

Article III of the New York Civil Practice Law and Rules: Jurisdiction, Service and Appearance

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ARTICLE III OF THE
NEW YORK CIVIL PRACTICE LAW AND RULES:
JURISDICTION, SERVICE AND APPEARANCE

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NOTES

INTRODUCTION

In 1954, the Temporary Commission on the Courts conducted hearings for the purpose of determining whether the Civil Practice Act, hereinafter referred to and cited as CPA, should be completely modernized, or amended in a piecemeal manner.¹ There was virtual unanimity in favor of a complete modernization.² To effect this revision, an Advisory Committee on Practice and Procedure was appointed. The product of its labor is New York's new Civil Practice Law and Rules, effective September 1, 1963, hereinafter referred to and cited as CPLR.

Article 3 of the CPLR, covering jurisdiction, service and appearance has been designed to utilize the "state's constitutional power over persons and things," to the fullest degree, to simplify the manner of service, to require methods of service that will increase the likelihood of actual notice and to eliminate the special appearance.³

The most important of these is the expansion of jurisdiction. Since the United States Supreme Court's announcement of the "minimum contacts" doctrine in the case of *International Shoe Co. v. Washington*,⁴ many other states have expanded their statutory basis for asserting jurisdiction. In these states, attorneys have become accustomed to view jurisdiction as a predicate to service, and not service as the basis of jurisdiction.⁵ Now, since New York has broadened its basis of jurisdiction, attorneys in this state may also have to think in terms of jurisdictional predicate, *i.e.*, the basis for the acquisition of jurisdiction being those activities which satisfy the requirement of "minimum contacts."

¹ 1962 N.Y. LEG. DOC. NO. 8, SIXTH REPORT TO THE LEGISLATURE BY THE SENATE FINANCE COMMITTEE ON THE REVISION OF THE CIVIL PRACTICE ACT 25 (hereinafter cited as SIXTH REP.).

² *Ibid.*

³ 1958 N.Y. LEG. DOC. NO. 13, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 37 (hereinafter cited as SECOND REP.).

⁴ 326 U.S. 310 (1945).

⁵ This distinction between jurisdictional predicate and notice was pointed out by the Supreme Court in the case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

It is the purpose of this note to contrast the provisions of Article 3 of the CPLR with the CPA within the context of other statutory provisions and decisional law which affect the area.

JURISDICTION

At the outset a basic distinction should be noted between subject-matter jurisdiction and jurisdiction which involves the power of a court over persons, property and status because of the relationship that each has with the forum state.⁶ The former involves the competency of a particular court to hear a case involving a particular matter.⁷ Thus, the monetary limit placed on causes of action which can be brought in a particular court, such as the limit placed on the New York City Civil Court,⁸ is an example of subject-matter jurisdiction. This note discusses jurisdiction which goes to the power of a court over persons, property and status since the only provisions of article 3 dealing with subject-matter jurisdiction are the removal provisions.⁹

Section 301—A "Catchall" Provision

The first provision in article 3 relating to jurisdiction operates as somewhat of a "catchall" for the traditional methods of acquiring jurisdiction in New York.¹⁰ As pointed out by the revisers, section 301:

is designed to make it clear that neither proposed section 3.2 [302] nor any similar provision which deals with the acquisition of jurisdiction in particular situations supersedes or operates as a limitation upon acquisition of jurisdiction over persons, property or status as previously permitted by law

⁶ See 1 CARMODY-WAIT, *CYCLOPEDIA OF NEW YORK PRACTICE* 64-69 (1953). For a recent comprehensive treatment of jurisdiction which involves the power of a court over persons, property and status, see Note, 73 HARV. L. REV. 909 (1960).

⁷ 1 CARMODY-WAIT, *op. cit. supra* note 6, at 65-66.

⁸ N.Y. CITY CIV. CT. ACT. § 7.

⁹ CPLR § 325 (grounds for removal): (a) by the supreme court where there has been a mistake in the choice of court, (b) from a court of limited jurisdiction where the court in which the action is pending does not have jurisdiction to grant the relief to which the parties are entitled, (c) removal to a lower court where it appears that the amount of damages sustained are less than demanded under certain conditions, (d) from supreme court to surrogate's court where the action pending affects the administration of a decedent's estate which is within the jurisdiction of the surrogate's court of the county of Bronx, Kings, Nassau, New York, Queens, Richmond or Westchester, and (e) to the supreme court where a county judge is incapable of acting in an action pending in the county court. See present provisions in CPA §§ 110-110-b, 190 (substantially unchanged by CPLR). See CPLR R. 326 (procedure on removal).

¹⁰ CPLR § 301: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

and judicial decision or as permitted by this proposed article or any other present or future provision.¹¹

However, the exact scope of this section is not clear. Specifically, it is not clear whether the section includes: (1) the common law bases for the acquisition of jurisdiction, or (2) the bases for acquisition provided presently by the CPA, or (3) the jurisdictional bases provided by statutes which are independent of the CPA and CPLR, or (4) all three. It would seem certain that under section 301 the traditional concepts which are used to acquire jurisdiction are retained: (1) physical presence within the state, (2) domicile within the state even though the party is not within the state, and (3) consent as a basis for jurisdiction, either expressed or implied.¹²

Although not expressly retained by section 301, the revisers point out that the basis of jurisdiction provided for by Section 229-b of the CPA will still be available under the CPLR.¹³ Section 229-b provides for the acquisition of jurisdiction over nonresident natural persons who "engage in business" within the state on causes of action which arise out of the conduct of that business. Under this section the defendant must be engaged in such business at the time of the service of summons as a condition to the acquisition of jurisdiction.¹⁴

Also left unaffected by section 301 will be the jurisdictional predicate of "doing business," so as to be found "present" within the state, which is utilized to assert jurisdiction over unauthorized foreign corporations.¹⁵ This concept has developed by case law in New York. The proposition was stated in the case of *Tauza v. Susquehanna Coal Co.* by Judge Cardozo:

We are to say . . . whether its business is such that it *is* here. If in fact it is here . . . not occasionally or casually, but with a fair measure of permanence and continuity, then . . . it is within the jurisdiction of our courts.¹⁶

The keynote is that the business must be fairly regular and systematic¹⁷ even though it is not necessary that the corporation maintain

¹¹ SECOND REP. 38.

¹² For a basic discussion of these concepts, see RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 78-81 (Tent. Draft No. 3, 1956); Note, 73 HARV. L. REV. 909, 935-48 (1960).

¹³ SECOND REP. 38. For an analysis of this section, see PRASHKER, NEW YORK PRACTICE §§ 98-99 (4th ed. 1959).

¹⁴ CPA § 229-b.

¹⁵ For a discussion of the development of this concept in New York, see 1959 N.Y. LEG. DOC. NO. 65, LAW REVISION COMM'N REPORT 94-106.

¹⁶ 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917). Whether a corporation is "doing business" is a question of fact. *Chaplin v. Selznick*, 293 N.Y. 529, 58 N.E.2d 719 (1944). The burden of proof is on the plaintiff. *Schwartz v. Breakers Hotel Corp.*, 13 Misc. 2d 508, 178 N.Y.S.2d 393 (Sup. Ct. 1958).

¹⁷ *Meinhard, Grief & Co. v. Higginbotham-Bailey-Logan Co.*, 262 App.

an office in the state. Thus, in the case of *Benware v. Acme Chemical Co.*,¹⁸ jurisdiction was obtained over a foreign corporation which had no office, bank account or property within the state but which maintained six salesmen under constant supervision on a full-time basis within the state. It is important to note that under the "doing business" concept jurisdiction is acquired even though the cause of action does not arise out of business transacted within the state.¹⁹

Thus it is clear that even under the CPLR, the practitioner will not be restricted to the provisions of article 3 but will also be able to utilize statutory provisions which are independent of the CPLR and which, depending on the circumstances, might be more to his advantage.²⁰

Present Statutory Provisions Other Than The Civil Practice Act

Generally speaking the statutory schemes which provide for the acquisition of jurisdiction independently of the CPA and CPLR fall within the two conceptual categories: (1) bases founded upon certain activities within the state, and (2) bases founded upon consent.

Those statutes which base jurisdiction on activities within the state can best be illustrated by Sections 59-a(2) of the Insurance Law, 253 of the Vehicle and Traffic Law and 250 of the General Business Law. Although all three provide for the implied appointment of an official of the state as attorney upon whom process may be served, the basis of jurisdiction is in fact the activities set out by these sections.

Section 59-a(2) of the Insurance Law provides for the acquisition of personal jurisdiction over an unauthorized insurer if it engages either by mail or otherwise in:

- (1) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of business...²¹

Div. 122, 28 N.Y.S.2d 483 (1st Dep't 1941) (Texas corporation held "doing business" where it maintained New York office for twenty years in its own name for its own use under the auspices of three buyers).

¹⁸ 284 App. Div. 760, 135 N.Y.S.2d 207 (3d Dep't 1954). See *Sterling Novelty Corp. v. Frank & Hirsch Distrib. Co.*, 299 N.Y. 208, 86 N.E.2d 564 (1949) (jurisdiction obtained over foreign corporation which had no local office but made all purchases through domestic corporation which acted as its exclusive buying agent); *Holzer v. Dodge Bros.*, 233 N.Y. 216, 135 N.E. 268 (1922) (foreign corporation with no local office selling cars to dealers within state deemed not to be "doing business").

¹⁹ *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

²⁰ SECOND REP. 455 (which contains a comprehensive analysis of these statutory provisions).

²¹ N.Y. INS. LAW § 59-a (2).

It provides that the commission of any of the acts enumerated is equivalent to an appointment of the Superintendent of Insurance as attorney for the insurer upon whom service of process may be made. This section has been construed as conferring jurisdiction where a single act falling within the enumerated categories has been shown.²²

Section 59-a(2) has been interpreted as not being available to a nonresident suing an unauthorized insurer.²³ On the other hand, it has been interpreted as being available in a suit by an authorized foreign corporation against an unauthorized insurer.²⁴

Many states have enacted legislation providing for the acquisition of personal jurisdiction over nonresident motorists involved in an accident or collision while operating a vehicle within its borders.²⁵ Section 253 of the New York Vehicle and Traffic Law allows for the acquisition of such jurisdiction where there is: (1) the use or operation of a vehicle in this state by a nonresident, (2) the use or operation of a vehicle in this state in the business of a nonresident, or (3) the use or operation of a vehicle in this state owned by a nonresident if so used or operated with his permission, express or implied. Such operation or ownership is deemed an appointment of the Secretary of State as attorney upon whom service can be made.²⁶

There are similar statutory provisions which allow for the assertion of in personam jurisdiction where the basis is certain activities within the state. They apply to the operation of an aircraft within the state,²⁷ to nonresident employers,²⁸ nonresident securities dealers,²⁹ and nonresident charitable organizations.³⁰

²² *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953) (jurisdiction sustained where a single policy of insurance covering hotel in New Hampshire was delivered by unauthorized foreign insurer by mail to New York resident).

