territory, he has no standing to represent the decedent in another jurisdiction.²⁴ Moreover, if the representative were permitted to sue, any recovery obtained would be removed to the jurisdiction that had granted him authority. Domestic creditors would thus be prejudiced by having to assert their claims in the foreign jurisdiction, perhaps being subject to laws peculiar to that locality.²⁵ It has been held though, that "as a matter of comity, in the interests of justice," a foreign administrator can bring an action to modify the amount of alimony payments that the deceased had been required to pay his former wife.²⁶ In *Matter of McCabe*,²⁷ a foreign administrator, who was sojourning in New York and had brought personalty of the estate with him, was permitted to move to revoke letters of administration which had been granted by a New York court with respect to that property. A foreign administrator has also been allowed to maintain an action to obtain assets of the estate located in New York, and in the possession of New York appointed administrators.²⁸ Without discussing the foreign source of his office, the court in *Matter of Davis*²⁹ permitted an administrator to oppose probate in New York because of the construction of the statute which permitted opposition by anyone "who is otherwise interested in sustaining or defeating the will."³⁰ It should be noted that the general rule may be circumvented by the representative's transfer of an assignable cause of action to a resident for prosecution.³¹ In addition, if the domestic debtor voluntarily pays the representative, obviating the need for resort to the courts, the general rule is inoperative.³²

More pertinent to the instant problem is the rule barring suits against foreign representatives except when there are assets of the

²⁴ "By the phrase 'foreign executor' the courts never mean the mere non-residence of the individual holding the office, but the foreign origin of the representative character. That is the sole product of the foreign law, and, depending upon it for existence, cannot pass beyond the jurisdiction of its origin." Hopper v. Hopper, 125 N.Y. 400, 402-03, 26 N.E. 457 (1891).

²⁵ See STORY, CONFLICT OF LAWS § 512 (3d ed. 1846).

²⁶ Kirkbride v. Van Note, 275 N.Y. 244, 9 N.E.2d 852 (1937).

²⁷ 84 App. Div. 145, 82 N.Y. Supp. 180 (3d Dep't 1903).

²⁸ Matter of Hughes, 95 N.Y. 55 (1884).

²⁹ 182 N.Y. 468, 75 N.E. 530 (1905).

³⁰ Laws of N.Y. 1894, c. 118.

³¹ Harper v. Butler, 27 U.S. (2 Pet.) 239 (1829) (executor); Peterson v. Chemical Bank, 32 N.Y. 21 (1865) (administrator).

³² See Parsons v. Lyman, 20 N.Y. 103, 112-13 (1859); Vroom v. Van Horne, 10 Paige's Ch. 549, 557 (N.Y. 1844); STORY, CONFLICT OF LAWS § 515 (3d ed. 1846).

estate located in New York.³³ In not permitting such actions to be brought, the courts have reasoned that the executors and administrators are officers of a foreign jurisdiction;³⁴ therefore, any interference with the administration of the estate which they represent would be a futile impropriety.³⁵ The futility of the judgments and decrees rendered would result from the fact that they could not affect property of the estate situated outside of the state which pronounced them.³⁶ Indeed, foreign representatives could not bind the estate even by consenting to the jurisdiction of the court.³⁷

The instant case is obviously in harmony with the above principles. It is thus evident that in order to repair the defect in the arbitration law made apparent by the principal case, the legislature will have to act. However, the way is beset with constitutional difficulties. In order to draft a statute that will be both constitutional and efficacious, it will be profitable to investigate other attempts to extend, through legislation, the jurisdiction of the state over foreign representatives.

