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Preserving Objections To In Personam Jurisdiction — Ohio's Persistent Shibboleth

J. Patrick Browne*

THE SCENARIO IS COMMONPLACE: Plaintiff causes summons to be served on the defendant. The defendant believes the summons is fatally defective, or the service is faulty, or that, for some reason or another, the court in which the action is brought cannot lawfully obtain jurisdiction over his person. Accordingly, he files a motion to quash and set aside the summons, or a motion to dismiss for want of *in personam* jurisdiction.

As so frequently happens, the court does not quite see the wisdom of defendant's position, and overrules the motion. Usually, the court's journal entry will note that the defendant's "objections and exceptions" to it's order "are noted and saved".

Must the defendant now reserve his objection to *in personam* jurisdiction in all subsequent motions and pleadings filed in the action?

Prior to the adoption of the Rules of Civil Procedure, the Conventional Wisdom held that he must; that all motions and pleadings thereafter filed had to be prefaced with some such magic phrase as: "Now comes the defendant and, while not waiving his objection to this court's jurisdiction over his person, and expressly reiterating said objection as if it was fully rewritten herein, says. . . ."¹

Whether or not the new Rules require such a reservation, it is quite certain that the old Code of Civil Procedure never did require it. That the Conventional Wisdom said that it had to be done (and it did have to be done if one wanted to avoid a charge of malpractice) is due solely to a judicial gloss put upon the Code by a faulty reading of some early Supreme Court decisions.

The early text writers² found no occasion that would call for such a reservation. Bates is brief and dogmatic, simply saying that:

If defendant in such cases duly move to dismiss for want of jurisdiction over him, his pleading to the merits after overruling the motion does not cure the error nor waive his rights.³

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¹ See, eg., 2 O. JUR. 2d *Appearance* § 34 (1953); 1 W. GARDNER, GARDNER'S BATES OHIO CIVIL PRACTICE 33 § 2.9 (1955). Interestingly enough, Professor Gardner neither cites authority for this proposition nor gives a form to be followed. Such a form—more elaborate than the one given in the text—may be found at 2 AM. JUR. PLEADING AND PRACTICE FORMS ANNOTATED 365-66, Form 16 (Rev. Ed. 1967).

² 1 S. NASH, PLEADING AND PRACTICE UNDER THE CODES OF OHIO, NEW YORK, KANSAS AND NEBRASKA 89 (4th Ed 1874); 2 C. BATES, PLEADING, PARTIES AND FORMS UNDER THE CODE 979 (1882); 1 A. YAPLE, CODE PRACTICE AND PRECEDENTS EMBRACING ALL ACTIONS AND SPECIAL PROCEEDINGS UNDER THE CIVIL CODE OF OHIO 396 (1887).

³ 2 C. BATES, *supra*, note 2. For authority Bates cites *Dunn v. Hazlett*, 4 Ohio St. 435 (1854). The fact pattern is classical: Plaintiff attempts to secure jurisdiction over

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Since Yapple⁴ is writing for the "young men of the Bar", he takes greater pains in spelling out the appropriate procedure. If one wishes to challenge the trial court's ruling with respect to jurisdiction, one must do so through error proceedings. To preserve the question for error proceedings, it is necessary to object to the ruling at the time it is made. The proper way to make the objection is by taking an exception. If the grounds for the objection appear in the court's journal entry, the exception may be taken simply by noting it at the end of the entry. If the grounds for the objection do not sufficiently appear in the journal entry, the party should prepare a bill of exceptions and present it to the court for allowance. After the bill of exceptions has been allowed, signed, and made part of the record, the party may proceed in the case, and plead to the merits. Nothing further is required.⁵

That Yapple's instructions were correct is evidenced by the decision in *Baltimore & Ohio Railroad Co. v. Collins, Admr.*⁶ and, more

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an out-of-county defendant by alleging that he is jointly liable with an in-county defendant. The out-of-county defendant raises the question of *in personam* jurisdiction by filing a general denial. In *Dunn*, the trial court found no liability on the part of the in-county defendant, and non-suited the plaintiff. Plaintiff asked for, and was given, leave to file an amended declaration against the out-of-county defendant alone. *Dunn*, the out-of-county defendant, moved to dismiss the amended declaration on the ground that the court had no jurisdiction over him. The motion was overruled, and he filed a general denial, noting his objection in a bill of exceptions. After judgment was taken against him, *Dunn* filed error proceedings in the Supreme Court. That court reversed, saying:

It may be claimed, however, that *Dunn* waived any right he might have by pleading to both the first and second declarations.

In all this we think the court erred, and this error was not cured by either the plea to the first or second declarations; surely not by pleading to the joint action, in which *Dunn* succeeded, and the error was committed by the court before pleading to the second, both in allowing plaintiff to proceed against *Dunn* alone, and in refusing to dismiss the suit, on the motion of *Dunn*, for want of service on him in the county in which suit was brought, we think that, after this last error was committed, *Dunn* did not waive his rights by pleading to the merits.

⁴ 1 A. YAPPLE, *supra*, note 2.

⁵ *Id.* at 395-97 and 528-29. Yapple specifically recommends that the exception be taken by a bill of exceptions, since, in most cases, affidavits or other evidence will be required to establish the grounds for the objection, and these will not appear sufficiently in the court's journal entry. These instructions are premised on §§ 5297-5304 of the Revised Statutes of Ohio, 1880. These actions of the Code of Civil Procedure remained substantially the same from their original enactment in 1853 (51 LAWS OF OHIO 57) until the amendment of 1935 (116 LAWS OF OHIO 104) which eliminated the need for an exception "whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon." This latter amendment became § 11560 of the Ohio General Code, and later, § 2321.03 of the Ohio Revised Code. The substance of the amendment has been carried over into Rule 46 of the Ohio Rules of Civil Procedure, which reads:

An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon.

⁶ 11 Ohio C. Dec. 334 (Cir. Ct. 1900), *aff'd* without opinion *sub nom.* *Collins v. Railroad*, 63 Ohio St. 577, 60 N.E. 1129 (1900). *Marsden v. Soper*, 11 Ohio St. 503 (1860) might also be cited for this proposition, though the point is not so clearly made. At page 506 the Supreme Court noted:

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clearly, by the decision in *Foster v. Borne*.⁷ Here the defendant moved to quash the service of summons. The Court of Common Pleas sustained the motion, quashed the service, and dismissed the petition. The Circuit Court, on petition in error for that purpose, reversed the judgment and remanded the cause for further proceedings, to which defendant excepted. Defendant did not proceed in error to the Supreme Court, but filed his answer in the court of common pleas, *without pleading the want of jurisdiction of his person in that answer*.⁸ Upon trial, judgment was rendered against the defendant. Thereupon, he *appealed* the judgment to the circuit court and, after trial in that court, judgment was again taken against him. He then took a petition in error to the Supreme Court. The Supreme Court affirmed, saying:

[W]e are clear in the opinion that *by his appeal to the circuit court, he waived the question of jurisdiction of his person, and entered his appearance in that court, and that court having thus acquired jurisdiction of his person, and also of the subject matter, there was no error in rendering judgment against him.* (Emphasis added.) If he had filed a petition in error in the circuit court, to reverse the judgment of the court of common pleas, he would not thereby have entered his appearance in the original action, and might have obtained a ruling upon the question as to the right of the court of common pleas to render judgment against him. . . .⁹

Thus, it is quite clear that the defendant's failure to reserve his objection to jurisdiction in his answer, or otherwise raise that issue in the answer, had no effect on the question of the trial court's jurisdiction over him. Rather, it was the taking of an appeal as opposed to a proceeding in error that cured the jurisdictional flaw.

