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JURISDICTION AND LIMITED APPEARANCE IN NEW YORK: DILEMMA OF THE NONRESIDENT DEFENDANT

LOUIS R. FRUMER†

X, A NONRESIDENT¹ of New York, is served in his home state with summons and complaint in a divorce action instituted in New York. The complaint charges that X has committed certain acts of adultery, and demands judgment for alimony and counsel fees. X doesn't believe that these charges of adultery can be substantiated, and he certainly doesn't want any judgment against him for alimony and counsel fees. He consults his local attorney, Smith, who consults by telephone a New York lawyer, Brown, for advice on the New York law of appearance. Smith explains the situation to Brown, and then continues:

"I, of course, recall the hornbook principles of jurisdiction. Maintenance, of an action against a nonresident is often difficult because of the limitations of territorial jurisdiction. It is axiomatic that a court which lacks jurisdiction over the person of a defendant is unable to render a personal judgment against him. Ordinarily, personal service must be made upon a nonresident within the state of suit for a court of that state to acquire in personam jurisdiction. Only in limited situations, exemplified by the nonresident motorist and the nonresident individual doing business within the state,² has there been deviation from this requirement of personal service within the state as the basis for acquisition of personal jurisdiction over a nonresident. But some form of service other than personal service within the state, may be sufficient to bestow upon a court in rem³ jurisdiction to act as to a specific subject-matter or status considered to be

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1. The term "nonresident", as used in this article, includes both a natural person who is a non-domiciliary of the state and a foreign corporation whose contacts with a state are not sufficient to subject it to the in personam jurisdiction of the courts of that state. That domicile within the state may be sufficient to lift the bar of territorial jurisdiction as to a natural person, see *Milliken v. Meyer*, 311 U.S. 457 (1940); N.Y. CIV. PRAC. ACT § 235, amended N. Y. Laws 1946, c. 144 on recommendation of New York Judicial Council, ELEVENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 193 (1945); N. Y. Laws 1949, c. 185 on recommendation of New York Judicial Council, FIFTEENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL (1949).

2. Even the constitutionality of statutes such as N. Y. CIV. PRAC. ACT § 229-b, relating to service of summons on a nonresident natural person doing business within the state, has yet to be sustained by the United States Supreme Court; see *Interchemical Corp. v. Mirabelli*, 269 App. Div. 224, 54 N. Y. S. 2d 522 (1st Dep't 1945); REPORT OF THE NEW YORK LAW REVISION COMMISSION 105-155 (1940).

3. The term "in rem", as used in this article, includes any type of proceeding in which in personam jurisdiction is not required in order that a court might act. The distinction is drawn between actions strictly in rem, which affect the interests of all persons in a thing; actions quasi in rem, which affect only the interests of particular persons; and actions relating to status. See, in general, Fraser, *Actions in Rem*, 34 CORN. L. Q. 29 (1948).

within the territorial jurisdiction of the court. Of course, a demand for a money judgment, which requires in personam jurisdiction, may be coupled with a claim involving a specific subject-matter or status, for which in rem jurisdiction will be sufficient. For example, in rem jurisdiction is sufficient for foreclosure of a lien upon property within the state, whereas in personam jurisdiction is required for rendition of a deficiency judgment after sale of the property subject to the lien. Or, an in personam claim for money, originally involving no specific subject-matter, may be converted into an in rem proceeding by attachment of a nonresident's property within the state, to the extent of the value of the property. I know that this divorce action, insofar as the decree of divorce itself is concerned, is in that category."

"Yes, that's all very sound," interrupts Brown. "Now, you can ignore this action and the New York court will not have any power to render a judgment against *X* for alimony and counsel fees, for the mere presence of a demand for in personam relief is ineffective in the absence of in personam jurisdiction. The remedy of sequestration is available in New York in divorce actions; in principle it is similar to attachment, but it is not available if the defendant owns no property in this state. Or, you can make a general appearance to contest the divorce on the merits, but then the court will acquire in personam jurisdiction to render a judgment against *X* for alimony and counsel fees. There is no occasion for a special appearance here, for its purpose is solely to contest the jurisdiction of the court."

"We do not want to make a general appearance," replies Smith. "What we want to do is appear and contest this divorce on the merits, without submitting to the in personam jurisdiction of the court as to alimony and counsel fees."

"I have never heard of that being done," says Brown, who by now is beginning to feel that Smith will be a rather difficult associate, "but we'll check the New York law just to be certain that it can't be done."

"By the way, I don't suppose this affects *X*'s case," says Smith, as he is about to hang up, "but you'll probably should know that *X*'s wife contends that he fraudulently secured around \$20,000 from her for an investment which didn't turn out very well. She hasn't said anything about this money in her complaint, and so I imagine that she's decided to forget about it."

"That does complicate matters," Brown explains. "New York procedure permits an entirely new cause of action to be added by amendment in an action already pending. If we make a general appearance in this divorce action, *X*'s wife might amend her complaint, as of course or by leave of court, and add this claim for \$20,000. The amended complaint could then be served upon me as *X*'s New York Attorney."

"Your procedure doesn't seem to be very fair to a nonresident," replies Smith. "I think it raises some constitutional questions of due process. Certainly it doesn't give a nonresident very much choice as to what he should do. Would you let me have a memorandum on the entire problem?"

The foregoing conversation raises a perplexing and difficult problem, whether, if an action is originally based upon proper acquisition of in

rem jurisdiction, a nonresident defendant may enter a *limited* appearance in New York for the sole purpose of contesting the in rem claim on the merits, without thereby subjecting himself to the in personam jurisdiction of the court either as to claims for personal relief presented in the original complaint or claims added by an amended or supplemental complaint.

I. DEMAND FOR IN PERSONAM RELIEF IN THE ORIGINAL COMPLAINT

The problems of special appearance and limited appearance have been intertwined in the decisions, but the distinction between the two must be kept clear. A nonresident defendant may desire merely to contest the jurisdiction of the court, to prevent entry of an in personam judgment against him, and the procedural device ordinarily available to him for this purpose is the special appearance. But whereas the traditional special appearance is solely to contest the jurisdiction of the court, a limited appearance is an appearance solely to contest on the merits the portion of the action based upon acquisition of in rem jurisdiction. However, a limited appearance will ordinarily include a special appearance, insofar as an adjudication may be required that the court does not possess in personam jurisdiction. The right to make a special appearance therefore must affect the right to make a limited appearance, for it is inconceivable that the right to make a limited appearance but not a special appearance should exist in a particular situation. Initially, for that reason, attention must be directed to the special appearance cases involving joinder of in personam and in rem claims.