²³ *Clifton Prods. Inc. v. American Universal Ins. Co.*, 169 F. Supp. 842 (S.D.N.Y. 1959).

²⁴ *Aero Associates, Inc. v. La Metropolitana*, 183 F. Supp. 357 (S.D.N.Y. 1960).

²⁵ See, e.g., ILL. ANN. STAT. ch. 95½, § 9-301 (Smith-Hurd 1957); PA. STAT. ANN. tit. 75, § 2001 (1960).

²⁶ The basis for the acquisition of such jurisdiction is the state's interest in regulating local acts which are dangerous to life or property. *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927).

²⁷ N.Y. GEN. BUS. LAW § 250 (language similar to § 253 of the Vehicle and Traffic Law). Predecessor of § 250 was held unconstitutional in the case of *Peters v. Robin Airlines*, insofar as it allowed the acquisition of jurisdiction where accidents or collisions occurred outside the state which had no causative connection to acts done within the limits of the state. 281 App. Div. 903, 170 N.Y.S.2d 1 (2d Dep't 1953) (memorandum decision).

²⁸ N.Y. WORKMEN'S COMP. LAW § 150-a.

²⁹ N.Y. GEN. BUS. LAW § 352-b.

³⁰ N.Y. SOC. WELFARE LAW § 482-d.

In certain areas New York exacts as a condition precedent to the performance of certain activities within its borders, that there be a consent to the personal jurisdiction of its courts. The best example of this is the foreign corporation. Under Section 210 of the General Corporation Law, a foreign corporation, before it can receive a qualifying certificate, must designate the Secretary of State as agent upon whom service can be made. This is provided for under the new Business Corporation Law by section 304(b).³¹ The Business Corporation Law under section 307(a) will additionally provide for such designation where an unauthorized foreign corporation which either itself or through an agent "does any business" in this state on any cause of action which arises out of or in connection with the doing of such business.³² A study of the revisers' notes to the Business Corporation Law does not make it exactly clear what is meant by the "doing of business." It may have reference to the "doing business" concept which has generally been a basis for the acquisition of jurisdiction.³³

A provision similar to Section 210 of the General Corporation Law is Section 59(1) of the Insurance Law which provides that foreign insurance companies seeking to do business within the state must designate the Superintendent of Insurance as attorney upon whom process can be served "on a contract delivered or issued for delivery or a cause of action arising in this state . . ."³⁴

Other statutory provisions which base jurisdiction on consent cover joint stock associations,³⁵ foreign banks and nonresident licensed lenders,³⁶ foreign insurance carriers,³⁷ foreign fiduciaries and executors, administrators, testamentary trustees and guardians.³⁸

As can be seen, these statutory provisions represent a piecemeal approach to expanding personal jurisdiction in New York. In recent

³¹ While § 210 is limited to foreign corporations other than moneyed corporations, § 304(b) of the new Business Corporation Law will not be so restricted. See present related provisions concerning foreign corporations in N.Y. GEN. CORP. LAW §§ 213, 214-a.

³² See N.Y. BUS. CORP. LAW § 305 which is a permissive provision for the designation of a registered agent in addition to the secretary of state.

³³ When initially recommended, this was its meaning. See 1944 N.Y. LEG. DOC. NO. 65, LAW REVISION COMM'N REPORT 379, 396. There would seem to be three reasons for construing this provision of § 307(a) as meaning "transacts business" rather than "doing business": (1) the subsequent decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); (2) § 302 of the CPLR which expresses an intent in New York to go to the limits of constitutional jurisdiction; and (3) the wording of the statute itself which refers to causes of action "arising out of or in connection with the doing of such business."

³⁴ N.Y. INS. LAW § 59(1).

³⁵ N.Y. GEN. ASS'NS LAW § 18.

³⁶ N.Y. BANKING LAW §§ 200(3), 343-a.

³⁷ N.Y. VEHICLE & TRAFFIC LAW § 344(1).

³⁸ N.Y. SURR. CT. ACT § 95.

years as a result of the Supreme Court's decision in *International Shoe Co. v. Washington*,³⁹ states have sought a more comprehensive approach to acquiring in personam jurisdiction over nonresidents and New York has followed this trend by its provision under the CPLR.⁴⁰

Jurisdictional Expansion

Section 302 of the CPLR represents the new attitude in New York to the problem of acquiring jurisdiction over nonresidents, and is a more comprehensive approach in this area.

The broad language of the provision recommended by the committee encompasses and goes beyond these particular statutes, and it represents a culmination of the trend that they indicate.⁴¹

The statute's importance requires its full rendition in the text:

§ 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.⁴²

The statute has been modeled on Section 17 of the Illinois Civil Practice Act.⁴³ Thus an analysis of the cases interpreting that statute and comparable statutes may provide the New York practitioner with some insight into Section 302 of the CPLR.

³⁹ 326 U.S. 310 (1945).

⁴⁰ See, e.g., ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); WIS. STAT. ANN. § 262.05 (Supp. 1962).

⁴¹ Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 66 (1960). See SECOND REP. 40-41.

⁴² Subdivision (b) acts as a limitation on the section. See 1961 N.Y. LEG. DOC. NO. 8, FIFTH REPORT TO THE LEGISLATURE BY THE SENATE FINANCE COMMITTEE ON THE REVISION OF THE CIVIL PRACTICE ACT 67 (hereinafter cited as FIFTH REP.).

⁴³ Certain provisions of the Illinois Act were not incorporated in § 302 because they were already provided for by other statutes. See SECOND REP. 39.

Section 302(a)(1) — Transacts Any Business Within the State

It should be noted at the outset that:

In defining the term "transaction of business," the "doing business" cases may not be ignored, particularly where the court found against the defendant on this issue.⁴⁴

The "doing business" concept will provide a foundation from which to start since "transacts any business" will operate as less of a requirement both quantitatively and qualitatively than does the former concept.⁴⁵

The problem posed by this subdivision is where to set a limit to the acquisition of jurisdiction on the basis of the constitutional requirement of "minimum contacts" as set forth in the *International Shoe* case.⁴⁶ The cases construing the Illinois provision provide some insight but do not provide a clear guideline. Thus, in the case of *Berlemann v. Superior Distrib. Co.*,⁴⁷ personal jurisdiction was sustained over defendant foreign corporation who, through an agent personally present in Illinois, solicited and secured two purchase orders from plaintiff for vending machines which were to be shipped from Colorado. Defendant was to provide a factory-trained serviceman who was to train the prospective purchaser. On the other hand,

⁴⁴ O'Connor & Goff, *Expanded Concepts of State Jurisdiction Over Non-Residents: The Illinois Revised Practice Act*, 31 NOTRE DAME LAW. 223, 236 n.69 (1956).

⁴⁵ See the comprehensive discussion in the 1959 Report for a provision similar to §302 of the CPLR which was designed to operate in regard to foreign corporations only. 1959 N.Y. LEG. DOC. No. 65, LAW REVISION COMM'N REPORT 69.

⁴⁶ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴⁷ 17 Ill. App. 2d 522, 151 N.E.2d 116 (1958). Jurisdiction was sustained under the Illinois provision where the activities included: (1) a contract which consisted of a letter mailed by defendant from Sweden and a telegram of acceptance sent by plaintiff from Chicago, and (2) prior to the contract defendant's representative made two visits to Illinois to negotiate with plaintiff's representatives the terms of the contract and to observe equipment tests. *National Gas Appliance Corp. v. AB Electrolux*, 270 F.2d 472 (7th Cir. 1959).

Jurisdiction has been denied in the following cases: *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959) (activities consisted of mailing out-of-town newspapers to subscribers in Illinois and shipping them to distributors within the state); *Kaye-Martin v. Brooks*, 267 F.2d 394 (7th Cir. 1959) (contract negotiated in New York, defendant came into Chicago to meet with plaintiff and contract completed in Texas); *Orton v. Woods Oil & Gas Co.*, 249 F.2d 198 (7th Cir. 1957) (activities consisted of defendant's acceptance of plaintiff's services in Illinois for its incorporation in Delaware and for the registry of its stock in Washington, D.C.); *E Film Corp. v. United Feature Syndicate, Inc.*, 172 F. Supp. 277 (N.D. Ill. 1958) (contract executed in another state and defendant's only contact with Illinois was the visit of one of its officers for the negotiation of the contract).

in the case of *Trippe Mfg. Co. v. Spencer Gifts, Inc.*,⁴⁸ the court found no jurisdiction where defendant's activities consisted of sending catalogues through the mails into Illinois. The mere shipment of goods into the state has been held insufficient to confer jurisdiction.⁴⁹ The cases turn on their individual facts and a consistent pattern cannot yet be discerned.

Some jurisdictions have statutory schemes which are more explicit and somewhat broader in scope than the Illinois provision.⁵⁰ In the case of *Woodring v. Crown Eng'r Co.*,⁵¹ the Florida court allowed the acquisition of jurisdiction over a nonresident corporation who, through a sales representative in the state, placed certain advertisements in a newspaper to promote the sale of its products within the state. Maryland expressly provides for the acquisition of jurisdiction on a cause of action arising out of a contract made within its borders.⁵² In the landmark case of *Compania de Astral, S.A. v. Boston Metals Co.*,⁵³ the court asserted jurisdiction on the basis of a contract for the purchase of three ships. The contract had been drafted in Maryland, revised and substantially agreed upon in New York, and signed by the defendant in Panama and the plaintiff

⁴⁸ 270 F.2d 821 (7th Cir. 1959).

⁴⁹ *Morgan v. Heckle*, 171 F. Supp. 482 (E.D. Ill. 1959); *Groback v. Addo Mach. Co.*, 18 Ill. App. 2d 10, 151 N.E.2d 425 (1958), *aff'd*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959) (defendant accepted orders outside the state and shipped goods into Illinois by independent carriers).

⁵⁰ See, e.g., FLA. STAT. ANN. § 47.16 (2) (Supp. 1960): "Any person, firm or corporation which through brokers, jobbers, wholesalers or distributors sells, consigns, or leases, by any means whatsoever, tangible or intangible personal property, to any person, firm or corporation in this state, shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business or business venture in this state." This section has been construed as not conferring jurisdiction where there was a shipment of goods to a single customer, who was not a broker, jobber, wholesaler or distributor, from a point outside the state. *Newark Ladder & Bracket Co. v. Eadie*, 125 So. 2d 915 (Fla. Dist. Ct. 1961).

