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JURISDICTIONAL DILEMMA OF THE NONRESIDENT DEFENDANT IN NEW YORK—A PROPOSED SOLUTION

LOUIS R. FRUMER and PAUL S. GRAZIANO

WITHIN the framework of a memorandum from Attorney Brown to Attorney Smith, an earlier article in this Review portrayed the dilemma of a nonresident defendant who desires to defend on the merits of a New York action based originally upon in rem jurisdiction without thereby subjecting himself to the in personam jurisdiction of the court. Such a defendant, it was pointed out, is interested in more than a mere special appearance to contest jurisdiction over his person. He wishes to enter a limited appearance, that is, an appearance 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. The right so to appear where the demand for in personam relief is contained in the original complaint was shown to be highly doubtful, and the New York decisions permit an in personam claim to be added by a complaint amended as of course after the defendant has appeared to litigate an in rem demand. Indeed, even the right to relief on a special appearance is in doubt in many of the situations in which the complaint demands both in rem and in personam relief and the defendant desires merely to prevent entry of a judgment in personam without litigating the claim in rem.

Attorney Brown and Attorney Smith continue their discussion of these problems through the mails.

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1. Frumer, Jurisdiction and Limited Appearance in New York: Dilemma of the Nonresident Defendant, 18 Ford. L. Rev. 73 (1949). Reference to this article will hereafter be made as: 18 Ford. L. Rev.
2. Id. at 75-87.
4. 18 Ford. L. Rev. at 75-81.
Smith: I have read your memorandum and, in addition, have done some independent research on the special appearance situation in New York, as exemplified by the recent case of Brainard v. Brainard. I have a few observations in connection with that problem which I should like you to consider. In the Brainard case, as you undoubtedly recall, an action for divorce and alimony was commenced by service of process outside the state pursuant to Section 235 of the Civil Practice Act. The defendant served an answer, asserting therein merely his objection to the court's exercise of jurisdiction over his person on the ground that he, a nonresident, had not been personally served within the state. Plaintiff took the position that service of the answer constituted a general appearance under Section 237 of the Civil Practice Act, thereby resulting in a waiver of all objections to the sufficiency of process. Special Term held that under the circumstances service of the answer did not constitute a general appearance. The Appellate Division reversed, two justices dissenting, and the Court of Appeals affirmed. The majority in the Appellate Division took the view that defendant should have raised his objection to the service of process by motion, appearing specially for that purpose, but did not indicate precisely what motion he should have made. Defendant contended throughout that there was no motion available to him. He could not have moved to vacate service of process since service was sufficient to give the court jurisdiction to determine the marital status. Nor, he contended, could he have moved for judgment under subdivision 1 of Rule 107 of the Rules of Civil Practice since the in personam demand for alimony, custody, and counsel fee did not constitute a separate cause of action for purposes of that rule.

In your memorandum, as I read it, the only serious objection mentioned by you to Brainard's use of Rule 107 was, as he contended, the

6. The Court of Appeals answered the questions certified but wrote no opinion.
7. The leading case is probably Jackson v. Jackson, 290 N. Y. 512, 49 N. E. 2d 988 (1943). Plaintiff commenced an action for a separation and for invalidation of a separation agreement by serving her nonresident husband personally without the state pursuant to an order. He appeared specially and moved to vacate the service of process. The Court of Appeals held that since the demand for annulment of the separation agreement did not affect the court's jurisdiction in rem over the separation cause the motion to vacate service had been properly denied.
8. The relevant portion of Rule 107 provides: "After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and an affidavit tending to show:
   "1. That the court has not jurisdiction of the person of the defendant."
restriction imposed therein by use of the words "causes of action." I am
led to believe that another, perhaps equally serious, objection may exist
against moving under the first subdivision of that rule. Historically,
the objection "That the court has not jurisdiction of the person of the
defendant" did not apply and was never intended to apply to a situation
where the objection was based upon the insufficiency of process or its
service, but rather to a case where the defendant was challenging the
jurisdiction of the court over his person on the ground that he was a
person not subject to such jurisdiction.

An analysis of the cases interpreting the pertinent provisions of the
Code of Civil Procedure, the Civil Practice Act and the Rules of Civil
Practice, may serve to explain my position. Section 421 of the Code of Civil Procedure provided that serving a
copy of a demurrer constituted a general appearance. Yet Section 488,
predecessor to Rule 106 of the Rules of Civil Practice, provided, in
relevant part, that

"The defendant may demur to the complaint, where one or more of the
following objections thereto appear upon the face thereof:
1. That the court has no jurisdiction of the person of the defendant."

And Section 498, predecessor to Rule 107 of the Rules of Civil Practice,
provided:

"Where any of the matters enumerated in section 488 of this act as grounds
demurrer, do not appear on the face of the complaint, the objection may
be taken by answer."

In other words, an objection to the court's jurisdiction of the person
of the defendant could be raised by demurrer under Section 488 if the
objection appeared upon the face of the complaint, or by answer under
Section 498 if the objection did not appear upon the face of the com-
plaint. But under Section 421 service of a demurrer or of an answer
constituted a general appearance, an appearance generally held to effect
a waiver of an objection to jurisdiction of the person.

9. 18 Ford L. Rev. at 75-81.
10. For a statement of the steps in the development of the New York Code of Pro-
cedure, see Coe and Morse, Chronology of the Development of the David Dudley Field
11. Service of an answer or of a notice of appearance also constituted a general
appearance.
12. Similarly, it has been held that the objections contained in Rule 107 may be taken
by answer instead of by motion, at the option of the defendant. Gentilala v. Fay Taxi-
cabs, Inc., 214 App. Div. 255, 257, 212 N. Y. Supp. 101, 104 (1st Dep't 1925), rev'd on
other grounds, 243 N. Y. 397, 153 N. E. 848 (1926); Rothschild, New York Civil Practice
13. See the leading case of Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884 (1894), as
well as the more recent Brainard case.
The apparent conflict between the foregoing provisions of the Code of Civil Procedure and the cases holding that a general appearance waived an objection to the court's jurisdiction of the person of the defendant can be resolved only by noting the construction early placed by the New York courts on the words "jurisdiction of the person of the defendant" as used expressly in Code Section 488 and by reference in Section 498.

 Probably the leading case construing those demurrer provisions is Nones v. Hope Mutual Life Insurance Co. The defendant, a Connecticut corporation doing business in New York, served a notice of appearance and of retainer of an attorney and then filed an answer, alleging therein that the court had no jurisdiction of its person because process had not been served upon it in the manner required by Section 135 of the Code of Procedure, namely, by publication. The court held that defendant, by its general appearance, had waived its objection to the manner in which process had been served. In arriving at its decision the court construed the words "jurisdiction of the person of the defendant" contained in Section 147 of the Code of Procedure (predecessor to Section 498, Code of Civil Procedure, and, eventually, to Rule 107, Rules of Civil Practice) as follows:

"It will be observed that the answer is founded upon that section of the Code which provides that when the court has no jurisdiction of the person of the defendant, the objection may be taken by answer, but the objection taken here is not that the court has no jurisdiction of the person of the defendant, but that the defendant had been irregularly served. . . . The meaning of the clause 'that the court has no jurisdiction of the person' is, that the person is not subject to the jurisdiction of the court, and not that the suit has not been regularly commenced. If the suit has not been regularly commenced, the defendant must relieve himself from such irregularity by motion."