If only in personam relief has been demanded, but the mode of service employed is not sufficient to confer in personam jurisdiction upon the court, the defendant may appear specially and move to set aside service of summons. If, however, in rem relief has also been demanded, and the service is sufficient to justify the exercise of in rem jurisdiction, may the defendant still appear specially and move to set aside the service of summons? In *Jackson v. Jackson*,⁴ plaintiff sought a separation and also invalidation of a separation agreement. Defendant moved to set aside service of summons outside of the state upon the theory that so much of the complaint as was directed toward setting aside of the separation agreement ran in personam, and that plaintiff was seeking in personam relief as a preliminary step toward relief in rem in the form of a judgment of separation. The Supreme Court at Special Term agreed with the defendant that the separation could not be granted if the separation agreement remained unimpeached. But, it concluded, in effect only one cause of action need have been alleged and, under such circumstances, defendant's motion should not be granted. The Appellate Division, after

4. 290 N. Y. 512, 49 N. E. 2d 988 (1943).

affirmance without opinion, certified to the Court of Appeals the question whether the action was one where the court might obtain jurisdiction over a nonresident by constructive service. The Court of Appeals also affirmed denial of defendant's motion, viewing the complaint as alleging two causes of action, separable and separated. The demand for invalidation of the separation agreement was held not to affect the court's in rem jurisdiction over the separation cause, since the prayer for in personam relief was merely a demand for additional relief which the court could not give under the circumstances.⁵

There can be no quarrel with the Court of Appeals in the *Jackson* case, if it merely intended to hold that a defendant may not move to set aside entirely the service of a summons if the complaint demands in rem relief for which the service is sufficient. But, did the court also intend to hold that this defendant could not have a ruling on jurisdiction prior to any participation in the action on the merits? The New York Rules of Civil Practice make provision for a "motion for judgment dismissing the complaint, or one or more causes of action stated therein," upon the ground that "the court has not jurisdiction of the person of the defendant."⁶ The defendant in the *Jackson* case did not specifically move for dismissal of the in personam claim for invalidation of the separation agreement, and the lower court had not ordered dismissal of the in personam claim, for it originally held that in substance only one cause of action was stated. Furthermore, it has been held that a motion to dismiss under these rules should not be granted as to a specific cause of action, if the motion is directed generally against the entire complaint.⁷ A motion to set aside service of a summons, after the complaint has been served, actually operates as a motion for dismissal of the complaint, but the fact that service of the summons will not be set aside should not preclude a defen-

5. *Id.* at 516, 49 N. E. 2d at 990: "Ordinarily it is enough, as against a motion to set aside service by publication or personally outside the state, that there be found in the complaint allegations which, if proven, would entitle plaintiff to a judgment *in rem*. Other allegations of personal liability may, at this point in the litigation, be disregarded, likewise such parts of the prayer for judgment as demand a judgment *in personam*."

6. Rule 106 (1), as to defect appearing upon the face of the complaint; Rule 107 (1), same provision for motion on the complaint and an affidavit stating facts tending to show that the court has not jurisdiction of the person of the defendant. Obviously this type of defect would not ordinarily appear upon the face of the complaint.

7. *Sullivan v. Sullivan*, 271 App. Div. 1016, 68 N. Y. S. 2d 394 (2d Dep't 1947). Defendant moved to dismiss, for want of jurisdiction, a complaint alleging an in rem cause for separation and an in personam cause for an injunction. Order denying motion to dismiss affirmed upon the ground that there was jurisdiction with respect to the in rem cause, and the motion was not specifically directed to the in rem cause. This holding was based upon the cases applying this rule to a motion to dismiss the complaint for failure to state a cause of action. It is highly questionable that this rule should be applied in a situation involving jurisdiction.

dant from appearing specially and moving specifically for dismissal of the in personam cause. In *Engel v. Engel*,⁸ an in rem claim for an interest in trust property located in New York was joined with in personam demands for an accounting and specific performance of an agreement to pay income. The court in the *Engel* case granted defendant's motion to set aside service of the summons, to the extent of dismissing the action insofar as it sought a decree for accounting and specific performance. Whether or not under the *Jackson* case such an order partially setting aside the service of summons is improper, cannot the same relief, insofar as a special appearance is concerned, be obtained by a proper motion under Rule 107?

Difficulty arises from reliance solely upon Rule 107 because of the limitations probably imposed by use in both Rules 106 and 107 of the term "cause of action". These words of art have not been construed for purposes of these specific rules, and the varying interpretations given to them for both the same and different purposes are now legendary.⁹ In *Brainard v. Brainard*,¹⁰ an action for divorce, alimony, custody, and counsel fees was commenced by service outside of the state. Defendant, with an eye on the *Jackson* case, filed a special appearance in conjunction with an answer, which merely set forth that defendant was a nonresident of the state and that the court was therefore without in personam jurisdiction. There is no indication that defendant was interested in contesting the divorce action on the merits, but, if defendant were a resident of New York, the constructive service might have been sufficient to give the court in personam jurisdiction. Under the 1946 amendment to Section 235 of the Civil Practice Act, in personam jurisdiction may be acquired by service outside of the state in an action for money only against a resident. This amendment has been construed to confer in personam jurisdiction as to alimony and counsel fees in a divorce action against a resident, although such an action is not for a sum of money only.¹¹

8. 22 N. Y. S. 2d 445 (Sup. Ct. 1940).

9. *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 298, 200 N. E. 824, 826 (1936) (problem of applicability of different statutes of limitations to each of several grounds of recovery for the same injury): "Since the defendant has committed but a single wrong and the plaintiff has suffered but a single injury, the plaintiff has in one sense only a single cause of action. . . . However, 'a "cause of action" may mean one thing for one purpose and something different for another.' (United States v. Memphis Cotton Oil Co., 288 U. S. 62, 67, 68.) Judicial decision cannot be based soundly upon dialectical distinctions or rigid application of purely formal concepts." See, in general, CLARK, CODE PLEADING 127 *et seq.* (2d ed. 1947) and authorities collected therein; Cleary, *Res Judicata Reexamined*, 57 YALE L. J. 339 (1948).

10. 272 App. Div. 575, 74 N. Y. S. 2d 1 (1st Dep't 1947), *aff'd mem.*, 297 N. Y. 916, 79 N. E. 2d 744 (1948).

11. *Ellsworth v. Ellsworth*, 189 Misc. 776, 71 N. Y. S. 2d 522 (Sup. Ct. 1947), 23

Plaintiff then moved for alimony pendente lite, custody, and counsel fees, contending that this answer was equivalent to a general appearance in the case, thereby conferring in personam jurisdiction upon the court. Defendant contended that under the *Jackson* case he could not move to set aside service of summons, that the in personam demand for alimony, custody, and counsel fees did not constitute a separate cause of action for purposes of Rule 107,¹² and therefore the court's lack of in personam jurisdiction could only be set up by answer. The majority opinion in the Appellate Division, without any attention to defendant's real or fancied dilemma, held that inasmuch as defendant had filed an answer, he had made a general appearance under Section 237 of the Civil Practice Act.¹³ The majority relies for this interpretation of Section 237 on *McClure*

N. Y. U. L. Q. REV. 340 (1948) (personal service without the state); *Dirksen v. Dirksen*, 72 N. Y. S. 2d 865 (Sup. Ct. 1947), 48 COL. L. REV. 287 (1948) (service by publication). Under the 1949 amendment to N. Y. CIV. PRAC. ACT § 235, effective September 1, 1949, ". . . a defendant domiciled in the state, may be served with the summons without an order, without the state in the same manner as if such service were made within the state. . . ." The amendment makes "it clear that domicile rather than the ambiguous term 'residence,' is the test, and broadens the right to serve defendants without the state to any case in which such defendant is a domiciliary." BULLETIN OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 321 (1949).

12. *Galusha v. Galusha*, 138 N. Y. 272, 281, 33 N. E. 1062, 1063 (1893): "The demand for alimony in a divorce suit is not an essential part of the cause of action. As described by Bishop it is merely an 'appendage' of the action. . . . Or where it enters into the final decree it is, as defined by this court, in the *Forrest* case (25 N. Y. 501), 'a mere incident of the judgment.'"

It must be noted that in the *Ellsworth* case, defendant's motion to set aside service of the summons and complaint was made in opposition to a motion by plaintiff for temporary alimony and counsel fees. A tenuous distinction can be drawn on that basis, that plaintiff's motion dependent in its entirety upon acquisition of in personam jurisdiction. See also, *Patnode v. Patnode*, 85 N. Y. S. 2d 788 (Sup. Ct. 1949); *Feldman v. Feldman*, 189 Misc. 564, 72 N. Y. S. 2d 390 (Sup. Ct. 1947); in neither of these cases was any question raised of defendant's right to appear specially to contest a motion for temporary alimony and counsel fees.