Indeed, from the enactment of the Code in 1853 until the decision in *Clippinger v. Sturgeon*¹⁰ in 1915, neither case nor text makes any mention of the need to preserve an objection to *in personam* jurisdiction.¹¹ All that is required of a litigant is that he raise the question by special appearance at his first opportunity to do so, and if the ruling is adverse to him, that he take an exception to the ruling.

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If the motion was based on an alleged want of jurisdiction, it would be no such appearance or waiver; and if the motion had been erroneously determined against the defendants in the judgment, they might have taken their exceptions, and reversed the ruling of the court.

⁷ 63 Ohio St. 169, 58 N.E. 66 (1900).

⁸ *Id.* at 170, 58 N.E. at 66.

⁹ 63 Ohio St. 169, 171-72, 58 N.E. 66, 66. To the same effect with respect to merely filing a *notice* of appeal, but not taking the appeal: *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563 (1862). This latter decision was much criticized. Nash says of it: "I do not believe this case to be law," and "The decision, so far as I have heard it mentioned, has not satisfied the profession." 1 S. NASH, *supra*, note 2, 87-8.

¹⁰ 5 Ohio App. 233 (1915).

¹¹ It might be argued that *Schaeffer v. Waldo, Barry & Co.*, 7 Ohio St. 309 (1857) is *contra*, since the court noted that "defendants waived the objection to service on the return day, and return of the summons, by filing their answer." However, defendants made a motion to dismiss for want of security *before* they made their motion to quash, and the case has always been treated as one in which the objection to jurisdiction was not raised at the first opportunity by special appearance solely for that purpose. *Russell v. Drake*, 164 Ohio St. 520, 522, 132 N.E.2d 467, 468 (1956); *Long v. Newhouse*, 57 Ohio St. 348, 370, 49 N.E. 79, 81 (1897); and *O'Neal v. Blessing*, 34 Ohio St. 33, 37 (1877).

But *Clippinger v. Sturgeon* worked an abrupt change in the law. At his earliest opportunity, defendant Saffel made a special appearance in the case by motion to set aside the summons served on him. The motion was overruled, and Saffel took his exception. After taking leave to plead, he filed an answer in which he "neither directly nor indirectly made or set up any defense as to the jurisdiction of the court, or in any way questioned or challenged the same."¹² During the trial (and after his co-defendant had been dismissed) Saffel moved for dismissal on the grounds that no evidence had been offered as to his liability, and the court had neither jurisdiction of the subject matter of the action nor of his person. The trial court sustained the motion, and the plaintiff prosecuted error to the Court of Appeals. That court reversed and remanded, saying:

But how stands the issue as between plaintiff and defendant E. G. Saffel? Summons was issued and served on him in Columbiana County, where he resides. He filed a motion attacking the jurisdiction of the court, which was heard and overruled. He then requested and was granted leave to file an answer, and did so. He pleaded two defenses in his answer, but in no way challenged the jurisdiction of the court, and *thereby voluntarily entered his appearance* and consented to the jurisdiction of the court over the subject-matter of the action and also over his person. (Emphasis added).

The cause came on for trial, and he appeared and participated in the proceedings, or at least was there by counsel. He embraced the first opportunity to challenge the jurisdiction of the court when he filed the motion to quash the service and return of summons, but there he stopped and did not continue to avail himself of this defense after the motion to quash was overruled by the court. He asked for and was given leave to plead, and filed his answer to the amended petition; and again failed to take advantage of the opportunity presented to attack the jurisdiction of the court. He then appeared in the trial of the case.

If a party wishes to insist upon the objection that he is not in court he must keep out for all purposes except to make that objection. But defendant Saffel did not do this, but by his own acts placed himself within the jurisdiction of the court, and is now in no position to complain.¹³

Here, apparently, the focus shifts from preserving the question of jurisdiction for review, to preserving the special appearance initially made in the action. By some magic that is not quite clear, a continuing objection to jurisdiction prevents further participation in the action from becoming a general appearance, while its absence converts that participation into a general appearance. What brought about this change?

In part, one might speculate. First of all, a contemporary text writer made the following unsupported statement:

¹² 5 Ohio App. 233, 234 (1915).

¹³ *Id.* at 235-36.

When a defendant invokes the action of the court, without questioning its jurisdiction, he thereby enters an appearance and submits to its jurisdiction of his person. And this he may do so long as the case is pending—that is, during the time within which any further procedural act may be done therein.¹⁴

This remark is not free from ambiguity, but it could be used to support the result reached by the Court of Appeals. Secondly, several jurisdictions had already established the rule that the objecting party must preserve his objection in all subsequent steps of the case if he wishes to avail himself of the point on appeal.¹⁵ Thus, these cases treat the reservation of the objection as something akin to a continuing exception. But that does not seem to be the point of *Clippinger*. *Clippinger* does not so much treat the absence of the reservation as a waiver of the exception as it does an entry of general appearance which, as a by-product, and *ex necessitate*, produces a waiver of the objection to jurisdiction.

In any case, there is no hint in the *Clippinger* decision that the court was influenced by either of these developments. Rather, the decision is expressly based on three prior Supreme Court decisions: *Allen v. Miller*,¹⁶ *Mason v. Alexander*,¹⁷ and *Long v. Newhouse*.¹⁸

Allen v. Miller involved an attempt to obtain jurisdiction over an out-of-county defendant by joining him with an in-county defendant.¹⁹ The out-of-county defendant, Miller, answered to the merits and, as part of that answer, objected to the court's jurisdiction of his person. He subsequently moved for dismissal for want of jurisdiction, and the motion was granted. Plaintiff filed his petition in error with the district court, but it was reserved to the Supreme Court. That court affirmed on the ground that the defendants were not properly joined, and the case was not properly venued in the county in which it was brought. In passing, the court said:

The defendant, Miller, embraced the first occasion which offered, to-wit: in his answer, to assert his objection to the jurisdiction of the court, *nor did he waive that objection by any*

¹⁴ G. PHILLIPS, AN EXPOSITION OF THE PRINCIPLES OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 495 § 464 (1896).

¹⁵ The cases are collected in Annot., 16 L.R.A.(n.s.) 177, 182 (1908). The rule is a minority one. As it is said in 2 R.C.L. *Appearances* § 21 (1914):

If, however, the defendant has duly preserved his exception a requirement that he should continue in all subsequent steps to object to that jurisdiction would seem to serve no useful purpose. It is extremely technical, and cannot be said to prevail generally; and as a rule the cases in the jurisdictions which hold that the general appearance is not a waiver of the objections to the jurisdiction over the person do not speak of any necessity, after exception has been taken, to continue to object uselessly.

¹⁶ 11 Ohio St. 374 (1860).

¹⁷ 44 Ohio St. 318, 7 N.E. 435 (1886).

¹⁸ 57 Ohio St. 348, 49 N.E. 79 (1897).

¹⁹ The classical *Dunn v. Hazlett* situation described in note 3, *supra*.

subsequent act on his part, as the defendant did in *Evans v. Ilse*, 7 Ohio St. Rep. 233.²⁰ (Emphasis added).