That distinction was often emphasized, but several cases, of which Hamburger v. Baker is probably the outstanding example, failed to

14. As well as, formerly, of the provisions in the Code of Procedure (compare §§ 130 and 139 with §§ 144 and 147), and of the modern practice provisions (compare § 237 of the Civil Practice Act with §§ 277-283 of the Act and Rules 106 and 107 of the Rules of Civil Practice).
15. 5 How. Pr. 96 (N. Y. Sup. Ct. 1850).
16. Id. at 98.
18. 35 Hun 455 (N. Y. Gen. Term 1st Dep't 1885).
In that case a summons was served upon the nonresident defendant in Virginia. He answered, setting forth his objection to the court's jurisdiction over his person on the ground that he was a nonresident who had no property in New York and who had not been served within the state. He then set forth several defenses to the merits. The lower court held that service of the answer constituted a general appearance and a waiver of the objection to regularity of service, but General Term for the First Department reversed, saying:

"This answer he had the right to make, for if the facts were as they were alleged, then the court had no jurisdiction over his person and acquired none by the service of the summons over him... And where that may be the fact, and it does not appear from the complaint itself, it may be relied upon as a defense by way of answer. (Code Civil Pro., § 488, sub. 1; § 498)"

That decision plagued the courts, which alternately followed, disapproved, distinguished, or ignored it. There is, in my opinion, no support for the result reached in the Hamburger case. The court simply lost sight of the fact that Sections 488 and 498 of the Code of Civil Procedure were never intended to cover objections to jurisdiction of the person which were based upon the insufficiency of process or its service. Section 424 of the Code expressly provided that "A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him." Furthermore, it was early held that a defendant could relieve himself of an irregularity in process by motion only.

You may ask: When could Code Section 488 be properly applied? A good example is Mallin v. Royal Petticoat Co. The complaint, in a county court action for breach of a contract of employment, alleged that defendant was a domestic corporation but did not allege the other

22. See the lower court opinion in Reed v. Chilson, affirmed and set forth in full in 16 N. Y. Supp. 745 (Gen. Term 5th Dep't 1891), aff'd, 142 N. Y. 152, 36 N. E. 884 (1894).
required jurisdictional facts. Defendant demurred on the ground that it did not appear from the face of the complaint that the court had jurisdiction of the defendant and of the subject of the action. Plaintiff moved for judgment on the pleadings, contending that service of the demurrer constituted a general appearance under Section 421 of the Code of Civil Procedure, and that, under Meyers v. American Locomotive Co., such an appearance resulted in a waiver of the essential jurisdictional allegations. The court denied plaintiff's motion and sustained the demurrer, saying:

"But in the case of Meyers v. Am. Locomotive Co. the objection of the jurisdictional facts [residence of the defendant] was waived by appearing and answering upon the merits, without raising it. . . .

". . . To hold that when by demurrer you attack the jurisdiction of the court you at the same time waive your rights under the same is inconsistent with all the canons of logic."20

With respect to Code Section 498 (and its modern counterpart, Rule 107), they are properly invoked, say the authorities, where, for example, the defendant is a foreign executor or administrator, and there are no estate assets within the jurisdiction, or is a foreign corporation not doing business within the state.

To sum up, then, it appears that under the Codes a defendant who was seeking to raise the objection that the court was without jurisdiction over his person could in the first instance do so in one of three ways,

28. 201 N. Y. 163, 94 N. E. 605 (1911).
30. E.g., 3 Carmody, New York Practice 2248 (2d ed. 1931); Webb, Elements of Practice 101 (1926).
31. Helme v. Buckelew, 229 N. Y. 363, 128 N. E. 216 (1920); cf. Belden v. Wilkinson, 44 App. Div. 420, 60 N. Y. Supp. 1083 (1st Dep't 1899). "Jurisdiction over the person in such cases as suits against foreign administrators, executors, and trustees, approaches jurisdiction of the subject matter but falls considerably short." 1 Moore, Federal Practice 663 n. 6 (1938). See also the very recent case of Leighton v. Roper, 300 N. Y. 434, 91 N. E. 2d 876 (1950). While it is true that the general rule as to a foreign executor or administrator is that he may neither sue nor be sued within our courts (Helme v. Buckelew, supra, at 365-366), it has been held that the rule is not applicable to a foreign testamentary trustee who is a resident of New York. Squier v. Houghton, 131 Misc. 129, 226 N. Y. Supp. 162 (Sup. Ct. 1927); see Braman v. Braman, 236 App. Div. 164, 168, 258 N. Y. Supp. 181, 186 (1st Dep't 1932).
34. Where a motion objecting to the court's jurisdiction has been denied, he may
depending upon the basis of his objection. If his attack was to the sufficiency of process or its service, his sole weapon was a *motion*. Where, however, the ground of his objection was that he was a person not subject to the jurisdiction of the court, the objection could be raised by *demurrer* if it appeared upon the face of the complaint, or by *answer* if it did not appear upon the face of the complaint.

Results under the Civil Practice Act and Rules of Civil Practice have been decidedly more uniform than those reached under the Codes, but not without some judicial legislation. Section 237 of the Civil Practice Act provides that serving upon plaintiff's attorney a copy of "a notice of motion raising an objection to the complaint in point of law" (substitute for the *demurrer*) is one of the methods by which the defendant may appear. A motion under Rule 106 or Rule 107 raises just such an objection. It should follow, therefore, that a motion under either of those rules constitutes a general appearance—and it does—with one case-made exception: a motion under subdivision 1 of either rule, provided the defendant makes the motion on a special appearance.

The reason why the courts have had to impose the special appearance restriction upon motions made under the first subdivision of Rules 106 and 107 is easily explained. Section 237, as just noted, provides, first, that serving a copy of a notice of motion raising an objection to the complaint in point of law (that is, motions under Rules 106 and 107) constitutes a general appearance, and then provides that "A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him." Once the courts failed to draw the distinction between objections to the court's jurisdiction of the person based upon

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35. N.Y. CIV. PRACT. ACT § 277; Shipley v. Schmitzer, 224 App. Div. 730, 229 N.Y. Supp. 915 (1st Dep't 1928); Medina, Pleading & Practice under the New York Civil Practice Act 77 (1922); see Clark, Code Pleading 538 and n. 135 (2d ed. 1947).


37. Ibid.; 3 Carmody, New York Practice 2251 (2d ed. 1931). Permitting objections to process to be raised under Rule 107 has caused some difficulty on the question of waiver by failure to move within the time specified therein. Maloney v. Ferguson, 182 Misc. 564, 566, 50 N.Y.S. 2d 937, 938 (Sup. Ct. 1943).
the insufficiency of process or its service and those based upon the ground that the defendant was a person not subject to the jurisdiction of the court—and permitted objections to process to be raised by motion under subdivision 1 of Rule 107—they were faced with the problem of preventing the application of Section 237. The problem was solved by requiring an objection under that subdivision to be raised by motion, with the defendant appearing specially. Once that requirement was imposed upon objections to process, it was a short step towards holding that a special appearance was required in all cases where subdivision 1 was sought to be invoked.

I do not mean to convey the impression that the distinction raised and recognized under the Codes may not be raised and recognized in the future. On the contrary, the plaintiff in the Brainard case raised that very point in her brief to the Court of Appeals. Personally, I see no good reason for distinguishing between the grounds upon which jurisdiction of the person may be challenged.

