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### New York Civil Practice Act; Section 235, 1946 Version--Does It Enlarge Court's Jurisdiction?

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While these latter cases present situations where income from a trust can be validly retained by the trustee for long periods of time, the general statutory prohibitions against accumulations remain in full vigor. The policy behind the statutes must always be considered. Whether an annuity be specified or the amount be discretionary, the trustee will be prohibited from tying up income either by way of capitalization or by the creation of reserve funds. The fact that the accumulations arise incident to the administration of the trust and are in no way connected with the main purpose of the trust will not save them from the stigma of illegality. The language of the statute is broad and will be broadly construed by the courts to give full effect to the statutory policy.

GEORGE F. MASON, JR.

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NEW YORK CIVIL PRACTICE ACT; SECTION 235, 1946 VERSION  
—DOES IT ENLARGE COURT'S JURISDICTION?

The concept of jurisdiction is an inherent part of the judicial process. One view that might be taken of jurisdiction as existent in American jurisprudence is that it is a limitation upon the power of the court, imposed by the individual. As the residuary of all power, he guaranteed to himself reasonable notice of complaint and opportunity to defend, and required that the summoning judicial tribunal should have authoritative power over the person of a defendant, or over the property or *res* toward which the litigation is directed. Such guarantee is perpetuated by the due process requirement in the Federal Constitution.<sup>1</sup>

Justice Holmes, speaking in *McDonald v. Mabee*,<sup>2</sup> notes that the "foundation of jurisdiction is physical power."<sup>3</sup> Violent body arrest, however, is rarely resorted to today for the acquisition of jurisdiction over the person of the defendant. It is sufficient for the acquisition of jurisdiction that the defendant is within the physical borders of the state when served.

But there is a more refined power that exists in a political sovereignty over its citizens, residents and domiciliaries. It is a power that survives a temporary inability to reduce a defendant to bodily custody. It is a power in the state, and a duty in the person, explicable and justifiable in view of the privileges afforded the person by virtue of his status in the state. Upon satisfactory notice of suit,

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<sup>1</sup> U. S. CONST. AMENDS. V, XIV.

<sup>2</sup> 243 U. S. 90, 61 L. ed. 608 (1917).

<sup>3</sup> *Id.* at 91.

though he be without the physical borders of the state, this duty takes the form of amenability to the process of the state. Concededly this power and corresponding duty is limited, by analysis of its basis, to residents of the state. No degree of notice or opportunity to defend will warrant assuming personal jurisdiction over non-residents.<sup>4</sup> The fundamental power is lacking.

Rhetorically, it might be asked whether it is not enigmatic that the protecting state subjects its own residents to greater susceptibility to suit than non-residents. The answer lies in a consideration of the purpose of the judiciary. The sound administration of justice is held to be one of the very pillars of successful government. Expenses are incurred and time and effort are consumed in establishing, maintaining and improving adequate court systems. It is imperative that courts be readily accessible for the speedy litigation of claims, settlement of disputes, and remedy of wrongs. Defense of an action is not necessarily onerous or penal. It is merely compliance with an obligation that flows from a right which is jealously guarded. Any system of jurisprudence having its roots in the common law affords a party who believes himself aggrieved, opportunity to seek, without restraint, judicial determination of his cause, and one who preserves such right to himself, by his own laws, cannot validly object to its exercise by another. Furthermore, it is the prerogative of those affected to utilize their voting power to abrogate this obligation by legislative enactment. Another alternative is afforded to voting and non-voting residents alike by the American conception of allegiance; that affiliation with the state, be it citizenship, domicile or residence, is subject to the continued will of the individual and may at any time be renounced.

Heretofore, a prospective plaintiff being within the defendant's "home" state, often found that the would-be defendant had removed himself from the state to avoid litigation. This is all too prevalent in this country of numerous sovereign states and modern modes of transportation. Ordinarily this flight is an absolute bar to obtaining personal jurisdiction, and in the instances when *in rem* jurisdiction will suffice, there are temporal and monetary considerations which are, if not prohibitive, at least burdensome. It might not be too subjective to venture the opinion that such conduct and obstacles were not anticipated by the founders of our judicial system, nor would they condone such interstate hide and seek as an exercise of sound justice.

Toward this end of sound justice and to meet present conditions with modern laws, New York State recently revised its laws dealing with the acquisition of jurisdiction by service of summons by publication<sup>5</sup> and personal service without the state.<sup>6</sup>

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<sup>4</sup> *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

<sup>5</sup> N. Y. CIV. PRAC. ACT §§ 232, 232(a), 232(b).

<sup>6</sup> N. Y. CIV. PRAC. ACT §§ 233, 234, 235.