The in-county—out-of-county situation was also the genesis for *Mason v. Alexander*. The procedural steps were complex, but they may be fairly simplified as follows: The out-of-county defendants filed an answer in the action which went solely to the question of jurisdiction. Plaintiff demurred to this answer, and the demurrer was sustained. Defendants excepted, took leave to answer, and answered to the merits. A trial was had, and judgment rendered against the defendants. From this judgment they *appealed* to the district court. There, they moved to dismiss for want of subject matter jurisdiction. When this was overruled, the defendants consented to trial on the merits, and it was during this trial that they raised the question of jurisdiction of their persons. This question was decided adversely to them, and judgment was taken against them. They then proceeded in error to the Supreme Court. The question there argued was whether the *district court* had had *in personam* jurisdiction. The Supreme Court found that it did, principally on the ground that the defendants themselves invoked its jurisdiction by appealing. Thus, the court followed *Fee v. Big Sand Iron Co.*²¹ But it also made the following remark:

Allen v. Miller, 11 Ohio St. 374, is to the effect that where a defendant, in connection with a plea to the merits, interposes a plea to the jurisdiction as to his person, and that being first heard and decided adversely, then proceeds with the trial is not thereby prevented from averring want of jurisdiction. At first blush this case might seem to be inconsistent with the holding in the later case [*Fee v. Big Sand Iron Co.*], though the opinions are rendered by the same judge. But a reference to the language of the opinion, page 379, would appear to relieve it of seeming inconsistency. It is that "the defendant, Miller, embraced the first occasion which offered, to wit, in his answer, to assert his objection to the jurisdiction of the court, nor did he waive that objection by any subsequent act on his part".²²

Again, *Long v. Newhouse* involves an out-of-county defendant joined with an in-county defendant for the purpose of obtaining jurisdiction over him. But here, the out-of-county defendants filed several motions with the trial court before raising an objection to *in personam* jurisdiction in the first defense of their answer. Clearly,

²⁰ 11 Ohio St. 374, 379; *Evans v. Ilse*, 7 Ohio St. 233 (1857) involved the filing of a demurrer to the petition *before* a previously filed motion attacking in personam jurisdiction had been ruled upon. The filing of the demurrer was held to be the entry of a general appearance and the abandonment of the attack on jurisdiction.

²¹ 13 Ohio St. 563 (1862). *See*, note 9, *supra*, for a comment on this case.

²² 44 Ohio St. 318, 329, 7 N.E. 435, 439-40 (1886). Later, on the same page, the Court put the quoted matter in context by saying:

Allen v. Miller seems to rest upon the effect of making objection to the jurisdiction at the first opportunity. The present case is one where the defendant *did not* make objection to the jurisdiction at the first opportunity; but they appeared first and objected afterward. (Emphasis in the original.)

they failed to avail themselves of the first opportunity to raise the question, and thus waived it; and the Supreme Court so held. But in doing so, it said:

The decisions of this court on the subject, are all to the effect, that any step taken in a case by a defendant, other than to object to the court's jurisdiction over his person, enters his general appearance to the action, and he cannot afterwards claim that the court's jurisdiction of his person has not been properly obtained.²³

From the context of this case, and from the examples cited by the court immediately after the above quote,²⁴ it is apparent that the words "any step taken in a case" refer to steps taken *prior to* raising the question of *in personam* jurisdiction. And, of course, that is the gist of all three cases: all hold that the defendant must raise the jurisdictional question at his first opportunity to do so, and that if he precedes it by any other "step", he has entered his general appearance and waived the jurisdictional point. *Allen v. Miller* suggests and *Mason v. Alexander* holds, that the objection once raised may be lost by some subsequent step, but none of the cases hold, or even suggest, that the objection, once made, need be reiterated in all subsequent steps if an appropriate exception is taken to the overruling of the objection. But even had there been such hint or holding, it would have been overruled—by implication if not by expression—by the later decision in *Foster v. Borne*.

Nevertheless, the *Clippinger* court completely ignored the decision in *Foster v. Borne*, and, specifically referring to the three passages quoted above, concluded that the defendant's failure to preserve his objection to jurisdiction amounted to a general appearance and a waiver of the objection. If the passages are taken out of context, a case can be made for the conclusion. Thus, even if the defendant

²³ 57 Ohio St. 348, 370, 49 N.E. 79, 81 (1897). Here, before filing their answer, defendants (1) moved for leave to plead, (2) moved to compel the plaintiff to attach to his petition an account of the items of his claim, (3) moved for leave to plead again, (4) moved to require the plaintiff to separately state and number, and (5) moved to strike certain averments from the petition. As the court said:

Manifestly they could not do this [raise the question of the court's jurisdiction over their persons] after the numerous instances in which they had submitted themselves to its jurisdiction by invoking its judgment on the legal completeness as well as the sufficiency of the plaintiff's petition.

²⁴ To continue the quote:

Thus a motion for leave to answer, *Brundage v. Biggs*, 25 Ohio St. 652; a motion to strike papers from the files, *Maholm v. Marshall*, 29 Ohio St. 611; a demurrer to a petition, 1 Ohio St. 286; and, though subsequently withdrawn, *Evans v. Iles*, 7 Ohio St. 238; a motion to dismiss for want of security for costs, *Schaeffer v. Waldo*, 7 Ohio St. 309; a motion to dismiss for want of jurisdiction of the subject-matter of the action, *Handy v. Ins. Co.*, 37 Ohio St. 366; *Smith v. Hoover*, 39 Ohio St. 249; and a motion to strike from the petition certain averments, *Railroad Co. v. Morey*, 47 Ohio St. 207, 210, have all been held to enter the party's appearance to the action, as completely as if he had been properly served with process.

In all of these cases, the motion was either filed prior to the attack on jurisdiction, or the attack on jurisdiction was made part of the motion. In this latter case, the attack on jurisdiction would not be by special appearance for that purpose only. *State v. Fremont Lodge of Loyal Order of Moose*, 151 Ohio St. 19, 84 N.E.2d 498 (1949).

properly raises the question of jurisdiction, he can waive it by a subsequent act on his part (*Allen v. Miller* and *Mason v. Alexander*). And, if he takes any other step other than to object to the jurisdiction, he enters a general appearance to the action (*Long v. Newhouse*). Therefore, to avoid waiving the objection by some subsequent act or step in the proceedings, he must preface that act or step with a reservation of his objection to the court's jurisdiction of his person.

But when these three passages are read in context, it is clear that the Stark County Court of Appeals decision in *Clippinger* is erroneous. And it is this skeleton of error upon which is stretched the fabric of the law. One court took a wrong turning in the road, and all other courts have since followed.

The subsequent history of what might aptly be called the *Clippinger* doctrine is both interesting and confusing. The question again reached the Supreme Court of Ohio some seven years after *Clippinger* in the case of *Ohio Electric Railway Co. v. The United States Express Co.*²⁵ Never was there such a pleading nightmare! Plaintiff filed its petition, to which defendant made answer and counterclaim. Thereafter, defendant left the state, and was beyond the reach of process. Plaintiff then filed an amended petition which stated a different cause of action than that alleged in the original petition. No new service was had or attempted on defendant, and defendant appeared specially and moved to have the amended petition stricken from the files. The motion was granted, but leave was given plaintiff to file a second amended petition. The trial court's journal entry noted that defendant excepted to such leave being granted. The second amended petition was filed, and again, no new service was had or attempted on defendant. To this the defendant filed an answer in which it expressly reserved the objection it had raised by motion, and in which it incorporated by reference all the averments and denials of its original answer and counterclaim, less a prayer for affirmative relief on the counterclaim. Judgment was for the plaintiff, and defendant proceeded in error to the Court of Appeals. One of the grounds of error was the granting of leave to file the second amended petition. Plaintiff argued that this ground had been waived when defendant answered to the merits. The Court of Appeals found for the defendant on this ground, and the plaintiff filed his petition of error in the Supreme Court. The decision of the Supreme Court on this issue is found in paragraph 3 of the syllabus, and reads as follows:

A defendant appearing only for the purpose of objecting to the jurisdiction, upon the overruling of such objection is not bound to rely at his peril solely upon his exception thereto, *but may make full defense without waiving such objection.* (Emphasis added).

