INDEX.

NOTICE OF APPEAL.

Filed November , 1923.

Essex County Circuit Court

ELISE LAURE, *Plaintiff,*	*Action at Law.*
vs.	*Notice of Appeal.*
JACK SINGER, *Defendant.*	

To: LIONEL P. KRISTELLER, Esq., attorney for plaintiff.

PLEASE TAKE NOTICE that the defendant appeals to the New Jersey Court of Errors and Appeals from the judgment heretofore entered herein on October 8, 1923.

STEIN, STEIN & HANNOCH,
Attorneys for Defendant.

Service duly acknowledged by plaintiff's attorney.

STIPULATION RESPECTING RECORD ON APPEAL.

It is hereby stipulated and agreed that the appeal herein be submitted to this Court upon the attached abridged record of the cause.

LIONEL P. KRISTELLER,
Attorney of Appellee.

STEIN, STEIN & HANNOCH,
Attorneys of Appellant.

AFFIDAVIT FOR WRIT OF ATTACHMENT.

Filed September 28, 1922.

Affidavit by Elise Laure, alleging that defendant was a resident of New York and that he owes her a debt of $9,000.

WRIT OF ATTACHMENT.

Filed September 28, 1922.

Writ of attachment issued, returnable October 19, 1922, to answer plaintiff's damages to the sum of $18,000.

Sheriff returned writ showing levy upon a miscellaneous quantity of scenery, costumes and theatrical appliances.

The statutory requirements with respect to the issuance and execution of the writ were complied with.

Appearance.

APPEARANCE.

Filed September 30, 1922.

ESSEX COUNTY CIRCUIT COURT.

ELISE LAURE, *Plaintiff,*	*Action at Law.*
vs.	*In Attachment.*
JACK SINGER, *Defendant.*	*Appearance.*

To the plaintiff and her attorney, and to whom it may concern:

PLEASE TAKE NOTICE that the defendant hereto enters his appearance in the above cause and hereby states that he is willing to accept declaration and complaint at plaintiff's suit.

STEIN, STEIN & HANNOCH,
Attorneys for Defendant.

ORDER DISCHARGING PROPERTY FROM LIEN OF ATTACHMENT.

Filed September 30, 1922.

ESSEX COUNTY CIRCUIT COURT.

ELISE LAURE, *Plaintiff,*	*Action at Law.*
	In Attachment.
vs.	*Order Discharging Property Attached from Lien of Levy.*
JACK SINGER, *Defendant.*	

A writ of attachment having issued herein pursuant to an act entitled "An Act for the relief of creditors against absent, fraudulent and absconding debtors," approved March 13, 1903, and the various acts amendatory thereof and supplementary thereto, under which writ levy has been made by the Sheriff of Essex County upon certain goods and chattels of the defendant located Keeney's (Shubert) Theatre, Branford Place, Newark, New Jersey, and the defendant having entered his appearance herein and having duly given notice thereof to the plaintiff, and having indicated to the plaintiff his willingness to accept a declaration and complaint at the suit of the plaintiff, and the defendant having further filed a bond with sufficient surety, endorsed with the approval of a Judge of this Court said bond being executed in favor of the plaintiff and being in the sum of five thousand dollars, and being in the form, amount and condition approved by the attorney of the plaintiff, and application now being made to the Court for an order to set the attachment aside and discharge the defendant's property therefrom, and the Court being satisfied that the defendant is entitled to the order prayed for,

Order Discharging Property from Lien of Attachment.

It is on this 30th day of September, 1922, on motion of Stein, Stein & Hannoch, ORDERED that the attachment heretofore issued herein be and the same is hereby set aside and the defendant's property discharged therefrom.

WM. S. GUMMERE,
C. J.

The foregoing order is approved.

LIONEL P. KRISTELLER,
Attorney for Plaintiff.

COMPLAINT.

Filed November 21, 1922.

ESSEX COUNTY CIRCUIT COURT.

ELISE LAURE, *Plaintiff,* vs. JACK SINGER, *Defendant.*	*In Attachment.* *Complaint.*

The plaintiff, residing in the City, County and State of New York, complaining of the defendant says:

1. That heretofore and on the twenty-fourth day of May, nineteen hundred and twenty-two, the defendant, a theatrical manager in the City, County and State of New York entered into an agreement with the plaintiff, wherein and whereby the plaintiff agreed to render her exclusive services to the defendant at least twice each day and not over fourteen times in each week during the theatrical season of 1922-1923, which said season was to consist of not less than thirty weeks, which thirty weeks were to be played within a period of thirty-five consecutive weeks, and in consideration of such services, the defendant agreed to pay the plaintiff the sum of three hundred dollars ($300) per week.

2. That under and pursuant to the terms of said written agreement, the original of which will be produced upon trial, the plaintiff commenced to render her services for the defendant, and that thereafter and on the ninth day of September, nineteen hundred and twenty-two, the defendant without reasonable or just cause, discharged the plaintiff and refused to permit her to render any other services for the defendant.

Complaint.

3. That the plaintiff has performed all of the agreements and conditions on her part to be performed, but the defendant has failed and neglected to perform the agreements and conditions on his part to be performed, to the damage of the plaintiff.

Judgment will be claimed for the sum of nine thousand dollars ($9,000), together with costs of suit.

LIONEL P. KRISTELLER,
Attorney of Plaintiff.

Dated November 21, 1922.

Answer.

ANSWER.

Filed.

ESSEX COUNTY CIRCUIT COURT.

ELISE LAURE,
Plaintiff,

vs.

JACK SINGER,
Defendant.

In Attachment.
Answer.

The defendant answering the complaint in the above matter respectfully shows and alleges:

1. He admits that a contract was entered into by him and plaintiff on May 24, 1922. He refers to said contract for complete terms and conditions thereof.

2. He admits that the plaintiff began to render service under the terms of said contract and that he discharged her and refused to permit her to render any further services. He denies the remaining allegations of paragraph two.

3. He denies the allegations of paragraph 3.

FIRST SEPARATE DEFENSE.

4. By the terms of paragraph 4 of the contract, it was provided that the plaintiff should:

> "A." "abide by all the rules and regulations in force at any theatre or place of performance, and furthermore agrees to abide by all the rules and regulations usual and customary in theatrical companies, which said rules and regulations are made part hereof. 'B.' To report for rehearsals promptly and at all times and places as directed by the

> Manager. 'C.' To furnish a complete orchestration of any music necessary for his or her vaudeville act or specialty. 'D.' To eliminate any portion of his or her act deemed objectionable by the Manager. 'E.' Not to make any changes in his or her vaudeville act or specialty without prior written consent of the Manager."

The plaintiff failed to perform the terms of said paragraph, in that she failed to report promptly for rehearsals, she refused to eliminate portions of her act which were deemed objectionable by the defendant.

SECOND SEPARATE DEFENSE.

5. The plaintiff performed her services in such an unsatisfactory manner and so poorly that defendant discharged her.

THIRD SEPARATE DEFENSE.

6. Paragraph 12 of said contract, provides among other things as follows:

> "This contract shall be construed only according to the Laws of the State of New York, and any suit or action thereon or following therefrom shall be brought and shall be maintainable only in a court held within the County and State of New York, and shall not be brought or maintained in any other County or State."

The Essex County Circuit Court, is therefore, without jurisdiction in the premises.

FOURTH SEPARATE DEFENSE.

7. Upon plaintiff's discharge it became and was her duty to seek other employment. She has obtained large sums of money through other employments had by her.

FIFTH SEPARATE DEFENSE.

8. Under paragraph 7 of the contract, it is provided:

"Shubert Vaudeville Exchange of New York City, is acting for the Manager in employing the artist, and five per cent. (5%) of the salary herein mentioned is to be deducted each week for the Shubert Vaudeville Exchange for procuring the artist this engagement, and the artist hereby directs and authorizes the Manager to so deduct such five per cent. (5%) and to pay the same direct to the said Shubert Vaudeville Exchange."

The defendant is therefore obligated to pay the Shubert Vaudeville Exchange of New York City, five per cent. of all moneys to which the plaintiff herein may be entitled, same to be deducted from the amount due the plaintiff.

SIXTH SEPARATE DEFENSE.

9. The defendant since the institution of the within proceedings, has been adjudicated a bankrupt by the United States District Court for the Southern District of New York. Pursuant to the act of Congress relating to bankruptcy he had filed a schedule setting forth the assets and liabilities, in which schedule was included the claim of the plaintiff herein. Due notice of the pendency of said proceedings has been given to the plaintiff.

The time within which application for discharge may be made in said proceedings has not yet expired. If discharge is granted in said proceedings the indebtedness to the plaintiff will be discharged, same being a debt dischargeable in bankruptcy under the aforesaid acts of Congress.

That the matters in controversy between the parties is therefore one which should be adjudicated upon by the United States District Court for the Southern District of

New York, and that this Court should not assume jurisdiction. In the event that this Court should assume jurisdiction it should only be for the purpose of determining the amount of indebtedness due from the plaintiff to the defendant staying any further proceedings pending the determining of the bankruptcy proceedings and the discharge in bankruptcy.

STEIN, STEIN & HANNOCH,
Attorneys for the Defendant.

APPLICATION TO COURT TO DECLINE TO ASSUME JURISDICTION.

Prior to the trial, defendant applied to the Court for an order declining to assume jurisdiction herein and dismissing the complaint, but no order was entered. The application was denied upon the grounds stated in defendant's motions made during the trial and hereafter more particularly set forth.

Motion to Strike Out Sixth Defense.

ESSEX CIRCUIT COURT.

October 8, 1923.

ELISE LAURIE,
vs.
JACOB SINGER CO., INC. } *Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appears Lionel P. Kristeller, Esq.

For the defendant appear Stein, Stein & Hannoch (by Herbert J. Hannoch, Esq.).

(A jury is called and sworn.)

Mr. Kristeller. I make a motion at this time to strike out the sixth defense.