Statutory Solutions

An interesting statutory evolution commenced in 1911, which resulted first in the reversal, and later the modification, of the general rule. In that year the legislature enacted Section 1836a of the Code

³³ ". . . [I]n exceptional cases suits will be entertained against foreign administrators where it is essential to the administration of justice, and an equity suit for the purpose of determining the ownership of property within our jurisdiction in my opinion comes within those exceptions." *Holmes v. Camp*, 219 N.Y. 359, 372, 114 N.E. 841, 845 (1916) (The property involved was the shareholder's interest in the capital stock of a domestic corporation.). See *Callanan v. Keenan*, 158 App. Div. 84, 142 N.Y. Supp. 561 (3d Dep't 1913) (foreclosure of a chattel mortgage); *Logan v. Greenwich Trust Co.*, 144 App. Div. 372, 129 N.Y. Supp. 577 (1st Dep't 1911) (continuation of action allowed where property was attached and defendant died before service of summons); *Montgomery v. Boyd*, 78 App. Div. 64, 79 N.Y. Supp. 879 (1st Dep't 1903) (enforceable right limited to property within the jurisdiction); *Helme v. Bucklew*, 229 N.Y. 363, 367, 128 N.E. 216, 217 (1920) (dictum); *cf. De Coppet v. Cone*, 199 N.Y. 56, 61, 92 N.E. 411, 413 (1910) (dictum). *Contra*, *Bostwick v. Carr*, 165 App. Div. 55, 151 N.Y. Supp. 74 (2d Dep't 1914). However, actions can be maintained against the representatives on contracts which they themselves made. *Johnson v. Wallis*, 112 N.Y. 230, 19 N.E. 653 (1889).

³⁴ See *Vaughan v. Northup*, 40 U.S. (15 Pet.) 1 (1841).

³⁵ *McMaster v. Gould*, 240 N.Y. 379, 385-86, 148 N.E. 556, 558 (1925).

³⁶ See *Pennyoy v. Neff*, 95 U.S. 714 (1877); *Thorburn v. Gates*, 232 N.Y. 544, 134 N.E. 565 (1921). It is said in the comment to the Restatement of Conflict of Laws, Section 512 (1934), that the representative holds the assets subject to the directions of the appointing court and is responsible only to that court. For a court in another state to order payment from assets would be an "improper interference" with the administration.

³⁷ *Burrowes v. Goodman*, 50 F.2d 92 (2d Cir. 1931); *Flandrow v. Hammond*, 13 App. Div. 325, 43 N.Y. Supp. 143 (1st Dep't 1897); *Judy v. Kelley*, 11 Ill. 211 (1849); see *RESTATEMENT, CONFLICT OF LAWS* § 513 (1934). *Contra*, *Leighton v. Roper*, 300 N.Y. 434, 91 N.E.2d 876 (1950). See note 60 *infra*.

of Civil Procedure, which provided that foreign executors and administrators could sue or be sued in the same manner as non-residents.³⁸ In 1920, this statute became Section 160 of the Decedent Estate Law.³⁹ Construing Section 1836a in *Helme v. Buckelew*,⁴⁰ Judge Cardozo indicated that the state, by an extension of comity, could remove the disability of a foreign representative to sue in the courts of this state. However, as far as removal of their immunity from suit was concerned, he said:

If the purpose of the statute was to permit the recovery of a judgment which irrespective of the consent of the jurisdiction of the domicile or of the presence of assets within this jurisdiction, would bind foreign administrators and executors everywhere as a judgment *in personam*, the statute registers a futile effort.⁴¹

In upholding the law's constitutionality, on a motion to vacate service of process, the court assumed that the executor against whom the action had been brought was within the state in his official capacity, and that there were assets of the estate in New York that required administration. In 1925, the legislature, ignoring Judge Cardozo's dictum, amended the law to permit the continuation of an action against the foreign representative of a non-resident defendant who had died after service of process, but before final judgment.⁴² In that same year, the case of *McMaster v. Gould*⁴³ squarely presented to the Court of Appeals the question of the statute's constitutionality. In holding it to be unconstitutional, the court stated that:

"Proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."⁴⁴

. . . [T]he purpose of the New York statute is to permit the revival of suit against the foreign representative for a judgment *in personam* without restriction or qualification. It does not discriminate between a case where there are assets and a case where there are no assets; between an attempt to reach assets and an attempt to get a general judgment *in personam*.⁴⁵

In the following year, 1926, the statute was repealed entirely.⁴⁶ It was not until 1951 that the legislature, upon the recommendation of the Judicial Council,⁴⁷ re-enacted that part of the law which permitted a foreign representative to maintain an action in the courts of this state.⁴⁸

³⁸ Laws of N.Y. 1911, c. 631.

³⁹ Laws of N.Y. 1920, c. 919.