²⁵ 105 Ohio St. 331, 137 N.E. 1 (1922).

But what does this mean? Does it mean that he may proceed to a defense on the merits without reserving his objection to jurisdiction, as in *Foster v. Borne*, or do the words "without waiving" imply the need for some affirmative action as in *Clippinger v. Sturgeon*? Ordinarily, the phrase "may make full defense without waiving" would imply that the defendant had done all that he need do, and no further affirmative action was required of him. But in the case itself defendant did reserve its objection in its second answer. Thus, in the context of the case, the phrase could mean that a "full defense" includes a reservation of the objection to jurisdiction. But again, it would be more logical to assume that the words "full defense" mean *more than* just a defense to the question of jurisdiction, rather than a defense which *includes* a reservation of the objection to jurisdiction. As the King of Siam said, "It is a puzzlement". The case can be read as one affirming the rule of *Foster v. Borne*, or as one affirming the *Clippinger* doctrine. And it has been read both ways.

The Supreme Court of Louisiana, for example, thought that the above-quoted paragraph of the syllabus did away with the need for preserving an objection to jurisdiction. The case²⁶ arose out of a suit on a judgment rendered by the Court of Common Pleas for Cuyahoga County. The defendant attacked the judgment as having been rendered by a court without jurisdiction of his person; the plaintiff attempted to support the judgment by arguing that defendant waived the question of jurisdiction by moving for a new trial without specifically reserving his objection to jurisdiction (which he had very carefully reserved, in all previous steps in the case). After commenting on several Ohio cases the Court quoted paragraph 3 of the *Ohio Electric* syllabus, and said:

Our conclusion is that the Ohio jurisprudence is against the contention of the plaintiffs in this case.²⁷

²⁶ Snyder v. Davidson, 172 La. 274, 134 So. 89 (1931).

²⁷ 134 So. 89, 93 (1931). Perhaps the principle reason for the decision is that the defendant was a Louisiana resident and the view of the Ohio law being urged by the plaintiff was not only highly technical but also in conflict with the law of Louisiana. As the court noted (134 So. 89, 91):

The rule established by the Supreme Court of the United States, and the rule in this state, and, as far as we are aware, the universal rule, is that * * * [i]f the defendant, being sued in a court that has not jurisdiction *ratione personae*, excepts to the jurisdiction when he first appears in the suit, and urges the exception before making any other defense, and if the exception is overruled, he is not compelled to allow judgment to go against him by default, but may thereafter resort to any other appropriate means of defense, without reiterating his protest against the jurisdiction of the court, and without thereby creating a presumption that he has abandoned his exception to the jurisdiction of the court. When a judge has erroneously overruled an exception to his jurisdiction, there is no good reason why the exceptor should continue to remind the judge of his error at every stage of the proceedings, in order to avoid a presumption that he (the exceptor) acquiesces in the erroneous ruling.

Clearly, the Louisiana Supreme Court is thinking in terms of preserving the question of jurisdiction for review. But the *Clippinger* doctrine had abandoned this viewpoint, and saw the problem as one involving the special appearance-general appear-

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On the other hand, the Court of Appeals for Cuyahoga County looked to the language in the opinion from which paragraph 3 of the *Ohio Electric* syllabus was taken, and concluded that that language mandated a reservation of the objection to *in personam* jurisdiction in all subsequent stages of the proceeding.²⁸

But this latter decision worked another subtle change in the Ohio law. The *Clippinger* doctrine held that the failure to preserve the objection amounted to a general appearance. This doctrine was accepted and followed by the Court of Appeals for Williams County in *Riegel v. State, ex rel. Weaver*.²⁹ Now, the Court of Appeals for Cuyahoga County is speaking in terms of preserving the question of jurisdiction for review, rather than in terms of entry of general

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ance dichotomy. Interestingly enough, the *Clippinger* decision was one of the Ohio decisions reviewed and distinguished by the Louisiana court. Thus, at page 93:

It is sufficient, however, to say that the decision in *Clippinger v. Sturgeon et al.* was not rendered by the Supreme Court of Ohio, and cannot be reconciled with the decision rendered by that court in *Bucurenciu v. Ramba et al.*, 117 Ohio St. 546, 159 N.E. 565, 566, decided in December, 1927.

Whether *Bucurenciu* does conflict with *Clippinger* is, at best, arguable. *Bucurenciu* was one of those in-county—out-of-county situations, and the out-of-county defendant went on trial after filing a general denial to the petition. Relying upon *Dunn v. Hazlett*, 4 Ohio St. 435 (1854), the Supreme Court held that the general denial was sufficient to raise the question of *in personam* jurisdiction at the defendant's earliest opportunity, and that he was free thereafter to defend on the merits. However, in paragraph 1 of the syllabus the court did note that the general denial (which, in the circumstances of the case, amounted to an objection to jurisdiction) "saves an exception to the jurisdiction." This at least, would indicate that the Supreme Court is still thinking in terms of preserving the question of jurisdiction for review, and has not adopted the *Clippinger* doctrine. But given the facts of *Bucurenciu*, there was no opportunity for the application of the *Clippinger* doctrine, so the conclusion remains speculative.

²⁸ *Peerless Corp. v. Taylor*, 52 Ohio App. 543, 550, 4 N.E.2d 168, 169 (1936). Here, defendant corporation raised the question by motion to quash. The trial court sustained the motion, but this ruling was reversed on error proceedings. Defendant corporation then answered, and reserved its objection to jurisdiction in its answer. Judgment was for plaintiff, and defendant corporation proceeded in error to the court of appeals. That court said:

The question of the correctness of the ruling upon the jurisdiction of the court is now for a second time presented to the Court of Appeals. That such question may still be presented, after answer of the corporation reserving such question, is approved in *Ohio Electric Ry v. U.S. Express Co.*, 105 Ohio St., 331, 137 N.E. 1. The court, at page 345 of the opinion says:

"A defendant having made timely objection to the jurisdiction of the court, upon the overruling of such objection is not bound to rely upon his exception thereto at his peril, but may make full defense without waiving such objection."

This is quoted at length here because the language of the opinion differs slightly from the language of paragraph 3 of the syllabus. The difference, however, is not material and, in any case, the language of the syllabus is the law of the case. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967). But in neither the language of the opinion nor in the syllabus does the Supreme Court mandate a reservation of the exception to jurisdiction.