The Court. Have you given notice?

Mr. Hannoch. I will waive notice.

Mr. Kristeller. I do not think that the sixth defense sets forth a defense.

The Court. Does it set up that he was adjudicated a bankrupt?

Mr. Kristeller. Yes, but not discharged.

The Court. How is that a defense unless he is discharged?

Mr. Hannoch. The bankruptcy proceedings have not as yet been disposed of.

The Court. I will strike out the sixth separate defense.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Motion to Court to Decline to Take Jurisdiction.

Mr. Hannoch. I desire to ask your Honor to decline to take jurisdiction in this case in view of the contract which has been entered into between the parties, particularly the second portion in paragraph 12 thereof. I have argued this question before your Honor in detail before, and will not, unless your Honor wishes it, repeat any argument again.

The Court. The clause in question which it is urged deprives this court of jurisdiction reads as follows: "This contract shall be construed only according to the laws of the State of New York, and any suit or action thereon or following therefrom shall be brought and shall be maintainable only in a court held within the County and State of New York and shall not be brought or maintainable in any other county or state."

The clearest line of cases I can find, in a hasty examination on this point, started with the decision of Justice Shaw, in the case of Nute *v.* Hamilton Mutual Insurance Company, 6 Gray 174, which case was followed, with some differentiations, down to the Nashua River Paper Company *v.* Hammermill Paper Company in 223 Mass., p. 8, where it was held that where a provision in a commercial contract between citizens of different states, to the effect that no action on it should be instituted other than in one or the other of the two states, was invalid as against public policy.

In the contract before me, the parties were residents of New York State and Berlin.

There is the case of Mittenthal *v.* Mascagni, 183 Mass., p. 19, which holds that a contract made in Italy between an Italian opera singer and one who assumes residence in Italy, where the contract stipulated, as I recall it, some particular court in Italy which was to have jurisdiction, thus ousting the jurisdiction of the Massachusetts courts, that Justice Knowlton indicates that this was not a suit of jurisdiction but held for the convenience

of the parties, that the contract was sound and not contrary to public policy.

On this phase of the whole question is the fundamental exposition of the law by Justice Shaw in the Nute case and followed by him in the case of Hall *v.* Peoples Mutual Fire Insurance Company, 6 Gray, p. 185, where he said: "It is a well-settled maxim that parties cannot, by their consent, give jurisdiction to courts where the law has not given it; and it seems to follow from the same course of reasoning that parties cannot take away jurisdiction where the law has given it."

These people come before us in this state, so far as the papers before me indicate, properly served in an attachment suit, in fact, the motion is directed toward the process of the court and the way in which they were brought before us, and was directed to the argument that they were not bound to appear before the court of any other state, but those courts indicated in New York. Therefore, we have no jurisdiction. If we have jurisdiction then can they agree to deprive us of it? It seems to me, while it is perfectly reasonable to say they can make this kind of a contract, and while I would prefer to follow the terms of this contract, just as they have made them, that it would be a dangerous precedent to establish; while it would be all right in this case, there may be another case next week or next month in which it would not be all right at all, and I am going to deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Kristeller opens for plaintiff.

Mr. Hannoch opens for defendant.

Motion for a Non-suit.

ELISE LAURE, sworn in her own behalf through an interpreter.

Direct examination by Mr. Kristeller.

Mr. Kristeller. I offer in evidence the contract.

Contract is marked Exhibit P. 1.

Mr. Kristeller. I offer in evidence the stipulation of counsel.

Stipulation is marked Exhibit P. 2.

(Exhibit P. 1 read to the jury.)

(Exhibit P. 2 read to the jury.)

Q Madame, you are the person who signed this contract? A Yes, sir.

* * * * * *

Cross examination by Mr. Hannoch.

Q When this contract was signed where were you? A In Hamburg.

Q That is where you live? A Yes, sir.

Q Who signed the contract for you? A I and my partner.

Q Are these your signatures here? A This is mine and this is my partners.

* * * * * *

PLAINTIFF RESTS.

Mr. Hannoch. I move for a non-suit in this case on the ground that clause 12 of the contract is one under which this court should not take jurisdiction in this controversy and the plaintiff, having violated the terms of the contract, is not entitled to recover before this court.

(Argument.)

The Court. I feel stronger than ever, in view of this contract having been made in Hamburg, which I did not

know when I decided the question before, that this court has jurisdiction.

I will deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

DEFENDANT RESTS.

Mr. Hannoch. I make the same motion for the direction of a verdict in favor of the defendant.

The Court. I will deny that motion for the same reason.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Hannoch sums up for the defendant.

Mr. Kristeller sums up for the plaintiff.

CHARGE TO JURY.

The Court charges the jury as follows:

MOUNTAIN, *J.*

This is an action brought by Elise Laure against the defendant Jacob Singer. The action is brought upon a contract. This contract was made in Hamburg, Germany, and contemplated the engagement of the plaintiff and her company, which consisted of Max Curran, a girl and herself. The contract signed by the defendant, Jacob Singer, provided as follows: that they were "to give certain performances in this country, and Canada as the manager may direct, at least twice each day, and not over fourteen times in each week, excepting and in addition thereto one extra performance on Election night, and one on New Year's evening and an extra performance on any other holiday if it occurs during this engagement, during the theatrical season of 1922-1923, said season to commence and terminate at the option of the manager but to consist of not less than thirty weeks, said thirty weeks to be played within a period of thirty-five consecutive weeks," and the three of them, said contract provides, were to receive the sum of $300 weekly. It was further provided that all railroad fares and baggage charges under this contract should be paid by the manager from the City of New York from the opening point to the closing point back in the City of New York. The contract further provides that "if the artists are prevented from rendering the services under this contract by reason of sickness, accident or causes beyond the act's control, the artists shall be paid a sum of money based on the number of performances rendered on a pro rata basis."

Now, it appears that after this contract was signed—the parties, of course, being bound by its terms—the plaintiff and her company came to New York and they started to perform, and did so for two days. Then, as

I understood the testimony, there was an accident of some kind due to the mechanism that was used in the act and Curran was hurt. He said he was not hurt badly enough to prevent him from continuing. As I say, they had worked for two days, as I recall the testimony, when that happened and then they had a conversation with Singer, the man who signed this contract, and as a result of that conversation, they found, according to their testimony, that they were deprived of work because Singer is alleged to have told them they did not need to come any more, or to work any more. It is alleged he said that they were finished there. Mr. Curran said he was prepared to go on; that his injuries did not preclude him from carrying out his act, but that the contract was terminated in the manner that I have indicated with the more detailed testimony of the witnesses.

Now, it was the duty of these people who were engaged or working under Madame Laure to seek other employment as quickly as they could; they could not retire for the rest of the period of this contract and live easily and expect the defendant to pay them the entire amount over that period of time. It was their duty, in other words, to diminish their damages, to go out and seek work and occupation so as to cut down the damages they claimed against the defendant. Now, it is for you to determine if they have done that, and if they have how much they have cut the damages down to which they claim they are entitled.

The defendant has not appeared. The defense has contented itself with the cross examination of the witnesses for the plaintiff, and rested.

If there had been a breach of this contract by Madame Laure or her company, you might say that Singer was entitled to advise them that they were no longer held under the contract, as they had breached it. The testimony of the plaintiff was that that was not so, that they were working and they had not breached it, and that

the breach was occasioned by Singer, discharging them improperly. If that is the case, and there is no testimony that I recall that the discharge was proper, then the plaintiff is entitled to damages and that is measured by the terms of the contract.

If you will read the contract you will see just how much the plaintiff and her company was supposed to get for their services and what expenses they had under this contract.

The plaintiff's lawyer had stated in open court they were willing to admit that the damages claimed by the plaintiff were diminished by the payment of passage money amounting, I think, to $470. Of course, whatever was paid by Singer would be credited to him and I think he paid $300 as I recollect the testimony and then by the combined efforts of all of them they earned a certain amount. The Court does not attempt to add up or calculate exactly what that total is but counsel in summing up have given the results of their calculations and you will bring in as damages for the plaintiff the amount that she would have earned if she had not been discharged, less whatever she has been able to earn or her company, less the passage money and less such payments as have been made to her under the conditions named in the contract.

(The jury retires.)

Rule for Judgment.

RULE FOR JUDGMENT.

Filed October 8, 1923.

ESSEX COUNTY CIRCUIT COURT.

33221

ELISE LAURE, *Plaintiff,*

vs.

JACK SINGER, *Defendant.*

Action at Law.

Verdict by a Jury.

Judgment for Plaintiff.

Amount $5,199.00

Costs 60.56

Total $5,295.56

Lionel P. Kristeller, attorney of plaintiff.

This action was tried before Judge Worrall F. Mountain, with a jury at the Essex County Circuit Court, October 8, 1923.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the said plaintiff and assess the damages against the defendant in the sum of five thousand one hundred ninety-nine dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of five thousand one hundred ninety-nine dollars and costs which are taxed at the sum of sixty dollars and fifty-six cents making in whole the sum of five thousand two hundred fifty-nine dollars and fifty-six cents.

Judgment entered and signed October 8, 1923.

Recorded in Book 98, Circuit Court Judgments, page 248.

GROUNDS OF APPEAL.

Filed December 28, 1923.

New Jersey Court of Errors and Appeals

ELISE LAURE, *Appellee,*	*On Appeal from Essex County Circuit Court.*
vs.	
JACK SINGER, *Appellant.*	*Grounds of Appeal.*

The appellant states the following grounds of appeal in this cause:

1. The Court erred in assuming jurisdiction herein in view of clause twelve of the contract of employment upon which the action was based, said clause reading as follows:

> "This contract shall be construed only according to the Laws of the State of New York, and any suit or action thereon or following therefrom shall be brought and shall be maintainable only in a court held within the County and State of New York, and shall not be brought or maintainable in any other County or State."