Most notable among the changes is the present Section 235 of the Civil Practice Act which reads as follows:

Where the defendant is a resident of the state and the complaint demands judgment for a sum of money only, and in any case specified in section two hundred thirty-two of this act, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state, except that a copy of the verified complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed.<sup>7</sup>

It can be seen that the section makes a distinction, in part, between residents and non-residents; distinguishes causes of action; refers to causes of action set forth in another section of the Civil Practice Act;<sup>8</sup> and gives the mechanics of its operation. Nothing is expressly stated as to what type of jurisdiction is procured by a plaintiff who follows its mandate. Is it *in personam*? *In rem*? *Quasi in rem*? Is the type of jurisdiction different when the defendant is a resident than when he is a non-resident? Does it depend on the cause of action? Is it determined by a combination of both the type of defendant and the cause of action? In brief, our inquiry is the extent and nature of the jurisdiction acquired under this section of the Act.

It is apparent that Section 235 may be used to effect service of summons in four general classes of cases:

1. Actions for a sum of money only where the defendant is a resident of the state.
2. Matrimonial actions.<sup>9</sup>

<sup>7</sup> N. Y. CIV. PRAC. ACT § 235.

<sup>8</sup> N. Y. CIV. PRAC. ACT § 232. In what actions order for service of summons by publication may be made. An order directing the service of a summons upon a defendant by publication, may be made upon the application of the plaintiff, as specified in sections two hundred thirty two-a and two hundred thirty two-b of the act, in any of the following actions:

1. Where the complaint demands judgment annulling a marriage, or for a divorce or a separation.
2. Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.
3. Where a levy upon property of the defendant within the state has been made under a warrant of attachment granted in an action to recover a sum of money only.

<sup>9</sup> N. Y. CIV. PRAC. ACT § 232(1).

3. Actions affecting specific property.<sup>10</sup>
4. Actions where a warrant of attachment has been ordered and levy has been made.<sup>11</sup>

It is well to note that the reason given by the draftsmen of the statute, for the general provision in Section 235 incorporating Section 232 was to attain simplicity and conciseness, rather than a long enumeration repetitious of that which is contained in Section 232.<sup>12</sup> In both former Section 232 and former Section 235 substantially identical provisions were to be found governing the matrimonial, specific property and attachment actions to which both the sections were applicable. "Though the application of Section 235 (prior to the 1946 amendment)<sup>13</sup> is seemingly limited to cases involving 1. exclusion from specific property within the state, 2. matrimonial actions, and 3. actions in which attachment has been levied, the section in fact comprehends all of the eight cases now specified in Section 232 (prior to 1946 amendment).<sup>14</sup> Such variation in specification leads to confusion."<sup>15</sup> Thus both of the old sections were mutually applicable to the same causes of action with the distinction lying in the manner of the service of the summons. The jurisdiction, acquired under both of the old sections (232, 235) had the same effect, whether the service was by publication or personally without the state. Both were considered to be constructive service. Either procedure entitled a plaintiff to the same type of jurisdiction over his adversary.<sup>16</sup> The interrelation still exists under the amended sections. "Implicit in the implementation of Section 235 is compliance with Section 232-a (persons against whom an order for service by publication may be made) and 232-b (use of due diligence, if required by the publication statute, to make personal service within the state). These limitations arise from the fact that Section 232 by its terms must be read with Sections 232-a and 232-b."<sup>17</sup> The new sections are complementary and must be read together.

To summarize, the application of old Section 235 was concurrent with old Section 232. The revised Section 232 has made no change in substance. This section has been expressly incorporated in Section 235. An examination of Section 232 and the related cases thereunder should define the application and limitations of one phase of Section 235. Actions for a sum of money only will be considered separately *infra*.

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<sup>10</sup> N. Y. CIV. PRAC. ACT § 232(2).

<sup>11</sup> N. Y. CIV. PRAC. ACT § 232(3).

<sup>12</sup> 11 REP. JUDICIAL COUNCIL 215 (1945).

<sup>13</sup> Bracketed material added.

<sup>14</sup> Bracketed material added.

<sup>15</sup> 11 REP. JUDICIAL COUNCIL 215, 216 (1945).

<sup>16</sup> 2 CARMODY, PLEADING AND PRACTICE 1293 (1930).

<sup>17</sup> PRASHEK, NEW YORK PRACTICE 115 (1947).

Section 232-1<sup>18</sup> which authorizes service of summons by publication in marital actions was formerly contained in Section 232-5.<sup>19</sup> Form was changed in the 1946 amendment but not substance.<sup>20</sup> Nowhere in the revised sections which replaced the former Section 232, nor in the report of the Judicial Council which drafted and proposed the new law, is there any suggestion that the type of jurisdiction formerly acquired, was to be changed.<sup>21</sup>