²⁹ 20 Ohio App. 1, 4, 151 N.E. 784, 785 (1926). The court said:

[Defendant] filed a motion to make more definite and certain, an answer, and a demurrer on the same day that he filed his motion to quash service [but after the motion was overruled] without making any protest that the court had no jurisdiction of his person, except in the motion last referred to. Under the rule laid down in *Clippinger v. Sturgeon*, 5 Ohio App. 233, he therefore entered his appearance.

appearance. In *Angus v. The Cincinnati Morris Plan Bank*³⁰ the Court of Appeals for Hamilton County appeared to agree with the Cuyahoga County Court of Appeals, but did so in such a fashion as to confuse and merge the two ideas.³¹

Whether or not this was a real deviation from the *Clippinger* doctrine is of no great moment, for the Court of Appeals for Cuyahoga County returned to (or adhered to, if you prefer) the *Clippinger* doctrine in *Barrett v. Black*.³²

The cases above discussed take the question down to the year 1951, and the real mystery is why none of them discuss the application of *Foster v. Borne*. It is as if that case had never been decided. For all practical purposes, it lay dormant until 1951, when it was used to justify the decision in *Blissenbach v. Yanko*.³³ It did not again come to the attention of the Supreme Court until 1955, when it was discussed in *State, ex rel. Rhodes v. Solether*.³⁴

This case put the question squarely to the Supreme Court. Relators—state officials—had been sued in Wood County. They moved to quash service of summons. When Judge Solether indicated that he would overrule their motion, they filed a petition for a writ of prohibition against him in the Supreme Court. The respondent demurred to the petition on the ground that it did not state a cause

³⁰ 56 Ohio App. 444, 10 N.E.2d 1019 (1937).

³¹ 56 Ohio App. 444, 445, 10 N.E.2d 1019, 1020 (1937). The court said:

Later, however, appellant answered and failed to reserve in its answer the complaint as to no service. Appellant thereby entered its appearance, and cannot now, having failed to reserve the question of process in its answer, raise the question. *Peerless Corporation v. Taylor*, 52 Ohio App. 548, 4 N.E.2d 168.

However, paragraph 1 of the syllabus makes no mention of the entry of appearance. It states:

[D]efendant who, after filing a motion to strike the amended bill for the reason no summons was issued thereon, answers but fails to reserve therein the complaint as to no service, will not be heard to raise the question on appeal.

But with respect to the courts of appeals, it is the opinion that is controlling, not the syllabus. *Carruthers v. Kennedy*, 121 Ohio St. 8, 166 N.E. 801 (1929); *Parkview Hospital v. Hospital Service Ass'n.*, 8 Ohio App.2d 315, 222 N.E.2d 314 (1966).

³² 66 Ohio L. Abs. 195, 197-98, 119 N.E.2d 306, 308 (1951). To quote Judge Skel:

But clearly the defendant's subsequent conduct in seeking extensions of time to plead after such motion had been erroneously overruled and finally pleading to the general issue [but with a reservation of his objection to jurisdiction in the answer], constituted an entry of appearance by defendant and a submission of the defendant to the jurisdiction of the court.

In another three years and two months, Judge Skel will repudiate these words, but for the moment, they establish that the failure to preserve the objection to jurisdiction in a motion for leave to plead made after the motion to quash has been overruled is an entry of general appearance.

³³ 90 Ohio App. 557, 560, 107 N.E.2d 409-10 (1951). The Court of Appeals for Mahoning County cited it as authority for the proposition that taking an appeal after an attack on jurisdiction and a defense on the merits is an entry of appearance which waives the jurisdictional question. In view of the change in the appellate procedure which eliminated proceedings in error, the court was quite wrong. For details of the change in appellate procedure, see 116 LAWS OF OHIO 104 (1935).

³⁴ 162 Ohio St. 559, 124 N.E.2d 411 (1955).

of action. Relators argued that prohibition was the only means available to them for testing the jurisdiction of the Wood County court because (1) if they answer to the merits after their motion to quash is overruled they will have entered their appearance and will have waived their objection, or (2) if they appeal under the new appellate procedure, their appeal will amount to an entry of appearance and a waiver of their objection. For this second point relators cited *Foster v. Borne*.

Technically, relators may have been asking for a writ of prohibition, but in substance, they were asking the court to advise them as to the proper procedure for preserving their objection to jurisdiction. With respect to the first point, the court's advice was trenchant. It simply stated that relators' "fears were unfounded", and quoted the third paragraph of the *Ohio Electric* syllabus.³⁵

With respect to the second point, the court discussed the facts of the *Foster* case, and noted, as it did so, that in that case defendants "filed their answers in the Court of Common Pleas, without pleading want of jurisdiction of their persons",³⁶ but it was not this, but the taking of the appeal, that worked the entry of appearance. It then went on to hold that the change in the appellate procedure had made the *Foster* case inapplicable since there is now only an appeal rather than an appeal and a proceeding in error. The Court said:

We hold, as was held in the *Ohio Electric Ry. case*, that if a defendant, at the first opportunity after an action has been instituted against him, appears only for the purpose of objecting to the jurisdiction of the court either as to subject matter or person, he is not, upon the overruling of such objection, bound to rely at his peril solely upon his exception thereto but he may make a full defense in the action without waiving his objection as to jurisdiction, either in the trial court, the Court of Appeals, or the Supreme Court.³⁷

Paragraph 2 of the syllabus of the case repeats the above language less the reference to the *Ohio Electric* case.

But as an advisory opinion, this was less than a happy one. For one thing, the reference to relying upon an exception is out of place. The 1935 amendments to the Code of Civil Procedure³⁸ had eliminated the need for taking an exception in cases such as this. Secondly, in quoting the language of the *Ohio Electric* case, the court reaffirmed the ambiguity inherent in that decision, and did nothing to dispel it. And this leads directly to the third point. In *Foster*, the defendants did not preserve their objections to jurisdiction in their answer

³⁵ *Id.* at 563, 124 N.E.2d at 413.

³⁶ *Id.* at 564, 124 N.E.2d at 414.

³⁷ *Id.* at 566, 124 N.E.2d at 414.

³⁸ 116 LAWS OF OHIO 104, at 115 (1935). At the time of the decision, this amendment appeared as § 2321.03, Ohio Revised Code. See, note 5, *supra*, for a fuller discussion of the language of the amendment.

(and this was held not to be an entry of appearance), but in *Ohio Electric* the defendant did make such a reservation. Here, the court declares the *Foster* case "inapplicable to present-day situations". But is it inapplicable *in toto* (which would include the question of preserving the jurisdictional point), or is it merely inapplicable with respect to the question of an appeal amounting to the entry of an appearance? Presumably, it is "inapplicable" only in the latter respect, but the point is not clearly made.

It might fairly be argued that since the court noted the question of reservation in passing, but did not comment upon it one way or another in its express holding, it did not consider the question material, and found no significance in the presence or absence of such a reservation.³⁹ But the court must surely have been aware of the emphasis being placed on this very point by the various courts of appeals, and it is surprising that it did not make mention of it in the holding even if only to discount it.

But if the court was not aware of this development in the lower courts, it soon would be, for the case of *Gibson v. Summers Construction Co.*⁴⁰ was coming to it on appeal from the Court of Appeals for Cuyahoga County.

Heretofore, the reported decisions from the Courts of Appeals had held that the reservation of the objection to jurisdiction had to be made in *all* subsequent steps of the proceedings, including motions.⁴¹ In *Gibson*, defendant filed a motion to make definite and certain after its motion to quash had been overruled. The motion did not contain a reservation of the objection to jurisdiction.⁴² This mo-

³⁹ Some support for this view can be found in the fact that the court cited *Bucurenciu v. Ramba*, 117 Ohio St. 546, 159 N.E. 565 (1927) and *Glass v. McCullough Transfer Co.*, 159 Ohio St. 505, 112 N.E.2d 823 (1953) as support for the proposition stated in the third paragraph of the *Ohio Electric* syllabus. In neither of these cases was there any reservation of the objection, nor any mention of the need to make one. In fairness, however, it should be noted that in neither of these cases was there much opportunity for such a reservation, since the objection to jurisdiction was first raised by answer rather than motion or demurrer. Nevertheless, the fact that these cases are cited seems to indicate that the court is stressing that the raising of the objection at the first opportunity is the act that preserves the objection for review, and not some magic formula inserted in subsequent pleadings or motions.