2. The Court erred in declining to non-suit the plaintiff for the reason that the plaintiff having violated the terms of the contract referred to above was not entitled to prosecute its suit before this Court and recover from the defendant.

3. The Court erred in declining to direct a verdict in favor of the defendant for the same reasons in point 2 above set forth.

Grounds of Appeal.

4. The Court struck out the defendant's sixth separate defense.

STEIN, STEIN & HANNOCH,
Attorneys of Appellant.

December 10, 1923.

Service duly acknowledged by plaintiff's attorneys.

Exhibit P. 1.

EXHIBIT P. 1.

SHUBERT ADVANCED VAUDEVILLE CONTRACT

Official Performer's Contract

An agreement made this *24th* day of *May, 1922,* by and between *Jack Singer,* theatrical manager of the City, County and State of New York, hereinafter called the MANAGER, and *Madame Laure & Company,* hereinafter called the ARTIST.

WITNESSETH AS FOLLOWS:

1. The artist in consideration of the payments to be made by the Manager as hereinafter specified, and of the sum of One Dollar to him or her in hand paid, the receipt of which is hereby acknowledged, hereby agrees to render his or her exclusive service to the Manager at such times and at such places in the United States and Canada as the Manager may direct, at least twice each day and not over fourteen (14) times in each week, excepting and in addition thereto one extra performance on Election Night, and one on New Year's Evening, and an extra performance on any other holiday if it occurs during this engagement, during the theatrical season of 1922-1923, said season to commence and terminate at the option of the Manager, but to consist of not less than thirty weeks. *Said thirty weeks to be played within a period of thirty-five consecutive weeks.*

The services of the artist to be as an actor, or actress or performer, and to include his or her vaudeville specialty, and his or her services in such parts as may be designated by the Manager, in consideration of which services the Manager agrees to pay to the Artist the sum of *Three Hundred* Dollars, weekly.

2. All railroad fares and baggage charges under this contract shall be paid by the Manager from the City of New York to the opening point, and from the closing point back to the City of New York.

Exhibit P. 1.

3. If the operation of any theatre in which the artist is to appear, is prevented by fire, casualty, public authority, strikes, or any other causes beyond the Manager's control, the Manager shall pay to the artist a sum of money based on the number of performances rendered on a pro rata basis. If the Artist is prevented from rendering the services under this contract by reason of sickness, accident or causes beyond the Artist's control, the Artist shall be paid a sum of money based on the number of performances rendered on a pro rata basis.

4. The Artist agrees:—"A." To abide by all the rules and regulations in force at any theatre or place of performance, and furthermore agrees to abide by all the rules and regulations usual and customary in theatrical companies, which said rules and regulations are made part hereof. "B." To report for rehearsals promptly and at all times and places as directed by the Manager. "C." To furnish a complete orchestration of any music necessary for his or her vaudeville act or specialty. "D." To eliminate any portion of his or her act deemed objectionable by the Manager. "E." Not to make any changes in his or her vaudeville act or specialty without prior written consent of the Manager.

5. If the Manager receives notice that the vaudeville act or specialty of the Artist engaged under this contract, is an infringement of a property right, copyright, or patent right, the Artist agrees to furnish security satisfactory to the Manager, to indemnify the Manager against any loss or damage whatsoever by reason of his permitting the presentation of such an act, before continuing with his or her act, or to change his or her act in a manner satisfactory to the Manager; such satisfaction to be solely in the judgment of the Manager.

6. The Artist shall not appear for any other person during the term of this engagement, either publicly or at clubs or at private entertainments, in any City in which

Exhibit P. 1.

the Manager may play his attraction without first obtaining the written consent of the Manager.

7. Shubert Vaudeville Exchange of New York City is acting for the Manager in employing the Artist, and five per cent. (5%) of the salary herein mentioned is to be deducted each week for the Shubert Vaudeville Exchange for procuring the Artist this engagement, and the Artist hereby directs and authorizes the Manager to so deduct such five per cent. (5%) and to pay the same direct to the said Shubert Vaudeville Exchange.

8. The Artist hereby agrees that if he or she refuses or fails to play any engagement under this contract, that he or she will pay to the Manager without demand as liquidated damages, an amount equal to twice the weekly salary paid under this agreement, for each and every week that Artist refuses or fails to play under this agreement.

10. The Artist further agrees that he or she will furnish at his or her own cost and expense all the necessary costumes required to properly dress any and all parts in their own vaudeville act or specialty, to the entire satisfaction of the Manager.

11. The Manager agrees to furnish the Artist with all the necessary costumes, hats, dresses and tights that may be required in the "REVUE" portion of the entertainment, and such wardrobe as is used in the "REVUE" portion of the entertainment shall at all times remain the property of the Manager.

12. Artists signing this agreement do so with the distinct understanding that any scenes, dialogue or action that they may create or help to create, or any scenes that may be allotted in the "REVUE" portion of the entertainment, shall at all times be considered a part of the show and the sole property of the Manager, it being further understood that the Manager may continue to use such scenes, dialogue or parts of scenes during or after the

Exhibit P. 1.

cancellation of this contract, without cost or without any claim for damages on the part of the Artist, it being distinctly understood that this does not apply to the Artist's vaudeville or specialty act.

This contract shall be construed only according to the Laws of the State of New York, and any suit or action thereon or following therefrom shall be brought and shall be maintainable only in a court held within the County and State of New York, and shall not be brought or maintainable in any other County or State.

SPECIAL NOTICE. No statement or promise by the Manager or its representative or the Artist or his or her representative concerning the Artist's position on the bill, or with reference thereto, dressing room, advertising, billing or any other thing or matter whatsoever, shall be binding on either party to this contract unless clearly endorsed in writing on the face of this contract and made a part thereof.

The Manager's address for the purpose of this agreement is now fixed at *706 Columbia Theatre Bldg. 47th & 7th Ave., N. Y. C.*

This engagement is to commence on or about September 4th, 1922.

The Artist's address for the purpose of this agreement is now fixed at *C/O W. L. Passpart, 226 W. 50th St., N. Y. C.*

WITNESS the hands and seals of the parties hereto at the City of New York, the day and year first above written.

MME. LAURE,
MAX WEYESCH,
JACK SINGER,
Manager.

Exhibit P. 2.

EXHIBIT P. 2.

ESSEX COUNTY CIRCUIT COURT.

ELISE LAURE, *Plaintiff,* vs. JACK SINGER, *Defendant.*	*In Attachment.* Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties:

1. That attached hereto and made part hereof is a copy of the contract entered into between the plaintiff and the defendant on the basis of which the within proceedings have been instituted. (Exhibit P. 1 attached.)

2. At the time the within proceedings were instituted neither the plaintiff nor the defendant were residents of the State of New Jersey, the plaintiff being a resident of Germany and the defendant being a resident of the State of New York.

LIONEL P. KRISTELLER,
Attorney for Plaintiff.

STEIN, STEIN & HANNOCH,
Attorneys for Defendant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ELISE LAURE, *Plaintiff-Respondent,* vs. JACK SINGER, *Defendant-Appellant.*	*Action at Law. On Appeal, etc.*

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

This is an appeal from a judgment entered in the Essex County Circuit Court, after a trial before Mountain, *J.*, and a jury, in favor of the plaintiff-respondent, and against the defendant-appellant, on October 8, 1923, for $5,259.56 damages and costs.

The suit was commenced by the issuance of a writ of attachment against the defendant to recover damages for the breach of a contract entered into between the respondent and the appellant, the contract being Exhibit P. 1 in this case. Under and pursuant to the terms of this contract, the respondent agreed to render to the appellant her exclusive services as an artist, at least twice each day and not over fourteen times in each week, during the theatrical season of 1922-1923, which season was to consist of not less than thirty weeks, and the thirty weeks were to be played within a period of 35 consecutive weeks. As compensation for her services, the respondent was to receive of the appellant, and the appellant agreed to pay the respondent the sum of $300 per week.

The respondent and her partners who worked under her, pursuant to the written contract in this cause, were acrobats, and the appellant was a theatrical operator conducting several "road shows," and by his agent, contracted with the respondent at her home in Hamburg,

for the tour covered by the written agreemnt, and as a result of the making of the contract, the respondent and her partners sailed from Germany to this country for the purpose of performing their part of the agreement.

It is evidence in the cause that on the ninth day of September, 1922, the appellant discharged the respondent, and refused to permit her to render any further services for the appellant. The respondent proved her case before the jury, and proved that she and her partners who were to have worked under her, pursuant to the contract in this cause, earned certain moneys between the date of the discharge (September 9, 1922) and the day of trial, thus reducing the amount of damages.

The appellant and the show, to which the respondent was assigned after her arrival in this country, arrived in the City of Newark during the month of November, 1922. The respondent having received no satisfaction from the appellant, after making repeated demands upon him to permit her to perform her part of the contract, proceeded to satisfy her claims against the appellant for her unlawful discharge by an action at law, and in order to acquire jurisdiction over the defendant, obtained upon proper affidavit, a writ of attachment requiring the sheriff of Essex County to attach the property of the appellant found in his county. The appellant not contesting the jurisdiction of the court at that time, made a general appearance in the cause, and executed to the respondent a surety company bond in the sum of $5,000, conditioned for the payment of any judgment obtained against the appellant in this cause, and thereupon, in accordance with the statute, obtained a release of the attached property.

Subsequently and on May 22, 1923, more than four months after the attachment had been levied, as appears from the stipulation on file, the appellant was adjudged a bankrupt, but notwithstanding the bankruptcy of the appellant, it having occurred subsequent to four months after the issuance of the attachment, the writ of attach-

ment remains in full force and virtue, and the bond of the appellant is now the "res" which is within the jurisdiction of this Court, and to which the respondent must now look to the satisfaction of her claim.

No proceedings of any kind have been taken to vacate the writ of attachment, and upon the day of trial, the appellant appeared by counsel before Mountain, *J.*, examined the jurors; opened his case to the jury; made certain motions which will be discussed hereafter; cross examined the witnesses of the respondents; and summed up his case to the jury, and the jury after being properly instructed by the Court calculated the damages of the respondent at $5,199.00, and the judgment was accordingly thereafter entered for that amount with costs.