⁵¹ 141 So. 2d 816 (Fla. Dist. Ct. App. 1962).

⁵² MD. ANN. CODE art. 23, § 92 (d) (1957): "*Suits on Contracts*—Every foreign corporation shall be subject to suit in this State by a resident of this State or by a person having a usual place of business in this State on any cause of action arising out of a contract made within this State or liability incurred for acts done within this State, whether or not such foreign corporation is doing or has done business in this State."

Wanamaker v. Lewis, 153 F. Supp. 195 (D. Md. 1957), where defendant, a national radio network, purchased the right to use and did use locally-owned facilities of affiliated stations in Maryland and extended transmission lines into Maryland for local dissemination of advertising, it was held to constitute "doing business." This represents a liberal trend in Maryland of construing the "doing business" concept. However, the mere solicitation of orders within the state has been held not sufficient for the assertion of jurisdiction. *Arundel Crane Serv., Inc. v. Thew Shovel Co.*, 214 Md. 387, 135 A.2d 428 (1957).

⁵³ 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).

in Maryland. The court found that the contract was made in Maryland because the last necessary act had been performed there.

Although judicial interpretation of "transacts business within the state" represents a continuing development toward expansion of jurisdiction, it is important to note that section 302(a)(1) is limited to causes of action *arising out of* the transaction of business. Thus, the practitioner may still find the "presence" concept for acquisition of jurisdiction over unlicensed foreign corporations useful since it does not have the same restriction. Also, since there is no provision in section 302 expressly covering unauthorized foreign insurers, the broader provision in Section 59-a of the Insurance Law might prove more workable, since it does not have the limitation that the cause of action must arise out of the commission of any of the acts enumerated.⁵⁴

With the expansion of jurisdiction that this subdivision represents, the constitutional limitations on state court jurisdiction come to the foreground.

Due Process

Under the due process clause, jurisdiction can be obtained over a nonresident when there has been certain "minimum contacts" with the forum state and when the nonresident has been given reasonable notice and opportunity to be heard.

In the case of *International Shoe Co. v. Washington*,⁵⁵ the Supreme Court stated the constitutional test of "minimum contacts":

due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁵⁶

The difficulty of applying such a broad test is readily appreciated. Its application requires a balancing of certain interests against the inconvenience of the defendant. In many instances the size of the defendant will be an important consideration, since it might prove an undue hardship to in effect force him to come in and defend an action in a foreign jurisdiction.⁵⁷ Thus, generalization becomes impossible because in the balancing of interests the facts of each case become controlling.

⁵⁴ See SECOND REP. 39.

⁵⁵ 326 U.S. 310 (1945) (activities consisted of having considerable number of salesmen in Washington, a substantial volume of business there and at times the maintenance of sample display rooms in the state).

⁵⁶ *Id.* at 316.

⁵⁷ See Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1435-36 (1962).

In the case of *McGee v. International Life Ins. Co.*,⁵⁸ the Court sustained jurisdiction where defendant, a nonresident insurer, had solicited and delivered a reinsurance contract into California and the insured had mailed premiums from that state until his death. The Court noted California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."⁵⁹ The Court held that it was "sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."⁶⁰ However, under the due process clause the power of acquiring jurisdiction is not unbridled. A year later, in the case of *Hanson v. Denckla*,⁶¹ the Supreme Court refused to recognize the acquisition of jurisdiction. That case involved an inter vivos trust which had been executed with a Delaware trust company by the settlor who at the time was a Pennsylvania domiciliary. The settlor had reserved power of appointment and subsequently, while a domiciliary of Florida, executed an instrument providing for the distribution of the trust corpus after her death. While she was domiciled in Florida, the Delaware trust company mailed to her checks covering income from the trust together with communications concerning the administration of the trust. After her death certain beneficiaries of her estate brought a proceeding in the Florida courts to determine which assets passed under the residuary clause. The Supreme Court held that the Florida court did not have jurisdiction:

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail.⁶²

It has been noted that one conclusion which may be drawn from the *Hanson* case is that "judicial jurisdiction is essentially a question of reasonableness."⁶³ Reasonableness as a criterion is carried over to the notice requirements.

In the case of *Mullane v. Central Hanover Bank & Trust Co.*,⁶⁴ the Supreme Court stated that due process requires the giving of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

⁵⁸ 355 U.S. 220 (1957). See *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950) (jurisdiction sustained over mail-order health insurance association which had solicited membership in Virginia and which had about 800 members in that state).

⁵⁹ *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

⁶⁰ *Ibid.*

⁶¹ 357 U.S. 235 (1958).

⁶² *Id.* at 251.

⁶³ 1959 N.Y. LEG. DOC. NO. 65, LAW REVISION COMM'N REPORT 114.

⁶⁴ 339 U.S. 306 (1950).

opportunity to present their objections."⁶⁵ In holding that notice by publication was insufficient in an action to settle the fiduciary accounts of a common trust, the Court pointed out the distinction between the question of jurisdiction and that of adequate notice.⁶⁶ Once again the Court spoke in terms of reasonableness: "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."⁶⁷ This approach was adopted by the revisers of the CPLR, who expressly designed the service provisions of article 3 to in fact provide actual notice by restricting the use of publication.⁶⁸

Thus, the due process requirements provide a somewhat broad guideline—the emphasis being on reasonableness—from which the courts functioning under expanded jurisdictional statutes can operate. Even though the due process requirements are met, jurisdiction may be refused on the basis of the prohibition of the commerce clause, *i.e.*, the court's exercise of jurisdiction might be an undue burden on interstate commerce.

Commerce Clause

With the expansion of jurisdiction prompted by *International Shoe*, the limitation imposed by the commerce clause⁶⁹ may take on new prominence.⁷⁰ This was pointed out by implication in the case of *Erlanger Mills v. Cohoes Fibre Mills*.⁷¹ There have been some lower court decisions which have imposed the limitation on the exercise of jurisdiction because of an undue burden on interstate or foreign commerce.⁷² The full scope of this limitation cannot be deter-

⁶⁵ *Id.* at 314.

⁶⁶ *Id.* at 313.

⁶⁷ *Id.* at 315. The Supreme Court has approved personal service without the state. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); mailing of the summons and complaint to defendant by registered mail, *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 650-51 (1950). However, it has stated that service by publication is inadequate except where no other means are available. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

⁶⁸ FIFTH REP. 273-74.

⁶⁹ *Davis v. Farmers Co-op. Equity Co.*, 262 U.S. 312 (1923). See the discussion in McGowan, *Litigation as a Burden on Interstate Commerce*, 33 ILL. L. REV. 875 (1939).

⁷⁰ See Weinstein, *Civil Practice Trends*, 62 COLUM. L. REV. 1431, 1436, (1962); Note, 73 HARV. L. REV. 909, 983-87 (1960).

⁷¹ 239 F.2d 502, 507 (4th Cir. 1956).

⁷² Burden on interstate commerce, *Baltimore Mail S.S. Co. v. Fawcett*, 269 N.Y. 379, 199 N.E. 628 (1936); *Hershel Radio Co. v. Pennsylvania R.R.*, 334 Mich. 148, 54 N.W.2d 286 (1952). Burden on foreign commerce, *Overstreet v. Canadian Pac. Airlines*, 152 F. Supp. 838 (S.D.N.Y. 1957); *Banque de France v. Supreme Court*, 287 N.Y. 483, 41 N.E.2d 65, *cert. denied*, 316 U.S. 646 (1942).

mined until further litigation in the area of expanding jurisdiction prompts its consistent application.

Forum Non Conveniens—Need For Reconsideration

The expansion of jurisdiction not only raises problems of constitutional limitation, but also difficulties with regard to the limits imposed by the doctrine of forum non conveniens. Professor Weinstein points to the necessity for re-evaluating the doctrine as it presently exists in New York:

Our courts will be forced in far more cases than before to think hard about balancing interests of the defendant, the plaintiff, and our court system. The doctrine of forum non conveniens will require the courts to decide whether "in the interest of substantial justice the action should be heard in another forum," and whether the court should "stay or dismiss the action in whole or in part on any conditions that may be just."⁷³

It is generally held under present New York law that a court may not refuse to exercise jurisdiction where either the plaintiff or defendant is a resident of the state.⁷⁴ However, where both parties are nonresidents the courts have discretion to refuse to assert jurisdiction.⁷⁵ In the area of commercial transactions and causes of action affecting property or property rights the courts will generally entertain jurisdiction between nonresidents on the basis of the commercial interest of the state.⁷⁶ There is express statutory provision—Section 225 of the General Corporation Law—for the maintenance of suits by a foreign corporation or nonresident against a foreign corporation in certain enumerated cases, and under Section 1314 of the Business Corporation Law there are certain additions.⁷⁷

⁷³ Weinstein, *supra* note 70, at 1435. See FIFTH REP. 67.

⁷⁴ De Le Bouillierie v. DeVienne, 300 N.Y. 60, 89 N.E.2d 15 (1949); see PRASHEK, NEW YORK PRACTICE § 22 (3) (4th ed. 1959); Comment, 26 FORDHAM L. REV. 534 (1957).

⁷⁵ De La Bouillierie v. DeVienne, *supra* note 74. For a general discussion of forum non conveniens see, 1 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 78-91 (1953).

⁷⁶ Wertheim v. Clerque, 53 App. Div. 122, 125 N.Y. Supp. 750 (1st Dep't 1900); Van Der Veen v. Amsterdamsche Bank, 178 Misc. 668, 35 N.Y.S.2d 945 (Sup. Ct. 1942).

⁷⁷ N.Y. BUS. CORP. LAW § 1314 (b): "(1) Where the action is to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract. (2) Where the subject matter of the litigation is situated within this state. (3) Where the cause of action arose within this state, except where the object of the action or special proceedings is to affect the title of real property situated outside the state. (4) Where the action or special proceeding is based on liability for acts done within this state by a foreign corporation. (5) Where the defendant is a foreign corporation doing business in this state." The changes: subparagraph (b)(1) permits actions to be brought upon contracts to be

The area of re-evaluation will be the situations created by the policy of generally allowing residents to assert jurisdiction without limitation. Emphasis will also have to shift from the convenience of the court to considerations of the convenience of nonresident defendants:

The increased power afforded plaintiffs in our courts must be tempered by some consideration for a defendant with widely scattered interests who may be harassed by suits in different jurisdictions. More to the point perhaps is the need for forbearance when the defendant is an individual residing far from a state having but the slenderest contact with the dispute.⁷⁸

Thus, the New York courts have to consider the expansion of jurisdiction in the light of the requirements imposed by the constitution and also on the basis of an adjusted doctrine of *forum non conveniens*.