⁴⁰ 96 Ohio App. 307, 119 N.E.2d 637 (1954).

⁴¹ Motion for leave to plead: *Clippinger v. Sturgeon*, 5 Ohio App. 233 (1915); *Barrett v. Black*, 66 Ohio L. Abs. 195, 119 N.E.2d 306 (1951). Motion to make definite and certain: *Riegel v. State, ex rel. Weaver*, 20 Ohio App. 1, 151 N.E. 784 (1926).

⁴² From the report of the case in 96 Ohio App. 307, 119 N.E.2d 637, it does not clearly appear that the motion was without a reservation of the jurisdictional objection. However, the text of the motion can be found at pages 3 and 4 of the Record on Appeal to the Supreme Court of Ohio, and reads as follows:

Now comes the defendant and moves this honorable court that plaintiff's petition be made definite and certain in the following particulars, to wit:

(1) That plaintiff state whether the work and labor performed by the plaintiff as set forth in his petition was by virtue of a written or oral contract. If written contract, then it is requested that plaintiff attach a copy of the same to his petition or incorporate the same in the petition.

(2) That the plaintiff set forth the times when the plaintiff furnished labor or materials for this defendant.

(3) That the plaintiff set forth the amounts that were charged for the labor that was furnished or materials furnished on each occasion.

tion was granted in part, and plaintiff filed an amended petition. In its answer to the amended petition, defendant reserved its objection to jurisdiction. The trial court found for the plaintiff, and defendant appealed on the question of jurisdiction. On appeal, plaintiff argued that defendant had entered its appearance by filing the motion to make definite and certain without reserving the objection to jurisdiction. The Court of Appeals for Cuyahoga County disagreed, holding that it was enough that the question was reserved in the answer.⁴³ Plaintiff then appealed to the Supreme Court.

There, he argued, as he had in the court below, that the defendant's failure to reserve its objection to jurisdiction in its motion was an entry of appearance. Defendant countered by arguing that no reservation was required; that all that was required was the raising of the objection at the earliest opportunity.⁴⁴ Thus, the question of reservation was put squarely before the court.

⁴³ 96 Ohio App. 307, 308-09, 119 N.E.2d 637-38 (1954). Judge Skeel said:

The claim of the plaintiff that the defendant entered its appearance by filing a motion to make definite and certain, after its motion to quash had been overruled, is not well taken. Having been compelled to come within the jurisdiction by the court's ruling on the motion to quash and having saved the question by its answer, the record does not disclose under those circumstances that defendant voluntarily submitted to the jurisdiction of the court, and upon the record that question is now before this court.

Not only is this in variance with what Judge Skeel had previously said in *Barret v. Black*, 66 Ohio L. Abs. 195, 119 N.E.2d 306 (1951) just three years earlier (*see*, note 32, *supra*), but it is also in direct conflict with the decision in *Riegel v. State*, ex rel. Weaver, 20 Ohio App. 1, 151 N.E. 784 (1926) which is more fully discussed in note 29, *supra*. Why this departure from previous rulings? The answer is uncertain, since Judge Skeel cited no authority for this new position, nor did he attempt to distinguish the existing cases (including his own prior decision) to the contrary. It was as if he were writing on a clean slate.

Ironically, Judge Skeel brought *Barrett v. Black* back to life in the later case of *Bennett v. Radlick*, 104 Ohio App. 265, 145 N.E.2d 334 (1957). The cases are remarkably similar. In both *Bennett* and *Barrett* the basic, underlying question was the extent of the jurisdiction of the Municipal Court of Cleveland. In both, defendant initially moved to quash service and, when that motion was overruled, took leave to plead without reserving his objection to jurisdiction in the motion. In both, defendant reasserted his objection to jurisdiction in the answer. But in *Bennett*, the answer also contained a counterclaim. It was argued that the request for affirmative relief amounted to an entry of general appearance. On this point, Judge Skeel held otherwise, but cited *Barrett* for the proposition that the Municipal Court did not have county-wide jurisdiction in actions for money only. Were he not precluded by his own decision in *Gibson* and that of the Supreme Court he might also have cited *Barrett* for the proposition that defendant had made his entry of appearance in *Bennett* by moving for leave to plead without reserving his objection to jurisdiction.

⁴⁴ The assignment of error, as it appears in plaintiff's brief to the Supreme Court, reads as follows:

The questions of law presented in this case involve the legal effect, as an entry of appearance, of a filing of a pleading [sic], without reservation, by the defendant; . . .

The questions are stated as follows:

I. Does the filing of a motion to make definite and certain, following the overruling of a motion to quash summons, enter the defendant's appearance in an action?

To this, defendant's brief replied:

The objection [to jurisdiction] over the person of the defendant was raised at the earliest moment in this case which was all that defendant was required to do. And the court having overruled the motion to quash, the rights and objections of the defendant were saved. See *Glass v. McCullough Transfer Co.*, 159 Ohio St. 505, 112 N.E.2d 823.

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And once again, that court left the answer unclear. Citing *Glass v. McCullough Transfer Co.*,⁴⁵ the court said:

If the motion [to quash] is overruled, he may then plead to the merits and continue to protest to the court's jurisdiction.⁴⁶ (Emphasis added).

At first blush, this sentence would seem to affirm that line of authority that began with *Clippinger*. Unlike the previous language used in *Ohio Electric* and *Solether* (i.e., "but may make full defense without waiving such objection" and "he may make a full defense in the action without waiving his objection as to jurisdiction"), this phrase implies some further affirmative action on the part of the defendant: a renewal of his protest to the court's jurisdiction.

But the decision really raises more questions than it answers. First of all, the *Glass* case is in the *Dunn-Bucurenciu* line, in which the objection to jurisdiction can be made by a general denial, or otherwise raised for the first time in the answer. In this line of cases, there is very little, if any, opportunity to raise the issue at a further stage of the proceedings, and none of the cases in this line requires the defendant to do so.⁴⁷ Thus, the case is not authority for the proposition for which it is cited. It does, however, tend to support the theory for which defendant cited it; that is, if the defendant raises the question of jurisdiction at his earliest opportunity, that is all that is required of him; he may thereafter proceed to defend the action without continuing his protest, and without waiving his objection or entering his appearance.⁴⁸ Secondly, at what step in the proceeding must the defendant "continue to protest"? Since the Supreme Court affirmed the judgment of the Court of Appeals, it can hardly be said that he must do so in motion to make definite and certain. But what about other motions? The court is silent; but it may fairly be concluded that the protest need not be part of motions filed subsequent to the overruling of the motion to quash. Then he must do so in his pleadings. But in all pleadings,⁴⁹ or just in the answer?⁵⁰ What about

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The *Glass* case does not speak defendant's piece quite as strongly as defendant would have it do, but it, taken in conjunction with *Ohio Electric*, *Solether*, and *Bucurenciu*, does give some plausibility to defendant's position.

⁴⁵ 159 Ohio St. 505, 112 N.E.2d 823 (1953).

⁴⁶ *Gibson v. Summers Construction Co.*, 163 Ohio St. 220, 228, 126 N.E.2d 326, 330 (1955).

⁴⁷ *Dunn v. Hazlett*, 4 Ohio St. 435 (1854); *Allen v. Miller*, 11 Ohio St. 374 (1860); *Drea v. Carrington*, 32 Ohio St. 595 (1877); *Mason v. Alexander*, 44 Ohio St. 318, 7 N.E. 435 (1886); *Long v. Newhouse*, 57 Ohio St. 348, 49 N.E. 79 (1897); *Bucurenciu v. Ramba*, 117 Ohio St. 546, 159 N.E. 565 (1927). This does not purport to be an exhaustive listing of this line of cases; these are cases in this line that are most frequently cited.