The appellant made three motions during the course of the trial with respect to the Court below assuming jurisdiction of this cause of action, because of a certain clause in the contract (first ground of appeal), and used the same clause in the contract upon the motion to nonsuit, and upon the motion for a direction of a verdict in favor of the appellant.

The answer of the appellant admits the making of the contract, and admits that the respondent began to render services under the terms of the contract, but denies every other allegation in the complaint.

The answer also contains six separate defenses. With respect to the sixth defense, the Trial Court, upon motion, at the trial, struck out that defense, and that is the fourth ground of appeal set out by the appellant.

The first, second, fourth and fifth defenses were not relied upon at the trial, and are not urged as grounds of appeal, and no proof having been offered to sustain them at the trial, they cannot be used on the argument on this appeal.

The third defense contains the clause which the appellant now relies upon, and *alleges as a defense* that because of this sentence in the contract, the respondent is

without remedy in our courts. At the opening of the trial, the appellant moved the Court to refuse to assume jurisdiction of the cause of action in this cause, because the contract of employment upon which the action was based, contained the following:

> "This contract shall be construed only according to the laws of the State of New York, and any suit or action thereon or following therefrom shall be brought and shall be maintainable only in a court held within the County and State of New York, and shall not be brought or maintainable in any other county or state."

The Trial Court in its discretion, refused to grant the motion of the appellant, and proceeded to try the cause (S. C., p. 14), and the appellant was represented by his counsel throughout the trial as hereinbefore set forth. Thereafter the appellant upon the same grounds at the close of the plaintiff's case, moved for a non suit, and this motion was denied (S. C. p. 16).

The appellant offered no evidence to sustain its defenses, promptly rested his case, and thereupon moved for a direction of a verdict in favor of the defendant, upon the same grounds, and this motion was likewise denied.

Whereupon the appellant's counsel summed up to the jury, and after hearing respondent's counsel, the Court charged the jury, and the verdict hereinbefore mentioned was returned.

The appellant having been adjudged a bankrupt, which fact is evidence in this cause and is admitted in the appellant's brief, the respondent was relieved from the necessity of demanding payment of the judgment before proceeding against the bond given to release the attached goods, it being evident that a demand would be futile. However, a demand for payment of the judgment was made upon the attorney for the appellant, who reported that in view of the bankruptcy of his client, the judgment could not be paid. The respondent then com-

menced suit upon the bond given to release the attached property of the appellant against the surety named in said bond, which said cause is now pending; and its determination, a motion having been made for judgment on the pleadings, no legal defense to said suit having been interposed, is being withheld by the Circuit Judge pending a final judgment in the instant case, the said Court being of the opinion that a judgment should be entered on said bond in favor of this respondent, after the appellant shall have had an opportunity of prosecuting this appeal.

POINT I.

The appellant is estopped from claiming that the Trial Court erroneously assumed jurisdiction.

> "If a court has jurisdiction of the subject matter, a defendant, by making a general appearance, waives the objection that the venue of the action is wrong—as where, although privileged to be sued only in the county of his domicile, or in a particular court, defendant is sued in a different county or court * * *." 3 Cyc. 521.

The respondent maintains that, even assuming but not admitting, that under the terms of the contract in the case at bar, the appellant had a right to have the respondent bring her action against him only in the County and State of New York, he waived this by entering a general appearance and participating in the trial to final judgment on the merits.

The rule has often been stated that where a defendant is entitled to be sued within the limits of the jurisdiction of a certain court, that privilege is a personal one, and may be waived by submitting to the jurisdiction of another court.

In the early case of *Fraley* v. *Feather,* 46 N. J. L. 429, the defendant was surety on an appeal bond given to review a judgment recovered before a Justice of the

Peace in Passaic County against two people who were residents of the City of Paterson. A verdict was rendered against the defendant (the surety), and upon certiorari to the Supreme Court, he contended that as the Justice of the Peace had no jurisdiction over the principals, for whom the defendant was surety, in view of the District Court Act which gave the District Courts in certain cities "jurisdiction exclusive of all other courts whatever, in all cases arising under that act where the party defendant resides within the corporate limits of the city wherein said court or courts shall be established," the appeal bond could not be enforced against him.

Scudder, *J.*, in delivering the opinion of the court, said:

> "Having jurisdiction of the subject matter in an ordinary action of trover and conversion, the justice's court also acquired jurisdiction of the persons of these defendants when they appeared and interposed no plea or motion challenging the authority of the court to hear the cause and pronounce judgment against them * * *. But this privilege (conferred by the District Court Act to be sued where one resides) like others which are merely personal to litigants, may be waived by appearing, pleading, and submitting to the authority of the court without seeking to be discharged. It is too late after judgment has been pronounced, and an appeal from that judgment has been taken, to claim that the bond given to secure the appeal is void, because the defendant had another forum given them by law, which they abandoned at the trial in the justice's court."

The very same point was decided in the case of *Funck* v. *Smith,* 46 N. J. L. 484, in which the opinion of the court was delivered by Dixon, *J.*:

> "The exemption granted (referring to the privilege conferred under the District Court Act, *supra*) thus appears to be a mere personal privilege, and, therefore, those who have it may waive it at pleasure. If a defendant so favored be sued before some other tribunal and designs to avail himself of his privilege, he must either plead to the jurisdiction

> (3 Blackstone 298) or move in time to be discharged. Pleading generally or going to trial without objection renders the authority of the court complete." Citing *inter alia Toland* v. *Sprague,* 12 Peters 300; *McCormick* v. *P. R. R. Co.,* 49 N. Y. 303.

An opinion of the Court of Errors and Appeals, *Dodd* v. *Una,* 40 N. J. Eq. 672, cites with approval the case of *Funck* v. *Smith, supra.* Magie, *J.,* speaking for the court, said at page 713:

> "When the subject matter is within the court's jurisdiction, the appearance and submission of parties may justify the assertion of the jurisdiction, and prevent their afterward questioning it."

The case of *Edwards* v. *Currie,* 78 N. J. L. 566, an opinion of the Court of Errors and Appeals, reiterates and reaffirms what was decided in the cases cited above.

In the case at bar the respondent maintains that after the entry of a general appearance, and after a trial upon the merits before a jury in which the appellant took advantage of cross examining the respondent's witnesses, the appellant waived any right that it might have had to be sued only in New York.

Assuming, as was said above, that the appellant had a right under his contract to have all disputes between him and the respondent determined by the courts in the County and State of New York, yet this was only a personal privilege, and could be waived at the pleasure of the appellant.

The original action was started by attachment; the New Jersey Court had jurisdiction over the subject matter; and when the appellant voluntarily waived the personal privilege that he had, not to be sued in New Jersey (assuming that he had such a privilege) and submitted to a trial upon the merits of the case, the jurisdiction of the Court was complete; the appellant's right to question the Court's jurisdiction is gone; and the Trial Court properly assumed jurisdiction in this case.

There have been some rather recent cases passing upon this very question.

Polhemus v. *Holland Trust Co.,* 61 N. J. E. 654, cited in *McCran* v. *Western Union,* 120 Atl. 515-519, decided that a defendant who answers fully on the merits, a bill in Chancery, submits himself to the jurisdiction of the Court, notwithstanding any objection to jurisdiction over the defendant reserved in the answer. A portion of the opinion in the Polhemus case, *supra,* is as follows:

> "On the question of jurisdiction, we think that by answering in full on the merits, although attempting to reserve the objection pleaded, the defendant submitted itself to the court. Such undoubtedly is the general rule * * *.
>
> * * * The answer was to the whole bill and each part of it, and must stand on the footing of an answer on the merits. If the plea was wrongly overruled, the remedy was by appeal; if rightly overruled, the answer still stood. The defendant did not appeal, but voluntarily submitted to a trial on the merits under its answer and a general replication. It could not, on final hearing, object to the jurisdiction to which it had submitted."

This case presents a situation almost precisely like the one in the instant case. While the case at bar was not in Chancery, still the facts were such that the defendant answered the complaint on the merits, and attempted to object to the assumption of jurisdiction by the Court at the same time. After pleading and submitting to a trial upon the merits, it is too late to question the Trial Judge's decision.

In *McGuinness* v. *McGuinness,* 72 N. J. E. 381, Chief Justice Gummere, stating the opinion of the Court of Errors and Appeals, said:

> "I have no criticism of the rule which declares that a defendant who, in one breath challenges the jurisdiction of the court in a pending suit, and, in the next, asks relief against the plaintiff on the merits in the same litigation, submits himself generally to the jurisdiction, for I can imagine no more potent act of submission by a party defendant in a pending suit than asking that affirmative judicial action be taken in his behalf for meritorious reasons."

In *Laura* v. *Puncerilli,* 91 N. J. L. 38, Swayze, *J.,* delivered the opinion for the Supreme Court:

> "It is also to be said that the defendant took part in the trial of the case to the extent of cross-examining a witness as to the merits. This, I think, was equivalent to a general appearance."

And even as late as January 10, 1924, when the case of *Gabriel* v. *Mason Art, Inc.,* 2 Misc. 50 (2 N. J. Adv. Repts. #4—January 26, 1924) was decided, the same principle was enunciated—namely, that a general appearance waives jurisdictional defects. The Court there, on p. 53, held:

> "But even upon an assumption that there was no proper service of the summons, nevertheless the fact that the court had jurisdiction of the subject matter and the defendant appeared and went to trial upon the merits of the case, constituted a waiver of any jurisdictional defect in the service of the process.
>
> "And this would be so even though there was a special appearance as to the motion to dismiss for want of jurisdiction by reason of lack of proper service of process."