In the *Ellsworth* case *ibid.*, the defendant appeared specially and moved to set aside service of summons on the ground that he was not a resident of the state. The court denied the motion on finding that defendant was a resident of New York. But, in the light of the *Jackson* case, did the court properly take the motion under consideration? See also, *Carnegie v. Carnegie*, 274 App. Div. 887, 83 N. Y. S. 2d 252 (1st Dep't 1948), wherein defendant was allowed, without discussion of propriety, to contest jurisdiction to award alimony by special appearance. Consider also, N. Y. CIV. PRAC. ACT § 235, amended, N. Y. Laws 1946, c. 144, N. Y. Laws 1949, c. 185.

13. "The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons exclusive of the day of service, a notice of appearance, a copy of an answer or a notice of motion raising an objection to the complaint in point of law. A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."

Newspaper Syndicate v. Times Publishing Co.,¹⁴ a case presenting a clearly distinguishable situation. The issue in the *McClure* case was whether or not a proper person had been served as representative of a domestic corporation; the defendant had moved to set aside service of summons, but then served an answer, merely setting up the issue of the court's jurisdiction, prior to determination of the motion. Probably the defendant in the *McClure* case served this answer to eliminate the possibility of a default judgment being taken against it pending determination of its motion; it could, of course, have eliminated this possibility by securing an extension of time to plead.¹⁵ But, there was no problem in the *McClure* case of joinder of in rem and in personam claims, and service there was either proper or defective as to the entire action. The court did hold that service of the answer was equivalent to a general appearance, but even assuming the case on its facts to be sound, its reasoning should not be decisive in the situation presented by the *Brainard* case. In the *McClure* case, the issue of proper service could without question have been tested by the motion to set aside service of summons. The dissent in the *Brainard* case by Justice Van Voorhis, with Justice Shientag concurring, after pointing out the dual nature of an action for divorce by a wife who is also applying for alimony, concurs in defendant's argument that, under the *Jackson* case, he could not have moved to set aside the service of summons. The dissent impliedly recognizes the validity of defendant's argument that a motion could not be made under Rule 107 to dismiss the claims for in personam relief, by its approval of the answer method by which the defendant did attempt to contest jurisdiction.

On the other hand, in *Zeide v. Flexser*,¹⁶ the complaint alleged two causes of action sounding in personam, the first for the reasonable value of services and for disbursements and the second for money loaned. A third cause repeated by reference the allegations of the first two causes and sought to set aside a conveyance of property within New York alleged to be in fraud of creditors. Defendant's motion to set aside service of summons outside of the state was denied, but note the manner in which the court's order was phrased:

"Accordingly, the motion is in all respects denied with leave to serve an answer within fifteen days after service of a copy of the order to be entered hereon, with notice of entry, *reserving, however, the right to object to the juris-*

14. 164 App. Div. 108, 149 N. Y. Supp. 443 (1st Dep't 1914).

15. *Zabriskie v. Second National Bank*, 204 App. Div. 428, 198 N. Y. Supp. 482 (1st Dep't 1923).

16. 175 Misc. 911, 25 N. Y. S. 2d 610 (Sup. Ct. 1941).

diction in respect to the relief prayed for under the first and second causes of action."¹⁷

The court in the *Zeide* case, in denying defendant's motion to set aside service of summons, allowed the defendant to make a limited appearance! The fraudulent conveyance cause necessarily was based upon the in personam claims of the plaintiff, representing a method of enforcement of the plaintiff's claims. Would the fraudulent conveyance cause constitute a separate "cause of action" under Rule 107?

In *Paprin v. Bitker*,¹⁸ an action was brought for specific performance of a contract for sale of realty in New York. The complaint contained an alternate prayer for damages. Relying upon the *Jackson* case, the court granted plaintiff's motion to strike defendant's special appearance, but, note, once again, the form of the court's order:

"It follows that this court has jurisdiction of the defendant in so far as plaintiff seeks judgment for specific performance and plaintiff's motion to strike the special appearance is granted, but with leave to the defendant, within ten days after service of entry, to serve an answer, *reserving, however, his right to object to the jurisdiction of this court in respect to any judgment in personam.*"¹⁹

Unless the alternative prayer for damages be regarded as a separate cause of action for the purpose of a motion to dismiss under Rule 107,²⁰ the defendant here was in the same position as the defendant in the *Brainard* case. Yet the court in the *Paprin* case, just as in the *Zeide* case, clearly allowed the defendant to make a limited appearance, to serve an answer contesting the specific performance action on the merits without subjecting himself to the in personam jurisdiction of the court as to the alternate prayer for damages.

The *Jackson* and *Brainard* cases create uncertainty as to whether or not there is even any right of special appearance solely for the purpose of contesting jurisdiction in situations not within Rules 106 and 107, and the need for legislation in this respect has been suggested.²¹ If there

17. *Id.* at 913, 25 N. Y. S. 2d at 612 (italics supplied).

18. 64 N. Y. S. 2d 289 (Sup. Ct. 1946).

19. *Id.* at 291 (italics supplied).

20. See Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901); CLARK, *supra* note 9, 444, 475.

21. Saxe, *1947-1948 Survey of N. Y. Law—Civil Remedies*, 23 N. Y. U. L. Q. REV. 867, 874 (1948). For apparently contrary position, see Comment, *Special Appearance in New York*, 34 CORN. L. Q. 230, 238 (1948), wherein the view is expressed that "although the limited application of Rule 107 may exist through inadvertence, there is much to be said for the final result." Nothing at all is then said to justify the final result, other than an expression of enthusiasm for denial of the right to make a special appearance to a "defendant who admits adulterous conduct but who seeks to escape the moral obligation to support his wife and children."

be no right of special appearance in situations not within Rules 106 or 107 because the in personam claim does not constitute a separate "cause of action", it is difficult to find a right of limited appearance in such situations. Yet, the *Zeide* and *Paprin* cases appear to grant the right of limited appearance. Of course, even if the right of special appearance does exist in a particular situation, it cannot be assumed that the right of limited appearance also there exists. Suppose, however, that a plaintiff joins two separate and independent claims, one sounding in personam and the other in rem, and there is no doubt that the in personam cause is subject to a motion to dismiss under Rule 107. Defendant appears specially, files a proper motion to dismiss, and at the same time files an answer on the merits as to the in rem cause. Joinder of the answer with the motion to dismiss probably would bring the defendant within the rule of numerous cases, not actually involving this particular type of situation, that acts of a defendant inconsistent with a special appearance solely to contest jurisdiction will constitute a general appearance.²² Yet conceivably, within the framework of existing cases and statutes, a defendant might appear specially, move to dismiss the in personam cause under Rule 107, and at the same time secure an extension of time to plead. Then, if the motion be granted, and the in personam cause dismissed, appear and defend the in rem action on the merits.