Jurisdiction acquired by a court in matrimonial actions has a dual aspect; that jurisdiction which is necessary for the court to alter the marital status between the parties (annulment, divorce, and separation) and that which is necessary to grant incidental relief along with the altering of the status (alimony, counsel fees, custody of children, etc.). The jurisdiction to alter the status is *in rem* and is based on domicile of one of the parties.<sup>22</sup> On the other hand alimony and counsel fees are essentially *in personam* and based upon the acquisition of personal jurisdiction. Service of the summons by publication is sufficient notice to an absent defendant to effect a change in the marital status.<sup>23</sup> Such is the case whether the absent defendant be a resident of New York or not. Due process is satisfied by the combination of the marital status within the state and the notice by publication.<sup>24</sup> When available, service by publication is permitted irrespective of the defendant's residence or non-residence.<sup>25</sup> As against a non-resident defendant, alimony or counsel fees may not be awarded where jurisdiction is based on service by publication. Such service is insufficient for the granting of an *in personam* judgment.<sup>26</sup> Personal jurisdiction of the defendant has always been required for the granting of alimony, except in the case of sequestration proceedings.<sup>27</sup> Sequestration is similar in many respects, to attachment, which is not permitted in matrimonial actions.<sup>28</sup> The court may order sequestration of property of the defendant located within the state any time prior to judgment. If the defendant is given sufficient notice and adequate opportunity to defend, alimony may be awarded from the proceeds. Where there has been such sequestration, the court acquires its jurisdiction for such award from seizure of the

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<sup>18</sup> See note 8 *supra*.

<sup>19</sup> N. Y. Laws 1921, c. 199, as amended by N. Y. Laws 1929, c. 644.

<sup>20</sup> Prashker, *New York's Statutes Governing Service of Summons by Publication: The Revision of 1946*, 21 ST. JOHN'S L. REV. 18 (1946).

<sup>21</sup> 11 REP. JUDICIAL COUNCIL 193-220 (1945).

<sup>22</sup> *Williams v. North Carolina*, 325 U. S. 226, 89 L. ed. 1577 (1945).

<sup>23</sup> *Rosenblum v. Rosenblum*, 181 Misc. 78, 42 N. Y. S. 2d 626 (Sup. Ct. 1943).

<sup>24</sup> *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405 (1891).

<sup>25</sup> *Becker v. Becker*, 58 App. Div. 374, 69 N. Y. Supp. 75 (1st Dep't 1901).

<sup>26</sup> *Baylies v. Baylies*, 196 App. Div. 677, 188 N. Y. Supp. 147 (2d Dep't 1921).

<sup>27</sup> N. Y. CIV. PRAC. ACT §§ 1171-1173; *Burch v. Burch*, 116 App. Div. 865, 102 N. Y. Supp. 305 (2d Dep't 1907).

<sup>28</sup> N. Y. CIV. PRAC. ACT § 902.

property prior to adjudication.<sup>29</sup> The law presumes that property is always in the possession of its owner. The seizure of the property by the court is deemed to have a notice giving effect. This notice is augmented by further notice served by publication. The combined effect is sufficient to satisfy due process of law.<sup>30</sup>

As was stated, the granting of alimony against a non-resident defendant where service of the summons is by publication is improper.<sup>31</sup> A nice question arises as to whether or not the same rule is applicable to a resident defendant. An exhaustive search of the records of New York yields no case in which such a decree or judgment was either granted or denied. A leading authority on New York Practice indicates that by such service *in personam* jurisdiction is acquired over a resident. The reasoning is that a resident of the state owes allegiance to the state and has the duty of submitting to its process whatever the form may be. It is only necessary that reasonable notice and opportunity to defend be given to satisfy due process.<sup>32</sup> As authority for the foregoing, the author cites *Hunt v. Hunt*<sup>33</sup> where the court said,<sup>34</sup> "It is a part of the law of the State, of which the defendant is a subject and a citizen. That law binding upon him is an assent given by him, that there may and will be acquired jurisdiction over him to hear a case and render judgment; affecting to an *extent*<sup>35</sup> his personal rights. As a denizen and a citizen of the State, he owes it allegiance, and is under the force and authority of its laws; and so long as he remains in that relation, he cannot throw off his subjection by the act of temporary or prolonged absence from the State. He is still amenable to those laws, and bound by their provisions as to substituted (constructive) service of process."

It is to be noted that in the *Hunt* case there was no issue of alimony involved. *In personam* jurisdiction of the defendant was deemed necessary for the granting of the divorce itself. Such statements in *Hunt v. Hunt* have been used by later cases, but the rule has not been followed in any case to the extent of holding *in personam* jurisdiction is acquired over a resident served by publication. In an action on a foreign judgment which was procured in Wisconsin against a resident of that state by constructive service, the New York court held it to be a valid *in personam* judgment entitled to full faith and credit.<sup>36</sup> Substituted service (service other than personally within the state) over residents was held to give valid *in personam* jurisdiction and when in accordance with the state law, not violative of

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<sup>29</sup> *Geary v. Geary*, 272 N. Y. 390, 6 N. E. 2d 67 (1936).

<sup>30</sup> *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

<sup>31</sup> See note 26 *supra*.