The respondent submits, that in view of the decisions here discussed, and because the subject matter in controversy was in the control of the Court in this state, the appellant, by entering a general appearance and participating in the trial of this cause on the merits, waived his right to object to the jurisdiction of the Trial Court in this case, and he is now barred from questioning the ruling of Trial Court when in the exercise of its direction it assumed jurisdiction of the instant case.

POINT II.

Clause 12 of the contract which stipulated, among other things, that "Any suit or action thereon or following therefrom shall be brought and shall be maintained only in a court held within the County and State of New York, and shall not be brought or maintainable in any other County or State," is void and unenforceable.

The ultimate question as to whether a stipulation, purporting to limit the courts in which an action on the contract may be brought, shall be respected, pertains to the remedy, and so is governed by the law of the forum; hence the validity of such a stipulation, according to the law of the place where made, does not necessarily render it effective in another jurisdiction in which an action, contrary to its terms, is brought. It is so held in *Meacham* v. *Jamestown, F. & C. R. Co.* (1914), 211 N. Y. 346, 105 N. E. 653, Ann. Cases 1015, C. 851.

An examination of the New Jersey Reports disclosed the fact that the precise question in point has never been decided by our own courts, although in other states, and especially in Massachusetts, this point has been extensively dealt with.

The courts in general refuse to respect or enforce contractual provisions to the effect that any action based upon the contract shall be brought in a certain court or in the courts of a certain state or district, whether such provision is invoked to defeat the jurisdiction of a court of another state or of another district of the same state as that of the court or district specified. This is upon the general ground that it is not competent for the parties by their contract, in advance, to oust the jurisdiction of the courts, and is sometimes assimilated to the principle which invalidates a stipulation for arbitration of all questions that may arise under a contract (L. R. A., 1916 D., 696).

An opinion delivered by Chief Justice Rugg for the Supreme Judicial Court of Mass. (*Nashua River Paper*

Co. v. *Hammermill Paper Co.*, 223 Mass. 8; 111 N. E. 678; L. R. A., 1916 D. 691), deals exhaustively with the leading cases in the country on this matter, and inasmuch as there are no cases directly in point in New Jersey, the defendant-appellant relies chiefly on the reasoning in that case, sometimes quoting verbatim from the words of that Judge. The decision there was to the effect that a stipulation in a contract between a Pennsylvania and a Massachusetts corporation restricting all actions thereunder to be brought in Pennsylvania, was unenforceable.

One of the earliest and leading authorities on this subject is the case of *Nute* v. *Hamilton Mutual Insurance Co.*, 6 Gray (Mass.) 174 (1856). This was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the County of Essex (Mass.)" It was held that this stipulation was not binding, and that an action could be brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy for a breach of a contract, which is created and regulated by law. Chief Justice Shaw in concluding the discussion, said:

> "The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases in the conduct of suits, in matters relating merely to the remedy, according to the stipulation of parties in framing and diversifying their contracts in regard to remedies."

In *Hall* v. *Peoples Mutual Fire Insurance Co.* (Mass.), 6 Gray 185, the provision of the contract of insurance was explicit to the effect that no action should be brought upon the policy except in the County of Worcester. In this case Chief Justice Shaw also wrote the opinion and after referring to the case of *Nute* v. *Hamilton Mutual*

Insurance Co., reported in the same volume, as substantially deciding the question, said:

> "The court were of the opinion that a stipulation in an original contract, that in case of breech, the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought * * *. It is a well settled maxim that parties cannot, by their consent, give jurisdiction to courts where the law has not given it; and it seems to follow, from the same course of reasoning, that parties cannot take away jurisdiction where the law has given it."

See also *Amesbury* v. *Bowditch Mutual Fire Insurance Co.* (Mass.), 6 Gray 596.

These cases have been generally understood as supporting the proposition that parties could not contract that their disputes, arising under a contract, should be litigated in a single court or in the courts of a particular jurisdiction.

As stated in the Federal Courts in *Home Insurance Co.* v. *Morse,* 20 Wall. 445, at 451:

> "A man may not barter away his life or his freedom, or his substantial rights * * *. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."

The reasoning in this case has been cited and relied on in numerous decisions of State and Federal Courts:

Doyle v. *Continental Insurance Co.*, 94 U. S. 535;

Prince S. S. Co., v. *Lehman*, (D. C.), 39 Fed. 704, 5 L. R. A. 464;

Slocum v. *Western Assurance Co.* (D. C.), 42 Fed. 235;

The Etona (D. C.), 64 Fed. 880;

Gough v. *Hamburg, etc.*, 158 Fed. 174;

U. S. Asphalt Ref. Co. v. *Trinidad Co.* (D. C.), 222 Fed. 1006.

The case of *Benson* v. *Eastern B. & L. Association,* 174 N. Y. 83, 66 N. E. 627, construed the provision of a contract of a Building and Loan Association that "any action against the association should be commenced in the County of Onandaga in the State of New York." The Court held that such a condition, if valid,

> "affected only the venue of the action. If, in violation of the stipulation, the plaintiff brought his action in another county, the defendant's remedy was to move to have the place of trial changed to that in which the plaintiff had agreed it should be brought. The code provides in what counties the venue of an action may be laid, but if, in contravention of those provisions, the venue is laid in another county than that prescribed, the remedy given is a motion to change the place of trial. The erroneous practice neither affects the jurisdiction of the court nor defeats the cause of action."

Perhaps it would not be amiss to state here that in the instant case the defendant-appellant used the clause in the contract in question not as a ground for a motion to change the place of trial—as it was intimated in the Benson case, *supra,* he might have done if the action was erroneously brought in the wrong county—*but as a means of absolute defense to defeat the cause of action.*

As stated by the Court in the Nute case, *supra:*

> "Upon the particular question here presented, the court are of the opinion that there is an obvi-

> ous distinction between a stipulation by contract as to the time when a right of action shall accrue and when it shall cease, on the one hand; and as to the forum before which, and the proceedings by which an action shall be commenced and prosecuted. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated by law * * *. The question is not without difficulty, but, upon the best consideration the court have been able to give it, they are of the opinion that *it is not a good defense to this action.*" (Italics ours.)

To the effect that a stipulation in a contract, requiring suit thereunder to be brought in a particular district, county or state, is against public policy and unenforceable as a matter of defense to an action on the contract, see

Savage v. *Peoples B. and L. Association,* 45 W. Va. 275-282;

Bartlett v. *Union Mutual Fire Ins. Co.,* 46 Me. 500;

Reichard v. *Manhattan Life Ins. Co.,* 31 Mo. 518;

Indiana Mutual Insurance Co. v. *Routledge,* 7 Ind. 25;

B. & O. R. R. Co. v. *Stankard,* 56 Ohio St. 224;

Owsley v. *Yerkes,* 109 C. C. A. 250;

First Nat. Bank v. *White,* 220 Mo. 717-737;

Healy v. *Eastern B. & L.,* 17 Pa. Sup. 385-392-393;

Matt v. *Iowa Mutual Aid,* 81 Ia. 135;

Shuttleworth v. *Marx,* 159 Ala. 418-428.

The opinion of Chief Justice Shaw of Mass., in the *Nute* case, *supra,* was mentioned as controlling in many of the cases just cited, and the current of authority seems to support almost without exception the view there expressed.

There are, however, two cases, *Daley* v. *Peoples B. & L. Association,* 178 Mass. 13, 59 N. E., 452; and *Mittenthal* v. *Mascagni,* 183 Mass. 19, 66 N. E. 425, which, without explanation, might seem to indicate that there are some decisions opposed to the clear and convincing legal reasoning expressed by Chief Justice Shaw in the *Nute* case.

The *Daley* case involved the construction of the following clause:

> "Any action against this association by any shareholder shall be brought * * * in the County of Ontario, State of New York."

The Court enforced the stipulation, but based its decision upon the ground, first, that practically all the members of the defendant association lived in New York; second, that practically all the transactions would take place there, and third, that the case of *Greve* v. *Aetna Insurance Co.,* 81 Hun. 28, 30 N. Y. Sup. 668, was controlling.

Assuming for the sake of argument that the first two reasons present valid grounds for the Court's decision, yet the fact that the *Greve* case was mentioned, shows that it played an important part in construing the stipulation in contract. The *Greve* case, however, was an inferior court case in New York, and was subsequently overruled by *Benson* v. *Eastern B. & L. Association, supra,* which was decided in 1903. Had the *Daley* case, decided in 1901, arisen subsequent to the *Benson* case, there is no doubt that the result of the *Daley* case would have been different because the law of New York would have been correctly submitted, and the *Benson* case, and not the *Greve* case, would have been controlling. This is the reasoning of Rugg, *C. J.*, and is most logical.

And yet, aside from the legal aspects involved in the *Daley* decision, there were peculiar circumstances in that case that may have warranted the Court finding as it did. There was the fact that a New York corporation, composed almost exclusively of residents of New York and transacting practically all of its business within the State of New York, might reasonably desire to have suits

brought against it by its own members within the boundaries of New York State. It does not seem harsh or unfair that under such circumstances the Court should seek to enforce a stipulation to the effect that all suits against the corporation should be brought in New York State.

And so, instead of being an authority *contra* to the position urged by the plaintiff-respondent, the *Daley* case is merely an exception easily distinguished by the special facts involved and the obsolete law relied upon.

The other so-called exception is *Mittenthal* v. *Mascagni, supra.* It is obvious that the decision in this case was based upon the peculiar circumstances involved, so that it is unnecessary to accord it more than cusory mention. Not only is the holding there distinguishable on its facts, but also if of any value on its legal reasoning, it has been cut down by the later opinion expressed in *Nashua Paper Co.* v. *Hammermill Paper Co., supra.*

As said by Chief Justice Rugg in the Nashua case, *supra*:

> "*The Daley and Mittenthal cases, as to the points adjudicated, while not extending the doctrine of the Nute case, do not overrule it, and are not inconsistent with it.* All three of these cases may be treated as stating the law applicable to the several states of facts presented to the court. *The Nute case lays down the general principle.* The other two cases stand as sound upon their several states of facts. *To extend them to the present case involves overruling the Nute case. That case, as has been pointed out, states a general principle which has been adopted and prevails in all Federal Courts by reason of the binding decisions of the United States Supreme Court in Home Insurance Co.* v. *Morse,* 20 Wall. 445, and *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535. *The same rule prevails generally in all states where the question has arisen.*
>
> *It relates to a matter, as to which uniformity of decision and harmony of law among the several jurisdictions of this country are desirable.* It would be unfortunate if contracts touching a subject of general commercial interest, and which may be

> broadly operated as to jurisdiction should be held valid in one state and invalid in another." (Italics ours.)