It is to be noted that the limitations discussed will be operative with respect to all the bases for acquiring jurisdiction under section 302 and that the caveats apply as well to the commission of tortious acts and the ownership, use or possession of real property within the state.

Section 302(a)(2) — Commits a Tortious Act

The provision of section 302 which relates to the commission of a tortious act within the state may very well pose the greatest problems in the area of acquiring personal jurisdiction. The issue to be resolved is where was the tort committed. In certain areas it is clear that the tort is committed within the state. On the facts presented in the case of *Nelson v. Miller*,⁷⁹ it would seem that a court would have very little difficulty in asserting jurisdiction. In that case, defendant, a Wisconsin resident, sent one of his employees into Illinois to deliver certain appliances, including a gas cooking stove, to the plaintiff. Plaintiff, while assisting the employee in unloading the stove, was injured because of the latter's negligence and the court sustained jurisdiction on that basis. A case which seems to be on the frontier of jurisdictional acquisition on the basis of the commission of a tort, is *Gray v. American Radiator & Standard Sanitary Corp.*⁸⁰ In that case defendant, an Ohio manufacturer

performed in this state, and subparagraph (b)(4) an addition which covers all acts and liabilities of foreign corporations done within the state. 1962 N.Y. LEG. DOC. NO. 30, SIXTH INTERIM REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF THE CORPORATION LAWS 136-37.

⁷⁸ Weinstein, *supra* note 70, at 1435.

⁷⁹ 11 Ill. 2d 378, 143 N.E.2d 673 (1957). See *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

⁸⁰ 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *accord*, *Anderson v. Penncraft Tool Co.*, 200 F. Supp. 145 (N.D. Ill. 1961). Compare, *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956); *Hellriegel v. Sears Roebuck & Co.*, 157 F. Supp. 718 (N.D. Ill. 1957).

of safety valves, sold its products to a water heater manufacturer whose plant was in Pennsylvania. The latter, after assembling the heater, shipped it to the purchaser in Illinois who in turn sold it at retail to the plaintiff who was injured by a defect in the safety valve. The court in sustaining jurisdiction over the Ohio manufacturer stated that "the place of a wrong is where the last event takes place which is necessary to render the actor liable."⁸¹ This is the American Law Institute position and would seem to be the position which will be adopted by the New York courts.⁸²

North Carolina has a statute which expressly provides for the acquisition of jurisdiction over a foreign corporation in a situation similar to that presented by the facts in the *Gray* case.⁸³ However, this statute was strictly construed and jurisdiction was not sustained.⁸⁴

Another problem presented by the commission of the tortious act provision is the tort of defamation. In the case of *Insull v. New York World-Telegram Corp.*,⁸⁵ the court refused to find jurisdiction where the libel had been initiated and published outside of Illinois and subsequently the newspapers containing the libel were mailed and distributed in Illinois. New York has averted the prob-

⁸¹ *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 434-35, 176 N.E.2d 761, 762-63 (1961).

⁸² RESTATEMENT, CONFLICT OF LAWS § 377 (1934):

1. *Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.*

Illustration:

1. A, standing in state X, fires a gun and lodges a bullet in the body of B who is standing in state Y. The place of wrong is state Y.

3. *Where harm is caused to land or chattels, the place of wrong is the place where the force takes effect on the thing.*

New York would seem to follow this position. RESTATEMENT, CONFLICT OF LAWS, NEW YORK ANNOTATIONS § 377.

It has been suggested that whether or not a tort has been committed should depend on the reasonableness of requiring a defendant to stand trial within the jurisdiction. Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. Rev. 599, 609 (1955).

⁸³ N.C. GEN. STAT. § 55-145 (1960), provides for the acquisition of jurisdiction over foreign corporations regardless of whether or not it is transacting business within the state on causes of action arising: "(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers. . . ."

⁸⁴ *Moss v. City of Winston-Salem*, 254 N.C. 480, 119 S.E.2d 445 (1961) (somewhat similar facts to the *Gray* case).

⁸⁵ 273 F.2d 166, 171 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960).

lem by expressly excepting from its provision causes of action for defamation of character; the basis for the exception rests on considerations of freedom of the press and the free transference of ideas across the nation.⁸⁶

One of the most perplexing problems raised by the tortious act provision is the question of jurisdictional facts. What effect does the tentative finding of the commission of a tortious act have on the ultimate disposition of the merits and vice versa? In the *Gray* case the court construed the concept of *tortious act* as one causing damage as contrasted with the commission of a *tort* which would require the establishment of liability, act and damage and thereby require a full trial on the merits.⁸⁷ Would an ultimate disposition that there was no *tort* committed result in obviating the court's jurisdiction? Although on its face this would seem to be the logical result, it would operate to undercut the jurisdictional effectiveness of the tortious act provision. To so hold would expose the defendant to a new trial in another state, since the rendering court's lack of jurisdiction would preclude its determination on the merits from having *res judicata* effect. The distinction between *tortious act* and *tort* made by the court in the *Gray* case might provide a workable solution in this area. Under this distinction, *tortious act* would develop as a jurisdictional concept and would have no bearing on the question of whether a substantive *tort* had been committed. In like manner an ultimate disposition on the merits should have no bearing on whether the court had jurisdiction.

The problem also arises in the area of default judgments and collateral attack. Can a defendant, by not entering an appearance in the state which bases jurisdiction on the tortious act provision, when being sued on this judgment in another state force relitigation of the merits by collaterally attacking the former state's jurisdiction, claiming that he did not commit a tort in that state? In the case of *Nelson v. Miller*, the Illinois court reasoned that when a default judgment is entered against a nonresident, his collateral attack could only raise the issue of whether he committed an act or omission but not that the acts or omissions gave rise to liability in tort.⁸⁸ It is evident that these problems are not easily resolved

⁸⁶ CPLR § 302(a)(2); see Weinstein, *Civil Practice Trends*, 62 COLUM. L. REV. 1431, 1436 (1962). Compare *New York Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. Sup. Ct. 1962).

⁸⁷ *Gray v. American Radiator & Standard Sanitary Corp.*, *supra* note 81.

The position adopted in the *Gray* case would seem to be a practical necessity. Otherwise, an elaborate pre-trial procedure would have to be established which would tend to offset the effectiveness of the "tortious act" provision by making its assertion burdensome on the courts.

⁸⁸ The jurisdictional facts that could be attacked: (1) an act or omission in Illinois, (2) committed by defendant or his agent, and (3) that the complaint state a cause of action arising out of such conduct.

and will require a great deal of litigation before workable and equitable solutions are found.

Due to the problems raised by the tortious act provision, the practitioner may find it more convenient to avail himself of another basis for acquiring jurisdiction. If the cause of action involves injury resulting from a nonresident's operation of a vehicle in the state, jurisdiction could be predicated on Section 253 of the Vehicle and Traffic Law. If the cause of action was one against a foreign corporation, the practitioner might be able to base jurisdiction on the theory that the corporation's "doing business" constitutes "presence." In this instance the restriction that the cause of action must arise out of the business done within the state would not apply. If "presence" cannot be found, it might be argued that every act of a corporation constitutes the transaction of business and therefore jurisdiction can be predicated on Section 302(a)(1) of the CPLR. A similar result might be achieved where a natural person commits a tort in the transaction of his business. The practitioner's awareness of the interplay of these provisions in certain instances might prove crucial to his success in pursuing his client's claim beyond the jurisdictional requirements to a disposition on the merits. This same awareness should be present when looking to the provision which allows jurisdiction to be predicated where the cause of action arises out of the ownership, use or possession of any real property situated within the state.

*Section 302(a)(3) — Ownership, Use or Possession of
Real Property Within the State*

The scope of the subdivision which deals with the ownership, use or possession of real property is not clear. Many of the cases construing comparable provisions in other states are generally involved with tort actions which have arisen from the ownership of property.⁸⁹ In the recent case of *Porter v. Nahas*,⁹⁰ an Illinois court sustained jurisdiction over a defendant who had been a tenant of an apartment in Illinois while a resident of that state and had subsequently moved to New York. The court in basing jurisdiction on the ownership provision of the Illinois statute reasoned that tenancy even if only for one month would be sufficient to make the provision operative.

Foster, *Illinois Judgment Against Wisconsin Tortfeasor Who Was Personally Served in Wisconsin*, 30 WIS. BAR. BULL. 18, 57 (No. 6, 1957).

⁸⁹ See 1959 N.Y. LEG. DOC. NO. 65, LAW REVISION COMM'N 125. Where the cause of action was based on contract, jurisdiction was denied in at least one instance. *Shouse v. Wagner*, 84 Pa. D. & C. 82 (Allegheny County Ct. 1952).

⁹⁰ 35 Ill. App. 2d 360, 182 N.E.2d 915 (1st Dist. 1962).

Pennsylvania has a more explicit statutory provision covering the area of causes of action arising out of the ownership or possession of real estate within the state.⁹¹ In the case of *Rumig v. Ripley Mfg. Corp.*,⁹² the statute was construed so as to acquire jurisdiction over a foreign corporation which had formed a Pennsylvania corporation expressly for the purpose of leasing a building within that state. The court, after finding facts sufficient to disregard the corporate fiction of the domestic corporation, sustained jurisdiction in a personal injury action arising from the lease of the building. Wisconsin has a broad statutory provision⁹³ which raises issues as to whether such ownership or possession of property can be used to acquire jurisdiction in cases other than tort actions. An illustration of such a case might serve to demonstrate the problems posed:

D, a resident of Delaware, has long been seeking a loan from P, a resident of New Jersey. Negotiations for the loan, which took place in New Jersey, had never come to fruition because of D's lack of security for the loan. Subsequently D, because of an inheritance, comes into the ownership of an office building in New York and appraises P of this fact who now becomes interested in giving the loan. P gives D a loan of \$175,000 and exacts from D a bond covering the amount and a mortgage which constituted a first lien on the building in New York. The mortgage was executed according to New York law and P had a friend go into New York to record the mortgage in New York County where the building was situated. D had never been in New York and had no connection with New York except for the ownership of the property. Upon D's default on payment of the principal to the extent of \$150,000 P comes into New York and seeks to base jurisdiction on the ownership provision of Section 302 of the CPLR, since the building on foreclosure will only sell for \$100,000.

