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APPEARANCE AND JURISDICTIONAL MOTIONS IN NEW YORK

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I. INTRODUCTION AND HISTORICAL BACKGROUND

IN the American legal system adequate notice, a reasonable opportunity to be heard and minimum contacts between the state and the defendant are essential for the exercise of judicial jurisdiction. It is generally assumed, however, that these prerequisites are intended for the protection of the individual litigants alone and not the public at large. Hence it rests with the defendant to protest that the process or its service is insufficient or that the contacts for the assertion of judicial power over him or his property are inadequate.[1] This policy of non-interference with the choice of the parties is obviously justified with respect to the requirement of notice and opportunity to be heard since both affect only private interests. It is less evident that the requisite of adequate contacts should be left to the parties' discretion since the distribution of the case load among the courts is a matter of public concern. Yet, the judges have no say in the matter save for the limited reach of the doctrine of *forum non conveniens*[2] which they may invoke on their own initiative as a forum-denying device.[3] A court that has jurisdiction over the subject matter[4] may acquire juris-

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1. *E.g.*, Pollard v. Dwight, 8 U.S. 421 (1808); Toland v. Sprague, 37 U.S. 300 (1838); Kendall v. United States, 37 U.S. 524 (1838); Farmer v. Nat'l Life Ass'n, 138 N.Y. 265, 33 N.E. 1075 (1893); Reed v. Chilson, 142 N.Y. 152, 36 N.E. 884 (1894); Everitt v. Everitt, 4 N.Y.2d 13, 148 N.E.2d 891, 171 N.Y.S.2d 836 (1958).

2. The doctrine of forum non conveniens has received only limited recognition in the United States. See Note, *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 1008 n.644 (1960), listing fourteen states which utilize the doctrine; Ehrenzweig, Conflict of Laws 121 n.2 (1962). In New York, the usefulness of the doctrine has been severely limited by its rejection in actions brought by New York residents, Gross v. Cross, 28 Misc. 2d 375, 211 N.Y.S.2d 279 (Sup. Ct. 1961); Marx v. Katz, 20 Misc. 2d 1084, 195 N.Y.S.2d 867 (Sup. Ct. 1959); Wagner v. Braunsberg, 5 A.D.2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958). See De La Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949); Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923). Additional New York cases are cited in Ehrenzweig, *op. cit. supra* at 122 n.5. It has also been rejected in actions against New York residents, Vigil v. Cayuga Constr. Corp., 185 Misc. 675, 54 N.Y.S.2d 94 (N.Y. City Ct. 1945), *aff'd mem.*, 269 App. Div. 934, 58 N.Y.S.2d 343 (1st Dep't 1945). Generally New York courts are reluctant to apply the doctrine in commercial cases, Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952); Wertheim v. Clergue, 53 App. Div. 122, 126, 65 N.Y.S. 750, 753 (1st Dep't 1900). In view of recent developments in the area of jurisdiction, our courts should free themselves from the shackles of this self-imposed limitation. See 1 Weinstein, Korn & Miller, New York Civil Practice (1963) ¶ 301.

3. Burdick v. Freeman, 120 N.Y. 420, 426, 24 N.E. 949, 950 (1890) (dictum); Justice Jackson, in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) emphasized that the doctrine not only serves the litigant's private interest, but benefits the public: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." Today, the public aspect of the doctrine is more important than ever because of the congestion besetting our courts and the expansion of jurisdiction through long-arm statutes. See generally Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929); Note, *Developments in the Law—State-Court Jurisdiction*, *supra* note 2, at 1008-13.

4. An objection based on lack of the court's subject matter jurisdiction, of course, may be raised at any time, *e.g.*, Davidsburgh v. Knickerbocker Life Ins. Co., 90 N.Y. 526 (1882).

diction over the defendant's person or property simply by his consent. The act which signifies this consent is called an appearance.[5]

When a defendant has been subjected to personal jurisdiction by process that satisfies notice and contact requirements, his appearance lacks jurisdictional significance.[6] His subjection to jurisdiction was involuntary. However, absent adequate contacts or notice, appearance serves as a substitute for either or both;[7] for unless he presents jurisdictional objections to the court in the proper manner and at the proper time his appearance cures all defects except lack of subject matter jurisdiction.[8] Practice statutes usually attach the effect of an appearance to specific procedural steps. For example, the usual Code provision declared that a defendant appears by serving a notice of appearance, an answer or a demurrer.[9] Conversely, statutes may provide that certain procedural steps shall *not* result in an appearance. For example, in New York a demand for service of a complaint following service of a summons without complaint[10] or a motion to discharge an attachment does not constitute an appearance.[11] However, the jurisdictional significance of many other procedural steps has not been defined by statute; the task is left to the courts. Case law has developed a doctrine of informal appearance which attributes the effect of submission to jurisdiction to defendant's participating in the litigation as "an actor in a genuine and substantial sense."[12] Thus, courts may acquire personal jurisdiction over a defendant although he never formally appeared and indeed protested that he did not wish to appear.[13] Unfortunately, precedents do not always furnish a reliable guide. For example, the courts in New York disagree over the question whether a motion to extend the time to answer the complaint constitutes an appearance.[14] While it is safe to say that participating in the action on the merits always results in an informal appearance,[15] it is not true that steps short of that never do.[16] Thus, a demand and later motion for a change of venue has been held to

5. See Restatement, Judgments § 18 (1942).

6. In New York an appearance, whether timely or not, entitles the defendant to notice of all subsequent proceedings in the action, Martine v. Lowenstein, 68 N.Y. 456 (1877). See New York Civil Practice Law and Rules (1962) (effective Sept. 1, 1963) [hereinafter cited as CPLR] Rule 2103(e). Unless otherwise indicated, Rules and Sections referred to herein are those of the CPLR.

7. "An appearance of the defendant is equivalent to personal service of the summons upon him." Rule 320(b). To the same effect, see former N.Y. Civ. Prac. Act § 237.

8. *E.g.*, Henderson v. Henderson, 247 N.Y. 428, 160 N.E. 775 (1928); Farmer v. Nat'l Life Ass'n, 138 N.Y. 265, 33 N.E. 1075 (1893).

9. *E.g.*, N.Y. Code Civ. Proc. § 421 (1877).

10. Section 3012(b).

11. Section 6222.

12. Henderson v. Henderson, 247 N.Y. 428, 433, 160 N.E. 775, 777 (1928).

13. Henderson v. Henderson, *supra* note 12. "[A] man may not say that he is not properly before the court, and in the same breath argue that, if he be, there is no ground to hold him," Judge Learned Hand in Armstrong v. Langmuir, 6 F.2d 369, 371 (2d Cir. 1925). See 16 N.Y. Jud. Council Rep. 185, 192 (1950); Restatement, Judgments § 19, comment *b* (1942).

14. See *infra* note 61.

15. Farmer v. Nat'l Life Ass'n, 138 N.Y. 265, 270, 33 N.E. 1075, 1076 (1893), cited with approval in Merchants Heat & Light Co. v. J. B. Clow & Sons, 204 U.S. 286, 290 (1907).

16. See Restatement, Judgments § 19, comment *b* (1942).

result in an appearance although these steps certainly do not involve the merits of the case.[17]

The technicality of the formal appearance, the vagueness of the doctrine of informal appearance and the curative effect of an appearance on defects of basis and notice have created vexing problems for defendants who wish to object to improper exercise of jurisdiction without submitting to personal jurisdiction. At the bottom of the difficulties experienced by the courts lies the postulate formerly accepted as axiomatic that a defendant cannot combine substantial participation in the litigation with an attack on the court's jurisdiction. The very concept of an appearance which spells submission to jurisdiction was thought to be incompatible with a simultaneous challenge to that jurisdiction.[18] This position was understandable in the era of the Codes when the courts barred pleading of inconsistent defenses and when alternative, conditional and hypothetical pleading was generally considered improper.[19] The problem, if viewed merely as an exercise in logic, has lost practical significance. Modern procedural pragmatism finds nothing repugnant in the idea that a defendant may recognize a court's power to determine the issue of personal jurisdiction while he submits, at the same time, defenses on the merits should the court affirm its power.[20] However, there is substance in the argument that to permit a defendant to take this "inconsistent position" is to defeat the policy of letting the same court determine the entire controversy once the parties have invoked its power, if only for a limited purpose. It is surely undesirable to expend time, effort and money on a contest on the merits, only to have the trial court, or perhaps an appellate tribunal pronounce in the end that the court lacked jurisdiction of defendant's person. Hence it may be argued that once a court with jurisdiction of the subject matter has heard the case, the substantive rights of the parties, rather than technical questions of personal jurisdiction over the defendant should determine whether the judgment should stand. The approach of American jurisdictions to these problems varies depending upon their preference for one or the other of conflicting policies and on judicial willingness to put aside formalism and dogmatic adherence to tradition in response to overriding considerations of convenience and fairness.

Extreme versions of logical purism are exemplified by one statute which

17. Dreskin v. Dreskin, 73 N.Y.S.2d 764 (Sup. Ct. 1947). The same is true of a motion to dismiss based on plaintiff's lack of capacity to sue, Montgomery v. East Ridgelawn Cemetary, 182 Misc. 562, 44 N.Y.S.2d 295 (Sup. Ct. 1943), *aff'd*, 268 App. Div. 857, 50 N.Y.S.2d 843 (1st Dep't 1944), or seeking the removal of a cause commenced in the state court, Farmer v. Nat'l Life Ass'n, 138 N.Y. 265, 33 N.E. 1075 (1893). *But see* General Inv. Co. v. Lake Shore Ry., 260 U.S. 261, 288 (1922). Among procedural steps not held to constitute an informal appearance have been: a demand for security for costs from a non-resident, Wendel v. Connor, 220 App. Div. 211, 221 N.Y. Supp. 10 (1st Dep't 1927) or a motion to extend the time to answer merely incidental to a special appearance. See *infra* note 61.

18. See *supra* note 13.

19. See Clark, Code Pleading (2d ed. 1947) 254-58, 629-32; 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3211.05. *Cf.* Rule 3014.

20. See Fed. R. Civ. P. 9(e); Rule 3014; 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 3014.11, 3014.12, 3211.05.

was in effect in Texas until 1962,[21] and another which, subject to many exceptions, is still in effect in Mississippi.[22] They deny altogether to a defendant the right to appear in a pending litigation in order to question jurisdiction of his person. Any appearance by him, even one confined expressly to contesting jurisdiction, results in the waiver of the very objection he seeks to raise. The only course open to him is to suffer a judgment by default. He may later attack that judgment on the ground of lack of jurisdiction should plaintiff seek to enforce it in the same state or elsewhere.[23] The United States Supreme Court upheld this type of statute in *York v. Texas*[24] on the questionable ground that due process does not protect against mere procedural inconvenience.[25]

The traditional method of raising and preserving jurisdictional objections before the advent of the Federal Rules of Civil Procedure was a "special" appearance, as distinguished from the "general" appearance.[26] In its simple form it is made solely to contest the court's jurisdiction over defendant's person or property.[27] The device was rationalized with an apologetic undertone by New York's Judicial Council:

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21. Tex. Rev. Civ. Stat. arts. 1242-1244 (1879), as construed by the Supreme Court of Texas, abolished the special appearance previously available there, York v. Texas, 73 Tex. 651, 11 S.W. 869 (1889). See Thode, *In Personam Jurisdiction; Article 2031 B, The Texas "Long Arm" Jurisdiction Statute; And the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 Texas L. Rev. 280, 292-97 (1964). Tex. R. Civ. P. 120 a (effective Sept. 1, 1962) aligned Texas with other "special appearance" type jurisdictions.

22. Miss. Code Ann. §§ 1881, 1882 (1956); McCoy v. Watson, 154 Miss. 307, 310, 122 So. 368, 369 (1929). Mississippi is the lone American jurisdiction where this type of statute survives. Even there many exceptions have been engrafted upon the rule, see Note, *Special Appearance in Mississippi*, 19 Miss. L.J. 59 (1947).

23. See Hodges, *Collateral Attacks* on *Judgments*, 41 Texas L. Rev. 499, 505-11 (1963).

24. 137 U.S. 15 (1890).

25. ". . . [M]ere convenience is not substance of right." *Id.* at 21. To speak of "mere convenience" when defendant in order to raise the jurisdictional objection must first suffer default is unrealistic. If defendant's position on the jurisdictional issue turns out to be erroneous he has lost his case on the merits unless the court sees fit to relieve him of the consequences of his default. This is quite apart from other harmful consequences which result from the entry of a judgment against the defendant. See Note, *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 992-93 (1960).

26. *E.g.*, Harkness v. Hyde, 98 U.S. 476 (1878); Mexican Cent. Ry. v. Pinkney, 149 U.S. 194 (1893); Reed v. Chilson, 142 N.Y. 152, 36 N.E. 884 (1894). See Restatement, Judgments § 20 (1942). For this dichotomy the mode of raising the objections is irrelevant. Under local law the objection may be raised by motion to dismiss, motion to quash, demurrer, special plea or the like. The common denominator is the necessity to confine the objection to the jurisdictional ground and to raise it before contesting the merits of the claim. Thus, *e.g.*, under the early New York practice the objection that the defendant is not subject to the court's jurisdiction, if it appeared on the face of the complaint, was raised by a "special" demurrer which was limited to the jurisdictional question. Ogdensburgh & L.C.R.R. v. Vermont & C.R.R., 16 Abb. Pr. (n.s.) 249, 254 (1874). See 16 N.Y. Jud. Council Rep. 185, 206-13 (1950). After 1921 the same objection was raised by motion under Rule 106 of the Rules of Civ. Prac. and after 1951 by motion under Civ. Prac. Act § 237-a. California uses the motion to quash, Cal. Civ. Proc. Code § 416.3. For an exhaustive survey of statutory procedures for challenging jurisdiction in the United States see Thode, *supra* note 21.