BROWN: There is ample authority to support your position. I did not go into this aspect of the special appearance problem in my memorandum primarily because I was more concerned with the limited than with the special appearance. This distinction as to the manner in which objection is to be made to the court’s jurisdiction over the person cannot

38. Since noting an appearance to be special for the sole purpose of contesting jurisdiction over the person is sufficient to prevent the application of § 237 of the Civil Practice Act where a motion for judgment is concerned, why it not be said that a similar result will follow from the service of an answer which notes the appearance to be special and does no more than challenge the court’s jurisdiction of the person of the defendant.

39. Montgomery v. East Ridgelawn Cemetery, 182 Misc. 562, 44 N. Y. S. 2d 295 (Sup. Ct. 1943), aff’d without opinion, 268 App. Div. 857, 50 N. Y. S. 2d 843 (1st Dep’t 1944) (defendant foreign corporation held to have waived its objection to lack of jurisdiction on the ground that it was not doing business within the state by seeking dismissal at the same time on ground that plaintiff lacked capacity to sue); cf. Rothschild v. Mendel, 64 N. Y. S. 2d 617 (Sup. Ct. 1946) (defendant foreign corporation, contending that it was not doing business within the state, held to have made a special appearance and thus preserved its jurisdictional objection); 3 Carnwath, New York Practice 2251 (2d ed. 1931). Contra: Auto Dealers Discount Corp. v. Santoro, 170 Misc. 635, 11 N. Y. S. 2d 10 (County Ct. 1939) (defendant allowed to raise question of jurisdiction by denial in his answer of allegation that he was a resident of Nassau County and by affirmative defense of lack of jurisdiction); cf. Davidoff v. Roger Wurmser, Inc., 27 N. Y. S. 2d 555 (County Ct. 1941), aff’d mem., 261 App. Div. 1087, 27 N. Y. S. 2d 558 (2d Dep’t 1941) (service of answer without raising therein plaintiff’s failure to allege residence of defendant within the county held to constitute a waiver of the objection).

be summarily dismissed despite the fact that, as you note, it has for
the most part been ignored by the cases decided under Rule 107.41
I agree that there is no basis, other than historical, for attempting to
distinguish between types of jurisdiction over the person. Lawyers
simply do not think in terms of such a distinction. Courts and text
writers alike have used the term “jurisdiction over the person” to include
defects in process and service of process.42 From a constitutional aspect
defects in process and its service relate to the problem of acquisition
of jurisdiction over the person of the defendant. If a non-domiciliary
of New York is served outside of the state the court does not thereby
acquire jurisdiction over his person. Similarly, the court does not obtain
jurisdiction over a foreign corporation not doing business in the state
even if an officer of the corporation should be served within the state.
In each instance the inquiry is whether the court may enter an in per-
sonam judgment against the defendant, and the procedure should
be uniform whereby a defendant may object to a court’s exercise of in
personam jurisdiction, regardless of the basis for that objection. Such
a uniform procedure is achieved under Rule 12(b) of the Federal Rules
of Civil Procedure which provides in part that

“... the following defenses may at the option of the pleader be made by
motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdic-
tion over the person, (3) improper venue, (4) insufficiency of process, (5) in-
sufficiency of service of process, (6) failure to state a claim upon which relief
can be granted, (7) failure to join an indispensable party...”

It is probable however that Rule 12(b) was so phrased as to eliminate
any possibility that the term “jurisdiction over the person” would be
held not to include defects in process and its service.

The problem of the special appearance in New York has been studied
by the New York Judicial Council and it has recommended enactment
of a bill which would abolish any possible distinction as to types of

41. See note 39 supra. CANNON’S MANUAL OF NEW YORK CIVIL PRACTICE (Carr, Finn
& Saxe 3d ed. 1946), referring to a motion under Rule 105 for defect appearing on the
face of the complaint, notes: “A void service of the summons would not illustrate a case
under this subdivision. In such a case, although the court gets no jurisdiction over the
person of the defendant, that fact would not appear on the face of the complaint.” Id.
at 259. And, referring to a motion under Rule 107 on the ground that the court has not
jurisdiction of the person of the defendant, “Such objection is usually waived by answer-
ing, so that defendant’s only remedy is by a proper motion, appearing specially.” Id.
at 271.

42. E.g., Orange Theater Corp. v. Rayberitz Amusement Corp., 139 F. 2d 871 (3d Cir.
1944), cert. denied, 322 U. S. 740 (1944); STULBERG, CONFLICT OF LAWS 69 et seq. (1937);
RESTATEMENT, CONFLICT OF LAWS §§ 47, 74 et seq. (1934).
section 237-a would be added to the Civil Practice Act:

"§ 237-a. Defendant’s special appearance. 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court’s jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, 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 that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

"2. An objection to the court’s jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objecting to the court’s jurisdiction over the subject matter.

"3. Where the court has no jurisdiction over any cause of action stated in the complaint, the court shall order the service of process set aside. Where, however, process and its service are sufficient to give the court jurisdiction over one or more of the causes of action stated in the complaint, the court shall order struck out of the complaint such part of it, including all or part of a prayer for relief, as is beyond the court’s jurisdiction, in which case the complaint will be deemed amended accordingly, or the court may order an amended complaint to be served.

"4. After a motion made pursuant to this section has been denied, the objection to the court’s jurisdiction over the person of the defendant may be set forth as a defense in the answer and the defendant may litigate the action on the merits without being deemed to have waived his objection to the court’s jurisdiction over his person.

"5. A notice of the motion made pursuant to this section, if served within twenty days after service of the complaint and made returnable within ten days thereafter, or, if there be no sitting of court within ten days, then for the first term or sitting of court thereafter at which the motion can be heard, shall operate to stay all further proceedings in the action until the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof; provided, however, that the court may in its discretion vacate or modify the stay on motion made upon notice to the opposing party."

43. SIXTEENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 185, 189 (1950). As ancillary to the recommended new § 237-a, it was proposed that, for correlation purposes, subdivision 1 of Rules 106 and 107 be deleted, and § 257 of the Civil Practice Act be amended to permit a defendant to demand a copy of the complaint without having made “either a general or a special appearance,” thus overcoming the holding of Muslisky v. Lehigh Valley Coal Co., 225 N. Y. 584, 122 N. E. 461 (1919). See Lisle v. Palmer, 29 N. Y. S. 2d 975 (Sup. Ct. 1941), aff’d without opinion, 263 App. Div. 720, 30 N. Y. S. 2d 1021 (2d Dep’t 1941), and the Council’s report at 191, 195, 213-17.
The Judicial Council bill does not go so far as Federal Rule 12(b), which eliminates the idea of waiver by joinder of defenses to the merits: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." The defendant may raise the defenses listed in Rule 12(b) either by motion or by answer. The need for a special appearance to object to jurisdiction over the person is thus eliminated but such an objection may be waived by first proceeding on the merits. "If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express provisions of paragraph (h) of Civil Procedure Rule 12 to be treated as waived, not because of defendant's voluntary appearance, but because of his failure to assert the defense within the time prescribed by statute."