Can New York assert personal jurisdiction on this provision and enter a judgment for the balance due on the bond? Has the cause of action arisen from the ownership of property within the state? Absent considerations of forum non conveniens, a literal reading of the provision would seem to confer jurisdiction if the transaction which culminated in the execution of the mortgage could be construed as having a substantial relation to the ownership of the property in New York.⁹⁴ It is to be noted that this factual situa-

⁹¹ PA. STAT. ANN. tit. 12, § 331: ". . . any non-resident . . . being the owner, tenant, or user, of real estate . . . and the footways and curbs adjacent thereto. . . . See *Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (Philadelphia County Ct. 1938).

⁹² 366 Pa. 343, 77 A.2d 360 (1951). See *Chong v. Faull*, 88 Pa. D. & C. 557 (Philadelphia County Ct. 1954).

⁹³ WIS. STAT. ANN. § 262.05 (6) (2) (Supp. 1962).

⁹⁴ This would require construing "substantial relation" as equivalent to "arising out of." It would seem to fall within the "minimum contacts" requirement and the draftsmen of the CPLR have demonstrated their intent

tion emphasizes lack of contact with the forum other than the ownership of property. In many instances where the solicitation, negotiation and execution of the bond and mortgage take place in New York, the practitioner might also be able to avail himself of the provision relating to the "transaction of business" as well as that relating to the "ownership of real property."

The significant effect of the ownership provision is that it may serve to confer in personam jurisdiction and its consequent effect of full faith and credit in an area where only quasi in rem jurisdiction could have been acquired. The restrictions imposed by quasi in rem jurisdiction—that judgment could be rendered only to the extent of the property within the state—would be overcome where there was a substantial relation between the ownership or possession and the cause of action. It should also be noted that there will be a definite interplay between the ownership provision and the traditional in rem action. Like the rest of the provisions of section 302, many of the jurisdictional questions raised do not lend themselves to easy solution and future litigation in this area while attempting to resolve many of the problems, might very well raise even greater problems.

The expanding jurisdictional concepts represented by section 302, while presenting problems, "is based on the premise that persons in the state should be permitted to protect their interests by resort to the courts of the state."⁹⁵

Section 303

Up to this point, discussion of in personam jurisdiction has been primarily concerned with defendant's contacts with the state. The CPLR, as does the CPA,⁹⁶ provides for the acquisition of jurisdiction where a "person not subject to personal jurisdiction" institutes an action in the state by providing that the commencement of such an action, with certain limitations, "is a designation by him of his attorney appearing in the action or of the clerk of the court if no attorney appears, as agent, during the pendency of the action, for service of a summons . . ."⁹⁷ It applies to "a separate action brought against the plaintiff by the defendant in an action first brought against him by the plaintiff."⁹⁸ The condition

to reach the limits of that requirement: "To make it possible, with very limited exceptions . . . to take full advantage of the state's constitutional power over persons and things." SECOND REP. 37.

⁹⁵ SECOND REP. 37.

⁹⁶ CPA § 227-a. See PRASHKER, NEW YORK PRACTICE § 99A (4th ed. 1959).

⁹⁷ CPLR § 303. See SECOND REP. 41.

⁹⁸ PRASHKER, *op. cit. supra* note 96, at 232.

imposed is that "such separate action would have been permitted as a counterclaim had the action been brought in the supreme court."⁹⁹ Further, the applicability of this section is limited to use against persons not subject to personal jurisdiction, thereby eliminating any problem caused by the distinction between domicile and residence.¹⁰⁰

With the exception of the appearance provisions,¹⁰¹ sections 301, 302 and 303 basically cover the grounds for acquiring in personam jurisdiction under the CPLR. Article 3 of the CPLR then makes provision for the acquisition of in rem and quasi in rem jurisdiction.

Section 314

Section 314 of the CPLR provides for situations where personal jurisdiction cannot be obtained—in rem and quasi in rem actions. It lists the situations: (1) in a "matrimonial action," (2) in actions affecting specific real or personal property within the state, including an action of interpleader or defensive interpleader, and (3) in actions pursuant to an order of attachment and actions for the replevy of a chattel. The section is based on Section 232 of the CPA. Replevin has been added to the in rem or quasi in rem actions.¹⁰²

Subdivision one, relating to matrimonial actions, is substantially unchanged. The full scope of the term "matrimonial action" is provided by Section 105(m) of the CPLR which results in a language change over Section 232 of the CPA.¹⁰³ As a result of the case of *Williams v. North Carolina*,¹⁰⁴ it is established that a court can exert in rem jurisdiction over the marital res when the plaintiff is domiciled within the state. Such jurisdiction can be exercised where the action is to annul a marriage, or to decree a divorce or separation. It cannot be exercised with regard to alimony and costs, which require in personam jurisdiction, unless the defendant appears generally in the action or there has been a prior seizure of his property within the state.¹⁰⁵

⁹⁹ CPLR § 303.

¹⁰⁰ SECOND REP. 42.

¹⁰¹ CPLR § 321, RR. 320, 322. See textual discussion *infra* p. 320.

¹⁰² SIXTH REP. 40.

¹⁰³ CPLR § 105(m): "The term 'matrimonial action' includes actions for separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage."

¹⁰⁴ 325 U.S. 226 (1945); 317 U.S. 287 (1942).

¹⁰⁵ See, *e.g.*, *Geary v. Geary*, 272 N.Y. 390, 399-400, 6 N.E.2d 67, 71 (1936); *Reschofsky v. Reschofsky*, 272 App. Div. 694, 74 N.Y.S.2d 636 (1st Dep't 1947). See *Waters v. Waters*, 28 Misc. 2d 689, 212 N.Y.S.2d 856 (Sup. Ct.

Subdivision two enumerates the situations for the acquisition of in rem jurisdiction over real and personal property within the state, including an action of interpleader or defensive interpleader. As related to real property, its predecessor¹⁰⁸ had been interpreted as conferring in rem jurisdiction in an action for the specific performance of a contract to convey real property within the state, where the defendant vendor was a nonresident.¹⁰⁷

It should be mentioned that there might be a definite overlapping in the area of real property between the in rem provision and Section 302(3) of the CPLR—the ownership, use or possession of real estate within the state. A literal construction of section 302(3) might allow in personam jurisdiction where previously only an in rem proceeding could be had.

The inclusion of interpleader and defensive interpleader in subdivision two, however, when considered in relation to Section 1006(g) of the CPLR, raises certain constitutional questions.¹⁰⁸ Section 1006(g) and its counterpart, Section 286-2 of the CPA, are “designed to meet the problem of affording the stakeholder a complete adjudication though some of the claimants are nonresidents and not subject to personal jurisdiction.”¹⁰⁹ Where the subject of the action of interpleader or defensive interpleader is property located within the state, and in the stakeholder's possession, jurisdiction can be predicated on the in rem or quasi in rem concepts. However, where the subject matter is money, such as a debt of the stakeholder, it has been held that such an action requires in personam jurisdiction over the nonresident.¹¹⁰ This may result in multiple liability of the stakeholder. Section 1006(g) seeks a solution by providing that a stakeholder may upon order of the court pay in a sum of money or part of it into court where the determination is one of a right, interest or lien upon a sum of money, whether liquidated or unliquidated, payable in the state pursuant to a contract or claimed as damages for unlawful retention of specific real or personal property within the state. The sum of money is deemed specific property within the state within the mean-

1961) (court asserted jurisdiction in separation action but would not award alimony because there was no in personam jurisdiction).

¹⁰⁶ CPA § 232.

¹⁰⁷ *Garfein v. McInnis*, 248 N.Y. 261, 162 N.E. 73 (1928).

¹⁰⁸ It has been held that interpleader is an in personam action and thus requires personal jurisdiction over the non-resident claimant. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). See the criticism of the *Dunlevy* case in *Atkinson v. Superior Court*, 49 Cal. 2d 338, 348, 316 P.2d 960, 966 (1957), *appeal denied*, 357 U.S. 569 (1958).

¹⁰⁹ 1960 N.Y. LEG. DOC. NO. 20, FOURTH PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 170 (hereinafter cited as *FOURTH REP.*).

¹¹⁰ *Hanna v. Stedman*, 230 N.Y. 326, 130 N.E. 566 (1921).

ing of Section 314 of the CPLR where there has been compliance with the court order. This provision as initially recommended was based on a trend toward liberalization of the areas where in rem and quasi in rem jurisdiction has been allowed by the United States Supreme Court.¹¹¹

A different approach to the same problem is that represented by Section 216 of the CPLR which provides a statute of limitation of one year from notice to the claimant which operates to preclude the nonresident claimant from suing in the courts of New York after expiration of the statutory period.¹¹² Its effectiveness is limited since the claimant can still bring suit in another state.¹¹³

Another approach to the problem is provided by Section 287 of the CPA which provides for a Compact among complying states.¹¹⁴ It proposes to allow for the acquisition of in personam jurisdiction by personal service upon the nonresident in another state or country, which is a member to the Compact.¹¹⁵ Although there seems to be no question of its constitutionality,¹¹⁶ it lacks effectiveness because New York has been unable to enlist the membership of its sister states.

The proposed solutions to the problem presented in the interpleader area once again point up the fact that state courts are on the threshold of jurisdictional acquisition.

Though the expansion of jurisdiction will operate to solve many of the problems which state courts have been faced with in the past, it will also give rise to many problems. As state courts tend to assert more jurisdiction over nonresidents through the "minimum contacts" tests, the question of notice will take on more significance. The Supreme Court has demonstrated its intent to

¹¹¹ See TWENTIETH ANNUAL REPORT OF THE JUDICIAL COUNCIL 283-84 (1954) where the Judicial Council cited *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). But compare the Judicial Council Report with Zimmerman, Wendell & Heller, *Effective Interpleader Via Interstate Compacts*, 55 COLUM. L. REV. 56, 58 (1958). Further, the vitality of the *Standard Oil* case has become ineffective. *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961).

¹¹² CPA counterpart, CPA § 51-a (the claim or part thereof must exceed \$50).

¹¹³ Another state or foreign country does not have to recognize the period of limitation set by New York. *Solicitor for the Affairs for His Majesty's Treasury v. Bankers Trust Co.*, 304 N.Y. 282, 107 N.E.2d 448 (1952).

¹¹⁴ Initially recommended in 1954. TWENTIETH ANNUAL REPORT OF THE JUDICIAL COUNCIL 284 (1954). See Zimmerman, Wendell & Heller, *Effective Interpleader Via Interstate Compacts*, 55 COLUM. L. REV. 56 (1955).

¹¹⁵ This purports to accomplish among member states the result accomplished under the Federal Interpleader provisions where the district courts have nationwide service of process. 28 U.S.C. §§ 1335, 1397, 2361 (1958). For a good discussion of Federal Interpleader, see Ilsen & Sardell, *Interpleader in the Federal Courts*, 35 ST. JOHN'S L. REV. 1 (1960).