27. For example, former N.Y. Civ. Prac. Act § 237-a provided: "[A] defendant may make a special appearance solely to object to the court's jurisdiction over his person." The section permitted the defendant to join with his jurisdictional motion an objection to the court's jurisdiction over the subject matter. Iowa R. Civ. P. 66 provides: "A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only

> [S]ince the defendant could abstain from coming into the court at all and yet subsequently move to vacate or modify any judgment, without making a general appearance, he might as well—and with more justice, since he avoids the prejudicial effect of a judgment against him—be permitted to come into court before judgment entered.[28]

Under the special appearance doctrine jurisdictional objections are treated differently than all other objections and defenses. They may be asserted only as a separate issue, distinct from and ahead of all others. This separateness must be one of form, through the use of a prescribed method, and one of substance, through the avoidance of commingling the jurisdictional issue with others whether or not they go to the merits of the controversy.[29] Thus the joinder of jurisdictional objections with other objections and defenses waives the former and constitutes a general appearance.[30]

The special appearance has the evident advantage of clarity and simplicity.

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before his general appearance." Ill. Ann. Stat. ch. 110, § 20 (Smith-Hurd 1956) provides: "Prior to filing any other pleading or motion, a special appearance may be made . . . for the purpose of objecting to the jurisdiction of the court over the person of the defendant . . . . Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance." See also Ala. Code tit. 7, § 226 (1958); Pa. R. Civ. P. 1017.19. Many jurisdictions adopted the Field Code's demurrer practice, but in fact created by case law a "special plea" or special appearance practice for the sole purpose of challenging the court's jurisdiction over the defendant. See, *e.g.*, Anheuser-Busch, Inc. v. Manion, 193 Ark. 405, 100 S.W.2d 672 (1937); Robinson v. Bossinger, 195 Ark. 445, 112 S.W.2d 637 (1938); Behr v. Duling, 128 Neb. 860, 260 N.W. 281 (1935); O'Hara v. Frederickson Bldg. Corp., 166 Neb. 206, 88 N.W.2d 643 (1958); Kansas, O. & G. Ry. v. Smith, 190 Okla. 103, 125 P.2d 180 (1942); Southard v. Oil Equip. Corp., 296 P.2d 780 (Okla. 1956).

28. 16 N.Y. Jud. Council Rep. 185, 197-98 (1950). The rule is summarized in Reed v. Chilson, 142 N.Y. 152, 155, 36 N.E. 884, 885 (1894):

> When a party does not intend to subject himself to the jurisdiction of the court he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act.

A motion to set aside a default judgment does not constitute a general appearance, *e.g.*, Seymour v. Judd, 2 N.Y. 464 (1849).

29. Former N.Y. Civil Prac. Act § 237-a(1) provided in part:

> [A] defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection . . . must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than provided in the section or if combined with an objection to the merits . . . shall be deemed waived.

The statutes and rules of other states contain similar provisions. *E.g.*, Tex. R. Civ. P. 120(a) provides: "Every appearance, prior to judgment, not in compliance with this rule is a general appearance"; Ill. Ann. Stat. ch. 110 § 20(1) (Smith-Hurd 1956): "Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance."

30. See, *e.g.*, Matter of Atterbury, 222 N.Y. 355, 362, 118 N.E. 858, 860 (1918); *Ex parte* Forbell, 82 N.Y.S.2d 109 (Sup. Ct. 1948); 39th-40th Corp. v. Port of N.Y. Authority, 188 Misc. 657, 65 N.Y.S.2d 712 (Sup. Ct. 1946). See 2 Carmody's N.Y. Practice § 758 (2d ed. 1930). Likewise, the service of an answer even though it raises only jurisdictional questions may constitute a general appearance. See Brainard v. Brainard, 272 App. Div. 575, 74 N.Y.S.2d 1 (1st Dep't 1947), *aff'd mem.*, 297 N.Y. 916, 79 N.E.2d 744 (1948); *cf.* Carnegie v. Carnegie, 274 App. Div. 887, 83 N.Y.S.2d 252 (1st Dep't 1948); Nones v. Hope Mutual Life Ins. Co., 5 How. Pr. 96 (N.Y. Sup. Ct. 1850). For a discussion of these cases, see 16 N.Y. Jud. Council Rep. 185, 200-04, 208 (1950).

In its undiluted form it enables the court to determine once and for all the issue of jurisdiction over the defendant's person or property before it tackles any other aspect of the litigation. Its disadvantage lies in its undue formalism. The waiver of the objection by failure to use the special appearance in the manner and for the purpose prescribed may be a threat to the uninitiated.[31] "A misstep can and probably will result in a holding that the defendant has made a general appearance in the action, thus submitting himself to the jurisdiction of the court for all purposes, despite his efforts to avoid doing that very thing."[32] Also, isolating the jurisdictional aspects of a controversy may at times be difficult and wasteful. This is particularly true since the evolution of long-arm statutes which base jurisdiction on the nature and locale of the transaction.[33] Finally, many jurisdictions which adopted the device of a special appearance did not maintain it in its pure form; they permitted a defendant, after denial of a motion raising a jurisdictional objection on a special appearance, to proceed to litigate the action on the merits without forfeiting that objection in the event of an appeal.[34] In adopting this rule they preferred a policy of limiting the number of appeals over a policy aimed at avoiding useless trials by a court without jurisdiction. Once that step had been taken it became, of course, difficult to justify a special appearance on the ground of procedural economy.

Modern procedure following the lead of the Federal Rules of Civil Procedure has abandoned the traditional distinction between a special and general appearance.[35] The defendant is no longer required "[to intone] at the door of the . . . courthouse . . . that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within."[36] It is now entirely proper to combine jurisdictional objections with

31. See, *e.g.*, Reed v. Chilson, 142 N.Y. 152, 36 N.E. 884 (1894) (service of a notice of retainer is a general appearance); Brainard v. Brainard, *supra* note 30 (service of an answer containing only a jurisdictional objection results in waiver of objection); Perlak v. Goodyear Tire & Rubber Co., 140 N.Y.S.2d 675 (Sup. Ct. 1955) (appearance limited "to the monetary extent of any attachment" stricken as sham).

32. 16 N.Y. Jud. Council Rep. 67 (1950).

33. The same question of fact may be jurisdictionally as well as substantively significant: for example, whether defendant committed the acts within the state on which plaintiff's cause of action is based. See Rule 302(a), *infra* note 57; Nelson v. Miller, 11 Ill.2d 378, 393, 143 N.E.2d 673, 681 (1957). The determination of the jurisdictional issue in plaintiff's favor does not preclude relitigation of the same question as bearing upon the issue of defendant's ultimate liability. Thus, it may be necessary to produce the same evidence twice in court. See Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 302.09.

34. Harkness v. Hyde, 98 U.S. 476, 479 (1878); Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382, 391, 171 N.E. 579, 581 (1930):

> [T]he rule is well established . . . that, when there is seasonable protest or disclaimer in response to a claim of jurisdiction, the protest or disclaimer is not nullified by proceeding thereafter to a hearing on the merits.

Cf. Restatement, Judgments § 19, comment *d* (1942).

35. Fed. R. Civ. P. 12. Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944), *cert. denied*, 322 U.S. 740 (1944). See 2 Moore, Federal Practice ¶ 12.12, at 2262-63 (2d ed. 1964). For state jurisdictions which have adopted the Federal Rules of Civil Procedure see 1 Barron & Holtzoff, Federal Practice and Procedure § 8 (Wright ed. 1960); Thode, *supra* note 21, at 284.

36. Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944), *cert. denied*, 322 U.S. 740 (1944).

others, whether on the merits or not.[37] Defendant's appearance of itself does not defeat the right to present jurisdictional objections; on the contrary, his appearance is necessary in order to raise them. However, like other objections and defenses which may be waived they are lost by defendant's failure to assert them timely.[38] Thus the modern approach has changed the function of an appearance. What was once consent to jurisdiction over the person is now no more than submission to judicial power to determine jurisdiction. Hence it is no longer true that a defendant who has appeared cannot thereafter question the court's jurisdiction over his person or property;[39] but it should still be true that, once he has appeared, he can no longer question the court's *power* to determine the issue of jurisdiction. If he defaults after an appearance, he has lost the jurisdictional objection by failure to raise it timely. And, since he has appeared, he should no longer be able to challenge collaterally the court's power, called into being by his appearance, to determine the jurisdictional issue.[40]

In adopting this modern approach the procedural reformer should not lose sight of the policy which favors the disposition of jurisdictional issues ahead of any others. The predisposition of these issues can be enforced by appropriate timing provisions which need not be related to the act of appearance. For example, the Federal Rules of Civil Procedure require the defendant, if he makes a pre-answer motion for an accelerated judgment, to include in it available jurisdictional objections.[41]

How is this general evolution mirrored in the history of New York's law of procedure? A strange disparity existed between statutory and case law for a period of approximately one hundred years from the adoption of the Field Code until the enactment of Civil Practice Act section 237-a in 1951. As originally conceived by Field, the treatment of jurisdictional objections approached closely

37. Fed. R. Civ. P. 12(b): "No defense or objection is waived by being joined with one or more other defenses or objection in a responsive pleading or motion." See Moore, *op. cit. supra* note 35, ¶ 12.12, at 2260.

38. Fed. R. Civ. P. 12(h). See Emerson v. National Cylinder Gas Co., 131 F. Supp. 299 (D. Mass. 1955). See Moore, *op. cit supra* note 35, ¶ 12.23.

39. Contrast Henderson v. Henderson, 247 N.Y. 428, 160 N.E. 775 (1928); Reed v. Chilson, 142 N.Y. 152, 36 N.E. 884 (1894); Garvin v. Garvin, 302 N.Y. 96, 96 N.E.2d 721 (1951); Everitt v. Everitt, 4 N.Y.2d 13, 148 N.E.2d 891, 171 N.Y.S.2d 836 (1958) (all holding that under New York's former special appearance rule a general formal or informal appearance waives all objections to jurisdiction over the person) with cases decided under Fed. R. Civ. P. 12(b) which hold to the contrary: Devine v. Griffenhagen, 31 F. Supp. 624 (D. Conn. 1940); Alford v. Addressograph-Multigraph Corp., 3 F.R.D. 295 (S.D. Cal. 1944); Emerson v. National Cylinder Gas Co., 131 F. Supp. 299 (D. Mass. 1955); Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943); Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d. Cir.), *cert. denied*, 322 U.S. 740 (1944). *But see* Fairhope Fabrics, Inc. v. Mohawk Carpet Mills, Inc., 140 F. Supp. 313, 316 (D. Mass. 1956).

40. Of course, if the defendant litigates the issue of jurisdiction over his person or property he cannot attack an adverse determination collaterally even if it were erroneous. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Vander v. Casperson, 12 N.Y.2d 56, 187 N.E.2d 109, 236 N.Y.S.2d 33 (1962). See Restatement, Judgments § 9 (1942).

41. Fed. R. Civ. P. 12(b), (g) and (h). There is, however, disagreement as to whether defendant may in his answer assert a defense which he failed to include in a prior motion under Rule 12. See 1A Barron & Holtzoff, Federal Practice and Procedure § 370, at 521-25 (Wright ed. 1960).

modern concepts of the function of an appearance. The 1848 Code of Procedure listed among the grounds for demurring to a complaint, when a defect appeared on its face, the objection that "the court has no jurisdiction of the person of the defendant."[42] When the defect did not appear on the face of the complaint the objection could be taken by answer.[43] If the defendant did not object either by demurrer or answer he was deemed to have waived all jurisdictional objections save the one to the court's jurisdiction over the subject of the action.[44] Thus, the statutory language seemed to permit a defendant to rely in his demurrer on lack of jurisdiction of the person along with any other ground enumerated in the Code, *e.g.*, failure to state facts sufficient to constitute a cause of action. Also, under the wording of the Code, when the jurisdictional defect did *not* appear on the face of the complaint, the defendant could assert the defect in his answer, together with defenses to the merits and denials, even though he had previously demurred to the complaint on some other ground and thus had appeared. Finally the broad language of the Code could very well have been interpreted as including objections to the process or its sufficiency, in addition to the objection that the defendant was not subject to the court's jurisdiction. In fact, the present New York Rule uses the language of the Field Code to cover both types of objections.[45]

The real trouble-maker in the statutory scheme was Code section 139. The last sentence of that section provided: "A voluntary appearance of a defendant is equivalent to personal service of the summons upon him." It is interesting to note that the provision did not appear in the Code as drafted originally.[46] It was added in 1851.[47] If that provision is taken literally, it renders nugatory all other provisions of the Code governing the raising of jurisdictional objections; for both the demurrer and the answer constituted an appearance,[48] and therefore would bring about the very thing the defendant tried to avoid, namely to submit to the court's jurisdiction over his person. Obviously this could not have been the intent of the legislature. Rather, the provision, read in the light of the statutory scheme, should have been construed as qualified by the other provisions of the Code. In other words, a voluntary appearance should have been deemed the equivalent of personal service of the summons, subject, however, to the right

42. N.Y. Code of Proc. § 122 (1848).
43. N.Y. Code of Proc. § 126 (1848).
44. N.Y. Code of Proc. § 127 (1848).
45. Rule 3211(a)(8). See 2 N.Y. Adv. Comm. Rep. 152 (1958).
46. N.Y. Code of Proc. § 139 (1849) provided: "From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings." The section was amended by Laws 1851, ch. 479, which added the last sentence quoted in the text. Final Rep. Comm'rs on Prac. and Pl., (Ass. Doc. No. 16) at 262 (1850) briefly explains: "*Amended Code* § 139. Enlarged, so as to include a voluntary appearance without service of process." Surely these words do not disclose an intent to change the entire statutory scheme. Rather they seem to convey the idea that a voluntary appearance, whether formal or informal, confers upon the court the power to determine all issues, including those pertaining to jurisdiction over the person.
47. See *supra* note 46.
48. See N.Y. Code Civ. Proc. § 421 (1877).

confirmed by the other sections to challenge jurisdiction. The substance of the Code provisions with some changes and additions found their way into the Code of Civil Procedure[49] and finally into the Civil Practice Act and Rules of Civil Practice.[50] The latter replaced the Code demurrer by a motion "raising an objection in point of law" and permitted the use of affidavits in support of jurisdictional defects that did not appear on the face of the complaint.