⁴⁰ 229 N.Y. 363, 128 N.E. 216 (1920).

⁴¹ *Id.* at 368, 128 N.E. at 217.

⁴² Laws of N.Y. 1925, c. 253.

⁴³ 240 N.Y. 379, 148 N.E. 556 (1925).

⁴⁴ *Id.* at 385, 148 N.E. at 558 (citing *Pennoyer v. Neff*).

⁴⁵ *Id.* at 387, 148 N.E. at 558.

⁴⁶ Laws of N.Y. 1926, c. 660.

⁴⁷ 1951 LEG. DOC. NO. 26(A), REPORT, N.Y. JUDICIAL COUNCIL 153 (1951).

⁴⁸ Laws of N.Y. 1951, c. 522, § 1.

Legislative provisions for proceeding against the representatives of deceased non-resident motorists were more successful. In this field, New York originally had a statute, Section 52 of the Vehicle and Traffic Law, which provided for service of process on the Secretary of State, as statutory agent for a non-resident motorist who had been involved in an accident in this state.⁴⁹ The Supreme Court held a similar Massachusetts statute constitutional in *Hess v. Pawloski*.⁵⁰ In that case, the defendant objected that there had been no personal service on him and that there was no property of his located within the state. Hence, the defendant asserted that the Massachusetts court had no jurisdiction over him, and, in acting without it, deprived him of procedural due process. In holding the law to be constitutional, the Court reasoned that a state might make regulations in the public interest to promote care on the part of residents and non-residents who use its highways. The implied consent to be served was limited to accidents growing out of the use of highways. In advance of the use of a highway, the state could require the non-resident to appoint one of its officials as agent to receive process. Furthermore, the Court felt that the state could provide that use of the highways is the equivalent of prior appointment.⁵¹ "The difference between the formal and implied appointment is not substantial so far as [the fourteenth Amendment is concerned]. . . ." ⁵² That the procedural requirements of due process, *i.e.*, notice and hearing, were not ignored by the Court became evident the following year in the case of *Wuchter v. Pizzutti*.⁵³ There the New Jersey "non-resident motorist" statute was held to be unconstitutional because it did not require the state officer, on whom process was to be served, to notify the defendant of the institution of the action.

Although effective against the motorist himself,⁵⁴ the New York statute was held to be inapplicable where the non-resident died before the service of process,⁵⁵ or after service, but before final judgment.⁵⁶ It was asserted by one court that, ". . . even if section 52 were to be amended in terms to permit such service upon a foreign executor, it would be futile in that aspect, for it would assume to subject such an executor to a suit *in personam* in our courts."⁵⁷ Despite this dictum, the legislature in 1945 amended the statute to provide both for service of process upon the foreign representative of a deceased non-resident motorist, and for the continuation of the action against the

⁴⁹ Laws of N.Y. 1909, c. 30, as amended, Laws of N.Y. 1928, c. 465.

⁵⁰ 274 U.S. 352 (1927).

⁵¹ *Id.* at 356.

⁵² *Id.* at 357.

⁵³ 276 U.S. 13 (1928).

⁵⁴ *Shushereba v. Ames*, 255 N.Y. 490, 175 N.E. 187 (1931).

⁵⁵ *Vecchione v. Palmer*, 249 App. Div. 661, 291 N.Y. Supp. 537 (2d Dep't 1936).

⁵⁶ *Balter v. Webner*, 175 Misc. 184, 23 N.Y.S.2d 918 (N.Y. City Ct. 1940).

⁵⁷ *Vecchione v. Palmer*, *supra* note 55 at 661, 291 N.Y. Supp. at 539.

deceased's representative, if process had already been served.⁵⁸ The Court of Appeals held this amendment to be constitutional in *Leighton v. Roper*.⁵⁹ The court there established, to its own satisfaction, that foreign representatives could bind the estate by consenting to jurisdiction.⁶⁰ It then reasoned that since, under the *Hess* doctrine, the

⁵⁸ Laws of N.Y. 1945, c. 719. This legislation was passed upon the recommendation of the Judicial Council. 1944 LEG. DOC. NO. 15(C), REPORT, N.Y. JUDICIAL COUNCIL 239 (1944); see PRASHKER, NEW YORK PRACTICE 185-87 (3d ed. 1954).

