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CPLR 320--Defendant's Appearance; Notice of Appearance Not Waiver of Jurisdictional Objection

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Substituted service proper under section 313.

Paragraph one of section 308 provides for personal service within the state upon a natural person. Paragraph three provides for what is commonly known as "substituted" service where personal service cannot be made with due diligence. Section 313 provides that a person domiciled in New York or subject to the jurisdiction of its courts under sections 301 and 302 may be served outside the state in the same manner as service is made within the state. It was contemplated that, when 313 was applicable and outside service authorized, the *methods* of service outside the state would be the same as those provided by 308 for service within the state.[88]

The federal district court, in *Davis v. Gahan,*[89] although quashing the service as defective, made that assumption, and indicated that in a case where 313 (authorizing extra-state service) is applicable, substituted service under 308 (3) may be made outside the state. The Federal Rules of Civil Procedure allow service in a federal district court action to be made pursuant to state statute.[90] Thus, the CPLR was applied in the cited case. There, defendant's wife was served with summons and complaint in Florida. The Florida marshal never certified that he could not serve the defendant personally. Also, process was never mailed to defendant. The court found that there was sufficient basis for jurisdiction over defendant under section 302, thereby rendering him amenable to service outside the state under section 313, but found that service under section 308(3) was not properly executed. The case is important, however, for it is strong authority that substituted service under section 308(3) will be permitted via section 313.

CPLR 320 — Defendant's appearance; notice of appearance not waiver of jurisdictional objection.

In New York, a 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.[91] Prior to the 1964 amendment to rule 320(b), an appearance of the defendant was equivalent to personal service upon him unless, *at the time of appearance,* an objection to jurisdiction was asserted by motion or by answer. The 1964 amendment deleted the words "at the time of appearance," thereby significantly changing the effect of the provision. Before the amendment was effective, if the defendant

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[88] See Book 29A, pt. 3 McKINNEY'S CCA § 403, commentary 98-99.
[89] 227 F. Supp. 867 (S.D.N.Y. 1964).
[90] FED. R. CIV. P. 4(e), (f).
[91] CPLR 320(a).

failed to make the objection at the time of appearance, the consequence was a waiver of his jurisdictional objection, as stated in rule 3211(e). That 320(b) before amendment could have grave consequences for a defendant was demonstrated by the court in *Renwal Prods., Inc. v. Kleen-Stik Prods., Inc.*[92] In that case, the summons was served without the complaint in Ohio. Defendant served a notice of appearance and a demand for the complaint. Later, in response to the complaint, defendant's answer set forth his objection to the court's jurisdiction over his person. Plaintiff moved to dismiss the defense alleging, *inter alia,* that by serving a notice of appearance, the defendant had waived the objection to jurisdiction.

This action was commenced before the amendment to rule 320(b). The court, however, refused to hold the language of rule 320(b) determinative because it was in conflict with rule 3211(e). The latter provides that at any time before the responsive pleading is required, a party may move on one or more grounds set forth in CPLR 3211(a); among those grounds is the objection to jurisdiction of 3211(a)(8). Thus, since the summons was served without the complaint, defendant had twenty days to answer the subsequently served complaint. However, if defendant did not appear within twenty days after service of the summons he would, said the court, be in default under 320(a). Defendant chose to appear by serving a notice of appearance, which technically constituted a waiver of jurisdictional objections. The court did not follow the technicalities, however; it refused to hold that the service of the notice of appearance constituted a waiver.

The 1964 amendment of CPLR 320(b) solves this problem, but only in the in personam case. Where the jurisdiction relied on is in rem or quasi in rem, CPLR 320(c) applies, and that provision still has the language "at the time of appearance" (which language the amendment struck out of 320(b)). Thus the jurisdictional objection must, in the in rem case, be asserted at the time of appearance, and since a notice of appearance cannot assert a jurisdictional objection, it is unwise to make appearance by that means. Appear instead by a 3211 motion or an answer.

The foregoing is essentially only a distillation. The law of appearance is in a maze in the CPLR. While the 1964 amendment of 320(b) was helpful in one regard, it was confounding in another—the differentiation that now has to be made is between the in personam case under 320(b) and the in rem case under 320(c). The practitioner is advised, in *any* instance where a jurisdictional objection is even remotely possible, to avoid serving a notice of appearance. If the summons is served alone, demand

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[92] 43 Misc. 2d 645, 251 N.Y.S.2d 778 (Sup. Ct. 1964).

the complaint without using the language "hereby appears" in conjunction with the demand.[93]

When supreme court retains jurisdiction of family court matter it must apply procedures of Family Court Act.

The apparent conflict between two provisions of the recent court reorganization amendment to the New York State Constitution[94] has recently been treated by the appellate division, fourth department. In *People v. DeJesus*,[95] the defendant-husband was indicted in the supreme court for assaulting his wife by cutting her face with a razor blade. Thereafter, the proceeding was transferred to the county court where defendant was arraigned. Upon arraignment, the court granted defendant's motion to transfer the proceeding to the family court[96] pursuant to Section 813 of the Family Court Act.[97] An appeal by the District Attorney was dismissed on the ground that the order of transfer was not appealable because not final. But the court took the occasion to treat the merits of the appeal because of the confusion existing in this important area of jurisdiction.

In its opinion, the fourth department discussed at length the principles concerning the jurisdiction of the supreme court with respect to family court matters. The court indicated that if a petition were presented to the supreme court on a matter which should have been initiated in the family court, the supreme court could retain the matter, but would be required to act as a family court and follow the processes and procedures of the Family Court Act.[98]

Section 13(b) of Article 6 of the New York Constitution directs that proceedings arising from crimes and offenses between

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[93] An extensive treatment of appearance under the CPLR and the impact of the 1964 Amendment of CPLR 320(b) appears in 7B McKINNEY's CPLR 3211, supp. commentary 49-55 (1964).

[94] The court reorganization amendment is the new N.Y. CONST. art. 6, which became effective September 1, 1962.

[95] 21 App. Div. 2d 236, 250 N.Y.S.2d 317 (4th Dep't 1964).

[96] "The Family Court is a unique court. . . . It is primarily a social court designed to handle the complex problems of family life. . . . The court was set up in such a way so that it would best serve the needs of the public without the complexities and entanglements of technical requirements. It is a court to which a layman may come for the purpose of seeking relief without counsel." Matter of Anonymous, 37 Misc. 2d 827, 831, 238 N.Y.S.2d 792, 796 (Family Ct. 1962).

[97] Section 813 provides in part: "any criminal complaint charging disorderly conduct or an assault between spouses . . . shall be transferred by the criminal court in which complaint was made to the family court in the county in which the criminal court is located. . . ."

[98] People v. DeJesus, 21 App. Div. 2d 236, 239, 250 N.Y.S.2d 317, 321 (4th Dep't 1964).