Superimposed upon the statutes was the case law which paid scant attention to the design of the Code. With typical unconcern for some of the Field Code's innovations the courts continued the old device of a special appearance which pre-dated the Code.[51] The provision allowing a demurrer on the ground that the court had no jurisdiction of the defendant's person was interpreted as limited to the case where the defendant was a person "not subject" to the court's jurisdiction.[52] Under the early decisions the objection had to be raised by demurrer or, if the defect did not appear on the face of the complaint, in the answer. On the other hand, when the objection was directed to the process or its sufficiency the defendant, in order to preserve it, had to raise it by motion to set aside the service of the summons, appearing especially for that purpose.[53] Eventually both objections, the one to the process or its sufficiency and the other that the defendant was not subject to the court's jurisdiction, were thrown into one basket, namely the motion objecting to the court's jurisdiction over his person. However, in keeping with the concept of the special appearance, the defendant was compelled to limit the motion strictly to the jurisdictional ground or face the consequences of a waiver.[54] In 1951, Civil Practice Act section 237-a eliminated the incongruity between statutory and case law. That section codified and clarified the case law and thus gave statutory recognition to the special appearance.[55] The section remained in effect until the adoption of the Civil Practice Law and Rules in 1962.[56]

49. N.Y. Code Civ. Proc. §§ 421, 424, 488, 498, 499 (1877).

50. N.Y. Civ. Prac. Act §§ 237, 278 (1921); N.Y. Rules Civ. Prac. 106(1), 107(1) (1921).

51. *E.g.*, Van Deusen & Forest v. Hayward, 17 Wend. 67 (N.Y. Sup. Ct. 1837).

52. *E.g.*, Nones v. Hope Mutual Life Ins. Co., 5 How. Pr. 96 (N.Y. Sup. Ct. 1850); Ogdensburgh & L.C.R.R. v. Vermont & C.R.R., 63 N.Y. 176, 181 (1875). *But see, e.g.*, Hamburger v. Baker, 35 Hun. 455 (N.Y. 1st Dep't 1885). For a detailed analysis of the conflicting case law under the Codes, see 16 N.Y. Jud. Council Rep. 185, 206-13 (1950).

53. See 3 Carmody's N.Y. Practice 2248-49 (2d ed. 1930); Webb, Elements of Practice 101 (1926); Bradbury, Topical Index Digest of the N.Y. Civ. Prac. Act & Rules Civ. Prac. 164-67 (1921).

54. "It is, therefore, apparently the law in New York that an objection under subdivision 1 of Rules 106 [no jurisdiction of the defendant's person, a defect that appears on the face of the complaint] and 107 [no jurisdiction of the defendant's person, a defect that does not appear on the fact of the complaint], as well as an objection to the sufficiency of process or its service, must be raised by motion on a special appearance or be deemed waived." 16 Jud. Council Rep. 185, 213 (1950).

55. N.Y. Civ. Prac. Act § 237-a, added by Laws 1951, ch. 729. In addition to clarifying the existing case law, CPA § 237-a relaxed prior law by permitting joinder of objections to the court's jurisdiction over the subject matter and the defendant's person. CPA 237-a(2). It also clarified the procedure where the defendant sought both in rem and in personam relief.

56. See *supra* note 6.

II. Basic Provisions of the CPLR[57]

1. *Raising Jurisdictional Objections in Actions In Personam*

As far as actions *in personam* are concerned, New York has flatly rejected the special appearance. It has divorced the concept of the appearance from any notion of waiver of jurisdictional objections. Thus the ancient distinction

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57. These provisions, so far as here pertinent, read:

§ 302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.

(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

§ 314. Service without the state not giving personal jurisdiction in certain actions.

Service may be made without the state by any person authorized by section 313 in the same manner as service is made within the state:

1. in a matrimonial action; or
2. where a judgment is demanded that the person to be served be excluded from a vested or contingent interest in or lien upon a 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, including an action of interpleader or defensive interpleader; or
3. where a levy upon property of the person to be served has been made within the state pursuant to an order of attachment or a chattel of such person has been seized in an action to recover a chattel.

Rule 320. Defendant's appearance.

(a) Requirement of appearance. The defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer . . . .

(b) When appearance confers personal jurisdiction, generally. Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer.

(c) When appearance confers personal jurisdiction, in certain actions. In a case specified in section 314 where the court's jurisdiction is not based upon personal service on the defendant an appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted at the time of appearance by motion or in the answer, unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.

Rule 3211. Motion to dismiss.

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

* * *

2. the court has not jurisdiction of the subject matter of the cause of action; or

* * *

8. the court has not jurisdiction of the person of the defendant; or
9. the court has not jurisdiction in an action where service was made under section 314 or 315 . . . .

* * *

between a general and a special appearance has become obsolete. Henceforth, defendant may preserve his objections to jurisdiction over his person simply by raising them timely.[58] The media for presenting the objections are either a pre-answer motion under Rule 3211 or the answer. It is immaterial whether the defendant challenges jurisdiction at the time of his appearance or thereafter. However, he loses the objections to jurisdiction over his person (like other dilatory pleas and defenses to the merits) by his failure to assert them timely by motion or in his answer.[59] He may freely join other objections and defenses, including those going to the merits, with his jurisdictional objections.[60] The risk that an inadvertent informal appearance will subject him to personal jurisdiction has been greatly lessened; for like a formal appearance the informal appearance will no longer spell his irrevocable submission to the court's jurisdiction if he challenges it seasonably. The point bears illustration.

Assume that a non-resident, sued in New York, moves to extend the time to answer. Undoubtedly this motion does not constitute a formal appearance.[60a]

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment and the court may treat the motion as a motion for summary judgment. The court may order immediate trial of the issues raised on the motion.

* * *

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in subdivision (a) is waived unless raised either by such motion or in the responsive pleading, except that a motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made by motion at any subsequent time or in a later pleading, if one is permitted . . . . (f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

58. Rule 320(b); Rule 3211(e). See 2 N.Y. Adv. Comm. Rep. 152-53 (1958); 4 N.Y. Adv. Comm. Rep. 187 (1960).

May a defendant who failed to assert a jurisdictional objection in the answer seek leave to include the objection in an amended answer? One writer suggests that this leave could not be given, but that the defendant should be able to include the objection in an answer amended as of right, McLaughlin, Practice Commentary to Rule 320, McKinney's CPLR (Supp. 1964). While it is true that the courts should not favor a belated assertion of jurisdictional objections, the court clearly has the power to allow the amendment under Rule 3025, if good and sufficient cause for the delay is shown. *Cf.* 1A Barron & Holtzoff, Federal Practice and Procedure § 370, n.80 (Wright ed. 1960). However, the court would have no power to grant leave to amend under Rule 3211(e), as proposed by the Judicial Conference, where the defendant made a pre-answer motion without raising the jurisdictional objection. See note 59, *infra*.

59. At the present time defendant may raise jurisdictional objections for the first time in his anwer even though he earlier made a motion under Rule 3211 based on non-jurisdictional objections. He will no longer be able to do so under amendments to Rules 320(b) and (c) and 3211(e) proposed by the N.Y. Judicial Conference pursuant to N.Y. Judiciary Law § 229. The amendments will become effective September 1, 1965, unless disapproved by the legislature. These amendments, their background and effect are discussed in the text *infra* pp. 400-06.

60. 2 N.Y. Adv. Comm. Rep. 152-53 (1958).

60a. A formal appearance, equivalent to personal service of the summons and sufficient to avoid default, if seasonable, is made under Rule 320(a): (1) by serving an answer; (2) by serving a notice of appearance; or (3) "by making a motion which has the effect of

However, it may constitute an *informal* appearance.[61] If it does, the defendant under New York's former special appearance statute would have irretrievably lost the opportunity to challenge the court's jurisdiction over his person or property. This is no longer true. Under the present rule it is clear that he may contest jurisdiction in personam seasonably by motion or in his answer notwithstanding his earlier informal appearance. Still it would not be correct to say that defendant "loses nothing" by appearing.[62] As suggested in the Introduction, by his appearance he validated, as it were, plaintiff's choice of a forum at least for the purpose of litigating the issue of jurisdiction. In most cases, however, a mere application for an extension of time to answer should not be deemed even an informal appearance.[63] A defendant who moves for an extension frequently does so because he has not yet decided whether he should submit the jurisdictional question to this court or whether he should default and challenge jurisdiction after entry of a judgment by default. On the other hand, on occasion defendant's conduct may fairly indicate his intent to litigate the jurisdictional question in the court to which he applied for the extension. For example, in addition to moving for the extension, he may have taken plaintiff's deposition on jurisdictional and other issues of the controversy.[64]

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extending the time to answer." The quoted phrase is a substitute for the phrase "a notice of motion raising an objection to the complaint in point of law" which appeared in the corresponding provision of the Civil Practice Act. See N.Y. Civ. Prac. Act § 237. The change sought to make it clear that any kind of motion that extends the time to appear should suffice to avoid a default. See 4 N.Y. Adv. Comm. Rep. 185 (1960). The phrase "a motion which has the effect of extending the time to answer" refers only to motions which have the automatic "built in" effect of extending the time to answer. See, *e.g.*, Rule 3024(c) providing that a corrective motion extends the time to serve the responsive pleading. On the other hand, a motion to extend the time to answer, which is granted does not constitute "a motion which has the effect of extending the time to answer." No automatic extension results from the making of such motion; the order of the court, granting it, and not the motion, extends the time to answer. See Note, 37 St. John's L. Rev. 285, 321-22 (1963).

61. Pre-CPLR cases distinguished between applications for extension of time to plead that were incidental to a jurisdictional objection and those made in the context of conduct disclosing an intent to contest the claim on the merits. The former were deemed consistent with a special appearance and thus preserved the jurisdictional objections: Maushart v. Kelly, 10 A.D.2d 630, 196 N.Y.S.2d 935 (2d Dep't 1960); Drake v. Shenandoah Pottery, Inc., 141 Misc. 471, 252 N.Y. Supp. 705 (N.Y. Mun. Ct. 1930). The latter amounted to a general appearance and waived all objections to the exercise of personal jurisdiction over the defendant: Capuano v. Zolla, 10 Misc. 2d 96, 174 N.Y.S.2d 820 (Sup. Ct. 1958); Hammond v. Hammond, 9 A.D.2d 615, 190 N.Y.S.2d 739 (1st Dep't 1959); Hecht v. Occhipinti Realty Co., 254 App. Div. 96, 38 N.Y.S.2d 953 (1st Dep't 1938), *aff'd*, 278 N.Y. 724, 17 N.E.2d 141 (1938). These decisions were in accord with the doctrine of special appearance which does not permit a defendant to present defenses on the merits along with jurisdictional objections. With the demise of the special appearance these cases have lost precedential value. The question whether a defendant by his conduct submitted the jurisdictional issue to the court should be distinguished from the question, relevant under former law, whether the defendant by his conduct waived all jurisdictional objections.

62. See Devine v. Griffenhagen, 31 F. Supp. 624 (D. Conn. 1940) (defendant "loses nothing" by filing a general appearance); 1A Barron & Holtzoff, Federal Practice and Procedure, § 370, at 514-15 (Wright ed. 1960): "Thus if in accordance with local practice counsel enters an 'appearance' but, within the time prescribed by this rule [Fed. R. Civ. P. 12], files a motion challenging . . . jurisdiction, his general appearance waives nothing." See also *id.* § 370, at 517-20.

63. Restatement, Judgments § 19, comment *b* (1942).

64. Under Rule 3106 a defendant may examine the plaintiff before he answers the complaint. See 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3106.07. Whether an

No better rule can be suggested for solving this problem than the old one which lets each claim of an informal appearance rest on its own facts; these will reveal the degree of defendant's participation in the lawsuit.[65]

2. *Appearance in Actions In Rem*[66]

The simplicity and clarity which distinguish New York's rules of appearance in actions *in personam* are missing in actions *in rem*. An incongruous provision reminiscent of the former special appearance rule requires the defendant in these actions to raise jurisdictional objections at the time of his appearance. It is gratifying that the Judicial Conference has now proposed an amendment to remove this disturbing feature of the law.[67] In all other respects the rules governing the raising and waiver of jurisdictional objections in actions *in rem* are the same as in actions *in personam*.