⁵⁹ 300 N.Y. 434, 91 N.E.2d 876 (1950).

⁶⁰ In coming to this conclusion, the court relied upon the following dictum of Judge Cardozo in *Helme v. Buckelew*, 229 N.Y. 363, 367, 128 N.E. 216, 217 (1920): "According to some decisions, an executor or administrator might submit to the jurisdiction of the foreign courts, and the judgment would then bind him everywhere (*Lawrence v. Nelson*, 143 U.S. 215, 222; *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 . . .)." *Leighton v. Roper*, 300 N.Y. 434, 440, 91 N.E.2d 876, 879 (1950). In the *Lawrence* case a foreign executor brought suit under an Arkansas statute permitting foreign representatives to sue. On a cross-claim, the executor was held liable. The decision was affirmed by the Supreme Court of Arkansas on a bill of review brought by the executor. The United States Supreme Court held that the executor was bound by the ruling of the Arkansas court because of his affirmative action in the case. The *Chicago Life Ins. Co.* case did not involve foreign representatives. However, it is similar to the *Lawrence* case in that a plea of lack of jurisdiction was precluded by a party's affirmative action in taking an appeal. Judge Cardozo had also cited *Babbitt v. Fidelity Trust Co.*, 70 N.J. Eq. 651, 655 (1906), and *The Newark Sav. Institution v. David Jones's Executors*, 35 N.J. Eq. 406 (1882). The first of these two cases contains a dictum which supports the proposition. There the New Jersey court relied only upon "13 Am. & Eng. Encycl. L. (2d ed.) 961" as authority that such was the law in that state. The latter case is a holding which supports the proposition. These cases, however, were not cited in the *Leighton* case. There, however, the court did cite Beale, *Conflicts of Law*, Section 513.1 as authority. That author asserts that the federal and New Jersey courts adhere to the proposition that a foreign representative can confer jurisdiction by consent. He relies upon the four cases already discussed, and in addition, *Lackner v. McKechney*, 252 Fed. 403 (7th Cir. 1918). There, a bill for an accounting was brought by a foreign representative, and it was held that by so doing, he waived immunity from all claims against himself. Thus it would seem that when a foreign representative is permitted to bring suit, and does so, a judgment rendered against him will bind him. This is far from the proposition in the *Leighton* case, *i.e.*, that in a suit against him, the representative can confer consent jurisdiction. On the other hand, in asserting that New York never felt that consent jurisdiction was insufficient, the New York case of *Flandrow v. Hammond*, 13 App. Div. 325, 43 N.Y. Supp. 143 (1st Dep't 1897), cited by Judge Cardozo as a *cf.* to the proposition which he asserted, was obviously overlooked. There, consent jurisdiction was held not to bind foreign representatives. It is believed that the better authority and reason is that jurisdiction cannot be conferred by the consent of foreign representatives (see text at notes 61 and 62 *infra*). If that be so, then their decedents cannot consent for them; thus the proposition asserted in the *Leighton* case is untenable, and the decision incorrect. For an amplification of this view, see cases cited in note 37 *supra*. See also *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947), 33 Iowa L. Rev. 407 (1948); 36 Iowa L. Rev. 128 (1950) (holding a similar Iowa statute to be unconstitutional). However, in harmony with the New York Court of Appeals' decision are *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943) (holding a similar

state could impose the requirement that statutory consent to substituted service be given by the non-resident motorist; logically, it could further require that such consent bind his representative. In this, it is believed, the court erred. No consideration was taken of the fact that the representative does not stand in the shoes of the deceased, but rather is an officer of a state⁶¹ whose laws have no operation without its territory.⁶² It would appear that the need for such a statute, and not settled principles of jurisdiction, prompted the decision of the court.