The defenses specified in Rule 12(b), whether raised by motion or answer, ordinarily are to be heard and determined in advance of trial on application of any party. The court may however, under subdivision (d) of Rule 12, order that the hearing and determination be deferred until the trial. If the objection, whether raised by motion or answer, be overruled, the defendant may litigate the merits without waiver of his right to appeal after final judgment on the jurisdictional ground. The jurisdictional defense need not be reiterated in the answer if it has been raised by

44. Under Federal Rule 12(g), "... If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule." Under subdivision (h), "A party waives all defenses and objections which he does not present either by motion ... or, if he has made no motion, in his answer or reply, except ..." the defenses of failure to state a claim upon which relief can be granted, failure to join an indispensable party, failure to state a legal defense to a claim, and the objection of lack of jurisdiction of the subject matter.

45. Orange Theater Corp. v. Rayherstz Amusement Corp., 139 F. 2d 871 (3d Cir. 1944), cert. denied, 322 U. S. 740 (1944); 2 Moore's Federal Practice 2260 et seq. (2d ed. 1948).

46. Orange Theater Corp. v. Rayherstz Amusement Corp., supra note 45, at 874.

47. The application is made under subdivision (d) of Federal Rule 12.

48. Molesphini v. Bruno, 26 F. Supp. 595 (E. D. N. Y. 1939). Professor Moore notes that "An objection as to lack of jurisdiction of the person, improper venue, insufficient process, or insufficient service of process having been raised by motion and disposed of adversely to the moving party, the ruling becomes the law of the case and hence normally the issue should not be reopened again by motion or at the trial, but should be reserved for the appellate court on appeal from a final judgment." 2 Moore's Federal Practice 2266 (2d ed. 1948). But he also points out: "Law of the case does not, however, have the inexorable effect of res judicata and does not preclude the court from reconsidering an earlier ruling if the court feels that the ruling was probably erroneous and more harm would be done by adhering to the earlier rule than from the delay incident to a reconsideration and the possible change in the rule of law to be applied." Id. at 2266 n. 11.
motion in order to preserve the point for appeal. There is authority, however, that a motion to strike will not be granted if the objection is set up in the answer after denial of a motion, even though such reiteration serves no purpose.

The Judicial Council bill does contain the provision, in subdivision 2, that an objection to jurisdiction over the person is not waived by joinder of a motion objecting to the court's jurisdiction over the subject matter. To that extent the present rule in New York that under a special appearance a defendant can do nothing but challenge jurisdiction over his person would be modified. Certainly, "No sound reason appears why a litigant should not be able to obtain a ruling of a trial court upon both jurisdictional questions." Strong argument can be made for the proposition that disposal should be made of jurisdictional objections before defendant is permitted to take any action on the merits. The difficulty I find with this position however is that it leads to piecemeal disposition of the case, and, in a state such as New York, the further delay caused by separate appeals.

The fact remains however that the Judicial Council bill is a good bill as far as it goes and it would appear to be highly desirable that it be enacted into law.

Smith: The Judicial Council bill does seem to be a step in the right direction. True, recommended new Section 237-a does not go so far as Federal Rule 12, but to adopt that rule in New York would necessitate a considerable modification of its present motion practice. It might, however, be desirable to adopt so much of the federal rule as eliminates the idea of waiver simply because objections to jurisdiction are joined with objections to the merits. A provision could then be included similar to subdivision (d) of Federal Rule 12 to the effect that the jurisdictional defenses "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." In support of the Council recommendation as it now stands it might be noted that it apparently seeks to clarify and improve without effecting any radical change in the fundamental special appearance concepts generally familiar to the New York bar.

52. Note, Practice: Objection to Jurisdiction Over the Person and the Subject Matter, 30 CALIF. L. REV. 690, 692 (1942).
Incidentally, the Council bill does not seem to affect the limited appearance situation. Did the Council make any attempt to deal with the limited appearance?

BROWN: No, the Council merely took cognizance of the problem. As to addition of an in personam claim after defendant has appeared to litigate a claim in rem, the study notes that:

"Where the original complaint against such a defendant [a nonresident defendant who has been served with process outside the state] states only an in rem claim, a general appearance to contest that claim on the merits will probably subject the defendant to an in personam claim should such a claim be alleged in a complaint amended as of course."\(^{33}\)

A recent case in this connection is *Wajtman v. Brooklyn Eastern District Terminal*.\(^{54}\) In an action for personal injuries against the Brooklyn Eastern District Terminal, defendant attempted to implead the Wheeling & Lake Erie Railway Company as a third-party defendant under Section 193-a of the New York Civil Practice Act.\(^{55}\) Service of the summons was vacated on the grounds (1) that the Wheeling Company was not doing business in New York and (2) that the attempted service was not made upon a proper person.\(^{56}\) The third-party plaintiff then attached property of the Wheeling Company in New York, serving the summons and complaint in Ohio.\(^{57}\) The Wheeling Company appeared after the attachment in the third-party “action brought against it by the Brooklyn Eastern District Terminal,” serving an answer to the third-party complaint. The original plaintiff then moved for leave to serve an amended complaint for the purpose of making the Wheeling Company a defendant in the main action.\(^{58}\) The motion was denied by Mr. Justice Fennelly:

55. The relevant portion of § 193-a provides: “1. After the service of his answer, a defendant may bring in a person not a party in the action, who is or may be liable to him for all or part of the plaintiff’s claim against him, by serving as a third-party plaintiff upon such person a summons and copy of a verified complaint.”
57. The Wheeling Company does not appear to have made any attempt to vacate the attachment. There perhaps might be some question whether an attachment may be had in a “liability over” situation. *Cf. Zenith Bathing Pavilion, Inc. v. Fair Oaks Steamship Corp.*, 240 N. Y. 307, 148 N. E. 532 (1925).
58. Under subdivision 3 of § 193-a of the New York Civil Practice Act, “The plaintiff may amend his pleading to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant, had he been joined
“Since plaintiff could not have joined this third party defendant originally in the action because of jurisdictional limitations, he should not now be permitted to accomplish indirectly that which he could not do directly.”

Despite the contention of the third-party defendant that it had entered an appearance limited to the third-party complaint, the Appellate Division for the Second Department per curiam granted the original plaintiff leave to serve the amended complaint. “... respondent, by appearing and filing its answer to the third-party complaint, appeared in this action” and “subjected itself to the jurisdiction of the court. ...” This holding, just as that in Mendoza v. Mendoza, raises serious constitutional questions.

It must be conceded that the results reached in the Mendoza and Wajtman cases might be the same under the Federal Rules of Civil Procedure. A similar problem arises in interpleader proceedings if the court originally as a defendant.” Although leave of court would appear to be required for such an amendment except where it may be made as of course (see N. Y. Civ. Prac. Act § 244), from a pleading standpoint there would not appear to be any discretion in the court as to whether the amendment will be allowed, at least, that is, where the claim is the same as that asserted against the original defendant. Twelfth Annual Report of the New York Judicial Council 212 (1946). See 18 Ford. L. Rev. at 90.