The CPLR prides itself on having pioneered a separate objection to jurisdictional defects in *in rem* actions. Rule 3211(a)(8) deals with lack of jurisdiction of the defendant's person while Rule 3211(a)(9) covers lack of *in rem* jurisdiction. The two paragraphs in turn are separated by five non-jurisdictional objections from the one covering lack of subject matter jurisdiction.[68] Despite the physical separation of these three types of objections their respective reach is by no means certain. The distinction between lack of subject matter jurisdiction (not waivable) and lack of *in rem* jurisdiction (waivable) is often problematical since the absence of a *res* not only destroys the basis for jurisdiction *in rem*, but also deprives the court of subject matter jurisdiction.[69] Defendant may also find it difficult to choose between an objection under subdivisions 8 and 9 where plaintiff has sought *in personam* relief although he obtained only *in rem* jurisdiction. Professors Weinstein, Korn and Miller suggest that "the tenuousness of these distinctions and the novelty of the provisions suggest that at least until experience clarifies the practice, a defendant would be wise to move under both paragraphs 8 and 9 in cases of doubt."[70] It may even be questioned whether the traditional classification of claims *in personam*, *in rem* and *quasi in rem* is still useful. Our courts have sustained jurisdiction over non-residents in cases which do not fit neatly into

informal appearance waived jurisdictional objections became an issue in a federal court when defendant took plaintiff's deposition and simultaneously obtained extensions of time to answer. Later, in his timely answer, he raised the defenses of lack of jurisdiction and improper venue, in addition to defenses on the merits. The court correctly held that under Federal Rule 12(b) and (h) he had not waived the objections. Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943).

65. See text accompanying notes 12-17, *supra*.

66. The terms action in rem and jurisdiction in rem are used in this article in their broadest sense to include quasi in rem actions and jurisdiction.

67. See text *infra* pp. 400-02.

68. See 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3211.21. The objections originally were combined in one subdivision; see 2 N.Y. Adv. Comm. Rep. 152 (1958). They were separated for the first time in Final N.Y. Adv. Comm. Rep. A-464 (Advance Draft 1961).

69. Rule 3211(a)(2) quoted *supra* note 57.

70. 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3211.22.

any of the traditional categories. Thus jurisdiction over non-residents was upheld in a proceeding brought by the trustees of a common trust fund for judicial settlement of their accounts.[71] And in interpleader actions a stakeholder may now secure his discharge after he has segregated, with the court's permission, the contested fund.[72] Hence one may wonder if the framing of separate objections directed to one or the other type of jurisdictional issues does not represent a reversion to the conceptualism of yesterday.[73]

The problem of raising and waiving jurisdictional objections in actions *in rem* must be distinguished sharply from the question of what effect an appearance has in these actions. The question there is whether a defendant who has appeared, but has not challenged the court's jurisdiction over his property or who has challenged it unsuccessfully, necessarily subjects himself by his appearance to the court's jurisdiction over his person. That problem will be discussed next.

3. *Limited Appearance Eliminated*

The CPLR outlaws the so-called "limited appearance."[74] A special appearance should not be confused with a limited appearance. The former is a proce-

71. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Mr. Justice Jackson, speaking for the majority, observed, at 312-13: "Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a procedure in rem'. It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its court or this Court may regard this historic antithesis . . . ."

72. CPLR 314(2), 1006(f).

73. See *infra* notes 92, 94; see also Atkinson v. Superior Court, 49 Cal. 2d 338, 316 Pac. 960 (1957), *cert. denied, appeals dismissed*, 357 U.S. 569 (1958); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 53 N.E. 812, 814 (1900).

74. This, at any rate, was clearly intended by the Revisers. 4 N.Y. Adv. Comm. Rep. 187-89 (1960). Professor Lenhoff has suggested that they failed to accomplish this purpose. He put the case of a defendant who has successfully asserted an objection to personal jurisdiction in a case specified in § 314. Even if he proceeds with the defense of the in rem aspect of plaintiff's claim, is he not within the saving clause of § 320(c): "[A]n appearance is not equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under . . . [paragraph] eight . . . is asserted . . . unless the defendant proceeds with the defense and the objection is not ultimately sustained"? Lenhoff, *A New Procedural Code in New York*, 13 Buffalo L. Rev. 119, 128 (1963). The question raised by Professor Lenhoff may yet prove troublesome, particularly in view of the awkward phrasing of § 320(c) with its involved double negative. Of course, it would be incongruous to sanction a limited appearance where defendant successfully asserts an objection to in personam jurisdiction but to deny it where he simply resists an in rem claim on the merits.

The problem of the limited appearance in New York before the enactment of § 237-a of the N.Y. Civ. Prac. Act was thoroughly examined by Frumer, *Jurisdiction and Limited Appearance in New York: Dilemma of the Non-Resident Defendant*, 18 Fordham L. Rev. 73 (1949); and Frumer & Graziano, *Jurisdictional Dilemma of the Non-Resident Defendant in New York—A Proposed Solution*, 19 Fordham L. Rev. 125 (1950); 16 Jud. Council Rep. 185, 200-04 (1950); see also 4 N.Y. Adv. Comm. Rep. 187-89 (1960); see generally Note, *Special Appearances to Contest the Merits in Attachment Suits*, 97 U. Pa. L. Rev. 403

dural device enabling a defendant to appear solely for the purpose of raising the jurisdictional question. A limited appearance, on the other hand, seeks to avoid the transformation of *in rem* jurisdiction into personal jurisdiction by a defense on the merits. This effect is averted by permitting the defendant to appear "for purposes of litigating the merits but limited to those claims which could be constitutionally adjudicated by the court in his absence by virtue of its *in rem* jurisdiction."[75] It is apparent from the preceding definitions of the special and the limited appearances that both serve to avoid the procedural consequences of a submission to personal jurisdiction; at the same time, both confer upon a court the power to determine, with binding effect upon the parties, a limited segment of their dispute. In the case of a special appearance the determination is confined to the issue of the court's jurisdiction over defendant's person or property. In the case of a limited appearance the court will determine the substantive rights of the parties but the determination will reach no further than the court's control over defendant's property or status.

4. *"Restricted Appearance" Created*

While the CPLR put an end to both the special and the limited appearances, as here defined, it created a new species of appearances: under Section 302(a) personal jurisdiction over a non-resident defendant may be based on his transaction of any business, his tortious conduct, or his ownership use or possession of real property, all within the state.[76] In that event, under Section 302(b), his appearance confers jurisdiction solely over causes of action, that arise from one or the other of the enumerated local activities. As is true of the special and the limited appearance, this statutory curb averts what would otherwise be the normal, procedural consequence of defendant's appearance, *i.e.*, his subjection to the court's unrestricted *in personam* power. Long-armed as it is, the novel jurisdiction is not permitted to reach beyond causes of action arising from defendant's local contacts which, under the statute, created jurisdiction in the first place. In other words, the particular basis of the long-arm jurisdiction qualifies its scope. For want of an accepted term and to distinguish it from both the special and the limited appearance, defendant's appearance pursuant to the long-arm statute may be called a "restricted appearance." For as already noted, it is restricted in the sense that it subjects the defendant to jurisdiction only with respect to his specified local contacts. In contrast, however, to the two other types of appearances, this novel species need not be claimed by the defendant at the time of his appearance; it operates restrictively on the court's jurisdiction as of course.

Although neither the draftsmen of the Illinois statute on which the New

(1940); Note, *The "Right" to Defend Federal Quasi In Rem Actions Without Submitting to the Personal Jurisdiction of the Court*, 48 Iowa L. Rev. 441 (1963); Note, *Limited Appearances*, 7 Utah L. Rev. 369 (1961).

75. Frumer & Graziano, *loc. cit. supra* note 74, at 125.

76. The Section is quoted *supra* note 57.

York provision was patterned nor those responsible for Section 302 elaborate on their reasons for creating the restricted appearance, these are plain enough.[77] In many, perhaps most instances of the long-arm jurisdiction it would be evidently unfair to subject the non-resident defendant to the burden of defending against additional claims that are unrelated to the specific "contact" on which the novel jurisdiction is based. Indeed, the unfairness may be so gross that subjecting the defendant to the prosecution of unrelated claims might deny him due process. Although the constitutional law on this problem is far from developed,[78] the draftsmen displayed sensible concern for defendant's situation and its constitutional implications. This attitude may be contrasted with the seeming unconcern for the comparable situation of a defendant who is subjected to *in rem* jurisdiction under the provisions of Section 314.[79] Such a defendant may have no valid jurisdictional objections against the proceedings. If he decides not to default and instead "proceeds with the defense," *i.e.*, litigates the merits of the claim asserted against the *res*, he becomes subject to personal jurisdiction since a limited appearance is not permissible. As a result, the defendant may be required to defend against any other cause of action, related or not, asserted simultaneously or added later. This contrast between the ban on the limited appearance ordained by Section 320(c) and the simultaneous emergence of the restricted appearance in Rule 302(b) gives pause for thought.

First of all, what is the relation of Section 302(b) and Rule 320(c)? It would seem that the restricted character of the long-arm jurisdiction overrides the unlimited appearance contemplated by Rule 320 if the defendant proceeds with the defense of an *in rem* claim. Were it otherwise, a non-resident subject to *in personam* jurisdiction under the long-arm statute would be in a serious jurisdictional predicament if the plaintiff attaches defendant's New York property: he could not choose to default since an *in personam* judgment, entitled to full faith and credit elsewhere, would result; nor could he proceed with the defense without exposing himself to unrestricted personal jurisdiction and the assertion of claims unrelated to any local activity. This could not have been the intent of the draftsmen[80] since the defendant's free choice—*i.e.*, either

77. "Subdivision (b) of CPLR 302 was added to clarify the limited nature of jurisdiction obtained under subdivision (a)," 1 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 302.15. The Joint Committee Comments on the parallel provisions of the Ill. Civ. Prac. Act, Ill. Rev. Stat. ch. 110, § 17(3) (Smith-Hurd, 1956), are equally brief: "[The provision] prohibits the joinder of an action not arising from the "minimum contacts" of Subsection (1), with an action arising out of these contacts. It should be closely adhered to so as to avoid diluting the bases of jurisdiction defined in Subsection (1)." *Id.* at 170. Finally, the Commissioners' Notes to § 1.03(b) of the Uniform Interstate and International Procedure Act which embodies a parallel provision, do no more than state that it is designed "to prevent assertion of independent claims unrelated to . . . [the] activity" which gave rise to the long-arm jurisdiction, 9 B Uniform Laws Ann. § 1.03 (Supp. 1964).

78. For authorities on the problem of ownership of property as basis for in personam jurisdiction, see Goodrich, Conflict of Laws 115-16 (4th ed. Scholes, 1964).

79. The text of the section is quoted *supra* note 57.

80. According to 1 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 302.15, Rule 320 must be read with the limitation set forth in Subdivision (b) of CPLR 302 in mind. *Cf.*

to abandon the local *res* and thereby to preserve his insulation from personal jurisdiction or to litigate the underlying claim on the merits and thereby to submit to personal jurisdiction—is usually said to justify the ban on a limited appearance.[81]

However, the tension between the basic approaches embodied in the two provisions just noted reaches deeper. In the heyday of *Pennoyer v. Neff*[82] the limited jurisdiction obtainable over a defendant's property usefully complemented an *in personam* jurisdiction that was as yet narrowly circumscribed by territorial and power concepts. Under the pressures of economic, social and technological realities these concepts have lost their hold on judicial and legislative thinking; the *International Shoe*[83] case and the long-arm jurisdiction spurred by it are symptomatic of the current trend. To a lesser extent, the pressures toward wider jurisdictional bases which undermined *Pennoyer v. Neff*, also affected judicial attitudes toward the complementary branch, *i.e., in rem* jurisdiction. Thus, for example, the increasing "reification" of intangible property, a semantic technique for expanding *in rem* jurisdiction has often been noted.[84] This trend reached an early highwater mark in *Harris v. Balk*[85] which sanctioned jurisdiction for garnishment proceedings against a non-resident although it was based merely on the fortuitous presence of his debtor within the state.

The judicial and statutory decline of the "limited appearance" in attachment cases is a related symptom: the early cases assumed that the defendant in an *in rem* proceeding had the choice between abandoning the *res* to a default judgment or litigating the claim underlying the seizure.[86] If he appeared, the effect of his appearance was limited. For if he lost, the judgment could not be enforced beyond the value of the *res* nor was he subject to a deficiency judgment.[87] Furthermore, he remained free to litigate the merits on a later occasion. On the other hand, if defendant won, the plaintiff was free to relitigate the merits whenever he was later able to obtain jurisdiction over the defendant's person or property.[88] Gradually, however, the doctrine of limited appearance lost ground. In a notable case, the court preserved the form but drained the substance of the limited appearance by extending the reach of collateral

Homburger, Book Review, Weinstein, Korn & Miller New York Civil Practice, 112 U. Pa. L. Rev. 1222, 1232-33 (1964).

81. See, *e.g.*, 2 Moore, Federal Practice ¶ 12.13, at 2264-65 (2d ed. 1964).

82. 95 U.S. 714 (1878).

83. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

84. See, *e.g.*, Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 Yale L.J. 241 (1939); for a recent illustration in New York, see Estate of Riggle, 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

85. 198 U.S. 215 (1923).

86. See, *e.g.*, Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 Fed. 214 (6th Cir. 1922); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

87. The "long-standing practice" in New York of entering a default judgment in the full amount of the complaint, although its effect is limited to the *res*, was disapproved in Benadon v. Antonio, 10 A.D.2d 40, 43-44, 197 N.Y.S. 1, 5-6 (1st Dep't 1960).

88. For the notions underlying the limited appearance, see Cheshire Nat'l State Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

estoppel.[89] Since defendant had litigated the merits of the underlying claim, he was held collaterally estopped from relitigating any of the issues actually contested in the first action. In other cases, the courts more forthrightly rejected the privilege of a limited appearance altogether, thus forcing the defendant either to abandon the *res* or to submit to unlimited *in personam* jurisdiction.[90] This, of course, is the approach now sanctified by Section 320.

This legislative ban on all limited appearances enacted without much supporting explanation,[91] is cause for misgivings. First of all, the recent developments in the field of *in personam* jurisdiction have profoundly affected the function of its jurisdictional twin, *i.e.*, the *in rem* jurisdiction. Even those who are persuaded of its continuing utility[92] will concede that its proper role will have to be redefined in light of the broad expansion of the *in personam* jurisdiction. A pragmatic re-appraisal will, it is hoped, emerge from wide judicial experimentation with modern jurisdictional concepts. This process, by trial and error, should not be inhibited by a blanket rejection (nor, for that matter, by a blanket endorsement) of the limited appearance. Recent studies of the concept have emphasized the need to shun as elsewhere dogmatic generalizations and instead to scrutinize and balance from type of case to type of case the several interests and policy considerations which favor, or militate against, a defendant's privilege to make a limited appearance.[93] The insights gained into the real issues at stake in the rapid expansion of *in personam* jurisdiction are only now beginning to be applied to the divergent situations still indiscriminately grouped under the heading of *in rem* jurisdiction.[94]

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89. Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94 (1939), criticized by Taintor, *Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. Pitt. L. Rev. 223; *cf.* United States v. Balanovski, 236 F.2d 298, 302 (2d Cir. 1956) ("[A] rule against personal jurisdiction will only bring on further litigation which the [defendant] . . . will lose on the merits by collateral estoppel or stare decisis").

90. *E.g.*, United States v. Balanovski, 236 F.2d 298 (2d Cir. 1956) and federal cases cited, *id.* at 302.

91. In substance, the draftsmen confined themselves to the following statement:

> A rule prohibiting a limited appearance forces the defendant to choose between defaulting on the in rem claim or submitting to personal jurisdiction; on the other hand, it affords a lever for obtaining personal jurisdiction over absent or non-resident defendants, whereby all the claims between the parties may be settled at one time and a multiplicity of suits avoided. 4 N.Y. Adv. Comm. Rep. at 188 (1960).

92. For a forceful critique, see Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 Harv. L. Rev. 303, 306-17 (1962); see also Traynor, *Is This Conflict Really Necessary*, 37 Texas L. Rev. 657, 660, 663 (1959).

93. Frumer, *Jurisdiction and Limited Appearance in New York: Dilemma of the Non-Resident Defendant*, 18 Fordham L. Rev. 73, 85 (1949); Frumer & Graziano, *Jurisdictional Dilemma of the Non-Resident Defendant in New York—A Proposed Solution*, 19 Fordham L. Rev. 125, 141 (1950); Note, 97 U. Pa. L. Rev. 403, 410 (1949); Note, *Limited Appearances*, 7 Utah L. Rev. 369, 374, 381 (1961).

94. It is time we had done with mechanical distinctions between in rem and in personam, high time now in a mobile society where property increasingly becomes intangible and the fictional res become stranger and stranger. Insofar as courts remain given to asking "Res, res- who's got the res?", they cripple their evaluation of the real factors that should determine jurisdiction.

Traynor, *Is This Conflict Really Necessary*, 37 Texas L. Rev. 657, 663 (1959); Note,

To some uncertain extent, this modern approach may explain the evident ambiguity of New York's pre-CPLR case law which has never taken a final, clear-cut stand for or against the limited appearance.[95] For this reason alone, it would have been wiser for the CPLR to follow the example of the recently amended Federal Rules of Civil Procedure on attachments and garnishments.[96] The federal amendments left the problem of the limited appearance to be dealt with by case law.[97]

The drastic surgery performed by the draftsmen of the CPLR on the concept of "limited appearance" raises a further question. Has this approach adequately dealt with the constitutional aspects of the problem? Those who reject the limited appearance do so because they believe that re-litigating the merits of the underlying cause of action in another tribunal is inconsistent with the policy embodied in the doctrine of *res judicata* and economy of litigation in general.[98] These considerations fail to note the hardships that may be created for a defendant in certain situations. He may be forced to abandon the *res* or to defend the underlying *in personam* claim in a foreign forum under circumstances which are clearly prejudicial to him.[99] Nor is it proper to ignore the opportunity opened to the plaintiff to pursue against an appearing defendant totally unrelated causes of action. In light of these possible burdens on non-resident defendants, serious constitutional arguments in favor of the "limited appearance" have been advanced.[100] The most recent, comprehensive study on jurisdiction considers the problem in connection with an attachment.[101] It

Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 956, 965, 966 (1960).

95. For a careful analysis of the New York cases until 1950, see the articles by Frumer & Graziano, *supra* note 74. Among more recent cases, *compare* Burg v. Winquist, 124 N.Y.S.2d 133 (Sup. Ct. 1953); Perlak v. Goodyear Tire & Rubber Co., 140 N.Y.S.2d 675 (Sup. Ct. 1955) *with* Vanderbilt v. Vanderbilt, 1 A.D.2d 3, 147 N.Y.S.2d 125 (1st Dep't 1955), *aff'd*, 1 N.Y.2d 342, 135 N.E.2d 553 (1956); Mirabella v. Banco Industrial, 38 Misc. 2d 128, 237 N.Y.S.2d 499 (Sup. Ct. 1963); Rothstein v. Autourist A/S, 40 Misc. 2d 522, 242 N.Y.S.2d 863 (Sup. Ct. 1963). *Cf.* for a case under the CPLR, Poly Repro Int'l Ltd. v. Pacific Copy Corp., 41 Misc. 2d 235, 245 N.Y.S.2d 89 (Sup. Ct. 1963).

96. Rule 4(e) Fed. R. Civ. P., effective July 1, 1963.

97. Note, *The "Right" to Defend Federal Quasi In Rem Actions Without Submitting to the Personal Jurisdiction of the Court*, 48 Iowa L. Rev. 441, 442 (1963). The Advisory Committee's restraint may, in part, have been induced by doubts whether, under the *Erie* doctrine, the federal courts must follow state law regarding the limited appearance, *id.* at 452; Kaplan, *Amendments of The Federal Rules of Civil Procedure (I)*, 77 Harv. L. Rev. 601, 627-28 (1964); Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337, 379-80 (1961).

98. See Note, 25 Iowa L. Rev. 329, 339-40 (1940), 2 Moore, Federal Practice ¶¶ 12.13, at 1064-65 (2d ed. 1964); Blume, *Actions Quasi In Rem Under Section 1655, Title 28, U.S.C.*, 50 Mich. L. Rev. 1, 22-24 (1951).

99. For a recent defense of the "humanitarian doctrine" of limited appearance, see Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337, 379 (1961); *cf.* Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 Calif. L. Rev. 44, 60-61, 69 (1962).

100. Taintor, *Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. Pitt. L. Rev. 223 228-33 (1942); Note, *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 953-54 (1960). *But see* Restatement, Judgments § 40, comment *a* (1942); Note, 48 Iowa L. Rev. 441, 447-49 (1963).

101. Note, *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 954 (1960).

forcefully suggests that the denial of a limited appearance imposes an unconstitutional condition on a non-resident defendant's right to protect his attached property. The denial has this effect where defendant is forced to defend his property at the price of submitting to personal jurisdiction in a state with which he lacks contacts other than the presence of his property. These contacts are reduced to the merest shadow in the case of the garnishment of a debt, based on the fortuitous presence of a non-resident defendant's debtor within the state.

Even if, at this juncture, constitutional arguments about the outer limits of *in rem* jurisdiction are speculative it would have been preferable to avoid the risk of head-on collisions with constitutional law by leaving the matter to judicial *ad hoc* determination. If the draftsmen looked to the doctrine of *forum non conveniens* to reduce the danger of constitutional embarrassments, they may have been overly optimistic. It will not be easy to persuade the judges of New York to shed promptly the self-denying limitations by which they have circumscribed the scope of that doctrine.

Finally, it may be observed that as New York is turning its back on the doctrine of limited appearance, the Europeans appear to show "a growing appreciation of the value of the concept of *quasi-in-rem* jurisdiction."[102] This contrasting trend is all the more noteworthy when it is recalled that several continental jurisdictions have pursued to its limit the notion of basing unrestricted *in personam* jurisdiction on the mere presence of defendant's assets.[103]

III. Subsidiary Problems

A. *Appearance in Actions Commenced by Service of Summons Without Complaint*

Should a plaintiff be permitted to commence a lawsuit by service of a summons unaccompanied by a complaint? The question has led to sharp disagreements between theorists and practitioners. Starting a lawsuit without giving the defendant any inkling of the nature and extent of the claim asserted offends basic notions of fairness and the principle of due notice which lie at the bottom of all orderly procedure. When the Advisory Committee prepared its original draft in 1957, it frowned upon "the indiscriminate use of the summons as a negotiating device."[104] The Committee discounted any real need for it in view of the simplicity of modern complaints and the freedom to amend them. The potential of the device for abuse and its wastefulness where it is not followed by a complaint have been stressed.[105] One should add

102. Nadelmann, *Jurisdictionally Improper Fora, XXth Century Comparative and Conflicts Law*, Legal Essays in Honor of Hessel E. Yntema, 321, 332 (Nadelmann, von Mehren and Hazard, eds. 1961).

103. *Id.* at 328-32.

104. 1 N.Y. Adv. Comm. Rep. 60 (1957). The tentative draft of proposed Rule 26.02, the precursor of Rule 3012(a), provided that "the complaint shall be served with the summons." *Ibid.*

105. 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 301.202. See also Weinstein, *Proposed Revision of New York Civil Practice*, 60 Colum. L. Rev. 50, 72-73 (1960).

that the device creates numerous technical problems as the later discussion will show.

On the other hand, it cannot be denied that in emergencies the use of the summons without complaint may be helpful. The Advisory Committee's stricture that "if an attorney has insufficient information to draft a complaint he ought not to begin the action"[106] overlooks the practicalities of life. An attorney may be away from his office when he learns of the defendant's temporary presence in the jurisdiction. The time consumed in preparing a complaint might make the difference between using or losing an opportunity to obtain personal jurisdiction of a non-resident. As long as we adhere for better or for worse to the doctrine of "transient jurisdiction,"[107] "we might as well enable the lawyer to use it." To write out a summons in longhand takes only minutes; not so to prepare even "a simple emergency complaint." Moreover, articulating the grievances in a pleading often embitters the atmosphere and dims the hope for a settlement. The service of a summons without complaint avoids this undesirable side effect; yet, it evidences the claimant's determination to press his claim. This is true not only in matrimonial and commercial cases, as has been recognized,[108] but quite often also in tort litigation of a more "personal" nature, such as libel, assault and battery, and false imprisonment.

The Advisory Committee's proposal to require the service of a summons and complaint was not the first of its kind. At least once before in New York's legislative history, a similar proposal had been made. The 1848 draft of the Field Code required the service of a summons and complaint in all actions.[109] This was a deliberate departure from the practice under the Revised Statutes which authorized starting an action at law by means which did not plainly indicate to the defendant what the claim was.[110] The Commissioners on Practice and Pleading in making their recommendations, as in many other instances, followed equity practice under which the bill served with a subpoena gave the defendant clear notice of the nature and particulars of the claim asserted.[111] The Commissioners' proposal was enacted in 1848,[112] but the change was short-lived. Only one year later, the Code was amended to permit starting an action by service of a summons without complaint.[113] The Commissioners' plea in their Final Report to the Legislature in 1850 to restore the substance of the original Code provision remained unheeded.[114] The provision permitting

106. 1 N.Y. Adv. Comm. Rep. 60 (1957).
107. See Schlesinger, *Methods of Progress in Conflicts of Laws, Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. Pub. L. 313 (1960). *But see* Ehrenzweig, Conflict of Laws 103-06, 119 (1962); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956).
108. 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3012.02.
109. First Rep. Comm'rs on Prac. and Pl., N.Y. 131-33 (1848).
110. See *id.* at 131-32 (1848).
111. *Ibid.*
112. N.Y. Code of Proc. §§ 106, 109 (1848).
113. N.Y. Code of Proc. § 130 (1849).
114. Final Rep. Comm'rs on Prac. and Pl., N.Y. (Ass. Doc. No. 16) at 255, 256 (1858).

service of the summons without complaint remained in the Code[115] and was continued by the Code of Civil Procedure[116] without material change. It appeared again in the Civil Practice Act.[117] When in 1957 the Advisory Committee prepared its original draft of rules of pleading it took a new look at the old problem. It proposed that, save in matrimonial actions, the complaint be served with a summons.[118] However, the proposal was abandoned in the face of determined opposition by the Bar.[119] The Advisory Committee's 1961 Advance Draft returned to the basic features of the former practice.[120] Thus New York has remained with the minority of states which permit this practice.[121] However, in restoring the old law several significant changes were made. Some were deliberate; others, probably unintentional, can only be explained by the draftsmen's haste in re-writing the law to reflect the policy decision made in the final stages of the new Practice Act. These changes and their consequences merit brief discussion.

