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New York General Business Law--Non-Resident Dealers-- Designation of Secretary of State as Agent for Service of Process

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beyond the necessities of the situation and has resulted in substantial injustice to the buyer seeking relief for breach of warranty under a sales contract.

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NEW YORK GENERAL BUSINESS LAW—NON-RESIDENT DEALERS—DESIGNATION OF SECRETARY OF STATE AS AGENT FOR SERVICE OF PROCESS.—On February 25, 1948, the New York Legislature added Section 352b to Article 23a of the New York General Business Law.¹ This new section provides that every non-resident dealer under Article 23a, relating to fraudulent practices in respect to stocks, bonds and securities, shall be deemed to have designated the Secretary of State as his agent for the service of process in all proceedings brought by the Attorney General arising out of the affairs and business of such dealer. The provision applies to every person, partnership, corporation, company, trust or association engaged as a dealer in selling securities.

The purpose of Article 23a, popularly known as the Martin Act, is to prevent fraud in the sale of securities and defeat wildcat schemes in relation thereto through which the public might be fraudulently exploited.² The nature of the relief in an action under this article is equitable in character.³ The Martin Act permits the Attorney General to institute an investigation if he believes a fraudulent security transaction is being perpetrated.⁴ Through the medium of a subpoena he may require the production of papers, sworn statements and witnesses during the course of the investigation. If, as a result of the investigation, the Attorney General believes a fraudulent scheme is in operation, he may commence an action to enjoin the dealer from engaging in security transactions.⁵

An action for an injunction, however, must have *in personam* jurisdiction as its basis. If the dealer sought to be enjoined is physically outside the state the purpose of the prohibitory statute may be rendered nugatory unless some procedural method is available to bring the fraudulent dealer within its sanctions. Before the enactment of Section 352b, the Martin Act was deficient in this respect, but with the addition of the new provision for service of process, the statutory omission has now been remedied. The effectiveness of the Act is thus rendered more complete as the boundaries of the state are no longer a protection to unscrupulous non-resident dealers.

Since a non-resident individual may be involved, as well as cor-

¹ Laws of N. Y. 1948, c. 21.

² *People v. Federated Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926).

³ *People v. Riley*, 188 Misc. 969, 64 N. Y. S. 2d 348 (Sup. Ct. 1946).

⁴ N. Y. GEN. BUS. LAW § 352.

⁵ *Id.* at § 353.

porations and other entities, consideration must be given to the basis by means of which jurisdiction will be exercised. It has been stated as a broad rule of law that a state may exercise jurisdiction over any person who does an act within its territorial limits, as to a cause of action arising out of such acts.⁶ Taking a more narrow view, the state may certainly exercise jurisdiction when acts of a certain character are committed. Subject to constitutional limitations, a state may even exclude a non-resident from doing certain acts within the state.⁷ Manifestly, these acts would be those which affect the public welfare and safety. Since the state may go to this extreme, it may, in its wisdom, permit the doing of the acts upon conditions.⁸ Thus the doing of a certain act may be conditioned upon the designation of an agent for the service of process in any action arising out of such acts. Under the new Section 352b any non-resident dealer who does business in New York shall be deemed to have irrevocably appointed the Secretary of State as his agent for the service of process. Thus by the act of doing business as a dealer, the non-resident subjects himself to the jurisdiction of our courts.

The foundation of such jurisdiction is the principle that under the police power of the state, acts which endanger the public safety may be made illegal unless the non-resident submits to the jurisdiction of the courts. In *Interchemical Corporation v. Mirabelli*⁹ the court stated that the constitutionality of state statutes similar to the one here involved, has been upheld under the police power of the state. In that case the court said: "The New York Legislature, in its wisdom, has adopted the broad view urged by many law writers that a state may require a non-resident individual to submit to reasonable provisions for substituted service to secure personal jurisdiction as a condition of voluntarily doing any sort of business within the state provided that the cause of action arises out of the business engaged in within the state."¹⁰ The selling of securities is affected with a public interest in that serious economic harm may result from unwise speculation by a gullible public. New York has recognized the fact that some regulation is necessary to protect the public welfare.

A statute, somewhat analogous to the one in question here, was considered by the United States Supreme Court in the case of *Doherty and Co. v. Goodman*¹¹ and the validity of the statute was unequivocally upheld. In that case a resident of New York engaged in the business of selling corporate securities in the State of Iowa. An action was brought against him in Iowa by virtue of a statute which permitted service to be made on any agent or clerk employed

⁶ RESTATEMENT, CONFLICT OF LAWS § 84 (1934).