¹¹⁶ TWENTIETH ANNUAL REPORT OF THE JUDICIAL COUNCIL 288-90 (1954).

require actual notice where humanly possible. The revisers in drafting the service provisions of the CPLR, have designed its provisions to in fact give actual notice.

SERVICE

Due process requires a method of notice reasonably calculated to afford parties interested in a judicial proceeding the opportunity to appear and be heard.¹¹⁷ Under the CPLR this is generally accomplished by service of summons, or, in the case of a special proceeding, by service of either a notice of petition or an order to show cause.¹¹⁸ The summons should state the plaintiff's basis of venue, and if venue is based on the plaintiff's residence then his residence should be specified.¹¹⁹ In matrimonial actions, where the summons is not accompanied by a complaint, the summons must have legibly written or printed on the face thereof the words "Action to annul a marriage," "Action for a divorce," or "Action for a separation," as the case may be.¹²⁰ In addition, if the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, the complaint need not be served with the summons in order for a default judgment to be entered. The plaintiff may serve with the summons a notice stating the sum of money for which judgment will be taken in case of default¹²¹ and this will allow the clerk to enter such default judgment without the plaintiff having to apply to the court.¹²²

In case there is some unsubstantial defect in the summons the court will usually allow this to be corrected by an amendment. However, the CPA has been strictly construed so that certain defects that are actually unsubstantial are not amendable.¹²³ The CPLR provision is designed to eliminate this type of construction

¹¹⁷ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

¹¹⁸ CPLR § 304. It is interesting to note that all provisions affecting real property in the CPA have been placed in a new consolidated law to be known as the Real Property Actions and Proceedings Law. Under this law all special proceedings involving real property, including a summary proceeding to recover possession of real property, will be commenced by service of petition and a notice of petition. N.Y. REAL PROP. ACTIONS & PROCEEDINGS LAW §§ 711, 731.

¹¹⁹ CPLR R. 305(a).

¹²⁰ 1962 N.Y. Sess. Laws 1214. (Effective September 1, 1963 as § 232 of the Domestic Relations Law.)

¹²¹ CPLR R. 305(b).

¹²² CPLR § 3215(a).

¹²³ SECOND REP. 154, citing *Friedman v. Prescetti*, 199 App. Div. 385, 192 N.Y. Supp. 55 (1st Dep't 1922) (insufficient papers on motion for order for service by publication).

by allowing the summons to be amended in all cases, if the defendant's rights are not prejudiced.¹²⁴

Where the court directs a new party to be brought into the action, and the order is not made upon the application of such party, a supplemental summons directed to him is issued.¹²⁵ But if the new party is brought in upon his own application, a supplemental summons need not be served upon him.¹²⁶

Personal delivery of the summons to the party to be served within the state continues to be the usual method of service under the CPLR.¹²⁷ As an alternative method, except in matrimonial actions, delivery to the defendant's designated statutory agent is also available.¹²⁸ Under rule 318, any person can be designated by a corporation, partnership, or natural person as their agent for service. The designation must be in writing with the consent of the agent endorsed thereon, and must be filed in the office of the clerk of the county where the person or organization making the designation resides or has its principal office.¹²⁹ Unlike the CPA, the new provision does not require that the designation be executed and acknowledged in the same manner as a deed.¹³⁰

If the person to be served is a natural person within the state, delivery to such person will, of course, be sufficient.¹³¹ However, if the defendant is a domestic or a foreign corporation, the summons must be delivered to an officer, director, managing or general agent, cashier, assistant cashier or to any other agent authorized by appointment or by law.¹³² Under Section 229(3) of the CPA an assistant cashier, a director or managing agent of a foreign corporation cannot be served if service can be made upon one of the officers specified in section 229(1) or upon the Secretary of State. Yet, any of the officers specified in section 229(3) can be served, in the first instance, if the defendant is a domestic corporation.¹³³ Section 311(1) of the CPLR eliminates his statutory

¹²⁴ SECOND REP. 154.

¹²⁵ CPLR R. 305(a).

¹²⁶ This was the interpretation given to § 219 of the CPA. 3 CARMODY-WAIT, *CYCLOPEDIA OF NEW YORK PRACTICE* 106 (1953). As there is no substantial change in the CPLR it would appear that this reasoning is applicable thereto.

¹²⁷ CPLR § 308(1).

¹²⁸ CPLR § 308(2).

¹²⁹ CPLR R. 318. The designation remains effective for three years unless it is revoked by the filing of a revocation, or by the death, judicial declaration of incompetency or legal termination of the agent or principal. The term "legal termination" is intended to cover the time when the particular entity is no longer amenable to suit. FIFTH REP. 278.

¹³⁰ Compare CPLR R. 318, with CPA § 227.

¹³¹ CPLR § 308(1).

¹³² CPLR § 311(1).

¹³³ CPA § 228(8), (9).

distinction between persons who may be served on behalf of a foreign as compared to a domestic corporation. In light of the fact that the process server often does not know whether the corporation is domestic or foreign, this innovation would seem to be desirable.¹³⁴

In the case of a domestic or licensed foreign corporation, service can also be effectuated by delivering duplicate copies of the summons to the Secretary of State. It is then the Secretary's duty to mail a copy of the summons to the defendant corporation.¹³⁵ In addition, under Section 307 of the Business Corporation Law which becomes effective on September 1, 1963, an unauthorized foreign corporation is deemed to have designated the Secretary of State as its agent for service of process in any action arising out of its doing business within this state.¹³⁶ In this case, in addition to delivering the summons to the Secretary, the plaintiff must thereafter give notice to the corporation by delivering a copy of the summons to the corporation without the state or by sending a copy of the summons to the corporation by registered mail. Furthermore, proof of service must be filed within thirty days of such service. Since the failure to comply with these numerous provisions could possibly result in a jurisdictional defect, an attorney might be reluctant to use this section. If he chooses not to, fortunately, by virtue of Section 302 of the CPLR, the necessary jurisdictional predicate will always exist where the cause of action arises from the doing of business within this state. That being the case, the CPLR provides, as will be discussed later, that service can be made without the state in the same manner as service is made within the state.¹³⁷

In addition to the 318 statutory agent, provided for in the CPLR, the Business Corporation Law provides that a domestic or authorized foreign corporation can designate a natural person who is a resident of and has a business address in the state or a domestic or a licensed foreign corporation as an agent for service of process.¹³⁸ This designation must be registered with the Department of State in Albany. Unlike the 318 agent, whose designation remains in effect for only three years, this agent's designation has no such time limitation.

Personal service on other types of business organizations is substantially unchanged by the CPLR. For instance, with respect

¹³⁴ SECOND REP. 161.

¹³⁵ N.Y. GEN. CORP. LAW § 217; N.Y. STOCK CORP. LAW § 25. This method of service is retained in § 306 of the Business Corporation Law which becomes effective on September 1, 1963.

¹³⁶ N.Y. BUS. CORP. LAW § 307.

¹³⁷ CPLR § 313.

¹³⁸ N.Y. BUS. CORP. LAW § 305.

to partnerships, both the CPA and CPLR allow the partners to sue or be sued in the partnership name. Also personal service upon any partner within the state will be sufficient notice to the partnership.¹³⁹ With respect to unincorporated associations, if the action is brought against the president or treasurer on behalf of such association, service of summons upon either of these officers is permitted.¹⁴⁰ Moreover, if the association is doing business within this state and has designated the Secretary of State as an agent upon whom service of summons can be made, the association may be served by personally delivering to the Secretary of State duplicate copies of such process.¹⁴¹ As in the case of a domestic or licensed foreign corporation, the Secretary of State is then required to send by registered mail a copy of the summons to the association.

With respect to infants and incompetents, the provisions in the CPLR are almost identical with those in the CPA.¹⁴² Whatever the particular age of the infant defendant, a copy of the summons must be delivered to the infant's parent or guardian, or if there be none within the state, to the person having the care and control of the infant or with whom he resides or in whose service he is employed. If the infant be of the age of fourteen or over, a copy of the summons must also be delivered to the infant. In the case of judicially-declared incompetents, if a committee has been appointed, service upon such incompetent shall be made by personally serving the summons within the state upon the committee and upon the incompetent. The court in its discretion may make an order dispensing with delivery of the summons to the incompetent defendant.

In the case of governmental subdivisions, the provisions designating persons upon whom process may be served are partially modified by the CPLR. For instance, the CPA provides that if the action is against the City of New York, service must be made by delivering a copy of the summons to the mayor, comptroller, corporation counsel or to any person designated in writing by any of them to receive process in their behalf, which designation must be filed in the office of the county clerk of the County of New York.¹⁴³ Section 311(2) of the CPLR does not provide for service on the mayor, comptroller or their designees. In addition, the CPA requirement that a county be served by delivery of a copy of the

¹³⁹ CPA § 222-a; CPLR §§ 310, 1025.

¹⁴⁰ N.Y. GEN. ASS'NS LAW § 13; CPA § 1025.

¹⁴¹ N.Y. GEN. ASS'NS LAW §§ 18, 19. For the purpose of this section association means only a joint stock association or business trust. N.Y. GEN. ASS'NS LAW § 2(4).

¹⁴² Compare CPLR § 309(a),(b), with CPA § 225(1),(2).

¹⁴³ CPA § 228(1).

summons to the chairman or clerk of the board of supervisors, the county clerk, or the county treasurer and by delivering or mailing another copy of the summons to the county attorney or to the clerk of the board of supervisors has been changed by the CPLR to require service only upon one county officer.¹⁴⁴ Referring to the double service requirement, the revisers contended that it was both onerous and unnecessary.¹⁴⁵ Unlike the CPA, the CPLR provides for service upon a park, sewage or other district by delivering the summons to the clerk, any trustee or any member of the board.¹⁴⁶ With regard to judicial bodies, the CPA requirement that the summons be delivered to a majority of a court, board, or commission has been altered to allow service on any one judge or member.¹⁴⁷ However, under both statutes, if the board or commission has a chairman or other presiding officer the summons may be delivered to such chairman or officer.

With respect to other public organizations, the CPLR leaves the CPA requirements substantially unchanged. Service upon the state is made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general personally within this state.¹⁴⁸ Service upon a city other than New York City is made by delivering the summons to the mayor, comptroller, treasurer, counsel or clerk of such city.¹⁴⁹ Service upon a town is made by delivering the summons to the supervisor or the clerk.¹⁵⁰ A village is served by delivering the summons to the mayor, clerk or any trustee of such village.¹⁵¹ A school is served by delivering the summons to the clerk, any trustee, or any member of the board of such school.¹⁵²

In addition to personally delivering the summons to the defendant or his statutory designee, a plaintiff can acquire in personam jurisdiction over a defendant by substituted service.¹⁵³ This is accomplished by mailing the summons to the person to be served at his last known residence and either affixing the summons to the door of his place of business, dwelling house, or usual place of abode within the state or delivering the summons within the state to a person of suitable age and discretion at the place of business, dwelling house, or usual place of abode of the person to be served. This method of service is available only if service cannot with due

¹⁴⁴ Compare CPA § 228(3), with CPLR § 311(4).