Similar problems arise in actions in which jurisdiction is based upon attachment of a nonresident's property. *P*, a resident of New York, has a claim for \$5,000 against *X*, a resident of New Jersey. *X* cannot be served in New York, but he does own property worth \$1,000, subject to attachment in New York. *P* can attach the property, serve *X* either by publication or personally without the state, and the New York court thereby acquires in rem jurisdiction to the extent of the value of the property. A subsequent suit by *P* for the balance due, after sale of the attached property, will be based upon his original cause of action and not upon the first judgment. *X*, once again, may make a general appearance and litigate the entire claim upon the merits. This situation is quite similar to that in the *Zeide* case, and there can be little doubt that it is not a situation within Rules 106 or 107. Unless there be some defect in the constructive service or attachment proceedings, there would be no reason for *X* to attempt to make a special appearance except, in a proper case, for a determination as to domicile. But, may *X* enter a limited appearance for the purpose of contesting the merits of *P*'s claim to the extent of the value of the property? Although different policy considerations might be applicable in this attachment situation than in a divorce-alimony, lien foreclosure-deficiency judgment, or specific performance-

22. 2 CARMODY'S NEW YORK PRACTICE 1362-1363 (2d ed. 1930) (Supp. 1948).

damages situation, the purpose and function of the limited appearance remains the same.²³

Although the American Law Institute Restatement of Judgments does not appear clearly to take a stand in situations not involving attachment,²⁴ it does take the position in the attachment situation that *X* may enter a limited appearance:

“§ 40. If, in a proceeding begun by attachment or garnishment or by a

23. An analogy may perhaps be drawn to the situation in which the nonresident defendant contends that an attachment should be vacated because he is not the owner of the attached property. Ordinarily, a defendant may make a special appearance to contest the validity of the attachment, the basis for the exercise of in rem jurisdiction. *Zabriskie v. Second National Bank*, 204 App. Div. 428, 198 N. Y. Supp. 482 (1st Dep't 1923) (property attached which belonged to defendant but which was not subject to attachment); *Manice v. Gould*, 1 Abb. Pr. (N.S.) 255 (N. Y. 1866). Defendant cannot, however, by motion on special appearance, assert the title of third persons to the attached property as a basis for vacating the attachment. The defendant may contest ownership of the property in his answer, or the claimant to the property may proceed under N. Y. CIV. PRAC. ACT § 924, as amended N. Y. Laws 1936, c. 351, N. Y. Laws 1940, c. 625, N. Y. Laws 1941, c. 253. *Godbout v. Irwin*, 273 App. Div. 1029, 79 N. Y. S. 2d 461 (2d Dep't 1948), *motion for leave to appeal dismissed*, 298 N. Y. 636, 82 N. E. 2d 31 (1948); *David S. Stern Corp. v. Silverman*, 257 App. Div. 394, 13 N. Y. S. 2d 355 (1st Dep't 1939). See *Untermeyer, J.*, dissenting, 257 App. Div. at 395, 13 N. Y. S. 2d at 356: “The reversal of the order [of dismissal], though with leave to interpose an answer contesting the ownership of the property attached, deprives the defendants of the opportunity to test the question of ownership, and hence of jurisdiction, before they are subjected to the inconvenience and expense of appearing generally in the action to defend upon the merits.

“Section 924 . . . would only apply a claim of ownership of the property attached by a third party not involved in this proceeding.” In *Dalinda v. Abegg*, 177 Misc. 265, 29 N. Y. S. 2d 5 (Sup. Ct. 1941), the court suggested that ordinarily a reference could be ordered to determine ownership of the property attached, but it then denied defendant's motion on the ground that plaintiff would require defendant's testimony on the issue of ownership of the property and plaintiff could not get such testimony on a reference because it related to a matter separate and apart from a trial. If the cases so limiting the right of examination before trial (*Norton v. Cromwell*, 248 App. Div. 707, 290 N. Y. Supp. 107 (1st Dep't 1936); *Matter of Erlanger*, 231 App. Div. 70, 246 N. Y. Supp. 275 (1st Dep't 1930). *Contra*: *Loonsk Bros., Inc. v. Mednick*, 246 App. Div. 464, 285 N. Y. Supp. 801 (4th Dep't 1935); *Etter v. Early Foundry Co.*, 164 Misc. 88, 298 N. Y. Supp. 208 (Sup. Ct. 1937)), be sound and applicable to this particular situation, defendant's rights could be protected by allowing him to make a limited appearance as to the property attached, after raising the issue of ownership in his answer.

24. RESTATEMENT, JUDGMENTS § 19, *Comment b* (1942): “*What constitutes a general appearance.* If the defendant enters an appearance in a proceeding in personam without limiting the purposes for which he appears, the appearance is a general appearance. If the court did not already have jurisdiction over him, such an appearance confers jurisdiction over him. If the defendant interposes an answer or demurrer or makes a motion raising a question as to the merits of the plaintiff's claim, this is a general appearance, even though the defendant shows that he does not intend thereby to submit himself to the jurisdiction of the court. . . .”

creditor's bill in a court which has no jurisdiction over the defendant, he enters an appearance for the purpose of contesting the validity of the plaintiff's claim, he does not thereby subject himself to the jurisdiction of the court, if in appearing he states that he does not submit himself to the jurisdiction of the court."

The proceedings in the American Law Institute show that this section was adopted in the belief that it represented an accurate statement of existing law.²⁵ The two cases to which Professor Scott referred, during discussion of this problem before the American Law Institute, as squarely holding that a nonresident may enter a limited appearance in the attach-

25. 19 PROCEEDINGS, THE AMERICAN LAW INSTITUTE 291-301 (1941-42):

"Mr. Scott: When the defendant puts in a general appearance, that will give the court jurisdiction over him personally so it can give a personal judgment against him, the result being that although the proceeding started is one quasi in rem it has been turned into one in personam. On the other hand, if the defendant appears solely to attack the validity of the attachment or garnishment or creditor's bill and does not urge any defense on the merits, then that does not give the court jurisdiction over him personally. There are one or two cases the other way. Finally, comes the case where he wants to protect his property by a defense on the merits, but does not want to submit himself personally to the jurisdiction. Can he do so? Can he defend on the merits without submitting himself personally? Of course, if no property has been attached, and he puts in a plea on the merits, the court gets jurisdiction over him. But where his property has been attached must he either kiss it goodbye or submit himself generally to the jurisdiction? If he wants to defend, should he not have a third alternative, that is to permit him to put in a plea on the merits but at the same time stipulating he shall not personally be subject to the jurisdiction? I have been able to find only three cases squarely on the point. Two of them are this way. I have cited them in Illustration 1; and the other is a recent case in Rhode Island (*Industrial Trust Co. v. Rabinowitz*, 13 A. (2d) 259, 129 A.L.R. 1236 (1940)), which held the other way, where the defendant was a resident of the State and the court expressly said these cases where the defendant was a non-resident were different. I have said here that where the defendant is a non-resident, which is what we are dealing with here, he can defend the property on the merits without submitting himself personally. The Advisers were all this way. The Council was divided. A majority favored the rule as we have here stated it. The authorities, such as there are, are this way.

"Judge Donworth: When I read this I was surprised to learn that this is the law. I never would have advised a client living outside the State of Washington that if his property in the State was attached that he could confess that attachment and be immune from the rendition of a judgment. I accept, of course, the statement of the Reporter that that is the law. I think it will surprise many members of the profession.

* * *

"Mr. Sims: I was one member of the Council who disagreed with this blackletter and devoted all the time that was necessary to read all the authorities on it which the Reporter has mentioned. I did not read the Rhode Island case. There was no authority but these, at least so far as I could find, and I proceeded to reason it out, and it seems to me that the Reporter is completely justified in stating the law as it is in the absence of decisions to the contrary.