1. *Demand for Complaint*

Under the former practice, in an action commenced by service of a summons without complaint, two steps were required to avoid a default: (a) service of a notice of appearance; and (b) a demand for service of the complaint. Both steps were time-limited (20 days).[122] In restoring the former practice the CPLR eliminated the time limitation for the demand.[123] The only explanation for the change given in the Advisory Committee's 1961 Advance Draft was the cryptic statement that the time limitation is "omitted as unnecessary; time to appear is covered by Rule [320(a)]."[124] It is true that a defendant

115. N.Y. Code of Proc. § 130 (1851).
116. N.Y. Code of Civ. Proc. §§ 416, 419, 479 (1877).
117. N.Y. Civ. Prac. Act §§ 218, 257 (1921).
118. See 1 N.Y. Adv. Comm. Rep. 60-61 (1957).
119. See Minutes of Meetings and Reports of the Joint Committee on the Civil Practice Act (1959-1963) at 14. The Joint Committee represented the N.Y. State Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers' Association.
120. Final Report, N.Y. Adv. Comm. A-414-15 (Advance Draft 1961); Sen. Fin. Comm. Rep. (Leg. Doc. No. 15) 417-18 (1961).
121. Colo. R. Civ. Prac. 3(a); Mass. Ann. Laws ch. 223, § 16 (1955); Mass. Ann. Laws ch. 231, § 11 (1956); N.H. Rev. Stat. Ann. § 509:4 (1955); N.Y. CPLR 304, 305, 3012; N.C. Gen. Stat. § 1-88 (1953); N.D. R. Civ. Prac. 3; Pa. R. Civ. Prac. 1007; S.C. Code Ann. § 10-401 (1962); S.D. Code § 33-0803 (Supp. 1960); Tenn. Code Ann. § 20-201 (1955); Utah R. Civ. Proc. 3(a); Vt. Stat. Ann. tit. 12, § 651 (1958); Wash. Rev. Code Ann. § 4.28.010 (1962); W. Va. Rev. Code Ann. § 5529 (1961); Wis. Stat. Ann. §§ 262.02, 262.12 (Supp. 1965).
122. N.Y. Civ. Prac. Act §§ 237.257.
123. Rule 3012(b) provides:
Demand for complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action. A demand or motion under this section does not of itself constitute an appearance in the action.
124. Final Rep. N.Y. Adv. Comm. A-415 (Advance Draft 1961); Sen. Fin. Comm. Rep. (Leg. Doc. No. 15) 418 (1961).

who has been served with a summons unaccompanied by a complaint should not be exposed to a double risk of default, that is, for failure to appear timely and, in addition, for failure to make a timely demand for the complaint.[125] The unfairness of the second risk of a default was sharpened by the wording of the summons which gave no inkling of a time limitation for demanding the complaint.[126] On the other hand, the solution adopted by the legislature is far from ideal. Perhaps it would have been better to require the defendant served with a summons without complaint either to appear or to serve a demand for the complaint within the time prescribed for answering the complaint; next, to provide that a demand for the complaint extends the time to appear;[127] and, finally, to place the burden of serving the complaint, after defendant's timely appearance, on the plaintiff without requiring any demand for it by the defendant. It should be incumbent upon the plaintiff who selected this anomalous mode of starting an action to follow automatically with the service of the complaint once the defendant has appeared timely in the action.

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125. See Stokes v. Schildknecht, 85 App. Div. 602, 83 N.Y. Supp. 358 (1st Dep't 1903).

126. Former N.Y. Rules Civ. Prac. 45 contained the following form of a summons: You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

127. Under present and former law a defendant who wants to see the complaint before deciding whether to appear or to default faces the problem of avoiding a default for failure to appear timely. One writer suggests that the defendant by demanding the complaint within the time allowed by Rule 320(b) for a timely appearance (20 or 30 days) extends the time to appear. He in effect argues that the time limitation fixed by Rule 320(b) is qualified by Rule 3012(b) which permits a demand without making an appearance. Siegel, Practice Commentary to McKinney's CPLR, § 3012(b) at 35 (Supp. 1964). However, there is nothing in the former Civ. Prac. Act § 257 as amended in 1951 (from which Rule 3012(b) is derived), or in the present law to indicate a legislative intent that a demand for the complaint extends the time to appear or answer. The draftsmen of N.Y. Civ. Prac. Act § 257, as amended, were not concerned with the risk of a default. That risk could be avoided by a stipulation or an order extending the time to appear. Nor was it their main concern to preserve defendant's right to choose between raising a jurisdictional objection or defaulting. The thrust of that section was to reject expressly the rule of Muslusky v. Lehigh Valley Coal Co., 225 N.Y. 584, 122 N.E. 461 (1919), which denied a defendant the right to demand the complaint unless he had appeared generally. That rule was a serious threat to a defendant served with a summons alone because he had to appear generally in order to be able to demand the complaint; and, by appearing generally, he waived any objection to the exercise of jurisdiction over his person or property. Later cases weakened the authority of the *Muslusky* case by sanctioning a special appearance to demand the complaint. The 1951 amendment of Civ. Prac. Act § 257 finally gave legislative recognition to the principle that a demand for the complaint is neither a general nor even a special appearance. The Judicial Council stated the legislative policy underlying that amendment: "Were it to be held that a later objection that the defendant is a person not subject to the jurisdiction of the court . . . would not be waived merely by making a general appearance in the action, there would be no need to amend Section 257." 16 N.Y. Jud. Council Rep. 185, 217 (1950). There is case law to the effect that a demand for the complaint does not prevent a default for failure to appear. See Renwal Products, Inc. v. Kleen-Stik Products, Inc., 43 Misc. 2d 645, 251 N.Y.S.2d 778 (Sup. Ct. 1964). See also 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 3211.05, 3215.19. Therefore the defendant is well advised to err on the side of caution when demanding the complaint; he should either stipulate for an extension of the time to appear or obtain an order to that effect.

2. *Summons with Notice*

When a plaintiff started a contract action for a liquidated amount without serving a complaint, former Rule 46 of the Rules of Civil Practice authorized him to state the amount for which he would take judgment in case of default.[128] With this notice, judgment by default could be entered by the clerk without application to the court; without the notice, an application was necessary.[129]

When the Revisers reinstated the practice of starting an action by service of a summons without complaint they continued the former notice practice. In fact, they enlarged it by permitting it in all actions "for a sum certain or for a sum which can by computation be made certain."[130] However, due to an apparent oversight the notice no longer serves merely to facilitate the entry of a judgment by default. It may in addition have become a novel prerequisite for the entry of a default judgment where the summons was served without complaint and defendant did not demand it. This curious result was produced by the wording of Section 3215(e) which regulates the proof when a judgment by default is applied for. As drafted originally, that section required the applicant to file proof of service of the summons and complaint and proof by affidavit of the facts constituting the claim, the default and the amount due.[131] When the practice of starting an action by service of a summons without complaint was restored, Section 3215(e) was re-written to authorize the entry of a default judgment upon proof of service of the summons and complaint or of a summons with notice.[132] However, the draftsmen apparently overlooked the possibility that an action may be commenced by service of a summons without notice. The defendant in that case might appear, but make no demand for the complaint; or he might default by failing to appear without ever having demanded the complaint. Under pre-CPLR decisions plaintiff could not serve a complaint unless the defendant had demanded it.[133] If these

128. Former N.Y. Rules Civ. Proc. 46 provided:
Notice with summons demanding money judgment. If an action be brought for the breach of an express contract to pay absolutely, or on a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation only; or on an express or implied contract to pay money received or disbursed, or for the value of property delivered, or for services rendered by, to, or for the use of, the defendant or a third person; and the complaint be not served with the summons, the plaintiff may serve with the summons a notice stating the sum of money for which judgment will be taken in case of default.

129. N.Y. Civ. Prac. Act § 485; see Everitt v. Everitt, 4 N.Y.2d 13, 148 N.E.2d 891, 171 N.Y.S.2d 836 (1958).

130. Rule 305(b) provides:
Summons and notice. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, and the complaint is not served with the summons, the plaintiff may serve with the summons a notice stating the sum of money for which judgment will be taken in case of default.

131. See tentative Rule 31.6(e), 1 N.Y. Adv. Comm. Rep. 98 (1957).

132. Rule 3215(e), so far as here material, provides:
Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of Rule 305, and proof by affidavit of the facts constituting the claim, the default and the amount due.

133. Gluckselig v. H. Michaelyan, Inc., 132 Misc. 783, 230 N.Y. Supp. 593 (Sup. Ct.

decisions are still good law, the defendant could stop the progress of the action simply by failing to demand the complaint. Since in that event plaintiff could not present the proof required by Rule 3215(e), he would have no choice but to discontinue the action[134] or, as has been suggested,[135] move to compel the defendant to accept the complaint. Fortunately, it is quite doubtful that the former law still controls. It has been argued[136] that the cases decided under the Civil Practice Act carried little persuasive force even under the former law; their strength was further weakened when the former time limit for making a demand for the complaint was eliminated.[137] A simple solution therefore would be to permit the plaintiff to serve the complaint on a defendant who has appeared, whether or not he demanded it. Service could be made in accordance with the usual provisions for service of pleadings upon a party who has appeared. As a practical matter, defendant in most instances will appear by an attorney who could be served by mail.[138]

This leaves open the question of how to deal with a defendant who after service of a summons without notice, unaccompanied by a complaint, simply defaulted. Had defendant demanded the complaint, he would have authorized, expressly or at least by implication, service of the complaint by mail to the address stated in the notice of appearance. However, in the absence of an appearance or demand, this mode of service would be of questionable validity. Section 3012(a), after stating that a complaint "may" be served with a summons, provides that a "subsequent" pleading asserting a "new" or "additional"

1928), *aff'd mem.*, 225 App. Div. 666, 231 N.Y. Supp. 757 (1st Dep't 1928). Everett v. Everett, 150 Misc. 609, 269 N.Y. Supp. 833 (Sup. Ct. 1933); Crouse v. Reichert, 61 Hun. 46, 15 N.Y. Supp. 369 (4th Dep't 1891). "The complaint may be served either with the summons or after the defendant has served his demand. The plaintiff has no right to serve a copy of the complaint after the service of the summons, and before the service of the demand by the defendant." 3 Carmody's N.Y. Practice § 1118, at 2462 (1930).

134. Rule 3217.

135. 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3012.03.

136. 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3012.03. See also 4 *id.*, ¶ 3215.19.

137. See text accompanying note 123, *supra.*

138. Rule 2103(b)(2) and (c). The Rule, as far as here pertinent, provides:

Service of papers.

* * *

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served on his attorney . . . . Such service upon an attorney shall be made: . . .

1. by delivering the paper to him personally; or
2. by mailing the paper to him at the address designated by him for that purpose, or, if none is designated, at his last known address . . . or
3. if his office is open, by leaving the paper with a person in charge, . . . or
4. by leaving it at his residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at his residence unless service at his office cannot be made.

(c) Upon a party. If a party has not appeared by an attorney or his attorney cannot be served, service shall be upon the party himself by a method specified in paragraph one, two or four of subdivision (b).

(d) Filing. If a paper cannot be served by any of the methods specified in subdivision (b) and (c), service may be made by filing the paper as if it were a paper required to be filed.

claim for relief shall be served on a party who has not appeared in the manner provided for service of a summons. It further provides that "in any other case" a pleading shall be served in the manner provided for service of papers generally.[139] It could perhaps be argued that a complaint served after service of a summons without complaint is not a "subsequent" pleading, because there was no "prior" pleading, and that it does not assert a "new" or "additional" claim, because there was no "old" or "original" claim. Therefore, the argument would run, the second sentence of the subdivision applies which permits service "in any other case" in the manner provided for service of papers generally. This literal construction, however, would do violence to the spirit of the statute. While it does not explicitly cover the situation under discussion, the provision clearly seeks to distinguish between defendants who did appear and those who did not.[140] In the absence of an appearance, service of the complaint in the manner of a summons affords a defendant reasonable notice of the nature of the claim asserted against him. This holds true whether plaintiff asserts a "new" or "additional" claim or the original claim after service of a simple summons.

Even service of the complaint on a defaulting defendant in person without the state in the manner provided for serving a summons might not always be sufficient. A constitutional question is presented where defendant is a non-resident transient whose only contact with the state was his temporary presence at the moment when the summons without complaint was served upon him. The requirement of a reasonable basis for jurisdiction over a non-resident would be reduced to a meaningless gesture if service of a summons without any indication of the nature of the claim and the relief sought were deemed sufficient to satisfy due process requirements under the "transient" rule of jurisdiction.

Regardless of whether or not procedural acrobatics of the kind described above permit escape from the trap which the present statutory scheme has created, clearly the trap itself should be removed. A party who starts an action should not be confronted with formidable technical problems when he seeks to enter judgment against a defaulting defendant. This does not necessarily mean that a return to the former practice would be desirable. For it permitted

139. Section 3012(a), so far as here pertinent, provides:

> Service of pleadings. The complaint may be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally . . . .

Cf. tentative Rule 26.2 (the precursor of present Rule 3012(a)) which, so far as pertinent here, provided:

> Except in an action for a separation, annulment, dissolution or divorce, the complaint shall be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. Every other pleading shall be served upon the attorney for each of the parties or upon the party himself, if he has not appeared by an attorney . . . . 1 N.Y. Adv. Comm. Rep. 60 (1957).

140. Rules 3012(a); 2103(e). See 3 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 3012.04, 3012.06.

entry of a default judgment against a non-appearing defendant served merely with a summons, without any notice of the nature of the claim asserted against him.[141] One possible solution would be to require in every case service of a summons and complaint or at least a summons with notice.[142] This would be a compromise between the present law and the Advisory Committee's original proposal to require a summons and complaint in all cases save matrimonial action where a summons with notice was permitted.[143] The compulsory notice would satisfy basic notions of fairness; at the same time it would relieve the plaintiff of the necessity to prepare a complaint in every case. Appropriate forms for the notice in the more common types of actions could easily be drafted if and when the long awaited official forms are forthcoming.[144] An alternative solution proposed by the Judicial Conference permits, but does not require, the plaintiff to endorse in every case a notice upon the summons.[145] To be sure, the latter solution will continue the present trap for the uninitiated, but it will at least enable the informed lawyer to avoid it whenever he expects a default.

B. *Timing of Jurisdictional Objections*

1. *Timing of Defendant's Objections*

When the CPLR was enacted in 1962 it contained inconsistent provisions for the timing of jurisdictional objections. Rule 320(b) and (c) then directed

141. N.Y. Civ. Prac. Act § 489; Rules Civ. Proc. 189. Application to the court was required in that case, Malone v. Citarella, 7 A.D.2d 871, 182 N.Y.S.2d 200 (2d Dep't 1959). See 7 Carmody-Wait Cyc. N.Y. Prac. 266 (1953).

142. *Cf.* Iowa, Rules Civ. P. 50, providing for a notice which "shall contain a general statement of the cause or the causes of action and the relief demanded, and, if for money the amount thereof" where a petition is not attached to the original notice. See also N.Y. Uniform District Court Act § 1402, N.Y. Uniform City Court Act § 1402 and New York City Civil Court Act § 1402 (permitting entry of a default judgment on the basis of a summons and complaint or a summons "stating the amount for which the plaintiff will take judgment if the defendant fails to appear and answer, and containing a statement of the nature and substance of the cause of action.")

143. See *supra* note 118.

144. Sen. Intr. 27, Pr. 4382, pp. 6, 8-10, 11 (1961) provided for promulgation of an appendix of forms. The provision was struck from the final version of the CPLR, see 6 Sen. Fin. Comm. Rep. (Leg. Doc. No. 8) 33 (1962), and 1 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 305.02, 3 *id.* ¶ 3013.09.

145. Proposed amended Rule 305(b) would read as follows:

> Summons and notice. If the complaint is not served with the summons, the summons may contain or have attached thereto a notice stating the object of the action and the relief sought, and, in an action for a sum certain or for a sum which can by computation be made certain, the sum of money for which judgment will be taken in case of default.

Report of the N.Y. Judicial Conference to the 1965 Legislature, Proposal No. 1, at 61. The amendment will become effective on September 1, 1965 unless it is disapproved by the 1965 Legislature. N.Y. Judiciary Law § 229.

The Judicial Conference further recommended amending Section 3215(e) to authorize entry of a default judgment also on the basis of service of a summons and notice under Rule 316(a). That notice is published together with the summons when service is made by publication. It indicates the object of the action and, when real property is involved, briefly describes it. See Report of the N.Y. Judicial Conference to the 1965 Legislature, at 90-91. Finally, the Conference recommended conforming amendments to subd. (a) and (b) of Section 3215 to cover the case when an action has been started by service of a summons without complaint. Bills implementing these recommendations have been introduced in the current session of the N.Y. Legislature.

the pleader to raise objections to jurisdiction over the person or property by motion or in the answer "at the time of appearance."[146] This requirement seemed to conflict with Rule 3211 under which one or more of enumerated objections and defenses may be raised either by motion or included in the answer at the pleader's option.[147] The Advisory Committee's Notes to the 1957 draft of that Rule emphasized the flexibility of the procedure: "the party will lose no rights by failing to move or to include all available grounds in his motion, for he still may assert in his answer or reply any defenses or objections not raised by motion."[148] However, the 1957 draft Rule did not as yet provide for objections to the court's jurisdiction over the person or property of the defendant. When the Revisers added such a provision in 1958 they explained its effect in these words:

> As under Federal Rule 12(b), the pleader is given the option of raising the defense by motion or in the answer, but he waives the the objection by failure to raise it by either method. If raised by motion, it must be joined with the other objections specified in Rule [3211(a)].[149]

Undoubtedly the Revisers intended to emphasize the principle that only one pre-answer motion under Rule 3211 is permissible;[150] therefore, if the defendant wants to raise a jurisdictional objection by a pre-answer motion he must join it with any other objections which he desires to raise in that fashion. However, if he fails to raise the jurisdictional objection by motion he may still plead it as an affirmative defense in his answer. This interpretation accords with the Advisory Committee's views as expressed in 1957 and with the plain wording of Rule 3211(e). Furthermore, it is in harmony with Rule 320 as drafted in 1960. The words "at the time of the appearance" were not contained in the original draft of the Rule, but were inserted in subdivisions (b) and (c) during the final evolution of the CPLR in 1961.[151] According to the Advisory Committee's Notes the added words sought to make it clear that the defendant cannot raise the jurisdictional objections "as an afterthought in his answer or by motion."[152] The insertions were called mere "language changes to clarify meaning."[153] They were not even mentioned among the

146. See Rule 320(b) and (c) quoted *supra* note 57. The phrase "at the time of appearance" was eliminated from subdivision (b) by a 1964 amendment. See text *infra* p. 402.

147. See Rule 3211(e) quoted *supra* note 57.

148. 1 N.Y. Adv. Comm. Rep. 87 (1957).

149. 2 N.Y. Adv. Comm. Rep. 152-53 (1958). Note, however, that Fed. R. Civ. P. 12 (g) requires the pleader to include in the motion all objections "then available to him." On the controversial construction of that Rule see *supra* note 41. See 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3211.05: "[The Advisory Committee] . . . included these objections in Rule 3211(a) and proposed that they be treated in every respect in the same way as the other three enumerated."

150. 1 N.Y. Adv. Comm. Rep. 86-87 (1957).

151. Final N.Y. Adv. Comm. Rep. A-310 (Advance Draft 1961); Sen. Fin. Comm. Rep. (Leg. Doc. No. 15) 280 (1961).

152. Sen. Fin. Comm. Rep. (Leg. Doc. No. 8) 280 (1961).

153. *Ibid.*

more important changes listed in the introductory note to the Advance Draft of the Advisory Committee's Final Report.[154] However, despite its innocuous billing, the change was one of substance and came close to a revival of the special appearance practice; for it required the defendant to voice his jurisdictional objections at the threshold of the litigation when he may not even know whether he has a valid ground for objecting. For example, a defendant who appears by making a corrective motion after service of an incomprehensible complaint may not be able to determine whether he has a jurisdictional objection until he has seen a properly drafted pleading.[155]

For actions *in personam*, the problem posed by Rule 320 was solved by a 1961 amendment which deleted the words "at the time of appearance" from subdivision (b). However, subdivision (c), governing the effect of an appearance in *in rem* actions remains unchanged. There the defendant still must raise the jurisdictional objections "at the time of appearance." As to the timing of these objections there is no sound reason for differentiating between actions *in personam* and actions *in rem*. As already noted, a cautious pleader, who is aware of the uncertain scope of these objections, may wish, in a proper case, to base his objections upon lack of both personal and *in rem* jurisdiction.[156] He should not be plagued by incongruous timing provisions in addition to other difficult procedural problems.[157] Commendably a proposed amendment deleting the words "at the time of appearance" from subdivision (c) has been adopted by the Judicial Conference.[158]

The Conference also considered the problem of a belated assertion of jurisdictional objections. To permit a defendant to raise non-jurisdictional objections and defenses by motion and then, in the event of defeat, to present, for the first time, jurisdictional objections in his answer runs counter to a strong policy favoring their disposition ahead of other defenses and objections. A court should not be placed in a position where it must determine issues going to the merits only to learn later that it had no jurisdiction over the defendant and therefore must dismiss the complaint. Assume, for example, that a defendant in an action on a promissory note has a questionable defense of payment and a solid defense of lack of personal jurisdiction. He might raise the defense of payment by making a motion for accelerated judgment under Rule

154. See Final N.Y. Adv. Comm. Rep. A-112-114. (Advance Draft 1961); Sen. Fin. Comm. Rep. (Leg. Doc. No. 15) 10-13 (1961).

155. Rule 3024. See also 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3211.05, discussing defendant's dilemma under former Rule 320(b) when he was served with a summons without notice.

156. See 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 3211.10, 3211.18-3211.22.

157. The lack of symmetry between Rule 320(b) and (c) frustrates in effect the purpose of the 1964 amendment of Rule 320(b); for the defendant will always strive to keep within the shorter time limitation of subdivision (c) when he combines objections to jurisdiction over his person and over his property.

158. See Rep. N.Y. Judicial Conference to the 1965 Legislature, App. B, 2, Proposal No. 3; see also *id.* at 62. The amendment will become effective on September 1, 1965 unless disapproved by the legislature, N.Y. Judiciary Law § 229.

3211(a)(5).[159] If after trial of the issue of payment under Rule 3211(c) judgment were rendered for the defendant he would never raise the jurisdictional objection.[160] However, if the defendant were unsuccessful he could, after denial of the motion, raise that objection in his answer and have the complaint dismissed. If in our hypothetical case plaintiff thereafter instituted a second action in this or another jurisdiction questions of *res judicata* and estoppel would be presented. Assume that the defendant again pleads payment as a defense. A strong argument could be made that the doctrine of *res judicata* would not preclude a re-litigation of that issue since a decision made by a court without jurisdiction over the defendant is void.[161] Furthermore, the holding *against* the defendant on the issue of payment was unnecessary in view of the eventual dismissal of the action. Thus defendant would get two bites at the proverbial apple unless, by litigating the issue of payment without apprising the court or the opponent of his objection (while he intended to avail himself of the benefit of a favorable determination), he were estopped from resisting plaintiff's reliance on *res judicata*. It is arguable that by his conduct the defendant consented to the exercise of jurisdiction at least with respect to the issue of payment.[162]

One writer, repeating a suggestion which emerged from panel discussions at a recent trial judges' seminar, proposes amendments to Rule 320(b) and (c) which would require jurisdictional objections to be asserted by motion or in the answer "whichever shall occur first."[163] The Judicial Conference found a different solution. It proposed to change the timing provision of Rule 3211(e) by providing that a defendant, who makes a pre-answer motion under Rule 3211 on any ground, waives objections to jurisdiction over his person or property which he has not included in his motion.[164] Thus a recurrence of

159. Rule 3211(c) authorizes the court to order an immediate trial of the issues raised on the motion to dismiss.

160. The judgment, of course, would bar any future claim on the same cause of action and preclude relitigation of the issue of payment under the doctrine of collateral estoppel in a subsequent suit between the parties on a different cause of action. Restatement, Judgments §§ 52, 68 (1942).

161. *E.g.*, Kamp v. Kamp, 59 N.Y. 212, 216 (1874). Restatement, Judgments §§ 5, 6, 14 (1942).

162. See Restatement, Judgments § 18 (1942). *Cf.* Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 Brooklyn L. Rev. 245, 250, 251 (1940).

163. See McLaughlin, *1964 Survey of New York Law, Adjective Law*, 16 Syracuse L. Rev. 419, 423 (1965).

164. See Report of the N.Y. Judicial Conference to the 1965 Legislature, App. B, 4, 5, Proposals Nos. 3 and 6; see also *id.* at 66, 67. The amendments will become effective on September 1, 1965, unless they are disapproved by the 1965 Legislature. N.Y. Judiciary Law § 229. Rule 3211(e), so far as here pertinent would provide:

> Any objection or defense based upon a ground set forth in paragraph one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. . . . A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made . . . at any subsequent time or in a later pleading, if one is permitted. An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no motion under subdivision (a), he does not raise such objection in the responsive pleading . . . .

an inconsistency between Rule 320(b) and (c) and Rule 3211(e) was averted.[165] The amendment would remove the mischief of a defendant's raising objections as an afterthought while it steers clear of any tie-in between his appearance and the timing of jurisdictional objections. A cross-reference in Rule 320 would alert the pleader to the existence of the waiver provisions in Rule 3211(e).[166] The amendment also avoids the problems of statutory construction which have arisen under the corresponding provisions of the Federal Rules of Civil Procedure.[167]

The policy against the belated assertion of jurisdictional objections applies with equal force to defenses in abatement which never enjoyed high favor.[168] A party should not be able to seek the dismissal of a claim on formal grounds after waging an unsuccessful contest on the merits. Hence thought should be given to an amendment which would expand the newly adopted jurisdictional waiver provision to other dilatory pleas enumerated in Rule 3211(a).[169]

2. Balancing Plaintiff's and Defendant's Right to Obtain Disposition of Jurisdictional Objections

Rule 3211(b) provides that a party may move for a judgment dismissing one or more defenses on the ground that a defense is not stated. Practitioners at the present time are using this provision for motions to strike jurisdictional objections in the answer without awaiting the trial of the action. Some cases approved this practice[170] although there is doubt as to whether subdivision (b) applies in that situation.[171] A jurisdictional defense in the answer may cause grave concern to the plaintiff. Unless he can move to dispose of it he would not know whether the court has jurisdiction over the defendant until the case is tried. This may be months or even years after the action is started. There is a serious danger that the cause of action may be barred by the statute of limitations if the court eventually dismisses the complaint for insufficient service.[172] Obviously the interests of plaintiff and defendant in the disposition

165. See text accompanying notes 146, 147, *supra*.

166. See Report of the N.Y. Judicial Conference to the 1965 Legislature, App. B, 1, 2, Proposals Nos. 2 and 3.

167. See *supra* note 41.

168. N.Y. Code Civ. Proc. §§ 488, 495, 498, 499 (1877); N.Y. Civ. Prac. Act § 237. See Clark, Code Pleading, 500, 507 (2d ed. 1947); 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 3211.04, 3211.05.