¹⁴⁵ SECOND REP., 160-61.

¹⁴⁶ CPLR § 311(7).

¹⁴⁷ Compare CPA § 1289, with CPLR § 312.

¹⁴⁸ CPLR § 307; CPA § 221.

¹⁴⁹ CPLR § 311(3); CPA § 228(2).

¹⁵⁰ CPLR § 311(5); CPA § 228(4).

¹⁵¹ CPLR § 311(6); CPA § 228(5).

¹⁵² CPLR § 311(7); CPA § 228(6).

¹⁵³ CPLR § 308(3).

diligence be made by delivering the summons within the state to the person to be served. It should be noted that service on a 318 agent does not have to be attempted in order for substituted service to be available. Under the CPA, the plaintiff has to procure a court order granting leave to effect such service.¹⁵⁴ These orders have been generally granted as a matter of course. Thus, this requirement was considered wasteful of both lawyers' and courts' time. Realizing this, the revisers eliminated the necessity of obtaining a court order.¹⁵⁵

To complete substituted service, proof of such service must be filed with the clerk of the court designated in the summons. Service will then be complete ten days thereafter. Unlike the CPA, the CPLR does not specify the time in which the proof of service must be filed.¹⁵⁶ Although the revisers do not discuss this point in their notes, the courts, in light of the specific requirement under the CPA, will probably require the plaintiff to file proof of service within a reasonable time after such service.

Under the CPLR, the substituted service provision is contained in section 308 which is entitled "Personal Service Upon a Natural Person." The section then states that "personal service upon a natural person shall be made . . ." This raises the interesting question as to whether an agent is included in the concept of a natural person. The problem is particularly acute in the case of a corporation where the person to be served is always an agent. In the past, the courts did allow substituted service upon a corporate agent.¹⁵⁷ It would seem that since the revisers did not indicate a change of policy, the same practice will continue to be followed. Moreover, this section seems to be concerned with enumerating the various methods of service rather than with specifying whom to serve. Consequently, it would appear that substituted service can be made upon an agent if he is the person to be served. While it is believed that this conclusion is correct, the courts may well interpret section 308 as applying to natural person defendants only.

Despite the fact that section 308(3) does not specifically prohibit substituted service in matrimonial actions, it would seem that this type of service will remain inapplicable in such actions.¹⁵⁸ Primarily this is due to the courts' interpretation of Section 1167 of

¹⁵⁴ CPA §§ 230, 231.

¹⁵⁵ FIFTH REP. 266.

¹⁵⁶ CPLR § 308(3). Section 231 of the CPA requires that proof of service be filed within twenty days after the order is granted.

¹⁵⁷ In the Matter of Lorenz-Schneider Co., 17 App. Div. 2d 842 (2d Dep't 1963).

¹⁵⁸ It is interesting to note that in the Fifth Report this method of service was specifically prohibited in matrimonial actions. FIFTH REP. 265.

the CPA (now Section 232 of the Domestic Relations Law)¹⁵⁹ concerning a default judgment in marital actions. As this section has no provision for granting a default judgment in instances of substituted service, the courts have consistently held this method of service inapplicable in such actions.¹⁶⁰ Thus, the revisers were presented with the possibility that the only form of notice available in this situation would be mere publication. As this method of service is less likely to give notice to a defendant than is substituted service, the revisers, in order to remedy this problem, decided that an order for service by publication in marital actions had to direct, if possible, that a copy of the summons be mailed to the defendant.¹⁶¹

Where personal service cannot be effectuated by one of the methods already discussed, service can be made by virtue of section 308(4), in such a manner as the court directs.¹⁶² Thus, it would seem that if the defendant's residence cannot with due diligence be determined, the court might order the plaintiff to mail the summons to a place where the defendant would probably receive it.¹⁶³ Furthermore, if the defendant cannot be located and his address is unknown, the court, in certain instances, may direct service by publication even though the action is not in rem or quasi in rem.¹⁶⁴ However, the application of this latter method, for the purpose of obtaining personal jurisdiction, is somewhat restricted since it is less likely to give the defendant actual notice of the proceeding.¹⁶⁵

As already noted, Section 302 of the CPLR is designed to take advantage of the constitutional powers of the state to subject non-residents to personal jurisdiction when they commit certain enumerated acts within the state. To insure the effectiveness of this provision, the revisers found it necessary to modify and enlarge much of the existing law with respect to service of nonresident defendants.¹⁶⁶ As a result, where the proper jurisdictional predicate exists, section 313, for the purpose of acquiring personal jurisdic-

¹⁵⁹ 1962 N.Y. Sess. Laws 1214. (Effective September 1, 1963.)

¹⁶⁰ *Weiss v. Weiss*, 227 App. Div. 757, 237 N.Y. Supp. 56 (2d Dep't 1929) (per curiam); *Purvis v. Purvis*, 167 App. Div. 717, 153 N.Y. Supp. 269 (4th Dep't 1915) (per curiam).

¹⁶¹ SIXTH REP. 114.

¹⁶² CPLR § 308(4).

¹⁶³ See SECOND REP. 165; cf. *Skidmore v. Green*, 33 F. Supp. 529 (S.D.N.Y. 1940).

¹⁶⁴ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (service by publication upon unknown beneficiaries was sufficient notice to deprive them of their rights to sue the trustee for negligence).

¹⁶⁵ *McDonald v. Mabey*, 243 U.S. 90 (1917) (publication in local newspaper not sufficient notice to bind a person who has left a state, intending not to return).

¹⁶⁶ SECOND REP. 162-63.

tion, authorizes service without the state to be made in the same manner as service is made within the state.¹⁶⁷ Accordingly, if a non-domiciliary or unlicensed foreign corporation commits a tortious act; transacts any business; or owns, uses, or possesses any real property in New York, personal jurisdiction can be obtained over such person or corporation on a cause of action arising out of this contact by merely delivering the summons to the party to be served without the state.¹⁶⁸ Parenthetically, it should be noted that if the defendant is a domiciliary, or a corporation deemed "present" in New York, personal jurisdiction can be obtained over such person or corporation on any cause of action by service without the state.

To acquire personal jurisdiction, the CPA permits service on a domiciliary outside the state.¹⁶⁹ With respect to nonresidents outside the state, however, personal jurisdiction can usually be obtained only where service upon a state officer or other designee is specifically authorized by a special statute.¹⁷⁰ For instance, under the Vehicle and Traffic Law, if a nonresident operates a motor vehicle in this state he will be deemed to have appointed the Secretary of State as his agent for service in any action growing out of an accident in which such nonresident was involved.¹⁷¹ When utilizing this statute the plaintiff is not only required to deliver a copy of the summons to the Secretary of State, but he must give notice of such service and a copy of the summons to the defendant by registered mail or deliver a copy of the complaint and summons to the defendant without the state. Although these special statutes will continue to be available, the practitioner, by virtue of section 313, will be able in most cases, under section 302, to obtain jurisdiction over the defendant by merely delivering the summons to such defendant outside the state. However, in a particular case, these special statutes, having been construed and tested, may be a less costly and more secure way of proceeding.

In view of the foregoing, suppose the plaintiff, proceeding under the Motor Vehicle statute, served the defendant with a summons and complaint without the state but failed to serve the Secretary of State. As the method of service would have been authorized under section 313, could the court permit the plaintiff to amend his pleadings so as to acquire in personam jurisdiction

¹⁶⁷ CPLR § 313.

¹⁶⁸ Section 313 also authorizes service upon a nonresident administrator or executor provided he represents a deceased who would have been subject to in personam jurisdiction under sections 301 or 302 were he alive. *Fifth REP.* 271.

¹⁶⁹ CPA § 235.

¹⁷⁰ For a discussion of statutes applicable to nonresident defendants see *SECOND REP.* 455-68. For a partial enumeration see note 207 *infra*.

¹⁷¹ N.Y. VEHICLE & TRAFFIC LAW § 253.

over the defendant? Since the method of service employed was reasonably designed to give the defendant notice of the proceeding against him, it would seem that the court would be exercising its discretion properly if it allowed the amendment.

A further problem exists with regard to the permissibility of substituted service outside the state. Since section 308(3) only authorizes this type of service within the state, this problem could prove to be troublesome. Unfortunately the revisers do not clearly indicate whether section 313 was intended to authorize substituted service outside the state.¹⁷² However, it would seem that the language of the section is broad enough to cover this situation. In any event, by virtue of section 308(4), the court clearly could direct service to be made in this manner.

Under the CPA, where service cannot be effectuated by personal or by substituted service *within the state*, the court, if it has jurisdiction over property of the defendant, in certain instances, may order service of summons by publication.¹⁷³ In contrast to this the CPLR authorizes service by publication only where "service cannot be made by another proscribed method with due diligence."¹⁷⁴ Accordingly this method of service will not be permitted unless personal or substituted service cannot be effectuated *within or without the state*.¹⁷⁵

Furthermore, the CPA limits the making of an order for service of summons by publication to particular classes of defendants listed in section 232-a such as unknown defendants, residents avoiding service, or nonresidents absent from the state. The CPLR, on the other hand, makes no such distinction. However, since personal service will have to be used whenever practicable, it would appear that a list of defendants upon whom an order for service of publication may be made will be unnecessary.¹⁷⁶

Under the CPA, the order of service of summons by publication directs the summons to be published in two English-language newspapers, not less than once a week for six consecutive weeks, and that a copy of the summons be mailed to the defendant.¹⁷⁷ The order can dispense with the mailing, if the court is satisfied

¹⁷² The early proposals provided for service by certified or registered mail in quasi in rem and in rem proceedings. This provision was deleted because the revisers were of the opinion that mailing plus affixing the summons to the door of the defendant's residence was a superior method of service. Therefore the revisers apparently assumed that substituted service would be available without the state. FIFTH REP. 273-74.

¹⁷³ CPA § 232.

¹⁷⁴ CPLR § 315.

¹⁷⁵ To acquire quasi in rem or in rem jurisdiction, section 314 provides that "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."

¹⁷⁶ SECOND REP. 166.