<sup>32</sup> 2 CARMODY, PLEADING AND PRACTICE § 729 (1930).

<sup>33</sup> *Hunt v. Hunt*, 72 N. Y. 217 (1878).

<sup>34</sup> *Id.* at 239.

<sup>35</sup> Italics added.

<sup>36</sup> *Huntley v. Baker*, 33 Hun 578 (N. Y. 1884).

due process.<sup>37</sup> Strict substituted service was held sufficient for the acquisition of personal jurisdiction of a resident.<sup>38</sup> A divorce decree of a Vermont court where the defendant was served by publication was held to give valid *in personam* jurisdiction, no alimony being involved.<sup>39</sup> The latest holding on the basis of the *Hunt* case was an action in New York on a judgment obtained in England against a resident thereof. The court held, citing also *Huntley v. Baker*,<sup>40</sup> that valid *in personam* jurisdiction was acquired by service of the process of the English court personally within New York and that the judgment was conclusive.<sup>41</sup>

It is doubtful whether the preceding authorities would be sufficient to sustain an alimony judgment against an absent resident where service is made by publication.

As heretofore noted, there is no square holding in New York on the point; however there are other cases which indicate the opposite view; that even as against a resident constructive service alone is insufficient for rendering an *in personam* judgment. In an action for separation, custody of the child and injunction of divorce proceedings instituted in Nevada by the defendant, the court held that the *in personam* relief asked could not be granted for lack of jurisdiction of the person of the defendant. "Even in the case of a resident of this State leaving the jurisdiction to evade its process, the court in such an action founded upon constructive service may go no further than to adjudicate with respect to the marital status and notwithstanding the provisions of the Civil Practice Act, may not award alimony or costs so as to charge such absent resident personally therewith."<sup>42</sup> Constructive service was made twenty-one days after the defendant left her New York residence.<sup>43</sup> As authority for this rule, the court cited two other New York cases.<sup>44</sup> In these cases service by publication was held insufficient to support an alimony judgment.<sup>45</sup> It seems doubtful that service by publication will support an alimony judgment even as against a resident.

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Continental National Bank v. Thurber*, 74 Hun 632, 26 N. Y. Supp. 956 (N. Y. 1893), *aff'd*, 143 N. Y. 648.

<sup>39</sup> *Hammond v. Hammond*, 103 App. Div. 437, 93 N. Y. Supp. 1 (1st Dep't 1905).

<sup>40</sup> See note 36 *supra*.

<sup>41</sup> *Rhodesian Gen. Finance, etc., Trust v. MacQuisten*, 170 Misc. 996, 11 N. Y. S. 2d 476 (Sup. Ct. 1939).

<sup>42</sup> *May v. May*, 233 App. Div. 519, 520, 253 N. Y. Supp. 606, 607 (1st Dep't 1931).

<sup>43</sup> *May v. May*, 233 App. Div. 519, 253 N. Y. Supp. 606 (1st Dep't 1931).

<sup>44</sup> *Edwards v. Edson*, 119 App. Div. 684, 104 N. Y. Supp. 292 (3d Dep't 1907); *Baylies v. Baylies*, 196 App. Div. 677, 188 N. Y. Supp. 147 (2d Dep't 1921).

<sup>45</sup> *Accord*, *Robinson v. Robinson*, 123 Misc. 80, 204 N. Y. Supp. 245 (Sup. Ct. 1924).



Section 232-2<sup>46</sup> which authorizes service of the summons by publication in actions affecting specific property within the state was formerly contained in subdivision 6 of the old section.<sup>47</sup> As the text of the new section is identical to the old, it would seem that no change was intended by the draftsmen of the statute as to what type of jurisdiction and the actions thereunder that would come within its purview.<sup>48</sup> Common examples of actions within this section are foreclosure of a mortgage,<sup>49</sup> partition,<sup>50</sup> and specific performance of a contract.<sup>51</sup> Application has also been made of the section as applied to specific personal property within the state as foreclosure of an attorney's lien against a fund,<sup>52</sup> an action concerning a bank deposit to the credit of partner sued for an accounting,<sup>53</sup> and an action to impress a trust on funds held by a bank.<sup>54</sup> Jurisdiction is acquired in these cases by publication coupled with the presence within the state of the specific property which is the subject matter of the action. It is *in rem* jurisdiction and cannot be made the basis of an *in personam* judgment. A deficiency judgment cannot be given in a foreclosure of a real property mortgage against a non-resident.<sup>55</sup> Nor can a deficiency judgment be granted against a resident defendant. The limitation on the granting of a deficiency judgment is that the defendant be personally served.<sup>56</sup> This is a statutory limitation which does not afford the alternatives of service by publication or personal service without the state.<sup>57</sup> In an action to foreclose a lien or mortgage on personal property an *in personam* judgment may be rendered only where the defendant has been personally served.<sup>58</sup> A court in an equity action cannot give money damages in lieu of specific performance against a non-resident but the fact that the complaint asks for damages in lieu of specific performance will not be grounds for a denial of an order for service by publication.<sup>59</sup> Where the subject matter of the action is specific property within the state and the defendant is a New York resident, no authority could be found as to

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<sup>46</sup> See note 8 *supra*.