169. Rule 3211(a)(3)(4)(6) (incapacity, another action pending, counterclaim not properly interposed).

170. Kukoda v. Schneider, 41 Misc. 2d 308, 245 N.Y.S.2d 271 (Sup. Ct. 1963). See also Vazzana v. Horn, 42 Misc. 2d 989, 249 N.Y.S.2d 682 (Sup. Ct. 1964).

171. Rule 3211(a)(7) and (b) was added to the tentative draft in 1961 since the motions were thought often to "perform a valuable function in permitting a party to have a defective pleading dismissed before being required to frame a responsive pleading and perhaps to submit to disclosure proceedings unjustifiably extended by the scope of the defective pleading." Sen. Fin. Comm. Rep. (Leg. Doc. No. 15) 483 (1961). See *id.* at 484; 4 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 3211.39, 3211.42, 3212.02. See also Vazzana v. Horn, *supra* note 170.

172. The danger is ever-present despite Section 205, at least, where the action was dismissed for insufficiency of process or service. See Erickson v. Macy, 236 N.Y. 412, 140 N.E. 938 (1923); Knox v. Beckford, 167 Misc. 200, 3 N.Y.S.2d 718 (Albany City Ct. 1938),

of jurisdictional objections should be fairly balanced. The Judicial Conference has now proposed an amendment to subdivision (b) of Rule 3211 which authorizes a pre-answer motion for judgment dismissing a defense on the ground that "it has no merit."[173] The amendment is broad enough to include jurisdictional objections; it clarifies beyond doubt plaintiff's right to move for disposition of jurisdictional defenses ahead of the trial. It should be noted that on a motion of this kind the court may order immediate trial of any factual issues.[174] In contrast, if after joinder of issue plaintiff moved for summary judgment under Rule 3212 the court under the Rule's present wording would have to deny the motion if any issue of fact other than the amount of the damages required a trial.[175]

3. *Jurisdictional Threshold Motions*

The CPLR has been criticized for its failure to authorize a jurisdictional threshold motion. It has been suggested that the defendant should be permitted, but not required, to raise jurisdictional issues by a motion which may be made before an omnibus motion for an accelerated judgment under Rule 3211.[176] The threshold motion thus has been envisioned as a qualification of the much heralded "one-motion-only" rule which is now in force.[177] Those who oppose the present practice point out that requiring the defendant to assemble all available grounds in the omnibus motion may make his task of preparing and briefing the motion unduly burdensome. If his jurisdictional objections are successful he has wasted his efforts on all of the other grounds on which the motion is based.[178] Nevertheless the arguments favoring a preliminary jurisdictional motion lack persuasive force. If a separate appeal from a denial of the threshold motion were allowed it would seriously weaken the policy against delaying tactics through multiple appeals. On the other hand, to defer an appeal from a denial of the motion until a later omnibus motion has been determined or the time for the motion has expired, would impair the usefulness of the preliminary motion. The defendant would be compelled either to brief the omnibus motion promptly after the threshold motion has been determined and before the jurisdictional objections have been finally adjudicated; or else to forego the threshold motion completely. Moreover, the common characteristic of the various grounds on which the omnibus motion may be based (other than failure to state

aff'd mem., 258 App. Div. 823, 15 N.Y.S.2d 174, *aff'd*, 285 N.Y. 762, 34 N.E.2d 174 (1941). See also 1 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶¶ 205.10, 205.11.

173. See Rep. N.Y. Judicial Conference to the 1965 Legislature, App. B, at 4, Proposal No. 5; see also *id.* at 65. The amendment will become effective on September 1, 1965 unless disapproved by the legislature. See N.Y. Judiciary Law § 229.

174. Rule 3211(c).

175. Rule 3212(b).

176. See Prof. Thornton's summary of discussions at the 1962 Crotonville Conference of Supreme Court Trial Justices, 8 Ann. Rep. N.Y. Judicial Conference 77-79 (1963); McEneney, *Motion Practice Under the CPLR*, 9 Ann. Rep. N.Y. Judicial Conference 186, 193-95 (1964).

177. Rule 3211(e): ". . . no more than one such motion shall be permitted."

178. See Prof. Thornton's report, *supra* note 176.

a cause of action and defect of parties which in any event are non-waivable) is that they are simple and comparatively easy to prove. In fact, defendant should not resort to the motion unless this is the case. Therefore, it should not cast too heavy a burden on the defendant to include all available grounds in his pre-answer motion if he wishes to have them decided before he serves an answer. If he fails to raise them in the omnibus motion he may still include them in the answer and thereafter, in a proper case, move for summary judgment. It is true, however, that, as already noted, present Rule 3212 governing summary judgments does not permit the movant, as does Rule 3211, to ask for an immediate trial of factual issues. Hence an amendment should be considered which would broaden the court's power to order an immediate trial of disputed questions of fact that arise on a motion for summary judgment; at least this should be allowed in the court's discretion whenever this disposition would have been proper, had the defendant made a pre-answer motion under Rule 3211.[179]

C. *Submission to Personal Jurisdiction through Proceeding with the Defense in In Rem Actions*

Finally, by eliminating both the special appearance and the limited appearance the draftsmen of the CPLR have created an interesting problem of procedural mechanics. As already noted, the defendant may appear and raise jurisdictional objections along with defenses to the merits; but he cannot contest the validity of an *in rem* claim and still confine an adverse adjudication to its *in rem* effect.[180] Accordingly, the Revisers had to fix the point in the progress of an action at which the defendant by participating in the litigation submits to personal jurisdiction if his jurisdictional objections are not sustained. The CPLR fixed this point of no return at the moment when defendant "proceeds with the defense."[181] Specifically, Rule 320(c) provides that a defendant in an action based on *in rem* jurisdiction does not submit to personal jurisdiction by his appearance if he asserts an objection to *in personam* or *in rem* jurisdiction by motion or in the answer "unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained." Thus, a defendant who refrains from "proceeding with the defense" may still default if his jurisdictional objection fails, and in that manner confine the judgment to its *in rem* effect.[182]

What then is the meaning of the crucial phrase "proceeds with the defense after asserting the objection to jurisdiction"? The answer, it would seem, is provided by the function of a limited appearance and the purpose of the quoted provision of Rule 320(c). If a limited appearance seeks to avoid conversion

179. It is doubtful whether the court may order an immediate trial of contested issues of fact arising on a motion based on Rule 3211(a)(7) or 3211(b). See Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 3211.51.

180. See text *supra* pp. 387-88.

181. See Homburger, Book Review, New York Civil Practice, Weinstein, Korn, Miller, 112 U. Pa. L. Rev. 1222, 1234 (1964).

182. 4 N.Y. Adv. Comm. Rep. 189 (1960).

of *in rem* jurisdiction into personal jurisdiction by defending the action on the merits,[183] and if Rule 320(c) was enacted for the specific purpose of denying any right to a limited appearance[184] the answer seems to follow readily. Procedural steps taken solely for the purpose of contesting any part of the claim on the merits should be deemed "proceeding with the defense." On the other hand, procedural steps which may serve a purpose unrelated to a contest on the merits should not be so considered. Therefore, service of a notice of appearance after service of a summons without complaint or a demand for change of venue followed by a motion for such change should not be construed as proceeding with the defense since a defendant has the right to take all steps necessary to avoid a default and to have the proper court pass on his jurisdictional objection. Likewise, a defendant who asserted a jurisdictional objection in his answer should be permitted to conduct an examination before trial, file a note of issue and proceed to trial, provided only that he confines these procedural activities to the jurisdictional issue and refrains from contesting plaintiff's claim on the merits. Perhaps the defendant should even be free to assert dilatory pleas which do not go to the merits of the claim, but show that the action is not maintainable, such as lack of legal capacity to sue or pendency of another action. Regardless of the merits of the claim asserted, plaintiff should not be able to force a defendant to submit to personal jurisdiction or to abandon his interest in the *res* by prosecuting an action which is not maintainable.

It should be noted, however, that the Revisers carefully avoid defining the precise meaning of the "limited appearance." They only speak of the question "whether a defendant may make an appearance limited to contesting an *in rem* claim without subjecting himself to personal jurisdiction."[185] Thus they explain the indefinite phrase "proceeding with the defense," used by the Rule, by the equally indefinite phrase "contesting an *in rem* claim." Nor do the Notes inform us whether the mere assertion of non-jurisdictional defenses or objections in a motion or an answer constitutes "proceeding with the defense." Construing the Rule literally it would seem that the mere assertion of the jurisdictional objections in the answer or in a pre-answer motion does not violate the prohibition against the limited appearance since only proceeding with the defense *after* asserting the objections involves submission to personal jurisdiction if the objection is not ultimately sustained.[186] However, it may well be that the oral argument of defenses to the merits raised by a pre-answer motion or the pleading of defenses to the merits in the answer after a pre-

183. See text *supra* p. 388.

184. 4 N.Y. Adv. Comm. Rep. 187-89 (1960). See 1 Weinstein, Korn & Miller, *op. cit. supra* note 2, ¶ 320.18. *But see* Lenhoff, *A New Procedural Code in New York*, 13 Buffalo L. Rev. 119, 128 (1963).

185. 4 N.Y. Adv. Comm. Rep. 187 (1960).

186. N.Y. Rule 320(c) provides that an appearance is not equivalent to personal service of the summons upon the defendant if a jurisdictional objection is asserted "unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained." See *supra* note 57.

answer motion raising jurisdictional objections has been denied constitutes "proceeding with the defense." The matter is not of great practical significance since in most cases the defendant will make the decision whether to run the risk of submission to personal jurisdiction *before* he answer or moves. If he wishes to contain a judgment to its *in rem* aspects he will be well advised to raise his jurisdictional objections by a motion which is limited strictly to that issue. Should he change his mind after denial of the motion he can still proceed with the defense having lost nothing except the opportunity to move again under Rule 3211.

CONCLUSION

Praise is due to the Draftsmen of the CPLR for discarding the special appearance practice with its out-moded technicalities and artificial limitations. No longer does defendant's general appearance in and of itself confer jurisdiction over defendant's person. No longer need he, by a threshold motion, appearing specially for that purpose, raise objections to the court's jurisdiction over his person or property. Following the Federal Rules of Civil Procedure the CPLR has changed fundamentally the concept of the appearance as well as its mechanics. At the new law's core, it seems, lies the principle that by his appearance the defendant gives the court power to determine the question of its own jurisdiction. This is the essence of what is left of the old concept of consent and voluntary submission to jurisdiction implied from the act of appearance. However, the court's power, acquired through the appearance, to adjudicate a dispute over jurisdiction should not be confused with abandonment of jurisdictional objections. Under the new approach the rules governing appearance and the raising of jurisdictional objections have been re-structured so that lack of jurisdiction over defendant's person or property may be pleaded as an affirmative defense in the answer or included in a pre-answer omnibus motion to dismiss the complaint. A waiver of the objection results only from defendant's failure to assert it seasonably in either of these two ways. Under an amendment proposed by the Judicial Conference now pending before the legislature the policy favoring an early disposition of jurisdictional objections would be strengthened. The amendment provides that a defendant who makes a pre-answer omnibus motion based on any ground waives objections to *in personam* or *in rem* jurisdiction that are not included in it. Furthermore, the amendment expressly sanctions plaintiff's right to move before trial for dismissal of a defense without merit (including jurisdictional defenses) that is asserted in defendant's answer.

Technical shortcomings of the present law are due mainly to imperfect integration into the statutory framework of the provisions authorizing an action to be started without service of a complaint. A late policy decision to restore this practice—originally rejected by the Revisers—apparently did not allow enough time to make all necessary conforming changes. What happened serves as an object lesson of the undesirable side effects frequently caused by piece-

meal tampering with the balanced structure of an integrated system. Curative amendments have been proposed by the Judicial Conference.

A flat prohibition against a limited appearance precluding non-residents from a contest on the merits of *in rem* claims without submission to personal jurisdiction found its way into the CPLR without thorough explanation of its background and the important policy decision underlying it. Statutory certainty, beneficial as it may be, may have been bought at a high price. The new rule is out of harmony with the restricted effect of an appearance in actions based on New York's long-armed statute; it stifles the natural growth of the law in an area which has not yet reached the stage of maturity when an informed choice between conflicting policy considerations is possible; and it excludes New York's Bench and Bar from sharing in a pragmatic search for a rule which satisfies theoretical and practical needs and, above all, the claims of justice.