60. “The respondent herein, having had its property tied up with an attachment, was obliged to appear and did appear, according to its notice of appearance, only in the third party 'action brought against it by the Brooklyn Eastern District Terminal,' and served an answer to that third party complaint.” Brief for Appellee, p. 3, Wajtman v. Brooklyn Eastern District Terminal, 276 App. Div. 853 (2d Dep't 1949).
62. 77 N. Y. S. 2d 169 (Sup. Ct. 1947), aff’d without opinion, 273 App Div. 877, 77 N. Y. S. 2d 264 (1st Dep’t 1948), appeal dismissed mem., 297 N. Y. 950, 80 N. E. 2d 347 (1948). An action for annulment was commenced against a nonresident, process being served by publication. Defendant moved to dismiss the complaint, thereby making a general appearance under § 237 of the New York Civil Practice Act. Plaintiff then served upon defendant’s attorney a complaint amended as of course, containing a new and independent claim for $20,000 alleged to have been fraudulently obtained from her by defendant and his father. The court denied defendant’s motion to strike this new cause of action on the ground that it possessed no discretion as to an amendment made as of course, and that such amendments may add new and additional causes of action.
63. See 18 Ford. L. Rev. at 89-93. The Wajtman case appears to go even further than Mendoza in so far as it allows an additional party to assert a claim directly against a nonresident defendant. It is more limited however in so far as the nature of the claim is concerned. Cf. Ex Parte Indiana Transportation Co., 244 U. S. 456 (1917).
64. Federal Rule 5(a) requires every pleading subsequent to the original complaint to be served upon each of the parties affected but under Rule 5(b), “Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court.” Professor Moore suggests that “It is quite likely that the summons issued
is acting on the basis of in rem jurisdiction, or if there has been nationwide service under the Federal Interpleader Act. A recent case in that field supports to a certain extent the Wajtman holding. In a proceeding apparently under the Federal Interpleader Act, the stakeholder sought to have determined conflicting claims to a deposit made on the purchase price of certain property. After appearance by the nonresident defendant claimants, the court permitted the filing of a cross-claim for specific performance of the same contract, basing its holding upon Federal Rule 13(g) relating to cross-claims.\footnote{Upon the filing of the original complaint and served at the institution of the action is sufficient \textit{process} to embrace all other claims for relief which may be asserted in subsequent pleadings,\textsuperscript{65} citing Adam v. Saenger, 303 U. S. 59 (1938). 2 Moore's \textit{Federal Practice} 1309 n. 2 (2d ed. 1948). But \textit{Adam v. Saenger} involved service of a counterclaim on the attorney of a nonresident plaintiff, a party who had invoked the jurisdiction of the court. That situation is the same as where defendant affirmatively invokes the jurisdiction of the court by filing a counterclaim. Merchants Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286 (1907); Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947). Freeman v. Bee Machine Co., 319 U. S. 448 (1943), must be placed in the latter category. Plaintiff, a Massachusetts corporation, instituted an action for breach of contract against an Ohio resident in a Massachusetts state court. Defendant was personally served while temporarily in Massachusetts. The action was removed to the federal court where defendant appeared generally, \textit{filed a counterclaim}, and moved for summary judgment. Plaintiff then moved for leave to amend its complaint to add a claim for treble damages under the Clayton Act, a claim within the exclusive jurisdiction of the federal courts. Attack upon the amendment centered upon the question, one of jurisdiction over the subject matter, whether in a removed action a claim may be added by amendment which would not have been within the jurisdiction of the state court, and the related problem of venue as to the new claim. Defendant's petition for certiorari stated: "The only question presented is whether a plaintiff may amend his complaint in a removed action so as to state a new and independent cause of action against the defendant which would be outside the state court's jurisdiction." Id. at 453 n. 8. Discussing that question, the problem of service of process was argued in the briefs but the majority opinion disposed of that aspect by merely stating "Process is of course a different matter. But under the Rules of Civil Procedure service of an amended complaint may be made upon the attorney, the procedure which apparently was followed here," citing Adam v. Saenger, supra, and Federal Rule 5. Id. at 455. The dissent did not even mention the problem of service.\textsuperscript{65} "Claimants . . . assert, however, that being residents of the State of Illinois, they have entered a limited appearance in this interpleader action in which they have been made parties and are not subject to the jurisdiction of this Court for any other purpose. An answer thereto is, that a Court in interpleader actions acquires general jurisdiction of the subject-matter and of the parties," Bank of Neosho v. Colcord, 8 F. R. D. 621, 624 (W. D. Mo. 1949); cf. Coastal Air Lines, Inc. v. Dockery, 150 F. 2d 874 (8th Cir. 1950); Hagan v. Central Avenue Dairy, Inc., 150 F. 2d 502 (9th Cir. 1950); Stitzel-Weller Distillery, Inc. v. Norman, 39 F. Supp. 182 (W. D. Ky. 1941). In the Hagan case, supra, the court by way of dictum stated that Bank of Neosho v. Colcord "gave broader scope to Rule 13(g) than we think proper." 180 F. 2d at 504 n. 6. For a splendid discussion of the jurisdictional problems involved in adding new claims in interpleader, see Professor Chafee's articles: Chafee, \textit{Broadening the Second Stage of Interpleader}, 56 Harvard L. Rev.}
Obviously, if the third-party defendant in the Wajtman case had been permitted to make a limited appearance after attachment of its property, either as to the property attached in the first instance or to the third-party claim, the plaintiff could not have amended his complaint to assert a claim directly against it.\footnote{66}

As to the limited appearance where the complaint requests in rem and in personam relief (as is true in substance where jurisdiction is based solely upon an attachment), the Judicial Council noted:

"If that motion [referring to a motion on special appearance under the proposed Section 237-a] is granted the defendant could probably not thereafter safely litigate on the merits the remaining cause or causes of action. To permit him to do so would be to place him in a better position than that occupied by a defendant against whom only an in rem claim is made in the original complaint but who is later subjected to an in personam claim in the amended complaint."\footnote{67}

It is true that it would not be logical to grant the right of limited appearance merely where the complaint originally requests both in rem and in personam relief, for to do so would be to place such a defendant in a better position than a defendant against whom only an in rem claim is asserted in the original complaint. While the situation of an in personam claim added in an amended complaint is perhaps more troublesome than an in personam claim contained in an original complaint,\footnote{68} the right of limited appearance should be available in both instances.

The Judicial Council study continues:

"Another, perhaps more cogent, reason exists for denying a defendant the right to defend on the merits after his motion made on a special appearance has been sustained. Traditionally, a special appearance has been permitted for the sole purpose of objecting, by motion, to the court's exercise of jurisdiction over defendant's person. Only after the motion has been denied has the defendant been, as he still is, permitted to defend the action on the merits without waiving the jurisdictional objection previously raised by him."

\footnote{541 (1943); Chafee, Broadening the Second Stage of Federal Interpleader, 56 Harv. L. Rev. 929 (1943).}  
\footnote{67. Sixteenth Annual Report of the New York Judicial Council 185, 192 (1950). The Judicial Council footnote to the statement of this latter situation (p. 191 n. 1) cites the Mendoza case and then makes reference to Frumer, supra note 1, at 88 et seq. for an analysis of the problems involved in the Mendoza and related cases.}  
\footnote{68. 18 Ford. L. Rev. at 95.}
"Permitting a defendant to litigate the cause or causes of action remaining after his motion made on a special appearance has been granted would be permitting him to make not only a special but also a limited appearance in the action. The limited appearance, however, has apparently not been sanctioned by the New York courts. Whether or not a defendant should be permitted to make such an appearance involves, in some instances at any rate (for example, matrimonial actions), such serious considerations of public policy that this aspect of the problem is not dealt with at this time."

Of course serious policy considerations are involved in allowing a defendant to make a limited appearance in proceedings such as matrimonial actions; and, concededly, the limited appearance does go beyond the scope of the traditional special appearance. The limited appearance cannot be blindly accepted for all situations, but a study of the problem certainly is to be desired.

I might also note that the Judicial Council study appears to question my interpretation of Zeide v. Flexser and Paprin v. Bitker cases which I considered as permitting a limited appearance in New York.