"Mr. Scott: There is an English case the other way where the defendant counterclaimed and, of course, that was easy. See *The Duplex* [1912] P. 8."

ment situation are *Cheshire National Bank v. Jaynes*²⁶ and *Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co.*²⁷ An early New York case, *Swift v. Tross*,²⁸ appears to have been overlooked. In the *Swift* case, the court rather summarily rejected the right of limited appearance after attachment of the nonresidents' property, on the ground that defendants could not "obtain all the advantages of contesting their entire indebtedness which would follow from a general appearance, and yet avoid the disadvantages of contesting their entire indebtedness which would follow from a general appearance, and yet avoid the disadvantages resulting from such appearance."²⁹ This reasoning is fallacious in its assumption that defendant by making a limited appearance would be able to secure all the advantages which would follow from a general appearance. This is not at all true, for, as pointed out by the court in the *Cheshire National Bank* case:

"The bar of whatever judgment may be rendered, where a non-resident defendant appears specially merely for the purpose of protecting his interest in attached property, extends no further against the plaintiff than it does against the defendant. It relates only to the property of the defendant held under effectual attachment."³⁰

No other New York cases have been found specifically dealing with the attachment situation, but, in *Grant v. Kellogg Co.*,³¹ a federal district court expressed the opinion that such a limited appearance cannot be made under New York procedure. An action for money damages for breach of contract was instituted in a New York state court by attaching bank deposits of the defendant foreign corporation in New York and personally serving the defendant outside of the state. After removal of the action to the federal court, defendant moved for an order "permitting it to appear specially in this action solely for the purpose of protecting its interest in the attached bank accounts and limiting plaintiff's recovery, if any, in this action, to the property attached." The court concluded that the issue was procedural and that the limited appearance could not be allowed in the absence of provision therefor under the federal rules,³²

26. 224 Mass. 14, 112 N.E. 500 (1916).

27. 285 Fed. 214 (C. C. A. 6th 1922). For detailed discussion of these two cases, see Taintor, *Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 *Pitt. L. Rev.* 223, 229 (1942).

28. 55 How. Pr. 255 (N. Y. Sup. Ct. 1878).

29. *Id.* at 258.

30. 224 Mass. 14, 15, 112 N.E. 500, 502 (1916).

31. 3 F.R.D. 229 (S.D.N.Y. 1943).

32. In view of the development of the doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938), can it be stated dogmatically that the issue is solely one of procedure? The court relies solely upon Professor Moore, 1 *MOORE'S FEDERAL PRACTICE* 650 (1938), for the proposition

and its view as to the New York law is therefore only dictum. This view was based solely upon *Henderson v. Henderson*,³³ a leading New York case for the proposition that acts of a defendant inconsistent with a special appearance may be equivalent to a general appearance. In the *Henderson* case, plaintiff sued for divorce, alimony, and counsel fees; the nonresident defendant attempted to make a special appearance and at the same time actually participated in the hearing of the action on the merits. Although the *Henderson* case has been cited³⁴ for the proposition that a limited appearance cannot be made in New York in the divorce-alimony situation, the defendant there made no attempt to contest only the divorce portion of the action on the merits, and to reserve, at the same time, his objections to the in personam jurisdiction of the court as to the demand for alimony and counsel fees. On its facts, the *Henderson* case cannot be regarded as a clear-cut decision on the right to make a limited appearance, despite general language in the opinion which might tend to indicate that the right does not exist in the divorce-alimony situation. Perhaps the absence of recent New York authority specifically in point as to the attachment situation can be attributed simply to a general assumption on the part of the bar that there is no right of limited appearance in that situation.

Jurisdictional concepts cannot remain static but must continue to develop to meet the needs of our complex modern economic and social structure. Consideration must, therefore, be given to the policy factors behind the idea of limited appearance. Do these factors vary from case to case so that the right of limited appearance should be given in one type of situation involving in rem and in personam claims and yet be denied in other situations? In the first place, why should a defendant desire to enter a limited appearance, which admittedly can result in litigation twice of the same issue upon the merits? Ordinarily, of course a party prefers to litigate in his own locality. He is thereby spared the inconvenience and expense of travel to the place of trial and he has the

that the limited type of appearance is not permissible in the federal courts. Professor Moore argues that, despite the *Salmon Falls* and *Cheshire National Bank* cases, and *Gershowitz v. Lane Cotton Mills*, 21 F. Supp. 579 (N. D. Tex. 1937) (defendant's motion for limitation of recovery to property attached granted without objection by plaintiff), the limited appearance procedure is unsound because it permits a litigation twice on the merits of the same claim. He does not amplify his discussion of this problem in his second edition, merely noting that the *Grant* case, citing his treatise, had reached a result in accord with his position, 2 MOORE'S FEDERAL PRACTICE § 12.13 (2d ed. 1948).

33. 247 N. Y. 428, 160 N. E. 775 (1928).

34. Comment, *supra* note 21, at 236. *Legler v. Legler*, 244 App. Div. 55, 278 N. Y. Supp. 804 (4th Dep't 1935) is also cited as support for the same proposition but in the *Legler* case the defendant's attorney, after entering a special appearance, argued against the merits of the alimony order.

limited advantage of knowledge of local conditions of trial. If his own witnesses reside in his locality, and place of trial is elsewhere, out of the state, he is faced with the expense of transporting them to the place of trial or of taking depositions. He cannot subpoena his witnesses to attend a trial in another state, and if they refuse to attend voluntarily, he must take their depositions, an expensive and clearly less effective mode of proof than oral testimony. Rules of evidence or of substantive law may vary to his prejudice.³⁵ Obviously these considerations are as equally applicable to a plaintiff as to a defendant,³⁶ and the relative conveniences of the parties will vary from case to case.³⁷ Similarly, the contacts of the claims for relief with the state of suit will vary. Professor Moore considers the attachment cases in connection with his query as to the rule in the federal courts in the lien foreclosure-deficiency judgment situation,³⁸ but should the lien foreclosure-deficiency judgment situations be treated alike? Is a defendant who has executed or assumed a mortgage on property in New York in the same position to insist upon the right to make a limited appearance as a defendant who is subjected to suit in New York by reason of the mere accident of owning property subject to attachment in New York? Are two defendants whose property has been attached to be considered in the same position, if the action against one is based upon a cause of action which accrued within the state of suit? So, also, if a plaintiff has acquired domicile in New York,

35. For an interesting illustration of such a situation, see *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94 (1939), *suggestion of error overruled*, 189 Miss. 73, 195 So. 322 (1940), extensively discussed by Taintor, *supra* note 27, at 224, 232, 235-237. In that case, in an action in rem in Louisiana, the nonresident defendant was prevented from introduction of evidence of oral warranties by Louisiana's characterization of the parol evidence rule as procedural, rather than substantive. In a subsequent in personam action in Mississippi, defendant was held to be bound by the Louisiana judgment because of its appearance in that action, despite the fact that the Louisiana court under Louisiana statutes had no power to render a judgment in personam against the defendant. See also, *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979 (1st Dep't 1897).

36. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1218 (1930): "... the physical power criterion may sometimes create undue obstacles to the prosecution of meritorious claims, and sometimes, by affording plaintiffs a wide choice of forums, present an opportunity to vex and inconvenience the defendant out of all proportion to what is necessary for a fair presentation of the plaintiff's own case—or to use the threat of such vexation to coerce settlement of doubtful claims otherwise than on the basis of their merits."

37. ARNOLD AND JAMES, *CASES ON TRIALS, JUDGMENTS AND APPEALS* 399 n. 36 (1936): "... one cannot avoid the feeling of impatience that the Supreme Court should be so afraid to give judicial approval to the eminently sensible and practical notion that courts should be given very broad jurisdictional powers, and then compelled to exercise those powers on considerations of practical convenience among the parties."