The most recent decisions that the plaintiff-respondent has been able to find bearing on this point in question are three New York cases.

In *Berkowitz* v. *Arbib,* 183 N. Y. S. 304, the Court in passing upon a clause in a contract providing for arbitration of disputes to the exclusion of relief through the courts, said:

> "It has always been the established law of this state that agreements in advance to oust its courts of jurisdiction are a nullity and entirely illegal and void. This principle found its latest complete and unequivocal acceptance in the Court of Appeals in Meachem *v.* Jamestown, etc., R. R. Co., 218 N. Y. 346."

The second case, *Stagg* v. *Oilfields,* 192 N. Y. S. 596, involved a ruling on this clause:

> "It is agreed that while for convenience this agreement is signed by the parties in the City of New York, United States of America, it should be considered and held to be as one duly made and executed in London, England."

A portion of the Court's opinion is as follows:

> "Furthermore it is by no means certain that the parties stipulated in the contract that no action would be brought under it outside of England. *If the clause were so intended, this court would not be bound to respect it.*" (Italics ours.)

The latest case, *Kent* v. *Universal Film Co.,* 193 N. Y. S. 838, involved a contract made in Havana whereby the parties, a resident of Havana and a New York corporation attempted to confer jurisdiction over all disputes arising out of the contract in Havana courts. The New York court refused to respect such a provision:

> "The federal court regards contracts by which parties attempt to confer exclusive jurisdiction over a particular court, foreign or domestic as contrary

> to public policy and void * * *. I think * * * that the defendant, a domestic corporation, could not even if it so intended, contract to oust this state of jurisdiction to call it to account under its agreements with the plaintiff."

In the case at bar the contract was made in Hamburg, Germany; it was performable in cities throughout the United States; by its terms actions thereunder were to be brought in New York only; suit was started and judgment obtained in New Jersey.

New Jersey, then, being the forum, and the stipulation in controvery relating to the remedy, the law of New Jersey should determine the validity of the stipulation. But this state, as has been said before, having no precedent of its own by which to be guided, must look elsewhere for its authority, and for such authority the respondent refers the Court to the cases just cited.

The plaintiff-respondent maintains that the stipulation contained in Clause 12 of the contract in the case at bar is void and unenforceable. In view of the long line of decisions which are absolutely opposed to respecting such provisions, and having due regard to the logic and reason behind these decisions, especially expressed in the *Nute* case, and the *Hammermill Paper Co.* case, *supra,* there seems to be no valid reason why New Jersey should not fall in line with the current of authority.

POINT III.

It was not error for the Court to strike out the defendant's sixth separate defense.

The respondent contends that this defense (S. C., p. 10, Sixth Separate Defense) interposed by the appellant, is not such a defense as would defeat the respondent's right to enter judgment. The purpose of obtaining this judgment, as the respondent readily admits, was to obtain the necessary basis for an action to be instituted against the surety company, which, together with the appellant ex-

ecuted the bond to the respondent under which the goods of the appellant attached in this case were released.

The respondent realizing that the appellant herein is bankrupt, has not and does not intend to issue execution against the appellant upon the judgment obtained in the court below.

There is ample authority for the proposition that where a surety bond is given to release the attached goods, the plaintiff may proceed to judgment on the attachment suit against the defendant for the purpose of holding the surety on the bond, even though bankruptcy proceedings have been instituted by the defendant. This rule has been generally stated in *Collier on Bankruptcy,* 13th Edition, 23, Volume 1, page 587:

> "A discharge in bankruptcy of the party principally liable does not preclude a creditor whose attachment or garnishment had been levied more than four months before bankruptcy proceedings from entering a judgment against the bankrupt with perpetual stay of execution in order to charge the sureties on the bond."

While no perpetual stay of execution has been entered in the instant case, that fact alone should not be sufficient ground of reversal of the judgment rendered below, in view of the fact that the only purpose for which judgment below was obtained was for the purpose of holding the surety on the bond.

One of the leading cases on this point is the case of *Butterick Publishing Co.* v. *Bowen Company,* a Rhode Island case, reported in 80 Atl. 277. The facts in this case were very similar to those in the instant case. The defendant's personal property was attached on the original writ. This attachment was dissolved upon the giving of a bond, with sureties, in the manner and in the form prescribed by the statute. The defendant filed a plea of the general issue. Before the case was reached for trial and more than four months after its commencement and the making of said attachment, the defendant filed a volun-

tary petition in bankruptcy. Upon the trial, the defendant set up his bankruptcy proceedings to stay the proceedings in the state court. The question on appeal was: did the *defendant's discharge in bankruptcy,* duly pleaded by him, bar a plaintiff from prosecuting his claim to judgment when the plaintiff's suit was commenced more than four months prior to the commencement of proceedings in bankruptcy by the attachment of personal property of the defendant, which attachment was discharged upon the giving of a bond with sureties, with the condition therein that the same shall be null and void, if the final judgment or decree in the action in which the writ was served should be forthwith paid and satisfied after the rendition thereof? The Court held that the plaintiff was not barred from prosecuting his claim to judgment and based its decision in part upon the case of *U. S. Pump Co.* v. *Northern Pennsylvania Co.,* 227 Pa. 262; 75 Atl. 1094, in which the Court, in considering the question, said:

> "Is there anything in the law or practice of Pennsylvania to prevent or dicountenance a special judgment against one discharged in bankruptcy? The appellee has secured its discharge, and its personal liability is gone; but that does not constitute any reason why a judgment against it should not be entered for the special purpose of fixing and enforcing the liability of the surety. The surety took the risk of appellee's insolvency, a risk that the appellant was supposedly protected against by the very bond in question, so it would be most unfair to allow the substitution of the bond for the goods attached, and then to deny the formal relief necessary in order to enforce its terms against the surety."

This decision applies precisely to the instant case. A judgment was entered on the attachment suit below merely to enforce the surety company's liability on the bond, which was given solely for the purpose of protecting the respondent, if it lost its remedy against the principal on the bond (the appellant).

A late application of this rule is found in the case of *Marks* v. *Outlet Clothing Company,* a Maine decision (1923) reported in 120 Atl. 427. Chief Justice Cornish there decided that a judgment in attachment could be obtained when the defendant was involved in bankruptcy proceedings, even though the sole purpose was to hold the surety company liable on its bond given to release the attached goods.

> "The defense is that the bond was given to take the place of an attachment and said attachment was vacated and made null and void by reason of the bankruptcy of the defendant within four months of the date of said attachment, and that by reason thereof the said writing obligatory is null and void. This defense is specious. The bankruptcy proceedings had no effect whatever upon the attachment because that had already been vacated by the giving of the bond. There was no attachment upon which bankruptcy proceedings could operate.
>
> Had no bond been given, the attachment would have been dissolved by the bankruptcy, but another state of facts existed. The defendant in the suit, instead of availing himself of the bankruptcy proceedings at the time, saw fit to vacate the attachment in another way, and executed the bond to supersede it. His sureties signed with him and their legal obligations were thereby fixed by the terms of the bond itself. They bound themselves absolutely and unqualifiedly to pay the judgment within 30 days after rendition, so says the bond.
>
> There is no exception in the case bankruptcy. None is implied, and the court can insert none. It can only enforce the contract made by the parties. The condition has not been complied with, and the penalty follows."

The respondent submits that in view of these decisions, there can be no justification in the appellant's contention that the Court erroneously struck out the appellant's sixth defense. The respondent was rightfully entitled to have judgment entered in the suit below, so that he could pursue his remedy against the surety on the bond given to release the attached goods.

POINT IV.

Respondent's answer to appellant's brief.

The first ground of appeal urged by the appellant has been heretofore fully discussed in Point III, and therefore, the respondent will not deal with it further.

As to the second ground of appeal urged by the appellant, the respondent will consider the cases and points in the order in which the appellant has raised them. The first three cases cited: *De Witt* v. *Buchanan,* 54 Barb. (N. Y.) 31; *Burdick* v. *Freeman,* 24 N. E. 949; *Morris* v. *Missouri Pacific Railway Co.,* 14 S. E. 228, are cases which do not involve decisions upon the point in question in the instant case. They are tort cases and any opinion upon the question as to whether a stipulation in a contract to the effect that actions thereunder could be brought in one jurisdiction only, would be *dicta* and, therefore, not binding upon this Court.

The fourth case, *Anglo American Co.* v. *Davis Co.,* 191 U. S. 373, passes upon the constitutionality of a provision of the New York code and, therefore, is not applicable to the instant case.

Mittenthal v. *Mascagni,* 183 Mass. 812, presents a set of facts in which the plaintiff and the defendant, both being residents of Florence, Italy, entered into a contract providing for personal service on a musical tour and *stipulated that all disputes were to be settled by the Courts of Florence, the place where both parties resided and the place where the contract was made.* The appellant seems to urge this case with much vigor, but it is not binding on the instant case, for two reasons, viz:

First, the facts in the instant case are different. The plaintiff and the defendant were not both residents of New York, and the contract was not made in New York, so it is obvious on the face of things that reasons which prompted the Court in the *Mittenthal* case, in finding as they did, could not be applied in the present case. The

respondent in the case at bar, lived in Hamburg, Germany, where the contract was made. The defendant resided in New York. It would have been very unfair, disregarding for the time being, the legal reasons involved, for the defendant to restrict the plaintiff's actions to the State of New York. As the facts unfolded themselves, had the plaintiff been restricted to New York for her action, she would have been absolutely without remedy, as the defendant had nothing in New York against which the plaintiff could have proceeded.