Smith: Your reference to Zeide v. Flexser and Paprin v. Bitker has prompted me to re-read those cases. It seems to me that they are not authority for permitting a limited appearance. The Zeide case was an action for the reasonable value of services and disbursements, money loaned, and to set aside the fraudulent conveyance of property situated in New York. The court denied defendant's motion to vacate service by publication because such service was sufficient to confer in rem jurisdiction upon the court, that is, the fraudulent conveyance might be set aside without entry of a personal judgment against the defendant. The Paprin case was an action for specific performance with an alternate prayer for money damages. Defendant served a notice of special appearance solely to contest jurisdiction of his person, but made no motion. Plaintiff moved to strike defendant's special appearance. The court pro-
ceeded on the theory that defendant had moved to vacate service of the summons and then granted plaintiff's motion on the ground that service without the state had been sufficient to confer jurisdiction as to the in rem cause, that is, for specific performance.

In both cases, it is true, the court granted to the defendant "leave . . . to serve an answer, reserving, however, his right to object to the jurisdiction of this court in respect to any judgment in personam." But my understanding is that under New York law after a motion raising an objection to jurisdiction over the person has been denied, the defendant may proceed on the merits without waiving his jurisdictional objection. If that is so, the mere fact that the court in each case expressly permitted the defendant to litigate the merits while reserving his right to object to the court's jurisdiction to grant in personam relief would seem to have no special significance.

The true case of permitting the defendant to make a limited appearance would seem to be one where the defendant's motion objecting to personal jurisdiction is granted and the defendant is, nevertheless, permitted to come in and litigate the in rem portion of the action on the merits. Such was not the fact in either the Zeide or Paprin case. In both, defendants moved (or, as in Paprin, the defendant was treated as having moved) to vacate the service of the summons and their motions were denied on the ground that service had been sufficient to confer in rem jurisdiction. There seems to be ample support for the position that the courts could not under the circumstances have done other than to deny the motions to vacate.

The Wajtman case is most interesting. It might be noted, however, that the in personam claim set up by the plaintiff against the third-party defendant, the Wheeling Company, was a claim arising out of the same transaction. While I agree that it is most unfair to permit a plaintiff to assert against a nonresident defendant an in personam claim which is entirely unrelated to the claim asserted in the original complaint, I see no injustice in compelling such a defendant to submit to jurisdiction for all purposes with respect to all transactions which form the basis of plaintiff's original claim. In a foreclosure-deficiency judgment situation, for example, if a defendant wants to contest the plaintiff's in rem claim on the merits he should, in the event of defeat, be prepared to accept

76. See note 34 supra.
77. Ibid.
a judgment against him for the deficiency. The plaintiff should not, however, be permitted to add or substitute, after the nonresident's appearance, an entirely new and unrelated claim as, for example, one for assault and battery. Such a defendant's appearance should be limited to contesting all claims of the plaintiff, in personam as well as in rem, but only in respect to the transaction or transactions complained of in the original complaint.

Brown: Your view of the Zeide and Paprin cases is not without merit, the rule being well established that when a motion made on special appearance has been denied, defendant may proceed on the merits without waiving his original objection. However, as I read those cases, they involved more than merely an application of that rule. Concededly, as you state, neither is a true case of a limited appearance, since in each case the motion made on special appearance was denied. But it did appear to me that the result was in substance to allow a limited appearance, especially in view of the authority which allows relitigation of the jurisdictional objection after it has been denied and set up in the answer. Even though the jurisdictional objection has been denied because service was deemed sufficient to confer in rem jurisdiction, if it can be relitigated at the trial, the net result can be a trial on the merits as to the in rem cause with the court ultimately refusing to grant a judgment in personam. That is not a true limited appearance, but I think the result can be the same. Of course, the difficulty in interpretation of the Zeide and Paprin cases arises not only from the brevity of the opinions but also from the confusion which exists as to the right of special appearance in the situations involved. I think that it probably can be said that in neither of those actions did the court have in mind the concept of the limited appearance.

Moreover, I would like to call your attention again to Engel v. Engel, where the court granted in part defendant's motion to set aside the service of summons (the procedure proposed under Section 237-a as recommended by the Judicial Council). The case was settled, and the opinion does not deal at all with the right to litigate thereafter the in rem claim on the merits. I am however advised by the attorney for the defendant in that action that the parties were proceeding to litigate the action on the merits in so far as the in rem claim was concerned. Of course, the case having been settled, it cannot serve as precedent.

79. See note 95 infra.
81. 22 N. Y. S. 2d 445 (Sup. Ct. 1940); 18 Ford. L. Rev. at 77.
82. "Your understanding of the decision of the court in so far as setting aside the
I am not entirely in agreement with your "same transaction" test which seems to a certain extent to follow the same "cause of action" idea of Section 5 of the Restatement of Judgments. As I understand your views, a nonresident defendant should be protected only as to claims added or substituted by an amended or supplemental complaint which do not form part of the same transaction as any of the claims alleged in the original complaint. The defendant, if he desires to litigate only the in rem claim on the merits, would have to make a general appearance as to any claims contained in the original complaint, in rem or in personam, even if only in rem jurisdiction has been obtained by the court. Thus in the Wajtman case, under your proposal, the third-party defendant would not be protected by a limited appearance as to the amendment there involved because the claim set up by the amended complaint formed part of the same transaction. To me it is still a claim asserted by a different party. On the other hand, under your view, the result in the Mendoza case would be different, the in personam claim there added by amendment being new and independent. I perhaps would be more inclined to go along with your idea if the "same transaction" test were also applied to the in personam claims contained in the original complaint, that is, if the defendant would be protected from those in personam claims which do not arise out of the same transaction as the in rem claim even though all are included in the original complaint. Moreover, I still think it grossly unfair to require a defendant to make a general appearance to contest the claim on the merits where his property has been attached, especially if the cause of action did not arise in New York.

Despite my own views on the limited appearance, it is necessary, from a legislative standpoint, to be practical. I doubt that the New York bar, unless it has no choice by reason of constitutional requirements still unsettled, would support any measure which goes very much beyond your proposal.

Smith: You say that you would be inclined to go along with my "same transaction" test which seems to a certain extent to follow the same "cause of action" idea of Section 5 of the Restatement of Judgments. As I understand your views, a nonresident defendant should be protected only as to claims added or substituted by an amended or supplemental complaint which do not form part of the same transaction as any of the claims alleged in the original complaint. The defendant, if he desires to litigate only the in rem claim on the merits, would have to make a general appearance as to any claims contained in the original complaint, in rem or in personam, even if only in rem jurisdiction has been obtained by the court. Thus in the Wajtman case, under your proposal, the third-party defendant would not be protected by a limited appearance as to the amendment there involved because the claim set up by the amended complaint formed part of the same transaction. To me it is still a claim asserted by a different party. On the other hand, under your view, the result in the Mendoza case would be different, the in personam claim there added by amendment being new and independent. I perhaps would be more inclined to go along with your idea if the "same transaction" test were also applied to the in personam claims contained in the original complaint, that is, if the defendant would be protected from those in personam claims which do not arise out of the same transaction as the in rem claim even though all are included in the original complaint. Moreover, I still think it grossly unfair to require a defendant to make a general appearance to contest the claim on the merits where his property has been attached, especially if the cause of action did not arise in New York.