38. Moore, *supra* note 32.

so that the courts of New York have jurisdiction of an action for divorce, does not New York have a considerably more important interest in the litigation than it does in an attachment action, especially one based upon a cause of action which did not accrue within the state? It cannot reasonably be argued that the limited appearance concept should be applied in all cases, without consideration of the relative conveniences of the parties and the contacts of a particular claim with the state of suit. But, what is needed is a re-examination of the New York appearance cases, now in a state of some confusion, in the light of the limited appearance concept. An acceptable compromise might result from a blending of the ideas of the limited appearance and of *forum non conveniens*.³⁹ Considerations of *forum non conveniens* have been introduced into the criteria for determination of jurisdiction over foreign corporations,⁴⁰ and there does not appear to be any sound reason for refusal to consider the factors of convenience and contacts in determining a non-resident's right to make a limited appearance. It does appear that this problem is one in which each state must search its own conscience, for while there is no indication that the Supreme Court is ready to discard the principle of territorial jurisdiction, it is not at all certain either that it will give constitutional sanction to the limited appearance concept.⁴¹

39. Under the doctrine of *forum non conveniens*, the court will decline to exercise jurisdiction because a more convenient forum exists elsewhere for trial of the action. In the absence of special circumstances, the New York courts will refuse to entertain jurisdiction of foreign tort actions between nonresidents. This idea is not however applied in New York in commercial actions between nonresidents, nor is it applicable if one of the parties is a resident. *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, 139 N. E. 223 (1923); *De Flammercourt v. Ascer*, 167 Misc. 473, 3 N. Y. S. 2d 461 (1938). See, in general, Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

40. *International Shoe Co. v. State of Washington*, 326 U. S. 310, 316 (1945): "To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient the demands of due process. L. Hand, J., in *Hutchinson v. Chase & Gilbert*, 45 F. 2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection..." See also *Kilpatrick v. Texas & P. Ry. Co.*, 166 F. 2d 788 (C. C. A. 2d 1948), 61 HARV. L. REV. 1254 (1948).

41. Professor Taintor (*supra* note 27) vigorously argues that a denial of the right of limited appearance in the attachment situation is a denial of due process. His article deals only with that situation, but it is undoubtedly the situation in which the most sympathy can be engendered for the nonresident defendant. He appears to distinguish *York v. Texas*, 137 U. S. 15 (1890), upholding the Texas statute denying the right of special appear-

II. DEMANDS FOR IN PERSONAM RELIEF ADDED BY AMENDED OR SUPPLEMENTAL COMPLAINT

Suppose that plaintiff demands no in personam relief in his original complaint and in rem jurisdiction is properly obtained to grant all of the relief originally demanded. The nonresident defendant appears to defend the action on the merits, and then, plaintiff amends as of course,⁴² adding a claim for relief sounding in personam, and serves the amended complaint upon defendant's attorney.⁴³ Or, plaintiff moves for leave⁴⁴ to serve an amended complaint, after expiration of the period within which an amendment may be made as of course, or for leave to serve a supplemental⁴⁵ complaint presenting a claim for in personam relief. Is a nonresident defendant bound by service of such an amended or supplemental complaint upon his attorney? To what extent does and should a nonresident defendant appearing to defend a complaint as originally served upon him subject himself to additional claims which may be asserted in an amended or supplemental complaint? The limited appearance idea comprehends not only in personam claims presented in the original complaint but additional claims which may be subsequently asserted.

In *Mendoza v. Mendoza*,⁴⁶ an action for annulment was commenced

ance, on the ground that in the attachment situation the defendant is compelled to abandon his property if he does not desire to make a general appearance. Of course, theoretically, plaintiff must show that he has a cause of action, whether or not the defendant appears. On the other hand, the Restatement of Judgments, although supporting the limited appearance idea where there has been an attachment, takes the position that such a provision is not unconstitutional as a denial of due process.

42. N. Y. CIV. PRAC. ACT § 244: "Within twenty days after a pleading, or the answer or reply thereto is served, or at any time before the period for answering it expires, or within twenty days after the service of a notice of a motion addressed to the pleading, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had. . . ."

43. N. Y. RULES CIV. PRAC. ACT § 101: "If a pleading be amended, a copy thereof must be served on the attorney for the adverse party. A failure to answer the amended pleading, within twenty days thereafter, has the same effect as a like failure to answer the original pleading." See also, N. Y. CIV. PRAC. ACT § 163: "Where a party has appeared a notice or other paper required to be served in an action must be served upon his attorney. . . . This section does not apply to the service of a summons or other process; or of a paper to bring a party into contempt; or to a case where the mode of service is specially prescribed by law."

44. The discretion of the court is to be liberally exercised in favor of allowing amendment. *Harris v. Tams*, 258 N. Y. 229, 179 N. E. 476 (1932).

45. N. Y. CIV. PRAC. ACT § 245-a: "Upon application by a party the court may, upon such terms as are just, permit the party to serve a supplemental pleading alleging any new and additional cause or causes of action or counterclaims even though such additional causes of action or counterclaims came into existence after the commencement of the action.

46. 77 N. Y. S. 2d 169 (Sup. Ct. 1947), *aff'd mem.*, 273 App. Div. 877, 77 N. Y. S. 2d 264 (1st Dep't 1948), *aff'd mem.*, 297 N. Y. 950, 80 N. E. 2d 347 (1948).

against a nonresident by service by publication. Defendant filed a motion to dismiss the complaint, thereby making a general appearance under Section 237 of the Civil Practice Act. Plaintiff then served upon defendant's attorney a complaint, amended as of course, containing a new and independent cause of action for \$20,000 alleged to have been fraudulently obtained from her by defendant and his father. The court denied defendant's motion to strike this new claim on the ground that it possessed no discretion as to an amendment made as of course, and that such amendments may add new and additional causes of action. On that basis it distinguished *Alkalaj v. Alkalaj*,⁴⁷ an action for sums due under a separation agreement commenced by attaching defendant's bank account within the state, in which plaintiff moved for leave to add, in a supplemental complaint, a claim for sums becoming due after commencement of the action. The motion was served after the defendant had served a notice of general appearance and interposed an answer, and the court, in denying plaintiff's motion as an exercise of discretion, broadly stated:

"Parties should be encouraged to appear in actions so that judgments will have an in personam validity. The possibility that such appearance may result in the addition of other causes of action will tend to deter general appearances. Furthermore a defendant placed in the position of the instant one at the time the attachment was obtained had no other recourse but to appear or permit the action to go by default. Therefore the circumstances here appeal to the discretion of the court to deny the instant application. If plaintiff can obtain jurisdiction she can sue for the additional sums in an independent action."⁴⁸

The implication in the *Alkalaj* opinion that defendant had no right of limited appearance in the original attachment situations is noteworthy. The court in the *Mendoza* case would undoubtedly have distinguished on the same basis *Phillips v. Phillips*,⁴⁹ a separation case, in which plaintiff moved for leave to serve an amended complaint adding two causes of action in personam. In denying the motion, the court very briefly stated:

"These actions could not have been commenced by service of process as in the separation case unless an attachment was first obtained."⁵⁰

In all three of these cases—*Mendoza*, *Alkalaj*, and *Phillips*—the court was faced with an attempt by the plaintiff to add a new and independent cause requiring in personam jurisdiction, after the defendant had made a general appearance. As to result, there can be little quarrel with the

47. 190 Misc. 326, 73 N. Y. S. 2d 678 (Sup. Ct. 1947).

48. *Id.* at 327, 73 N. Y. S. 2d at 679.

49. 119 N. Y. L. J. 584 (Sup. Ct. Feb. 16, 1948).

50. *Ibid.*

Alkalaj or *Phillips* cases, but the disturbing feature of both the *Mendoza* and *Alkalaj* cases is their assumption that the problem involves the element of *discretion*. Now, it is of course settled that, as a matter of pleading, a complaint amended as of course may add new and additional causes of action, and there is no discretion in the court as to whether or not such causes will be added.⁵¹ Similarly, there is discretion in the court as to a motion for leave to add new causes in an amended or supplemental complaint. But, the problem here is more than simply a question of pleading, it is a question of jurisdiction. That this is a problem of jurisdiction, rather than merely of pleading, is recognized by the American Law Institute Restatement of Judgments:

"§ 5. Comment g. *Jurisdiction as to causes of action added or substituted by amendment.* If a plaintiff brings an action against a defendant who is subjected to the jurisdiction of the court, whether by personal service upon him within the State or by a substituted form of service while he is domiciled within the State or by his general appearance in the action or otherwise, the jurisdiction of the court over him continues although the complaint is amended, where the effect of the amendment is not to add or substitute a different cause of action from that stated in the complaint.