<sup>47</sup> N. Y. Laws 1921, c. 199, as amended by N. Y. Laws 1929, c. 644.

<sup>48</sup> 11 REP. JUDICIAL COUNCIL 195, 196 (1945); Prashker, *New York's Statutes Governing Service of Summons by Publication: The Revision of 1946*, 21 ST. JOHN'S L. REV. 18, 19 (1946).

<sup>49</sup> *Schwinger v. Hickock*, 53 N. Y. 280 (1873).

<sup>50</sup> *Steel v. Norton*, 110 Misc. 730, 182 N. Y. Supp. 76 (Sup. Ct. 1916), *aff'd*, 182 App. Div. 903, 168 N. Y. Supp. 1130 (2d Dep't 1918).

<sup>51</sup> *Garfein v. McInnis*, 248 N. Y. 261, 162 N. E. 73 (1928).

<sup>52</sup> *McKennell v. Payne*, 197 App. Div. 349, 189 N. Y. Supp. 7 (2d Dep't 1921).

<sup>53</sup> *Slater v. Kruh*, 261 App. Div. 810, 24 N. Y. S. 2d 827 (1st Dep't 1941).

<sup>54</sup> *Fenchtwanger v. Central Hanover Bank*, 288 N. Y. 342, 43 N. E. 434 (1942).

<sup>55</sup> *Schwinger v. Hickock*, 53 N. Y. 280 (1873).

<sup>56</sup> *Pacek v. Ferrar*, 258 App. Div. 772, 14 N. Y. S. 2d 814 (4th Dep't 1939).

<sup>57</sup> N. Y. CIV. PRAC. ACT § 1108.

<sup>58</sup> N. Y. LIEN LAW § 208.

<sup>59</sup> *Paprin v. Bitker*, 64 N. Y. S. 2d 289 (Sup. Ct. 1946).

whether or not money damages in lieu of a judgment affecting the specific property can be rendered. Historically, equity would remand the plaintiff to an action at law for his damages. Since the joinder of law and equity damages may now be given in the same court in the exercise of its law function. Where damages are sought at law for breach of contract the action is one for a sum of money only. In such an action the procurement of a warrant of attachment<sup>60</sup> is a prerequisite for obtaining an order for service by publication.<sup>61</sup> It seems doubtful that damages which fall within Section 232-3,<sup>62</sup> can be obtained under Section 232-2,<sup>63</sup> in lieu of a judgment affecting the specific property. Thus under Section 232-2, service by publication against an absent defendant, resident or non-resident gives rise to *in rem* jurisdiction.

Under Section 232-3<sup>64</sup> service by publication may be ordered when a prior levy upon the defendant's property within the state has been made under a warrant of attachment. Attachment is limited to actions for a sum of money only.<sup>65</sup> In New York, "the attachment statutes authorize an attachment in actions for recovery of money only. Under such provision, an attachment is not allowed in equity actions, or actions at law, where the plaintiff seeks incidental equitable relief."<sup>66</sup> Attachment is not permitted in an action for specific performance although the alternate prayer is one for a money judgment.<sup>67</sup> Nor may an attachment be procured in an action to foreclose a mortgage despite plaintiff's request for a deficiency judgment.<sup>68</sup> In replevin although it is a law action, an attachment is not permitted since the demand is for the return of the chattel and not for a sum of money only. Thus the phrase, "a sum of money only" has a settled meaning today as it is used in the New York statutes. The jurisdiction acquired over a non-resident defendant pursuant to Section 232-3 is *quasi in rem*. To satisfy the requirements of due process under the United States Constitution, the attachment levy must be made prior to service by publication to give the court jurisdiction over the action. The attachment of the property is the basis of jurisdiction, and the execution on the judgment must be limited to the extent of the property attached.<sup>70</sup> As against a resident defendant service by publication after an attachment levy upon his property

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<sup>60</sup> N. Y. CIV. PRAC. ACT § 903.

<sup>61</sup> N. Y. CIV. PRAC. ACT §§ 232(a), 232(b).

<sup>62</sup> N. Y. CIV. PRAC. ACT § 232(3); see note 8 *supra*.

<sup>63</sup> N. Y. CIV. PRAC. ACT § 232(2); see note 8 *supra*.

<sup>64</sup> N. Y. CIV. PRAC. ACT § 232(3); see note 8 *supra*.

<sup>65</sup> N. Y. CIV. PRAC. ACT § 902.

<sup>66</sup> 7 REP. JUDICIAL COUNCIL 397, 398 (1941).

<sup>67</sup> Olsen v. U. S. Fidelity & Guaranty Co., 230 N. Y. 31, 128 N. E. 908 (1920).