Despite my own views on the limited appearance, it is necessary, from a legislative standpoint, to be practical. I doubt that the New York bar, unless it has no choice by reason of constitutional requirements still unsettled, would support any measure which goes very much beyond your proposal.

Smith: You say that you would be inclined to go along with my "same

service of the summons is concerned is correct. We did proceed [as to the] in rem claim and that was subsequently settled." No replies were received to inquiries also directed to the attorneys in the Zeide and Paprin cases.

83. See Restatement, Judgments § 5, comment g (1942); 18 Ford. L. Rev. at 90-94. Section 5 also gives immunity, as to subsequently added causes of action, to the nonresident personally served within the state or who has made a general appearance even though the original claim sounds in personam. That problem is not within the scope of this article although such cases are of course persuasive with respect to the in rem-in personam situations. Of course, § 5, which does not deal with original joinder of in rem and in personam claims, is qualified by § 40 which permits the nonresident to make a limited appearance in an attachment or creditor's bill situation.

84. See 18 Ford. L. Rev. at 81-85.
transaction” test if it “were also applied to the in personam claims contained in the original complaint, that is, if the defendant would be protected from those in personam claims which do not arise out of the same transaction as the in rem claim.” I am in favor of your modification since as to an in personam claim not in any way connected with the in rem claim asserted in the complaint the court would, in the absence of a general appearance by the defendant, be entirely without jurisdiction to make a binding adjudication. Why don’t you recommend a statute to that effect?

Brown: I think that I will attempt to draft a statute along those lines. Incidentally, you will be interested to know that the Governor has vetoed the Judicial Council bill. Apparently the veto resulted from disapproval of the bill by the Committee on State Legislation of the Association of the Bar of the City of New York. Although the Committee agreed that there was a great need for the bill and conceded that, “On the whole the bill has been carefully thought out by those who drafted it and it is well drawn,” it objected to both subdivisions 4 and 5 of proposed Section 237-a. As to subdivision 4, which provides

“After a motion made pursuant to this section has been denied, the objection to the court’s jurisdiction over the person of the defendant may be set forth as a defense in the answer and the defendant may litigate the action on the merits without being deemed to have waived his objection to the court’s jurisdiction over his person”

the Committee objected that elimination of the distinction between types of objections to jurisdiction over the person would allow relitigation of jurisdictional objections based upon defects in process or its service. The Committee is attempting to make a distinction which is not made by the cases, nor, to my knowledge, in actual practice. The distinction as to types of jurisdiction over the person should be eliminated, but provision should be made prohibiting relitigation of the jurisdictional objection in all cases.

One problem does occur to me in connection with subdivision 4, as it is now worded. Let us suppose that defendant’s objection to the court’s exercise of in personam jurisdiction is overruled. He litigates the action on the merits, both in rem and in personam. Judgment for plaintiff and defendant appeals. The appellate court finds that the objection to juris-

85. See text p. 144 supra (emphasis supplied).
87. Id. at 300.
88. See note 95 infra.
89. But see note 48 supra.
diction over the person should have been sustained. Will it merely reverse as to any in personam portion of the judgment? If so, will not defendant in substance, in this situation, have been permitted to make a limited appearance, that is, contest the in rem portion of the action on the merits? If any possibility of a limited appearance is to be eliminated (and, concededly, the Judicial Council study does not go into the problem), it would appear that a defendant after a hearing on the merits should be required to appeal from the denial of his jurisdictional objection, and, if that be sustained on appeal, be precluded from any defense on the merits as to the in rem portion of the action.

In so far as subdivision 5, providing

"A notice of the motion made pursuant to this section, if served within twenty days after service of the complaint and made returnable within ten days thereafter, or, if there be no sitting of court within ten days, then for the first term or sitting of court thereafter at which the motion can be heard, shall operate to stay all further proceedings in the action until the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof; provided, however, that the court may in its discretion vacate or modify the stay on motion made upon notice to the opposing party."

is concerned, the bill was criticized for failing to provide that if the motion be denied defendant has a specified time within which to appear generally and serve his answer. "Unless the court should exercise an inherent discretionary power to give the defendant permission to do so, an unsuccessful defendant who has carried out the steps provided in the bill would find himself in default."90

It appears to me that subdivision 5 is intended to prevent that possibility, and it is so explained in the Judicial Council study.91 Although the subdivision does not expressly spell out the time periods applicable after service of a copy of the order deciding the motion, it seems clearly intended to coincide with Section 283 of the Civil Practice Act.92


91. SIXTEENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 185, 195 (1950).

92. "If objections to a pleading, presented by motion for judgment or by corrective or regulatory motion, be not sustained, the moving party may serve an answer or reply, or an amended answer or reply where he has pleaded to a separate cause of action, counterclaim or defense not affected by the motion, as a matter of right, after the decision of the motion and before the expiration of ten days after service of notice of the entry of the order deciding the motion, unless the court shall be of the opinion, to be stated in the order, that the objections are frivolous. Upon the decision of a point of law, at trial or special term or in the appellate division or court of appeals, the court, in its discretion, also may allow the party in fault to plead anew or amend, upon such terms as are just."
SMITH: The nub of the Committee's objection to the Judicial Council bill, as you note, is that since subdivision 1 of the recommended Section 237-a would do away with the distinction between grounds of objection to the court's jurisdiction of the person, an objection to the sufficiency of process or its service could, even after a full hearing, be reiterated in the answer by virtue of subdivision 4. A defendant would thus have two opportunities to have his objection sustained. Although there is much to be said for the Committee's position that such a procedure is undesirable, its contention that a defendant may not under present law do that very thing is questionable. The Committee says:

"It is true that dicta in certain cases indicate that true objections to the jurisdiction of the person of the defendant (as distinguished from objections that process or its service is insufficient) may be relitigated at the trial, even after a motion based upon such an objection has been denied."64

No case that I have been able to uncover has drawn a distinction between grounds of objection to jurisdiction after motions properly raising such objections have been denied. On the contrary, in a recent case the court noted:

"After the confirmation of the referee's report, defendant answered. The conclusions of the referee and the subsequent order of the court do not preclude the defendant from raising and controverting the jurisdiction of the court at the trial. The decision of the court upon the motion and the recommendation of the referee were merely interlocutory and hence cannot conclude further contest of the issues. . ."65

Furthermore, although the Committee says that "it may be that all objections to the jurisdiction of the person of the defendant should be disposed of before trial, and that no such objection should be permitted to be raised in the answer,"66 it is clear that their main objection is aimed at permitting objections to process to be raised in the answer. I fail to see why it is any more undesirable to have two hearings on the objection to process or its service than it is to have two hearings on

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94. Id. at 304.
the objection that the defendant is a person not subject to the jurisdiction of the court. Both objections challenge the jurisdiction of the court to award in personam relief. The only reason for ever distinguishing between them is that an objection to process is waived by a voluntary general appearance.  

The practice of permitting two hearings of jurisdictional objections, however, should be discontinued. One hearing on the merits of the objection is sufficient. My view is that subdivision 1 of the recommended new Section 237-a, abolishing the distinction between the grounds of objection to jurisdiction over the person, should be left unchanged. Subdivision 4, however, might be redrafted to read substantially as follows:

"4. Upon a motion made pursuant to this section the court may hear and determine the objection, or it may direct that the questions of fact be tried before a referee, or it may allow the same facts to be alleged in the answer as a defense. If the motion of the defendant is denied on the merits, he shall not be permitted to reiterate the objection in his answer, but he may either appeal from the order denying his motion or proceed on the merits without thereby being deemed to have waived his objection and in the event of an adverse judgment bring up for review the order denying his motion by specifying it in his notice of appeal from such judgment."

