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Conflict of Laws—Non-Resident's Action Against Foreign Corporation Where Cause Of Action Arose In New York

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be well worth the price"[25] because it is a major step towards a rational determination of choice of law questions in the field of torts.

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NON-RESIDENT'S ACTION AGAINST FOREIGN CORPORATION WHERE CAUSE OF ACTION AROSE IN NEW YORK

Petitioner, a Cuban national, purchased a United States currency draft in Havana for $120,000 from the Industrial Bank of Cuba, payable at the Colonial Trust Company in New York City. Upon presentation of the draft to the New York bank the petitioner, Gonzalez, was denied payment, because the nationalized Cuban bank had directed the Colonial Trust Company not to honor the draft. Subsequently, the petitioner brought an action in the Supreme Court of New York against the foreign bank by attaching its assets in New York.[1] The Court of Appeals, applying New York law, reversed the Appellate Division, Second Department, and *held*, three judges dissenting, the Supreme Court properly took jurisdiction. First, the respondent had a duty not to affirmatively interfere with payment of the draft in New York, and by countermanding the order for payment there was a cause of action established in New York. Second, the Act of State Doctrine was not a bar to the jurisdiction of the state. *Gonzalez v. Industrial Bank (of Cuba)*, 12 N.Y.2d 33, 186 N.E.2d 410, 234 N.Y.S.2d 210 (1962).

Prior to World War II the state courts of the United States firmly adhered to the Act of State Doctrine that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[2] After the war, however, the state courts began to re-examine the tenet in an effort to justify the harsh and steadfast doctrine. With the deep scrutiny there evolved a corrosion of the once absolute rule: first, it appears that the doctrine is a self-imposed limitation of state courts, and second, even more important to the unstabilizing effect on the doctrine, is the tendency for the state courts to sit in judgment on acts committed by foreign nations when the latter breach recognized rules of international law.[3] In the instant case, there being no present policy from the executive branch requiring acquiescence by Cuba to be sued in our courts, New York was at liberty to take jurisdiction.[4] Consequently, the New York policy on such acquiescence is operative, and the

25. Reese, *supra* note 22, at 1254.

1. Gonzalez v. Industrial Bank (of Cuba), 33 Misc. 2d 285, 227 N.Y.S.2d 459 (Sup. Ct. 1961).

2. Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918). See Hewitt v. Speyer, 250 Fed. 367 (2d Cir. 1918); Comment 57 Yale L.J. 108 (1947); Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. Pitt. L. Rev. 881 (1962).

3. Banco National de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961). See also, Hyde, *The Act of State Doctrine and the Rule of Law*, 53 Am. J. Int'l L. 635 (1959); Committee on International Law, Association of the Bar of City of New York, A Reconsideration of the Act of State Doctrine in United States Courts (May 1959).

4. 43 Dep't State Bull. 171 (1960).

Supreme Court will adjudicate cases involving acts of foreign governments when they breach international law.[5]

Notwithstanding the Act of State Doctrine, may a non-resident sue a foreign corporation in New York State? A well established conflict of laws rule holds that the forum state will utilize internal standards in determining whether it may take jurisdiction.[6] In the instant case N.Y. Gen. Corp. Law section 225(3)[7] permits a non-resident to sue a foreign corporation in the state, "where the cause of action arose within the state." If by refusing to honor the draft payable in New York a cause of action arose in the state, then the Supreme Court was warranted in exercising jurisdiction under the statute.[8]

According to New York law a cause of action arises when there is a breach of contract within the territorial borders of the state.[9] Furthermore the situs of the cause of action is almost universally the jurisdiction where the contract is to be performed.[10] Judge Danforth clearly enunciated the often quoted rule of jurisdiction for bills and notes that "the cause of action arises when that is not done which ought to have been done; or that is done which ought not to have been done .... [T]he place where it occurs is the place where the cause of action arises."[11] Therefore when a contract, including a negotiable instrument, is made in another state or territory, but payable in New York, the place fixed for performance is the place where the cause of action arises.[12]