⁴⁸ See, note 44, *supra*.

⁴⁹ At the date of this decision, § 2309.02, Ohio Revised Code, defined the pleadings in a civil action as the petition, a demurrer to the petition, the answer and/or cross petition, a demurrer to the answer, the reply, and a demurrer to the reply.

⁵⁰ At least one court indicated that it would be sufficient to assert the reservation in the answer. See, *Bennett v. Radlick*, 104 Ohio App. 265, 268, 145 N.E.2d 334, 336 (1957). But in this case, the answer was the next pleading filed. Thus of necessity, the court said nothing about demurrers.

opening statement, or a motion for a directed verdict, or a motion for judgment non obstante veredicto or new trial? If continuing to protest serves a meaningful purpose, at what stage does it serve that purpose, and at what stage does it cease to serve? Thirdly, the italicized phrase need not be given the interpretation placed on it above. It could be read to mean that the defendant's protest to the jurisdiction automatically continues after his motion to quash is overruled; that a plea to the merits does not *discontinue* the protest, since the two are not mutually exclusive. But this is a very strained reading, and hardly one that comports with the words used, or the fact that defendant did preserve his objection in his answer if not in his motion to make definite and certain.

Yet, this latter interpretation of the court's language finds some support in the fourth and final point: the italicized phrase does not appear in the syllabus, and is thus not part of the law of the case.⁵¹ Accordingly, it could be argued that if the court had intended the reservation of the objection to jurisdiction to be an essential feature of Ohio pleading, it would have said so in its own designation of the law of the case. And this is especially true here, since the very point at issue was whether such a reservation had to be made in the motion to make definite and certain. Thus, it could be concluded, since the court did not speak of continuing to protest in the syllabus, it did not intend those words to go beyond what it had already said in *Ohio Electric and Soletcher*. The phrase at issue, then, is mere *dictum*, and adds nothing to the law as previously enunciated.

Perhaps, but the fact remains that the court did make the statement (albeit as *dictum*); that it made it in a radically different formulation than that previously used by it; and that formulation corresponds in result, if not in detail, with what the Courts of Appeals had been saying. Therefore, it is more logical to assume that the court intended what the phrase imports: the defendant must reserve his objection to jurisdiction at some subsequent stage of the proceeding. Since, in this case, he did so in the answer, it is equally logical to assume that that is the step at which the reservation must be made.

The above construction is logical, but it is not altogether convincing. After reading all of the Supreme Court cases on point, a nagging doubt remains as to what the Court really intended when it said "If the motion is overruled, he may then plead to the merits and continue to protest the court's jurisdiction".⁵²

⁵¹ Paragraph 2 of the syllabus in *Gibson, supra*, note 46 at 221, 121 N.E.2d 327 reads:

The filing of a motion by a defendant to make the petition definite and certain following the overruling of his motion to quash the service of summons in the action does not effect the entering of the appearance of the defendant therein.

⁵² Whatever the court may have intended, the Court of Appeals for Cuyahoga County saw the decision as an affirmation of the *Clippinger* doctrine. See, *Bennett v. Radlick*, 104 Ohio App. 265, 145 N.E.2d 334 (1957). For the facts of this case,

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That doubt is intensified by the Supreme Court's *per curiam* opinion in *State, ex rel. Gregory v. Masheter*.⁵³ Relators brought a proceeding in mandamus in the Court of Appeals for Harrison County. Respondent filed a motion to quash service, which was overruled, and respondent appealed to the Supreme Court. Relator moved to dismiss the appeal on the ground that the order overruling the motion to quash was not a final order. The Supreme Court granted the motion, saying:

The motion is well taken. The order overruling the motion to quash service of summons is not a final appealable order as defined by Section 2505.02, Revised Code. Respondent is not precluded by the overruling of the motion to quash but may make a full defense in the action without waiving his objection to jurisdiction. *State, ex rel. Rhodes, Aud., v. Solether, Judge*, 162 Ohio St. 559.⁵⁴

It is significant to note that the court not only reverts to its prior formula in this type of case, but it completely ignores its previous decision in *Gibson*. Indeed, except for a misapplication of the principle in Judge Skeel's dissent in *Mayer v. Sumergade*,⁵⁵ it would seem that this aspect of the *Gibson* decision has died a natural death.

What, then, of the Conventional Wisdom? There is no doubt that the Conventional Wisdom was absolutely correct as far as the various courts of appeals were concerned. Since the *Clippinger* decision in 1915, all of the reported decisions of those courts emphasize the need to preserve the objection at some further stage of the proceeding.

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see, note 43, *supra*. At 104 Ohio App. 267-68, 145 N.E.2d 336, the court cited both *Solether* and *Gibson*, and said:

The law of Ohio now clearly recognizes the right of one who has challenged the jurisdiction of the court over his person by a motion to quash service of summons on the ground that service has not been lawfully made or made beyond the territorial jurisdiction of the court, and where such motion to quash has been overruled, to defend on the merits without waiving his right, after judgment against him, to seek a review on appeal of the question of the court's jurisdiction over his person *where such objection to the jurisdiction of the court is pleaded in the answer*. (Emphasis added.)

Note, however, that the court is again speaking in terms of preserving the question for review rather than in terms of entering a general appearance.

⁵³ 3 Ohio St. 2d 43, 208 N.E.2d 926 (1965).

⁵⁴ *Id.* 208 N.E.2d at 927.

⁵⁵ 111 Ohio App. 237, 248-49, 167 N.E.2d 516, 524 (1960). Judge Skeel said:

A defendant who at his first opportunity (or at any other time during trial) challenges the jurisdiction of a trial court by demurrer, based either on the claim that the court is without jurisdiction of the subject matter or that it is without jurisdiction because the petition does not state a cause of action, and where the court overrules such demurrer, does not waive either of such claims by then pleading to the issues seeking his just or legal rights against the claim by answer and trial of the alleged cause of action, particularly where, as here, the defendants, as a defense, continue to assert their claim that the petition does not state a cause of action.

The principle of *Gibson* hardly applies to the problems of demurrers. In any case, under the old procedure, neither lack of subject matter jurisdiction nor failure to state a cause of action were waived by failing to assert them at the outset, and there never was any requirement that objections on either of these two grounds had to be preserved in subsequent stages of the proceeding.

It is probably true to say that the *Gibson* decision has modified those decisions to the extent that those courts would now be satisfied with a reservation in the answer, although it would be more prudent to make it in any *pleading* filed after the motion to quash had been overruled. And since the trial courts are more sensitive to the rulings of their respective Courts of Appeals than they are to the rulings of the Supreme Court (especially when the latter are ambiguous), the Conventional Wisdom no doubt held true with respect to the trial courts as well.

But the Supreme Court is another matter. At the very best, the Supreme Court's opinions on this point have been Delphic. With the exception of *Gibson*—an aberration in an otherwise clean line—the Supreme Court has never expressly required a defendant to preserve his objection to *in personam* jurisdiction in pleadings or motions filed with the court after his initial objection to jurisdiction had been overruled. And even the language in *Gibson* which suggests the necessity for doing so is subject to a different interpretation. While the court has, from time to time, noted that the defendant did (*Ohio Electric, Gibson*) or did not (*Foster*) make such a reservation, it has placed no emphasis whatsoever on that point. The emphasis has always been placed on whether or not the defendant properly raised the question of jurisdiction at his first opportunity to do so. If this question was answered in the affirmative, he was free to "make a full defense in the action without waiving his objection to jurisdiction". Even the language in *Gibson*—"plead to the merits and continue to protest to the court's jurisdiction"—can be read to harmonize with the former formulation. And the language in *Gibson* is *dictum*.