Under this subdivision there could be only one hearing on the merits of a jurisdictional objection and that hearing would in almost all cases be held before trial. The court should not, as it is now permitted to do, defer decision of jurisdictional questions to the trial of the action simply because the affidavits are conflicting. In such a case the court should direct a reference. Provision is, however, made for permitting a court to defer hearing the jurisdictional objection until the trial of the action, a power which ought to be exercised only under exceptional

97. See text pp. 126-32 supra.
99. The pattern followed is that of Rule 108 of the Rules of Civil Practice: "If the plaintiff on the hearing of a motion specified in rule one hundred and seven shall present affidavits denying the facts alleged by the defendant or shall state facts tending to obviate the objection, the court may hear and determine the same and grant the motion, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just; or it may direct that the questions of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of which shall be reported to the court for its action; or it may overrule the objections, and in its discretion may allow the same facts to be alleged in the answer as a defense. If the objections be made to some of the
circumstances. One such situation is where substantially the same proof would be required at the trial as would be required at a hearing in advance of trial. For example, the validity of a foreign divorce may be in issue and depend upon the domicile of the defendant in the New York action (plaintiff in the foreign action) within the state granting the divorce, and at the same time the in personam jurisdiction of the New York court may also be in issue and depend upon the domicile of the defendant within New York at the time process was served upon him in another state. Another instance where the power to defer determination of the jurisdictional objection might be properly exercised by a court is when the affidavits are conflicting and one of the parties is unable to secure a deposition for purposes of a reference.\textsuperscript{100} True, the problem of limitations might arise because of the delay in determining the objection,\textsuperscript{101} but that is a factor to be considered by the court in determining whether it should permit the objection to be set up in the answer.

You will note that under subdivision 4 as redrafted above the defendant cannot reiterate the jurisdictional objection in his answer after his motion has been denied on the merits.\textsuperscript{102} He may either appeal from the order denying his motion or proceed on the merits without fear of


\textsuperscript{101} The Committee made another observation with respect to insisting upon determination of jurisdictional objections before trial: “Moreover, the statute of limitations has run against many causes of action by the time they are reached for trial, so that if a plea to the jurisdiction,—which under the bill would include an objection based upon the insufficiency of process or its service,—is sustained at the trial the plaintiff would find himself barred from commencing a new action; contemplation of this result suggests that all pleas to the jurisdiction are best disposed of at the inception of the action. Even Section 23 of the Civil Practice Act would not save the plaintiff if there was no adequate service of the summons.” \textit{Bulletin of the Committee on State Legislation of the Association of the Bar of the City of New York,} No. 6 at 307 (April 10, 1950). The Committee’s observation is sound with respect to defendants who are residents of the state. As to nonresidents, however, it would seem that § 19 of the Civil Practice Act would afford relief in certain situations. See National Surety Co. v. Ruffin, 242 N. Y. 413, 152 N. E. 246 (1926).

\textsuperscript{102} But see note 48 \textit{supra}. 
waiver and, on appeal from an adverse judgment, bring up for review the order denying his jurisdictional objection.\footnote{103}

With respect to your objection to subdivision 4 of the Council’s recommended new Section 237-a, it is true that to the extent that an appellate court would permit the in rem portion of the judgment to stand, and \textit{Jackson v. Jackson}\footnote{104} strongly indicates that it would, the defendant has in effect been permitted to litigate the in rem claim on the merits. As a practical matter I dare say that few indeed are the cases where a defendant’s objection that the court has no jurisdiction over his person is sustained after a court or referee has determined that such objection is without merit. Theoretically, however, my only thought is that a defendant whose objection has been overruled and then litigates the merits is not asking the court to insulate him from an in personam claim, as is the case of a defendant seeking to make a true limited appearance, but is more or less resigned to the fact that litigate the merits or not this court is proceeding on the theory that it has his person within its jurisdiction. Such being the case, the defendant probably feels that he has nothing to lose by proceeding on the merits. If he wins, fine; if he loses, and an appellate court decides that his jurisdictional objection should have been sustained, he has made an unexpected gain.

As to subdivision 5 of the bill it does seem that it was intended to do that which the Committee fears it does not do. For clarity’s sake, however, the subdivision might be reworded to read as follows (matter in brackets to be deleted from the Council’s recommendation; matter in italics to be added thereto):

"5. A notice of the motion made pursuant to this section, if served within twenty days after service of the complaint and made returnable within ten days thereafter, or, if there be no sitting of court within ten days, then for the first term or sitting of court thereafter at which the motion can be heard, shall operate to stay all further proceedings in the action until the \textit{expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof}; determination of the motion; provided, however, that the court may in its discretion vacate or modify the stay on motion made upon notice to the opposing party. \textit{If the motion of the defendant is denied, he may serve an answer, as a matter of right, before the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof}."

\footnote{103. That an order denying defendant’s motion objecting to jurisdiction under existing law may be reviewed on appeal without the need for reiteration of the objection in the answer seems possible. N. Y. Civ. Prac. Act § 580; see also Application of Dorfman, 66 N. Y. S. 2d 591, 592 (County Ct. 1946).

104. 290 N. Y. 512, 49 N. E. 2d 988 (1943).}
Have you drafted that limited appearance statute?

BROWN: I have drafted a statute, giving the right of limited appearance based upon the “same transaction” test, which might be Section 237-b of the Civil Practice Act:

“Defendant’s limited appearance. A defendant in an action within section two hundred thirty-two who has not been served in a manner sufficient to confer jurisdiction over his person and who has not made a general appearance in an action may make an appearance limited to contesting the causes of action stated in the original complaint, and all causes of action thereafter added or substituted, which form part of the same transaction as any cause of action, or part of a cause of action, of which the court would have jurisdiction in the absence of such service or general appearance.”

Under this proposed statute, if the plaintiff joins a cause of action for specific performance with an alternate prayer for damages and a cause of action for assault and battery, defendant could make an appearance limited to contesting the specific performance cause. By such an appearance he would subject himself to the in personam jurisdiction of the court as to the alternate claim for damages because that claim forms part of the same transaction as the specific performance cause. He would not, however, have to appear also as to the claim for assault and battery, a separate and independent claim. Nor could such a separate and independent claim be added by an amended or supplemental pleading. But, if plaintiff has sued originally merely for specific performance, he could amend to assert an alternate claim for damages because such claim constitutes part of the same transaction.

SMITH: Your proposed Section 237-b should be brought to the attention of the New York bar. It would certainly avoid the unfairness of a situation like that presented by the Mendoza case. I appreciate the fact that it does not go so far as you would like in the attachment situation, but I think the section as now proposed would be much more seriously considered by the New York bar than it would be if it contained a provision also granting the right to make a limited appearance where a nonresident’s property has been attached. Under this proposed new section, the defendant must appear generally in the attachment situation, but he would be protected as to any added or substituted claims which do not form part of the in rem claim originally asserted.

BROWN and SMITH: Well, despite the Governor’s veto of the Judicial Council bill, definite strides have been made during the past year toward clarification of the special appearance problem. There seems to be good reason to suppose that at least a special appearance statute will be enacted by the New York legislature in 1951. With good luck something may even be done about the limited appearance problem.