"The result is different, however, where by amendment a different cause of action is added to or substituted for the original cause of action, if when the amendment is made the defendant is no longer subject to the jurisdiction of the State. This is true whether or not notice of the amendment is given to the defendant. . . . The fact that the court has acquired jurisdiction over the defendant with respect to the original cause of action does not give the court jurisdiction over him as to other causes of action. . . . The result is the same also where the defendant was not otherwise subject to the jurisdiction of the court but entered a general appearance in the action before the complaint was amended. . . .

"It is immaterial whether the cause of action stated in the amended pleadings arose before the action was brought or subsequently to the bringing of the action.

"The fact that by statute or otherwise a plaintiff is permitted to add or to substitute new causes of action by amendment is not sufficient to give the court jurisdiction over the defendant as to such new causes of action if at the time of the amendment the defendant is no longer subject to the jurisdiction of the State. Such provisions are applicable only where at the time of the amendment the State has jurisdiction over the defendant; they are procedural rather than jurisdictional."

"*Illustrations:* . . .

6. By a statute of State X, a plaintiff is permitted to amend his complaint by adding or substituting a cause of action other than that stated in the

51. *Brown v. Leigh*, 49 N. Y. 78 (1872). Consider, however, the statement by the court, at 82, not amplified in subsequent cases, that "the causes of action in the amended complaint must, like those in the original, be warranted by the summons."

complaint. A brings an action in State X against B, who is domiciled in State Y, claiming damages for breach of a contract. B is not served with process in State X, but enters a general appearance in the action by C, his attorney. Thereafter A amends his complaint by adding a claim against B for assault and battery. B moves to strike out the amendment to the complaint on the ground that as to the claim stated therein the court has no jurisdiction over him. The motion will be granted."⁵²

To what extent is this position, although contrary to that earlier taken by the Restatement of Conflict of Laws,⁵³ supported by the authorities? In *Ex parte Indiana Transportation Co.*,⁵⁴ after an appearance by defendant in a libel in personam for causing the death of a person through capsizing of a steamer, the court granted leave to intervene to 373 other libellants each alleging a distinct cause of action for death due to the same accident. At that time the defendant was not subject to process within the federal district, but it was contended that the court had jurisdiction over it in respect of the additional libellants by reason of the defendant's earlier appearance in the action. The court repudiated this contention, stating:

" . . . appearance in answer to a citation does not bring a defendant under the general physical power of the court. He is not supposed even by fiction to be in prison. Conventional effect is given to a decree after an appearance because when power once has been manifested it is to the advantage of all not to insist upon its being maintained to the end. *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353. That, however, is the limit of the court's authority. Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the

52. RESTATEMENT, JUDGMENTS, § 5, *Comment g* (1942), also states the well-established rule that "the jurisdiction of the court over him continues although the complaint is amended, where the effect of the amendment is not to add or substitute a different cause of action from that stated in the complaint." This principle of continuing jurisdiction is upheld in *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913). In application of this principle, in *Ohlquist v. Nordstrom*, 143 Misc. 502, 257 N.Y. Supp. 711 (Sup. Ct. 1932), *aff'd mem.*, 238 App. Div. 766, 261 N.Y. Supp. 1039 (4th Dep't 1933), *aff'd mem.*, 262 N.Y. 696, 188 N.E. 125 (1933), service of notice of motion under Section 211a of the Civil Practice Act for contribution from a codefendant on New York attorneys who had appeared for the codefendant in the original action was upheld, although the codefendant had ceased to be a resident of the state. *But cf.* *New York Life Insurance Co. v. Dunlevy*, 241 U.S. 518 (1916).

53. RESTATEMENT, CONFLICT OF LAWS § 82 (1934), *Comment d.* "*Subsequent amendments to complaint after appearance.* When by the law of the state in which the action is brought, an appearance is such as to subject him to the jurisdiction of the court generally, jurisdiction attaches not only with respect to claims stated in the original complaint but also to the claims by the same plaintiff stated in amendments to the complaint if the law of the state where the action is brought so provides at the time of the appearance."

54. 244 U.S. 456 (1916).

defendant has appeared in that suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before."⁵⁵

True it is that this case involved additional plaintiffs, possessing separate causes of action against the defendant, but is not a distinction on that basis from the situation in the *Mendoza* case rather tenuous? It is well to remember in this connection that Section 237 of the Civil Practice Act merely provides that "a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him."

In *Fidelity & Casualty Co. of New York v. Bank of Plymouth*,⁵⁶ plaintiff originally sought an in rem judgment setting aside a conveyance of a specific tract of land alleged to be made in fraud of creditors. After appearance by the defendant, plaintiff moved for leave to file an amended complaint adding a new cause of action for an in personam judgment as to proceeds received by defendant from sale of another tract alleged to have been fraudulently conveyed. Stating that "the precise question is one of first impression in this state, and the industry and research of counsel have failed to bring to our attention any case in which the same has been passed upon by the court of any other jurisdiction,"⁵⁷ the court denied plaintiff's motion on the ground that it "would challenge the good faith of the court" to allow the amendment. The court pointed out that no in personam relief was demanded in the original complaint, that the amended complaint sought to set up an entirely new cause of action as to a different tract of land, and that defendant had not been personally served within the state with the amended complaint.

Would the court in the *Mendoza* case have reached a different result if the amended complaint had substituted an entirely new cause of action, rather than merely adding a new cause of action? In *Hay v. Tuttle*,⁵⁸ plaintiff instituted an action for conversion of certain stock, apparently located in Massachusetts, by attachment of the defendant's property. The defendant appeared, and, at the trial, plaintiff failed to prove a demand for return of the stock alleged to have been converted, as re-

55. *Id.* at 457. See also, *Adam v. Saenger*, 303 U.S. 59 (1938), wherein the court, in sustaining service of counterclaim on attorney of nonresident plaintiff under California procedure, pointed out (at 67) that "the plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff." May the state exact the same price as a condition of opening its courts to a defendant?

56. 213 Iowa 1058, 237 N.W. 234 (1931), 25 Iowa L. Rev. 329 (1940).

57. *Id.* at 1060, 237 N.W. at 235.

58. 67 Minn. 56, 69 N.W. 696 (1896).

quired under Minnesota law. Plaintiff then attempted to amend his complaint so as to set aside the transfer of the stock and to recover it from the defendant. Denying plaintiff the right to so amend, the court made the point that:

" . . . there was an important question of comity involved. The defendant being a nonresident, no jurisdiction of his person could be obtained, unless he voluntarily came within the state, or voluntarily appeared in an action. By framing his complaint ostensibly as one for conversion, and attaching defendant's property, as if the action was one for the recovery of money, the plaintiff compelled the defendant to appear, and submit to the jurisdiction of the court, for the purpose of protecting his property against the attachment."⁵⁹

Similarly, in *Maya Corporation v. Smith*,⁶⁰ plaintiff originally instituted an action to foreclose a lien upon certain stock, based upon in rem jurisdiction. Plaintiff sought to amend its complaint to state a cause of action for rescission of the contract of sale of the stock and to recover an in personam judgment for the further consideration paid by plaintiff in cash for the property acquired by plaintiff under the contract. The court allowed defendants to withdraw their appearances, pointing out that the cause of action asserted in the amended complaint would not have been within the in rem jurisdiction of the court.