Although grave doubts as to the constitutionality of the statute are entertained,⁶³ the fact remains that it is the only enactment providing for suits against foreign representatives that has been held valid. In order to extend jurisdiction over foreign executors and administrators in the field of arbitration law, it would be advisable to adopt the form of a statute which has been upheld. Thus the language of Section 52 can be varied to provide that:

A non-resident who contracts to submit to the jurisdiction of this state for the purpose of arbitration shall be deemed to have consented to the appointment of the Secretary of State as his true and lawful attorney for the receipt of service of process. He shall also be deemed to have consented that such service shall be irrevocable and binding upon his executor or administrator. Where the non-resident has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such non-resident in the same manner and on the same notice as is provided in the case of the non-resident. Where an action has been duly commenced under the provisions of this section by service upon a defendant who dies thereafter, the court must allow the action to be continued against his executor or administrator upon motion with such notice as the court deems proper.⁶⁴

Conclusion

The proposed statute is conformable to the Court of Appeals' interpretation of Section 52 in that, basically, jurisdiction is conferred upon the courts of this state by virtue of the deceased's consent. It

Arkansas statute to be constitutional); *Plopa v. Du Pre*, 327 Mich. 660, 42 N.W.2d 777 (1950) (upholding the Michigan statute); *Scott, Hess And Pawloski Carry On*, 64 HARV. L. REV. 98 (1950); 28 CHI.-KENT L. REV. 347 (1950); 26 IND. L.J. 93 (1950); 25 N.Y.U.L.Q. REV. 907 (1950); 57 YALE L.J. 647 (1948).

⁶¹ See note 20 *supra*.

⁶² See notes 15, 16, 17, 24, 34 and 36 *supra*.

⁶³ In this connection it should be recognized that the court disclaimed any intention to determine the enforceability of its decree in the foreign state. Rather, it merely resolved the conflict between established rules of jurisdiction and New York's police power in favor of the latter. This conflict will remain open, however, until the Supreme Court determines the efficacy of such a decree in a foreign state.

⁶⁴ Cf. N.Y. VEH. & TRAFF. LAW § 52.

differs from Section 52 in that, under the latter statute, the cause of action arises in New York and the state has a valid objective in exercising its police power in protecting the life and limb of residents. Here, objection may be raised on the ground that there is no reason for the exercise of that inherent power. Further objection may be made that the statute ". . . would involve us not only in problems of constitutional power and complications of international usage, but in a cumbrous and inconsistent and unworkable procedure which would disorganize the scheme disclosed in other statutes, and there carefully developed, for the administration of estates."⁶⁵

Whether the New York public policy which favors arbitration agreements is strong enough to effectively eliminate state boundaries in this area will, of course, eventually have to be determined by the Supreme Court. It is not believed that a statute extending the jurisdiction of the state in this manner would be held to be constitutional. However, the arbitration law will continue to be defective if an attempt to correct it is not made; it will do no harm to try the remedy.



NOTICE OF ATTORNEY'S LIEN—ACQUISITION OF LIEN PRIOR TO COMMENCEMENT OF AN ACTION

Introduction

The common law afforded an attorney protection from the "knavery"¹ of his clients by securing payment for his services. This was accomplished by two types of lien: one, the retaining lien on all the client's papers in the attorney's possession, the other, the charging lien on the judgment recovered through the attorney's efforts.² These liens were first created by the courts ". . . in an effort to protect an attorney from a client, who was willing to take the benefit of his attorney's skill and labor, but who was unwilling to give anything in return."³

⁶⁵ Cardozo, J., in *Helme v. Buckelew*, 229 N.Y. 363, 373, 128 N.E. 216, 219 (1920).

¹ *Goodrich v. McDonald*, 112 N.Y. 157, 163, 19 N.E. 649, 651 (1889).

² See *Goodrich v. McDonald*, *supra* note 1; *Matter of Senitha*, 252 App. Div. 304, 299 N.Y. Supp. 407 (3d Dep't 1937), *aff'd mem.*, 284 N.Y. 730, 31 N.E. 200 (1940); *Ozorowski v. Pawloski*, 207 Misc. 407, 139 N.Y.S.2d 31 (County Ct. 1955). As far back as early Roman Law, an advocate had the right to retain papers and instruments of his client until his fee was paid. See WEEKS, *A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW* 43 (2d ed. 1892).

³ *Matter of Sebring*, 238 App. Div. 281, 286, 264 N.Y. Supp. 379, 385 (4th Dep't 1933).