<sup>68</sup> Smyth v. Mayer, 105 Misc. 391, 174 N. Y. Supp. 197 (Sup. Ct. 1918), *aff'd*, 188 App. Div. 954, 176 N. Y. Supp. 922 (1st Dep't 1919).

<sup>69</sup> Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 (1877).

<sup>70</sup> N. Y. CIV. PRAC. ACT § 641(1).

gives *in personam* jurisdiction. As an owner of property is at all times deemed to be in constructive possession of his property,<sup>71</sup> the attachment primarily serves a notice giving purpose. It is not the basis of jurisdiction over the resident. The execution on the judgment is not limited to the specific property attached,<sup>72</sup> but on the contrary requires execution out of unattached personal property prior to execution out of attached realty.<sup>73</sup>

As to matrimonial, specific property, and actions where an attachment levy has been made, the past history of Section 235 shows that it is interrelated with Section 232 and that it is subject to the same limitations on jurisdiction as Section 232. The discussed limitations on service by publication apply also to personal service without the state. This view of the scope of Section 235 would follow the intent of the draftsmen of the statute as shown in the revisor's note annexed to the statute that nothing was to be changed.

The origin of that part of Section 235 which permits personal service on a resident defendant without the state in an action for a sum of money only is of importance. That provision alone is the new part of the section. Its origin should give some indication of the section's interpretation. The actions specified in Section 232 and now incorporated in Section 235 by reference were formerly enumerated in Section 235, and also in Section 232 with substantially the same wording. In the initial drafts of all the statutes dealing with service by publication<sup>74</sup> and service without the state without an order<sup>75</sup> it was proposed that this provision should be included in Section 232 and that Section 235 should merely be a general section authorizing service without the state in all the actions enumerated in Section 232.<sup>76</sup> The purpose of the inclusion of that proposed part of Section 232 was to permit personal jurisdiction of a resident defendant without requiring a prior warrant of attachment.<sup>77</sup> The view of the draftsmen was that an attachment is an onerous burden upon a plaintiff. It is lengthy, expensive and could be dispensed with. A plaintiff could still proceed, however, by procuring a warrant of at-

<sup>71</sup> *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

<sup>72</sup> N. Y. CIV. PRAC. ACT § 645(2).

<sup>73</sup> *Place v. Riley*, 98 N. Y. 1 (1885).

<sup>74</sup> N. Y. CIV. PRAC. ACT §§ 232, 232(a), 232(b), 233, 234.

<sup>75</sup> N. Y. CIV. PRAC. ACT § 235.

<sup>76</sup> 11 REP. JUDICIAL COUNCIL 194, 213 (1945).

Thus Section 232 as proposed read: ". . . 1. Where the defendant is a resident of the state, and the complaint demands judgment for a sum of money only. 2. Where the complaint demands judgment annulling a marriage, or for a divorce . . . . 3. Where the complaint demands judgment that the defendant be excluded from . . . interest in or lien upon specific real or personal property within the state . . . . 4. Where a levy has been made upon property of the defendant within the state . . . ; and Section 235 as proposed read: ". . . In all cases where an order directing the service of a summons upon a defendant, by publication, is procurable . . . ."

<sup>77</sup> 11 REP. JUDICIAL COUNCIL 197, 203 (1945).

tachment. "The proposed amendment dispensing with the need for a prior attachment where residents are concerned, supplements the existing provision authorizing the making of an order for service of summons by publication where an attachment has actually been levied."<sup>78</sup> Also preserved was the rule that a prior attachment would be necessary in the case of a non-resident defendant for the court to acquire jurisdiction.<sup>79</sup> In this form<sup>80</sup> the bill was passed in 1945 by the legislature but vetoed by the governor. The reason given was that the bills allowed an action against a resident with jurisdiction being acquired by service by publication alone and without the notice giving effect of a prior attachment.<sup>81</sup> By way of remedy the provision was deleted from Section 232 and included in Section 235. In this manner the revision was adopted.<sup>82</sup> The change insured the absent resident defendant of actual notice of the action against him by personal service and not merely by publication. At the same time it benefited the plaintiff by not requiring the vexatious attachment proceedings, but permitting it if desired.

The jurisdiction acquired under this provision is *in personam*. Indeed, there is complete absence of any *res*, status, or attachment which is necessary for an *in rem* or *quasi in rem* proceeding. Further, the extent of the designers of the section was to take advantage of the decision in *Milliken v. Meyer*<sup>83</sup> by the Supreme Court of the United States as to what procedure by a state is sufficient notice and opportunity to defend to an absent resident to constitute due process.<sup>84</sup> The Court there held that a resident of a state as incident to his citizenship owes the duty to the state of being amenable to suit even though he is without the territorial limits of the state. Due process is satisfied by adequate notice and opportunity to defend.<sup>85</sup> The test to be applied is that the proceeding shall not be contrary to natural justice. "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."<sup>86</sup> The statute which was there in issue is substantially the same as Section 235.