The second reason for holding that the *Mittenthal* case is not binding on this Court, is that the effect of its decision while perhaps not absolutely overruled, has been weakened by the opinion of Chief Justice Rugg, in *Nashua River Paper Co.* v. *Hammermill Paper Co.*, 111 N. E. 678, heretofore discussed in Point II of this brief.

Greve v. *Aetna Insurance* (30 N. Y. S. 688) incorrectly stated the New York law, as Chief Justice Rugg remarked in the *Nashua* case, *supra.*

Daley v. *Peoples B. & L.* (59 N. E. 452) was decided upon the assumption that the *Greve* case correctly stated the law of New York. The *Greve* case was overruled by the opinion of *Benson* v. *Eastern B. & L. Association*, 174 N. Y. 83, as stated in Point II of this brief, and had the *Benson* case been decided before the *Daley* case, it probably would have changed the decision in the latter case.

State v. *Trimble,* 238 S. W. 839, involving the right to recover in Missouri, upon a cause of action, created by the Kansas Workmen's Compensation Act, does not involve a decision as to the efficacy of a stipulation as in the instant case, and, therefore, is not applicable.

The weight to be given to the *Nashua* case, *supra,* does not depend upon the special facts, but rather upon the collection of authorities there found. Chief Justice Rugg traces the history of this subject and after a careful and logical analysis arrives at the conclusion that a stip-

ulation in a contract restricting the parties to actions in a particular state is such a stipulation as would tend to oust the courts of jurisdiction and, therefore, cannot be adhered to by the Courts.

POINT V.

The Essex County Circuit Court having properly exercised its discretion in assuming jurisdiction over this case; and the appellant having appeared in this case generally and being thereby estopped from raising the question that the Trial Court erroneously assumed jurisdiction; and the clause in the contract in suit (in Clause 12) restricting all actions to be brought thereunder in courts in the State of New York only, being void and unenforcible; and there being no merit in the appellant's contention that the Trial Court committed an error in striking out the sixth defense in the answer of the appellant; and the verdict in the court below being in all respects proper; the judgment of the Essex County Circuit Court should be affirmed with costs to the respondent.

March Term, 1924.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

ELISE LAURE, *Plaintiff-Appellee,* *against* JACK SINGER, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex Circuit Court.*

BRIEF OF APPELLANT.

Statement of Issues.

This suit is based upon a written contract (Exhibit P. 1) dated May 24th, 1922, made in *Hamburg, Germany,* between plaintiff, *a resident of Germany* (Exhibit P. 2), and defendant, *a resident of New York* (Exhibit P. 2.), Plaintiff was a theatrical performer. Defendant was a theatrical producer. The contract entered into between them provided for a thirty-week engagement to be performed by the plaintiff for the defendant within a period of thirty-five weeks during the theatrical season of 1922-1923 throughout the United States and Canada, at a weekly salary of three hundred dollars.

After performing for a few days, plaintiff was discharged at Brooklyn, N. Y., on September 9th, 1922 (complaint page). She alleges that she was wrongfully discharged. The defendant contended that the discharge was a proper one; but inasmuch as the jury has found in favor of the plaintiff, the question of wrongful discharge is disposed of and the matter is not one of the subjects on appeal.

On September 28th, 1922, a writ of attachment was issued out of the Essex County Circuit Court against the defendant on the ground of his non-residence, the claim being in the sum of nine thousand dollars, the full amount

of salary to be earned during the entire period of the contract. The property attached was released upon the filing of a bond under the statute.

The jury, after hearing evidence as to the amount of salary earned by the plaintiff through other sources during the period of the contract, gave judgment in her favor for the sum of $5,295.56.

There are two grounds of appeal urged:

1. The Court erred in striking out the defendant's sixth defense.

2. The Court erred in assuming jurisdiction in the case in view of clause 12 of the contract.

The Court erred in striking out the defendant's sixth defense.

The defendant's sixth defense was as follows:

> "The defendant since the institution of the within proceedings has been adjudicated a bankrupt by the United States District Court for the Southern District of New York. Pursuant to the Act of Congress relating to bankruptcy, he has filed a schedule setting forth the assets and liabilities, in which schedule was included the claim of the plaintiff herein. Due notice of the pendency of said proceedings has been given to the plaintiff.
>
> "The time within which application for discharge may be made in said proceedings has not yet expired. If discharge is granted in said proceedings the indebtedness to the plaintiff will be discharged, same being a debt dischargeable in bankruptcy under the aforesaid Acts of Congress.
>
> "That the matters in controversy between the parties is, therefore, one which should be adjudicated upon by the United States District Court for the Southern District of New York, and this court should not assume jurisdiction. In the event that this court should assume jurisdiction it should only be for the purpose of determining the amount of the indebtedness due to the plaintiff from the defendant, staying any further proceedings pending the determining of the bankruptcy proceedings and the discharge in bankruptcy."

The debt sued upon was a debt dischargeable in bankruptcy.

Section 17 of the Bankruptcy Act provides:

A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) are liabilities for obtaining property by false pretenses or false representations, or wilful and malicious injuries to the person or property of another; or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

This debt does not come within any of the exceptions. If, therefore, the debt was a provable one, a discharge in bankruptcy would have satisfied it.

Section 63 of the Bankruptcy Act defining provable debts says:

Debts of the bankrupt may be proved and allowed against his estate which are * * *

(4) founded upon an open account, or upon a contract express or implied; and

This debt comes clearly within the provision of subsection 4 of the above quotation.

The granting of a discharge would, therefore, have relieved defendant from his obligation under his contract to the plaintiff.

If the Court felt that it should have heard the case, then it could have heard it solely for the purpose of fixing the

amount of the liability under the contract and restrained any further proceedings under the judgment until the disposition of the bankruptcy proceedings. Instead of doing that it has entered a general judgment.

See *Schunack* v. *Art Metal Nov. Co.,* 84 Conn. 331, 80 Atl. 290;

American Woolen Co. v. *Maaget,* 86 Conn. 234, 86 Atl. 583.

The Court erred in assuming jurisdiction because of the terms of the contract between the parties.

Paragraph 12 of the contract provides as follows:

> "This contract shall be construed only according to the laws of the State of New York, and any suit or action thereon or following therefrom shall be brought and shall be maintainable only in a court held within the county and State of New York, and shall not be brought or maintained in any other county or state."

The last two clauses of paragraph 12 of the contract sets forth the addresses of the respective parties in New York City for the purposes of the contract.

It is conceded on the part of appellant that parties cannot by agreement *enlarge* the jurisdiction of courts, nor can they by agreement, *oust* a court of jurisdiction. Appellant does not contend in this case that the Essex County Circuit Court did not have jurisdiction. He contends that the Court should have refused to assume jurisdiction because of the terms of the contract between the parties.

It will be recognized that a state may deny the use of its courts for litigation between non-residents of causes of action arising wholly in other states.

In 15 C. J., page 118, paragraph 816, it is held that jurisdiction may be refused "where there are reasons of policy against entertaining the action" and "where the action is between non-residents or one that arose without the state, even though the action is transitory."

In *DeWitt* v. *Buchanan,* 54 Barb. (N. Y.) 31, plaintiff sued for damages for assault and battery. Both plaintiff and defendants were residents and citizens of Great Britain and Canada. The tort had been committed there. The Court held that while in principle it had jurisdiction, nevertheless, as a matter of policy, it should not entertain jurisdiction. At page 33 the Court said:

> "Unless for special reasons, non-resident volunteers should not be permitted the use of our courts to redress wrongs or enforce contracts committed or made within their own territory. Our courts are organized and maintained at our own expense for the use, benefit and protection of our citizens. Volunteers should not be invited to bring their matters here for litigation. But if a volunteer flee to this country, he may be pursued and prosecuted here.
>
> "Nothing appears in this case showing why jurisdiction should be entertained. It seems an ordinary case of assault and battery committed in Canada, both parties still residing there, the defendant being casually here when arrested."

In *Burdick* v. *Freeman,* 24 N. E. 949, (New York Court of Appeals), the action was for criminal conversation. The parties were citizens of other states, but were living in New York when the suit was brought. The cause complained of occurred outside of New York and in the state of the parties' residence and domicile. After the case had been closed, and the jury had been charged, the defendant contended that the plaintiff could not maintain its action because the Court was without jurisdiction. The Court held that it had jurisdiction, but that in its discretion, it could have refused to entertain the action and could have dismissed it. But in the instant case, the defendant had waited until the case was closed, and fearing an adverse decision, had then raised the point of law of jurisdiction for the first time. The Court held that he should not be permitted to speculate upon the probable outcome of the case, and then ask the Court to exercise its discretion in his favor. Accordingly, the Court declined the motion.

In *Morris* v. *Missouri Pacific Railroad Company,* 14 S. E. 228, the Texas Supreme Court refused to entertain jurisdiction of a suit between non-residents to recover damages for injuries to real estate occurring outside of the state.

In *Anglo-American Provision Company* v. *Davis Provision Company,* 191 U. S. 373, the United States Supreme Court held that a state might deny jurisdiction to its courts over suits by corporations of foreign states against corporations of foreign states on foreign judgments. In that case the plaintiff and defendant were Illinois corporations. A suit was instituted in New York upon an Illinois judgment. The New York Code provided that a foreign corporation could not sue another foreign corporation excepting if the cause of action arose in New York. It was contended that this provision of the code was unconstitutional. The Supreme Court held that the provision was entirely proper, and that the plaintiffs were not entitled to maintain their action in New York as a matter of right guaranteed to them by the constitution.