In reversing the lower court, four to three, the majority held that the Supreme Court could exercise jurisdiction over the subject matter. They determined that under N.Y. Gen. Corp. Law section 225(3) a non-resident could sue a foreign corporation in our courts if there was sufficient contact with the state. The Court of Appeals then logically applied the essential element by holding that a cause of action arose in New York when the draft was not honored at the designated place of performance in New York City. In the words of the court "the countermand of payment issued to Colonial in New York constituted a wrong and breach of contract committed by Industrial in New York."[13] The majority then, without apparent difficulty, ruled that in the absence of a contrary directive by the State Department the Act of State Doctrine was no bar to New York taking jurisdiction. Despite the sound reasoning of the court, Judges Foster and Van Voorhis argued that the drawer of a draft only contracts to reimburse the holder at the place where the instrument

5. Moscow Fire Ins. Co. v Bank of New York, 280 N.Y. 286, 20 N.E.2d 758 (1939).
6. Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931).
7. N.Y. Gen. Corp. Law § 225(3) (1929) (now N.Y. Bus. Corp. Law § 1314(3)).
8. L. B. Foster Inc. v. Koppel Indust. Car & Equip. Co., 127 Misc. 51, 215 N.Y. Supp. 214 (Sup. Ct. 1926).
9. Walker v. Bank of New York, 9 N.Y. 582 (1854).
10. Wester v. Casein Co. of America, 206 N.Y. 506, 100 N.E. 488 (1912).
11. Hibernia Nat'l Bank v. Lacombe, 84 N.Y. 367, 384 (1881).
12. *Ibid.*; Auten v. Auten, 308 N.Y. 155, 163, 124 N.E.2d 99, 106 (1954); Emmons v. McFaul, 195 Misc. 276, 89 N.Y.S.2d 307 (Munic. Ct. of Syracuse 1949). *Cf.*, Restatement (Second), Conflict of Laws § 370 (1958), stating that "the law of the place of performance determines whether a breach of contract has occurred."
13. Instant case at 37, 186 N.E.2d at 414, 234 N.Y.S.2d at 214.

is made.[14] Thus they contended the situs of the draft, Cuba, is the place of the cause of action and not New York. This argument would negative the right of the Supreme Court to take jurisdiction. In view of the cases relied upon, however, it appears as though the dissent confused two separate and distinct issues; *i.e.*, the difference between the jurisdictional right and/or power to hear a case, and the choice of law to be applied by the forum state.[15]

Judge Fuld, however, raised a very interesting question when he affirmed the jurisdictional points, but dissented in contending that the case must be remanded to determine which law should apply, New York or Cuban. The majority completely ignored this conflict of laws issue in its application of New York law. Perhaps this was incorrect in light of a statement by Justice Cardozo on negotiable instruments in this area, "that conflict of laws has been more remorseless. . . , more blind to final causes, than it has been in other fields."[16] This observation is particularly true in New York where the choice of law to be applied for negotiable instruments defies logic, and for this reason Judge Fuld's disagreement is basically sound.[17] It does appear that the majority without due consideration correctly chose to apply New York law, but nevertheless the question definitely warranted consideration in the opinion.

Not only are the legal merits of the court's reasoning sound in holding that New York properly accepted jurisdiction, but as a practical matter the decision is vital for the protection of all persons who suffer inequities from pernicious nations such as Castro's Cuba. Still law is more than logic and fair play. It is also the stabilizer of our society which necessarily relies upon court decisions and precedents to develop the framework for orderly community living. For this reason, after deciding in favor of New York jurisdiction, the court should have discussed and clarified the choice of law dilemma. But even with this possible weakness in the decision the court did firmly establish that non-residents may seek the protection of our courts when there is a cause of action in New York. Furthermore, there is a cause of action when a contract, in this case a draft payable in New York, is countermanded at the intended place of performance.

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14. *Id.* at 37, 186 N.E.2d at 416, 234 N.Y.S.2d at 215.
15. Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939); Amsinck v. Rogers, 189 N.Y. 252, 82 N.E. 134 (1907).
16. Cardozo, The Paradoxes of Legal Science 68 (1928).
17. Everett v. Vendryes, 19 N.Y. 436 (1859). *Contra*, Amsinck v. Rogers, 189 N.Y. 252, 82 N.E. 134 (1907). See generally Lorenzen, The Conflict of Laws Relating to Bills and Notes (1919); Stumberg, *Commercial Paper and the Conflict of Laws*, 6 Vand. L. Rev. 489 (1953); Note, *Commercial Policy in the Conflict of Laws of Bills and Notes*, 55 Harv. L. Rev. 1181 (1942).