Therefore, with respect to the Supreme Court, the Conventional Wisdom is probably wrong. But the point is debatable. Unfortunately, the judges of the debate—the trial courts and the Courts of Appeals—have subscribed to the view of Conventional Wisdom, and true debate is foreclosed.

Thus, the pre-Rule answer to the question posed at the beginning of this article is: "Yes, you must preserve your objection at least in your answer, and prudence would dictate that you preserve it in all other pleadings and motions as well".

But what of the situation under the Rules? Here, the answer is an unequivocal "No!"

While the pre-Rule rationale for requiring the reservation was never entirely clear,⁵⁶ two distinct theories can be found in the

⁵⁶ As it is said in Sunderland, *Preserving a Special Appearance*, 9 MICH. L. REV. 396, 398-99 (1911):

But no question of law or practice has come under the writer's observation which has been passed upon by the courts with so little consideration as this one. One would expect just the converse to be true, in view of the

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cases. The first was premised on the idea that an objection to a court's ruling on a question of law had to be taken by way of exception. Here, the emphasis was placed on preserving the question for review, and the reservation of the objection to jurisdiction was seen as a continuing exception to the court's ruling and an indication that the defendant was going to take the matter to a higher court. To the same effect, the failure to make the reservation was an indication that defendant had abandoned his exception, and was no longer interested in a review of the original ruling. To the extent that the Supreme Court can be said to have required the reservation, it required it on the basis of this theory.

The second theory was grounded in the dichotomy between special appearances and general appearances. The objection to jurisdiction had to be made by a special appearance. The reservation of that objection somehow kept that special appearance alive, and prevented further participation in the proceedings from becoming a general appearance. On the other hand, further participation in the proceedings without the shield of the reservation had its natural effect—a general appearance. It is to this theory that the courts of appeals have subscribed, with the Court of Appeals for Cuyahoga County occasionally lapsing into the heresy of the first theory.

Neither of these theories can find any justification in the Code of Civil Procedure. Until 1935, all that Code required was the making of the objection and its notation by way of exception added to the journal entry or through a bill of exceptions allowed and made part of the record. And after 1935, not even the taking of an exception was required (although a bill of exceptions might still be necessary for purposes of exhibiting the error in the Court of Appeals). As was noted earlier, these theories are simply a judicial gloss put upon the Code; they are part of that "common law" that grew up and supplanted the statutory language of the Code; verbal accretions which judges could not resist affixing to it.

The theories are equally unsupported by any provisions of the Civil Rules.⁵⁷ With respect to the first theory, Rule 46 clearly notes that an exception is not necessary, *at any stage or step of the case or matter*, to lay a foundation for review whenever a matter has been

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great importance always attaching to jurisdictional questions. But with a few conspicuous exceptions, judicial discussions of this question are trivial and superficial. Most of the cases which pass upon the question contain no discussion whatever, even when the question is presented to the court for the first time. Often the opinions cite no authorities. Frequently they purport to rest upon cases which upon inspection are found to be not at all in point. In several states the courts have reversed themselves in the most naive manner.

Sunderland drew the above conclusion from a survey of all the jurisdictions. It is apparent that Ohio is simply a microcosm of the whole.

⁵⁷ The discussion of the Rules is based on the text of the Rules found in WEST'S OHIO RULES OF COURT, 1972.

called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. Thus, there is no room in Rule practice for the concept of a continuing exception, and no need to make a reservation of one's objection to jurisdiction to satisfy this concept. The *objection* to jurisdiction, of course, must be raised as provided in the Rules.

The second theory is likewise laid to rest by the Rules. Lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process may be presented by motion *or* by responsive pleading.⁵⁸ Further, Rule 12(B) provides that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion, and Rule 12(H) provides that these objections are waived only if they are not raised by motion *or* responsive pleading. The effect of all of this is to eliminate the special appearance; under the Rules there is only one appearance—a general appearance. As the Rules Advisory Committee Staff Notes state:

The third sentence of Rule 12(B) makes a special appearance unnecessary, and as will be pointed out later, waivable defenses are waived by failure to include them. This is a striking change from previous Ohio practice.⁵⁹

Since there is no longer any distinction between a special appearance and a general appearance, there is nothing for the reservation of the objection to jurisdiction to preserve. Accordingly, it no longer serves any function, and is no longer required.⁶⁰ Indeed, there is some Federal authority to the effect that if the jurisdictional question is reiterated in the answer, it will be stricken on motion.⁶¹

⁵⁸ OHIO R. CIV. P. 12(B) (2), (4) and (5).

⁵⁹ 1 W. KNEPPER, OHIO CIVIL PRACTICE WITH FORMS 80.3 § 3.06 (1970). To the same effect see J. McCORMACK, OHIO CIVIL RULES PRACTICE WITH FORMS 137 § 6.17 (1970), where it said:

The basic philosophy that a party must contest jurisdiction over his person at the earliest opportunity is not changed. The change is that there is now no requirement of a special appearance, for the purpose of contesting jurisdiction over the person only, which is separate from any other procedure. * * * The trap that formerly existed under Ohio practice has now been eliminated by eliminating the requirement of a special appearance for contesting jurisdiction over the person only.

And also 3 W. MILLIGAN, OHIO FORMS OF PLEADING AND PRACTICE 12-18 (1971), where it is said:

The theory of the rule is that a quick presentation of defenses is to be encouraged and that successive motions are to be discouraged. Thus, no defense is waived by joining it with another, the effect of which is to destroy the reason for special appearances. See Ohio Civil Rule 12(B). A responding party waives a defense only by failing to include it in a Rule 12 motion or in the answer. A voluntary appearance does not waive the objection of lack of jurisdiction over the person.

⁶⁰ 3 W. MILLIGAN, OHIO FORMS OF PLEADING AND PRACTICE 12-41 (1971):

Reassertion in answer. The jurisdictional defense need not be reiterated in the answer if it has been raised by motion.

⁶¹ Riss & Co. v. Association of Western Railways, 162 F.Supp. 69 (D.D.C. 1958); Southwell v. Robertson, 27 F.Supp. 944 (E.D. Pa. 1939); Molephini v. Bruno, 26 F.Supp. 595 (E.D. N.Y. 1939).

This is so because the adverse ruling on the original motion to quash or motion to dismiss becomes the law of the case, and the matter cannot be heard again at that judicial level. Therefore, since the trial court would exclude all evidence or argument relating solely to the question of jurisdiction, there would be no point in reiterating the objection to jurisdiction in the answer.⁶²

As Professor Jox recently put it:

Under the Federal Rules of Civil Procedure, a defendant cannot again raise the question of jurisdiction if he has previously done so by motion to quash, as the latter act alone preserves the question for appellate review in the event of an adverse verdict.⁶³

That is also true under the Ohio Rules of Civil Procedure. The day for preserving one's objection to *in personam* jurisdiction is over; the rule is dead.

⁶² *Riss & Co. v. Association of Western Railways*, 162 F.Supp. 69, 72 (D.D.C. 1958).
1958).

⁶³ Jox, *Non-Resident Motorists Service of Process Acts—Notice Requirements—A Plea For Realism*, 33 *Federal Rules Decisions* 151, 212 (1964).