Appellant contends, therefore, that the plaintiff was not entitled to maintain her action as a matter of right, but as a matter of discretion. In view of the contract which had been executed by her and *upon which her cause of action was based,* the Court below should have refused to entertain her suit.

The identical point raised in the case at bar has been passed upon favorably to appellant's contention by the Massachusetts Supreme Court, in the case of *Mittenthal* v. *Mascagni,* 183 Mass. 812. In that case, a contract was made in Italy, between the defendant, an Italian subject, and the plaintiff, a resident of New York, who elected a domicile in Italy by the terms of his contract. Plaintiff by clause 12 of the contract did the same thing in the case now at bar. Under the provisions of the contract, the defendant undertook to direct operas composed by him,

on a tour throughout the United States and Canada, for a period of fifteen weeks, at a weekly salary of four thousand dollars, beside expenses. The contract was in the Italian language, and provided:

> "The present contract in its form and substance is regulated by the Italian laws by will of the parties concerned and according to article 9, of the Italian civil code. *Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy.* Maestro Mascagni reserves the right to direct actions in New York for payment of his recompense, and, therefore, he alone has the faculty to derogate the competence of the established contract."

A suit was brought in Massachusetts to recover damages for breach of contract. A motion to dismiss was made and denied, and an appeal taken. The Appellate Court reversed the order below, and granted the motion to dismiss.

Chief Justice Knowlton held that the intent of the agreement was clear to have it construed by the laws of Italy, and that all proceedings excepting those for recompense, should be maintained in those courts. If the clause was valid according to the laws of Italy, it would be enforced in Massachusetts, because there was nothing so objectionable to it that the courts of Massachusetts should disregard it on the ground of public policy. No proof as to the Italian laws was presented, and it was, therefore, presumed that the laws of Italy were the same as the laws of Massachusetts. The Court recognized that agreements requiring parties to arbitrate and not avail themselves of any legal proceedings were invalid because such agreements amounted to an utter abnegation of one's legal rights. The Court on the other hand recognized that it was permissible for parties to make ageements with respect to preliminary and incidental matters in dispute as long as they retained the right to appeal to the courts for the determination of any sub-

stantive question of liability. The Court said that in modern times the tendency was to permit greater freedom in contracting than before.

Passing to the consideration of the case then before it, the Court said:

> "In most cases, certainly in a case like the present, there is no occasion for the protection of the dignity or convenience of the courts. *The contract was between citizens of foreign states, who, as far as our tribunals are concerned, well might make any reasonable arrangement for the settlement of their disputes.* (Italics are ours.)
>
> "The determining question seems to be whether such a contract as this is so improvident and unreasonable, such an abnegation of legal rights, that the government, for the protection of mankind, will refuse to recognize it, even when made in a foreign country by subjects or citizens of that country. We can fancy the parties to this contract at the time of making it, saying something like this:
>
> "'As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances, through a great many independent states, each of which has its own courts and system of laws, under some of which a person sued in a civil action when about to leave the state may be arrested and held to bail or imprisonment, if suits may be brought in any one of these numerous jurisdictions, there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks after which Maestro Mascagni intends to return to his permanent home in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions at great distances from the home of either.'
>
> "If moved by such considerations, the parties made the agreement in question, shall the Court

> say that they were *non compos mentis* and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?"

The Court then proceeds to discuss various other cases. It distinguishes various other cases which attempt to *oust* a court from jurisdiction, as distinguished from those merely limiting the area within which proceedings shall be brought.

The Court then dismisses the action.

Appellant contends that the reasoning and rule laid down in the above case should be dispositive of the case at bar, because the situation is practically identical.

In *Meecham* v. *Jamestown, &c., Railroad,* 211 N. Y. 346, the New York Court of Appeals held that a contract requiring arbitration in case of a dispute, was invalid, inasmuch as it *ousted* the court of jurisdiction. The Court, however, refers to the *Mittenthal* v. *Mascagni case, supra,* as follows:

> "Whether such a contract is always invalid where the tribunal is a foreign court we do not need to determine. There may conceivably be exceptional circumstances where resort to the courts of another state, is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction (citing Mittenthal *v.* Mascagni)."

Thus we see that the New York Court of Appeals recognizes the distinction made in the Mittenthal case.

In *Greve* v. *Active Live Stock Ins. Co.,* 30 N. Y. S. 668 (1894), a policy of insurance provided that

> "any suit or action at law, or in equity, for the recovery of any claim or enforcement thereof hereunder, shall be brought and maintained and shall be sustainable only in courts of Warren County, State of New York."

A suit was brought upon the policy in New York County. An answer was filed, pleading the above clause

of the policy and a demurrer was interposed to the answer. They overruled the demurrer and sustained the answer.

The Court held that the agreement was not "so manifestly against public policy as to make it the duty of the Court to refuse enforcement of the stipulation in the contract, relating to the place of trial."

In *Daley* v. *Peoples B. & L. Assn.*, 59 N. E. 452 (Mass. Sup. Court 1901), the plaintiff, a citizen of Massachusetts, brought suit against the defendant, a New York corporation. His rights were based upon a certificate which provided that

> "any action brought against this association by any shareholder, shall be brought in the County of Ontario, State of New York."

The Massachusetts court held that this clause prevented plaintiff from suing in the Massachusetts courts, and the proceedings were dismissed.

In *State* v. *Trimble,* 238 S. W. 809 (Missouri Supreme Court, 1922), a suit was brought in the courts of Missouri to recover upon a cause of action created by the Kansas Workmen's Compensation Act. That act provided (*inter alia*):

> "No action or proceeding provided for in this act shall be brought or maintained outside the State of Kansas."

The Court held that inasmuch as the cause of action was created by statute, the statute could impose conditions as to the forum in which the suit might be maintained. Accordingly, the suit was dismissed.

In the Court's opinion, in discussing the various limitations which might be placed upon the institution of proceedings, the Court referred to agreements of parties prescribing where suits might be brought to enforce liability created by their contract. The Court said (p. 810):

> "Indeed it can readily be seen that one of the inducements that would lead one of the parties to elect to come under the act is the important consideration, that if a contraversy should unfortu-

> nately arise between the parties to the contract, suit could not be brought except in the forum of the place of the contract. *It is well settled that parties may so contract if they choose*'' 15 C. J. 739.
>
> *Daley* v. *Peoples B. & L. Assn.*, 59 N. E. 452;
> *Mittenthal* v. *Miscagni*, 66 N. E. 425;
> *Greve* v. *Active Ins. Co.*, 30 N. Y. S. 668.

That Court thus recognizes the doctrine here contended for.

These cases are authorities for the contention raised herein.

Counsel for appellee rely to a great extent upon the case of *Nashua River Paper Company* v. *Hammermill Paper Company*, 111 N. E. 678 (Mass.). In that case, the contract provided that no action should be brought on it "in any court of any state of the United States, or in any Circuit or District Court of the United States, against the company other than in the Courts of Common Pleas, of the State of Pennsylvania." This clause was held to be invalid and did not prevent the maintenance of an action in Massachusetts. An examination of this case, however, discloses that one of the parties was a corporation, organized under the laws of the State of Massachusetts, and the Court holds that that feature differentiates the case from the Mittenthal case. The Court in the Nashua River Paper Company case, referring to the Mittenthal case, said:

> "As both parties (in the Mittenthal case) were non-residents, they had no standing in the courts of this state as a matter of strict right, but only as a matter of comity (citing cases). It, therefore, was regarded as appropriate to yield to the terms of the contract between the parties, having such obvious foundation in convenience and reason, although the Court well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens."

In considering the various other cases cited by appellee, the Court should bear in minl the distinction that in many

of them the contracts sought to oust the court of jurisdiction, and in many of them some of the parties litigant were residents of the state in which the action was brought.

It is, therefore, respectfully submitted that the judgment below should be reversed.

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New Jersey Court of Errors and Appeals

ELISE LAURE, *Plaintiff-Appellee,* *vs.* JACK SINGER, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

REPLY BRIEF OF APPELLANT.

The appellant desires to reply briefly to the first point urged in the respondent's brief to the effect that the appellant is estopped from claiming that the Trial Court erroneously assumed jurisdiction.

In the cases of *Fraley* v. *Feather,* 46 N. J. L. 429, *Funck* v. *Smith,* 46 N. J. L. 484, and *Edwards* v. *Currie,* 78 N. J. L. 566, no objection was taken to question jurisdiction until after the case had been closed, and the courts quite properly held that the question of defective service and personal privileges were waived.

In *Polhemus* v. *Holland Trust Co.,* 61 N. J. E. 654, a special plea to the jurisdiction was stricken out. No appeal was taken, but an answer filed and the case disposed of on the merits. The Court held that the jurisdictional elements were waived. In that matter, however, an appeal could have been taken from the order striking out the plea.

In the present case, no appeal could have been taken until the case was concluded. Consequently, the case does not mitigate against the appellant's contention.

In the cases of *McGuinness* v. *McGuinness,* 72 N. J. E. 381, *Laure* v. *Puncerelli,* 91 N. J. L. 38, and *Gabriel* v. *Mason Art Inc.,* 2 N. J. Misc. 50, the courts held that by participation in the suit through the cross examination of witnesses, the general questions of jurisdiction are waived.

The facts in those cases justify the opinions. This ruling, however, is not applicable to the case at bar for the reason that the facts upon which the appellant relies to establish his contention that the Court should not have assumed jurisdiction, were only brought out on cross examination. This fact was, viz: where the contract was executed, the place of execution being at Hamburg, Germany, (Case, p. 15). In view of this, it is contended that the cases do not apply.

We cannot see what further steps the defendant could have taken to raise the question of the propriety of the Trial Court assuming jurisdiction. He applied to the Court for an order declining to take jurisdiction before the trial. This was denied. He made a similar application at the opening of the trial and again at the close of the plaintiff's case. Exceptions were duly taken and allowed.

We, therefore, submit that the Court should consider the matter raised by the appeal on the merits of the appeal.

Respectfully submitted,

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