The actions which are encompassed by the phrase "for a sum of money only," are those discussed *supra*. The phrase has been borrowed from the attachment statutes and has the same meaning here.

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<sup>78</sup> 9 REP. JUDICIAL COUNCIL 348 (1943).

<sup>79</sup> *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1877).

<sup>80</sup> See note 76 *supra*.

<sup>81</sup> 12 REP. JUDICIAL COUNCIL 58 (1946).

<sup>82</sup> See note 8 *supra*.

<sup>83</sup> 311 U. S. 457, 85 L. ed. 278 (1940), *rehearing denied*, 312 U. S. 712, 85 L. ed. 1143 (1940).

<sup>84</sup> 12 REP. JUDICIAL COUNCIL 58, 59 (1946).

<sup>85</sup> *Milliken v. Meyer*, 311 U. S. 457, 85 L. ed. 278 (1940), *rehearing denied*, 312 U. S. 712, 85 L. ed. 1143 (1940).

<sup>86</sup> *McDonald v. Mabee*, 293 U. S. 90, 92, 61 L. ed. 608, 610 (1917).

In conclusion it may be said that the jurisdiction acquired against a non-resident defendant is the same whether the service be by publication or personally without the state. In the absence of an appearance it is *in rem* or *quasi in rem* and cannot be made the basis of an *in personam* action. Obviously, actions for a sum of money only are inapplicable to non-residents.<sup>87</sup>

As against residents of the state, in the case of an attachment levy, with service by either method, the jurisdiction acquired is sufficient for the court to render an *in personam* judgment. In matrimonial actions and actions involving specific property the view may be taken that against residents the jurisdiction is the same whether the service be by publication or personally without the state. This view is based on a strict judicial interpretation of the revised sections. The indications that no change was intended, the similarity of language of the old and new sections, the prior determination of mutual applicability of both sections, all lend their support to such view. It may be noted that Sections 232 and 235 were strictly construed.<sup>88</sup> There are no cases prior to the 1946 revision which granted more than *in rem* or *quasi in rem* relief to a party proceeding under either section. There is a current of authority already noted which indicates that *in personam* relief may not be had.

It is possible, however, to take another view of the jurisdiction acquired in matrimonial and specific property actions over a resident defendant when service is made pursuant to Section 235. A resident of the state as incident to his citizenship owes the duty to be amenable to suit even though he is without the territorial limits of the state.<sup>89</sup> The extent of the jurisdiction acquired is determined by the reasonableness of the notice given and the adequacy of the opportunity to defend. Fair play and substantial justice are the tests.<sup>90</sup> Actual notice by personal service without the state satisfies the test.<sup>91</sup> Under this view the jurisdiction acquired over an absent resident is *in personam*. Under the 1946 revision a personal judgment is permitted<sup>92</sup> where jurisdiction is acquired by personal service without the state. However, such a judgment is not permitted where the service is by publication unless there is a prior attachment. This change recognized the rule of the *Milliken* case.<sup>93</sup> When the notice giving effect of a prior attachment was not deemed necessary, personal service without the state was required. Section 235 recognizes the superior notice giving effect of personal service to service by publication. It meets the substantial justice test and allows more

<sup>87</sup> N. Y. CIV. PRAC. ACT § 235.

<sup>88</sup> *Rose v. Heller*, 190 App. Div. 519, 179 N. Y. Supp. 821 (1st Dep't 1920).

<sup>89</sup> *Hunt v. Hunt*, 72 N. Y. 217 (1878); *Milliken v. Meyer*, 311 U. S. 457, 85 L. ed. 278 (1940), *rehearing denied*, 312 U. S. 712, 85 L. ed. 1143 (1940).

<sup>90</sup> *McDonald v. Mabee*, 293 U. S. 90, 61 L. ed. 608 (1917).

<sup>91</sup> *Milliken v. Meyer*, 311 U. S. 457, 85 L. ed. 278 (1940), *rehearing denied*, 312 U. S. 712, 85 L. ed. 1143 (1940).

<sup>92</sup> N. Y. CIV. PRAC. ACT § 235.