⁷ 1 BEALE, CONFLICT OF LAWS § 84.2 (1935).

⁸ RESTATEMENT, CONFLICT OF LAWS § 84, comment *b* (1934).

⁹ 269 App. Div. 224, 54 N. Y. S. 2d 522 (1st Dep't 1945).

¹⁰ 269 App. Div. 224, 54 N. Y. S. 2d 522, 526 (1st Dep't 1945).

¹¹ 294 U. S. 623, 79 L. ed. 1097 (1935).

in the office or agency of the non-resident. No consent to serve process in this manner had been given by the non-resident. The court held that since Iowa considered the business of dealing in corporate securities as exceptional and subjected it to special regulation, the exercise of jurisdiction was proper, and that no constitutional right was violated.

The service of process under the method contemplated by the new Section 352b is not altogether novel. Section 52 of the New York Vehicle and Traffic Law provides that a non-resident, by operation of a motor vehicle in this state, is deemed to have thereby appointed the Secretary of State as his agent for service of process in any action against the non-resident arising out of any accident or collision in which the non-resident may be involved while so operating the vehicle. This statute provides for notice to the non-resident via the mails. Another New York statute, Section 229b of the Civil Practice Act, provides for acquisition of jurisdiction over a non-resident doing business through agents in New York by service of process upon such agents in charge of that business at the time of service. The action must arise out of the particular business the non-resident is operating, and notice must also be sent through the mails.

It is interesting to note certain marked similarities in the two New York statutes just referred to.

Section 52, Vehicle and Traffic Law

1. A non-resident operating a motor vehicle in New York State.
2. The cause of action must arise out of the act of operating the vehicle within this state.
3. Service upon the Secretary of State.
4. Provision for notice through the mails.

Section 229b, Civil Practice Act

1. Non-resident doing business in New York.
2. The cause of action must arise out of the particular business.
3. Service of process upon the non-resident's agent in charge of the business.
4. Provision for notice to the non-resident through the mails.

The constitutionality of both of these statutes has been upheld.¹²

¹² *Shushereba v. Ames*, 255 N. Y. 490, 175 N. E. 187 (1931) (holding judgment against non-resident pursuant to statutory service on secretary of state is in accordance with due process); *Interchemical Corporation v. Mirabelli*, 269 App. Div. 224, 54 N. Y. S. 2d 522 (1st Dep't 1945).

Section 352b has similar elements as follows:

1. Non-resident doing business as a dealer in New York.
2. The cause of action must arise out of dealer's business.
3. Service upon the Secretary of State.
4. Provision for notice through the mails.

The comparison indicates that one of the common elements in all three statutes is a provision for notification to the non-resident by mail. Such a provision is essential to satisfy the constitutional requirement of due process. The economic harm done to the public by fraudulent and highly speculative security transactions is a solid basis upon which the legislature is enabled to enact statutes of this nature.¹³ The courts will undoubtedly uphold the constitutionality of this statute on the same basis as the others, namely, the police power of the state.

Section 218 of the Stock Corporation Law prohibits suits by an unlicensed foreign corporation on contracts made in New York when it is doing business in New York. As a condition to obtaining a license, the foreign corporation must designate the Secretary of State as its agent for service of process. The New York Court of Appeals has held the statute inapplicable to a single transaction and has said that the statute applies only where the business is carried on with some continuity of act and purpose.¹⁴

Section 352b provides that any non-resident who "shall do business in this state as a dealer" is deemed to have designated the Secretary of State his agent for service of process. Since the words "do business" have been construed to mean more than an isolated transaction in the Stock Corporation Law and as the words "do business" are incorporated in Section 352b and the word "dealer" is defined by Section 359e, New York General Business Law, to mean ". . . engages . . . in the business of trading in securities . . .," it appears probable that a non-resident who comes to New York and, without "doing business as a dealer," perpetrates a single fraudulent security transaction would not come within the purview of Section 352b.

In view of the foregoing it appears that Section 352b is a lawful exercise of the police power of the state. It is anticipated that the amendment will materially aid the Attorney General to more effectively carry out the purposes of Article 23a of the New York General Business Law.

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¹³ Simpson, *The New York Blue Sky Law and the Uniform Act*, 8 N. Y. U. L. Q. REV. 465 (1931). In the opening paragraph of an analysis of the New York Blue Sky Law the author points out that the people of New York lose about \$500,000,000 annually in fraudulent security transactions.

¹⁴ *International Fuel and Iron Corp. v. Donner Steel Co.*, 242 N. Y. 224, 151 N. E. 214 (1926).