It does appear that the position of the Restatement of Judgments, despite the *Mendoza* case, is supported by competent and well-reasoned authority, which is based upon principles of "fair play and substantial justice" to the nonresident defendant, principles which are embodied in the constitutional requirements of due process.⁶¹

One recent New York decision, *Nicholas & Co. v. Societe Anonyme*,⁶² does support the Restatement of Judgments position, even though the actual result in the case would be sanctioned by the *Mendoza* case. Plaintiff's original complaint alleged a cause of action for lost profits in the sum of \$8,049.00 against the defendant, a French corporation. The loss was alleged to have been suffered as a result of defendant's failure to deliver merchandise purchased by plaintiff for the purpose of resale. After attachment of defendant's property in New York and personal service in France, defendant's attorney filed an appearance and answer.

59. *Id.* at 59, 69 N.W. at 697.

60. 32 F.2d 350 (D. Del. 1929).

61. *International Shoe Co. v. State of Washington*, 326 U. S. 310, 316 (1945): ". . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

62. 189 Misc. 863, 73 N. Y. S. 2d 155 (Sup. Ct. 1947), *aff'd mem.*, 272 App. Div. 1002, 74 N. Y. S. 2d 403 (1st Dep't 1947).

Plaintiff then amended as of course, reiterating the allegations of the original complaint but adding allegations which set out a claim for total damages in the sum of \$50,000 for wrongful termination of an alleged exclusive agency agreement. The purchases upon which the original complaint was based arose out of this agency agreement. Defendant moved for an order permitting its attorneys to withdraw their general appearance and vacating the warrant of attachment on the ground that plaintiff had abandoned its cause of action on which the attachment was procured and had substituted a different cause of action, thereby discharging the attachment and entitling defendant to be relieved of its appearance. In denying the defendant's motion, the court held that whether defendant's contention was sound depended on the meaning of "a different cause of action. A different form of action, involving different legal consequences from the same facts, would give rise to no such relief, *provided of course that this form was of the description in which attachment is a permissible remedy.*"⁶³

Is the court sound in its conclusion that the amended complaint set out no different cause of action? Such conclusion is in line with the Restatement of Judgments position, for the Restatement utilizes in this connection the same definitions it gives to the term "cause of action" for purposes of res judicata.⁶⁴ So, under the Restatement, "if a breach of contract constitutes a repudiation of the contract a judgment in an action for breach of contract bars a subsequent action for all elements of damages arising from the contract."⁶⁵ Now, applying these or any other tests, the new claims set up in the *Mendoza*, *Alkalaj* and *Phillips* cases constituted new causes of action. But only one cause of action would appear to be involved, under the Restatement tests, in such situations as divorce-alimony, lien foreclosure-deficiency judgment, and specific performance-damages.⁶⁶

63. *Ibid.* (Italics supplied).

64. §§ 61-67.

65. *Comment h*, § 62. See, in this connection, *Pakas v. Holingshead*, 184 N.Y. 211 (1906); *Koppel v. St. Regis Paper Co.*, 47 N.Y.S.2d 443 (City Ct. N.Y. 1944), *rev'd per curiam*, 56 N.Y.S.2d 790 (App. Term, 1st Dep't 1945).

66. In *Johnston v. Federal Land Bank of Omaha*, 226 Iowa 496, 284 N.W. 393 (1939), the complaint, in an action originally for specific performance of a contract for a loan on realty, was amended to set out damages occurring after the institution of suit and to change the prayer for relief from specific performance to one for money damages. It was held that the amendment did not constitute a new "cause of action" and that the defendants, who had previously made a general appearance, were bound. On that basis, that no new cause was being asserted by the amendment, the court distinguished the *Fidelity & Casualty Co.* case, *supra* note 56. The court did not particularly stress the fact that in personam jurisdiction was required as to the claim originally asserted in the *Johnston* case. It apparently would have reached the same result as to an action originally for the

Is the attachment situation once again worthy of special treatment? Note that in the *Nicholas & Co.* case the court expressed the opinion that even though the cause of action be considered the same, jurisdiction could not be sustained if attachment would not be a permissible remedy under the amended complaint.⁶⁷ To that extent the opinion goes beyond the Restatement of Judgments position. But, it nevertheless represents a sensible viewpoint.

Obviously these problems would not arise if the nonresident defendant were allowed to enter a limited appearance to the in rem action as originally instituted. The argument is stronger for the right of limited appearance in this situation than where the demand for in personam relief is contained in the original complaint. Whereas the defendant is put on notice of the in personam claim if it is asserted in the original complaint, he is groping in the dark as to subsequently added claims. Not only are the same considerations of policy applicable here as were previously discussed in connection with in personam claims contained in the original complaint, but, as has been pointed out, stronger constitutional sanctions are also present. Even if a defendant should not be allowed to make a limited appearance as to in personam claims asserted in an original complaint, such right should be allowed as to in personam claims subsequently asserted.⁶⁸

conveyance of land within the state. See *Dunlop v. First Trust Joint Stock Land Bank*, 222 Iowa 887, 270 N.W. 362 (1936), *semble*.

67. In *Lane & Bailey v. Beam*, 19 Barb. 51 (N.Y. 1854), defendant having appeared after attachment, the court denied plaintiffs' motion for leave to amend their complaint, from an action on contract, to an action in tort for conversion, on the ground that attachment was not a permissible remedy as to the claim in tort (at 53): "The courts are disposed . . . to allow any amendment that justice may require. Does justice call for this amendment? The plaintiff has played his game with an object in view, and succeeded in that, and he should not be allowed now to seek another advantage inconsistent with his first successful scheme." Of course, there should be little question that the attachment itself can be vacated where an entirely different cause of action is set up. *Wade v. Gates Rubber Co.*, 205 App. Div. 17, 199 N.Y. Supp. 16 (1st Dep't 1923).

68. The Restatement of Judgments position as to jurisdiction must, however, be distinguished from the limited appearance idea, insofar as operation of the doctrine of collateral estoppel is concerned. Collateral estoppel precludes relitigation of facts litigated in one action, and necessary to a determination, in a subsequent action between the same parties on a different cause of action. *Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N. Y. 304, 165-N. E. 456 (1929); *Karameros v. Luther*, 279 N. Y. 87, 17 N. E. 2d 779 (1938); RESTATEMENT, JUDGMENTS § 68 (1942); Scott, *Collateral Estoppel By Judgment*, 56 HARV. L. REV. 1 (1942). Under the Restatement, this doctrine would be applicable in a subsequent suit on a different cause of action, even though the court lacked jurisdiction as to that cause, if the defendant appeared in the first action. RESTATEMENT, JUDGMENTS §§ 73 (*Comment c*), 74 (*Comment c*), 75 (*Comment c*) (1942). The limited appearance concept, strictly applied, would not permit operation of collateral estoppel, or, for that matter, *res judicata*, if the second suit be for a personal judgment on the same cause. The Restatement fully adopts the limited appearance idea only in the attachment situation.

CONCLUSION

"I have just mailed to you a memorandum on the problems of appearance in New York which we discussed in connection with X's case," telephones Brown to Smith. I think you will see from my memorandum that I cannot recommend, in view of the present state of the decisions, that we appear to contest this divorce on the merits unless X is prepared to have an in personam judgment entered against him for alimony and counsel fees."

"What about the claim of X's wife for \$20,000?" asks Smith.

"There is a big risk involved there also, as you will see," says Brown. "On the basis of the *Mendoza* case, X is likely to be subjected to the in personam jurisdiction of the court as to that claim by an appearance to contest the divorce action. If X's wife were to amend and add that claim, I think we might have to carry the case up to the Court of Appeals and possibly even to the United States Supreme Court."

"Well," replies Smith. "I think we'd better just stay out of this New York divorce action. I'm actually not so perturbed about X's wife getting alimony and counsel fees if she can prove that she is entitled to a divorce, but I'm certainly not interested in litigating that \$20,000 claim in New York. We'll just forget about the matter and let her get her divorce. By our doing that, she certainly can't get anything else."

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