<sup>93</sup> 12 REP. JUDICIAL COUNCIL 58, 59 (1946).

comprehensive jurisdiction, *i.e.*, *in personam* when the action is commenced by actual notice. By implication, at least this view has been embodied in Section 235. Should the superiority of personal notice be recognized in the first clause of Section 235 and be ignored in the succeeding clause? The statute is susceptible to either interpretation. Constitutionality poses no problem.<sup>94</sup>

Up to the present time no Court of Appeals decision has come down interpreting Section 235 as related to marital actions or actions affecting specific property. There have been several reported lower court cases which are interesting to note.<sup>95</sup> *Ellsworth v. Ellsworth*<sup>96</sup> was a matrimonial action wherein the plaintiff wife sought a judicial separation. Motion was made for temporary alimony and counsel fees. It was alleged that the defendant husband was a resident of New York. He was served personally without the state pursuant to Section 235. The court held that Section 235 in reference to matrimonial actions applied to both the *in rem* aspect of the action and the *in personam* aspect. If the defendant is a resident of the state, the jurisdiction acquired will allow, not only a change in the marital status but also an order for temporary alimony and counsel fees. The court cites the *Milliken* case<sup>97</sup> as the basis for jurisdiction so acquired. Concededly the Federal Constitution permits a state to exercise such jurisdiction over its residents. The court did not cite any controlling New York authorities for its holdings nor did it indicate how the legislature by the 1946 revision availed itself of the *Milliken* rule in matrimonial actions. In *Feldman v. Feldman*<sup>98</sup> the same question was presented as in the *Ellsworth* case. Subject to a fact finding by a referee the court indicated it would follow the same rule. Section 235 was sought to be utilized in *Altholz v. Altholz*<sup>99</sup> to procure a declaratory judgment declaring invalid a prior divorce obtained by the other spouse. In view of the prior interpretations and limited application of old Section 235 the court ignored the *Milliken v. Meyer* decision as a basis for a New York court having jurisdiction. It was stated "If the Legislature intended to encompass all actions affecting the matrimonial status in the present legislative scheme of extra territorial jurisdiction, it could easily have so indicated."<sup>100</sup> In *Brainard v. Brainard*<sup>101</sup> decided in the Appellate Division little light is cast upon the problem. The reason for

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<sup>94</sup> Note, 32 CORN. L. Q. 600 (1947).

<sup>95</sup> *Ellsworth v. Ellsworth*, — Misc. —, 71 N. Y. S. 2d 522 (Sup. Ct. 1947); *Feldman v. Feldman*, 189 Misc. 564, 72 N. Y. S. 2d 390 (Sup. Ct. 1947); *Altholz v. Altholz*, — Misc. —, 72 N. Y. S. 2d 143 (Sup. Ct. 1947); *Brainard v. Brainard*, — App. Div. —, 74 N. Y. S. 2d 1 (1st Dep't 1947).

<sup>96</sup> — Misc. —, 71 N. Y. S. 2d 522 (Sup. Ct. 1947).

<sup>97</sup> *Milliken v. Meyer*, 311 U. S. 457, 85 L. ed. 278 (1940), *rehearing denied*, 312 U. S. 712, 85 L. ed. 1143 (1940).

<sup>98</sup> 189 Misc. 564, 72 N. Y. S. 2d 390 (Sup. Ct. 1947).

<sup>99</sup> *Altholz v. Altholz*, — Misc. —, 72 N. Y. S. 2d 143 (Sup. Ct. 1947).

<sup>100</sup> *Id.* at 144.

<sup>101</sup> — App. Div. —, 74 N. Y. S. 2d 1 (1st Dep't 1947).

this is that although the plaintiff utilized Section 235 for service in an action seeking divorce and alimony, the court held that the defendant had, by interposing an answer, made a general appearance. However, a dissent recognized that the application of Section 235 is not yet settled. The position taken was that the defendant had not subjected himself personally to the jurisdiction of the court and in stating that the case should be remanded, added, "the effect of that section (235) could be tested in that event."<sup>102</sup>

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#### DERIVATIVE ACTIONS BY POLICYHOLDERS

During the past century there has been considerable expansion and growth in the business of insurance, until today a large portion of the wealth of this nation is in the hands of insurance companies. Whenever there are large holdings and concentrations of wealth, there will also be attempts at control by those who have, in any way, an interest in such holdings. Such attempts are illustrated by those actions brought by policyholders under theories analogous to those which lie behind a stockholders' derivative action. The existence of the right of a policyholder to bring such a derivative action has received scant clear-cut judicial or legislative recognition, therefore if the right exists, it requires clarification as to its nature and extent.

Fundamentally, derivative actions were evolved for the purpose of exercising an additional check on the management of a corporation and as a further protection of those who had a beneficial interest in its assets and affairs. There is no doubt that the stockholders' derivative action has proved a wholesome means of protecting the stockholder's interest, not only because it has afforded a means of obtaining redress for injuries and wrongs actually inflicted but also because it has prevented many acts of mismanagement. Since a corporation is a separate entity, the ownership of all the property is in its name and any cause of action that accrues belongs to the corporation and not to the stockholders individually or collectively.<sup>1</sup> The corporation must act through its duly authorized agents, namely its officers and Board of Directors, but they may not always act in the best interest of the corporation or they may neglect to pursue the corporation's rights. In theory, the stockholder has control over the management

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<sup>102</sup> Brainard v. Brainard, *supra* note 100.

<sup>1</sup> Continental Securities Co. v. Belmont, 206 N. Y. 7, 15, 99 N. E. 138, 141 (1912).