¹⁷⁷ N.Y. R. CIV. PRAC. R. 50.

that with reasonable diligence the plaintiff cannot ascertain a place where the party to be served would probably receive the matter transmitted. The order also must state that personal service upon the defendant without the state is equivalent to publication and mailing.¹⁷⁸ It is interesting to note that except in matrimonial actions mailing will be eliminated under the CPLR.¹⁷⁹ The revisers realized that the mailing requirement was unnecessary because if the defendant's address is known he could always be served in another manner and an application for service by publication should be denied in the first instance.¹⁸⁰ The requirement that the summons be published in two newspapers will be retained, but only one of them will have to be in English. In addition, the summons will only have to be published once in each of four successive weeks.¹⁸¹

Turning to the contents of the publication, the revisers indicated that the only change from the CPA will be the requirement that a brief statement of the object of the action be published along with the summons and notice.¹⁸²

Where the defendant defaults in appearing or pleading, and the plaintiff desires to enter a default judgment, proof of service is required as a condition of entry of judgment.¹⁸³ With the possible exception of substituted service, the proof can be filed at any time prior to the entry of such judgment.¹⁸⁴ It should be in the form of a certificate if the service is made by an authorized public officer, or in the form of an affidavit if made by any other person.¹⁸⁵ Also, a writing admitting service by the person served is adequate. The proof should specify the papers served, the person who was served and the date, place and manner of service. In addition, the fact that service was made by an authorized person in an authorized manner should be stated.

Where a default judgment is rendered against a person who was served with a summons other than by personal delivery to

¹⁷⁸ CPA § 233.

¹⁷⁹ CPLR R. 316.

¹⁸⁰ SIXTH REP. 114; SECOND REP. 168.

¹⁸¹ Furthermore rule 316 requires the first publication to be made twenty days after the order is granted. This is a substantial reduction from the CPA rule which permits the first publication to begin three months after the order is granted. N.Y.R. CIV. PRAC. R. 51.

¹⁸² SECOND REP. 168. Essentially the CPLR provisions relating to publication are a simplification of the provisions in Rules 50-52 of the Rules of Civil Practice. Therefore, the notice must still apprise the defendants when and where the order and complaint have been filed. In addition, where the order is brought to recover a judgment affecting real property, the notice should also describe the property.

¹⁸³ CPLR § 3215(e).

¹⁸⁴ See PRASHKER, *NEW YORK PRACTICE* 158 (4th ed. 1959) for a discussion of similar provisions under the CPA.

¹⁸⁵ CPLR R. 306.

him or his 318 agent, Section 317 of the CPLR will allow him to defend on the merits, notwithstanding the default, provided that the court find that he was not personally given notice of the summons in time to defend and that he has a meritorious defense.¹⁸⁶ To utilize this section, the party seeking to defend must request permission to do so within one year after he obtains knowledge of the entry of the judgment, but in no event more than five years after such entry.¹⁸⁷ Unlike the comparable provision in the CPA, there is no requirement that the defendant acquire knowledge of the judgment by written notice.¹⁸⁸ Obviously, the basic purpose of this section is to allow a defaulting party to open a default judgment and defend where the summons was served by substituted service or by publication. However, the language would seem to be applicable to other situations. For instance, if the person served was a registered agent under Section 305 of the Business Corporation Law and such agent failed to notify the corporation, it would seem that the section should be available to the defaulting corporation. But even if the section is construed not to apply to this situation, the courts can open the default since they have inherent discretionary power to permit a judgment to be set aside.¹⁸⁹

APPEARANCE

Before examining the appearance provisions of the CPLR, one basic distinction must be made. While the CPA distinguishes between general and special appearances,¹⁹⁰ the CPLR does not. It provides that every appearance is the equivalent of personal service unless a defendant questions the court's jurisdiction over his person.¹⁹¹ A defendant, making such a challenge, will prevent a plaintiff from taking a judgment by default because he has appeared. But whether this appearance is a waiver of jurisdictional objections will depend upon the court's disposition of the jurisdictional contentions in an in personam action, or a defendant's activity after

¹⁸⁶ Under Section 217 of the CPA if good cause and a meritorious defense are shown, the court must grant the defendant's motion, whereas, under the CPLR even if the conditions in sections 317 are satisfied, a literal reading of the provision seems to indicate that the court will have discretion in deciding whether or not to grant the motion.

¹⁸⁷ CPLR § 317.

¹⁸⁸ CPA § 217. Under the CPA, if written notice isn't served upon the defendant, he can defend within seven years after the entry of the judgment.

¹⁸⁹ *Brown v. Brown*, 58 N.Y. 609, 611 (1874); *SECOND REP.* 169. Even though section 317 is not applicable in an action for divorce, annulment or partition, the court pursuant to this inherent power could allow a defendant to open the default.

¹⁹⁰ CPA §§ 237, 237-a.

¹⁹¹ CPLR R. 320(a).

an adverse ruling in a quasi in rem or in rem situation. This distinction will be discussed in more detail.

The CPA provides for appearance by service of a notice of appearance, copy of an answer, or a motion "raising an objection to the complaint in point of law."¹⁹² Rule 320(a) of the CPLR has retained the first two methods, but has replaced the last with the clause, "or by making a motion which has the effect of extending the time to answer." For example, a motion pursuant to rule 3211¹⁹³ (motion to dismiss a cause of action or a defense) constitutes an appearance because subparagraph *f* of that rule grants an automatic extension. While the grounds for such a motion would constitute a general appearance under the CPA because they are objections in point of law,¹⁹⁴ they are, under the CPLR, an appearance because of the interplay of the extension of time provisions.¹⁹⁵ Of course, whether or not the appearance will be deemed a submission to the court's jurisdiction depends on whether or not jurisdictional objections, pursuant to rule 3211(a)(8),(9), are joined with the other grounds in the motion to dismiss. If they are, rule 320(b) and/or (c) expressly states that this appearance is not a conferral of jurisdiction upon the court. In effect, this manner of raising jurisdictional objections is analogous to the special appearance under the CPA.

Since the making of such a motion is an appearance, two uncertainties which exist under the CPA are dispelled. Under the CPA there is scant authority which holds that a motion to make a complaint more definite and certain is not an appearance.¹⁹⁶ However, under the CPLR,¹⁹⁷ such a motion would entitle the moving party to an automatic extension. Thus, it would be an appearance because the *motion* has the effect of extending the time to answer.

The second uncertainty exists where a defendant wishes to secure an extension of time which usually arises when he was served only with a summons. A demand for a copy of the complaint would not constitute an appearance under both the CPA and the CPLR.¹⁹⁸ Therefore, if a defendant did nothing other than make such a demand within the time allotted to appear, he would be in default. In order to avoid this, he could either secure

¹⁹² CPA § 237.

¹⁹³ CPLR R. 3211.

¹⁹⁴ N.Y.R. CIV. PRAC. R. 107; *Montgomery v. East Ridgelawn Cemetery*, 182 Misc. 562, 44 N.Y.S.2d 295 (Sup. Ct. 1943), *aff'd mem.*, 268 App. D.v. 857, 50 N.Y.S.2d 843 (1st Dep't 1944).

¹⁹⁵ CPLR RR, 320(a), 3211.

¹⁹⁶ 255 Fifth Ave. Corp. v. Freeman, 120 Misc. 472, 199 N.Y. Supp. 519 (Sup. Ct. 1923).

¹⁹⁷ CPLR R. 3024(a),(e).

¹⁹⁸ CPA § 257; CPLR § 3012(b).

an extension from plaintiff's attorney or the court. If he chose the former, it is clear that this would not be an appearance which would prevent a default.¹⁹⁹ If he proceeded by the latter, there is doubt. Under the predecessor of the CPA, it was settled that this motion was not such an appearance.²⁰⁰ Nevertheless, there seems to be confusion under the CPA.²⁰¹ This problem has been resolved by the CPLR. Rule 320(a) provides that the mere making of a motion, as distinguished from the court's disposition of it, constitutes such an appearance if the motion has the effect of extending the time to answer. For example, under the CPLR, a motion to dismiss or to correct a complaint entitles the moving party to an extension of time to serve a responsive pleading after the court disposes of such motion.²⁰² Thus, by reference to rule 320(a), this is an appearance because the making of the motion generated the extension. However, when a defendant petitions a court for an extension, the making of the motion does not generate the extension. The court's disposition of it creates the extension. Thus, it would seem that such a motion is not an appearance.

While the CPA only provides for three methods of appearing, courts recognized a "de facto appearance." For example, in *Henderson v. Henderson*,²⁰³ the defendant purported to appear specially in a divorce proceeding. In fact, he participated in the merits by cross-examination. The court held that his conduct was tantamount to a notice of appearance. Since Section 301 of the CPLR provides that "a court may exercise such jurisdiction . . . as might have been exercised heretofore," this "de facto appearance" has probably been retained.

Having discussed the methods whereby one effects an appearance, attention should now be given to the time within which one must appear. The CPA requires a defendant to appear within twenty days of service of summons upon him.²⁰⁴ However, if a plaintiff were proceeding pursuant to some special statute, as the Vehicle and Traffic Law²⁰⁵ (authorizing service upon a non-resident motorist), a defendant would have twenty days to appear after the provisions of that statute relating to completion of service had been satisfied. The CPLR has retained the twenty-day provision.

¹⁹⁹ *Maushart v. Kelly*, 10 App. Div. 2d 630, 196 N.Y.S.2d 326 (2d Dep't 1960); *Muffett v. Logan*, 15 Misc. 2d 734, 182 N.Y.S.2d 499 (Sup. Ct. 1958).

²⁰⁰ *Benedict v. Arnoux*, 38 N.Y. Supp. 882 (1895); cf. *Paine Lumber Corp. v. Galbraith*, 38 App. Div. 68, 55 N.Y. Supp. 971 (2d Dep't 1899).

²⁰¹ 3 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 377 (1953).

²⁰² CPLR RR. 3211, 3024.

²⁰³ 247 N.Y. 428, 160 N.E. 775 (1928); accord, *Gundersheim v. Kurcer*, 28 Misc. 2d 463, 218 N.Y.S.2d 701 (Sup. Ct. 1961).

²⁰⁴ CPA § 237.

²⁰⁵ N.Y. VEHICLE & TRAFFIC LAW § 253.

However, if the method of service is one of those specified in rule 320²⁰⁶ (generally methods other than personal delivery to the defendant) then a defendant has thirty days to appear after service is complete. For example, if there is service of summons upon an official of the state authorized to receive it, this being one of the enumerated methods, a defendant is entitled to the benefit of the thirty-day provision. Thus, service pursuant to Section 253 of the Vehicle and Traffic Law would now permit a defendant thirty days within which to appear (service pursuant to this statute is upon the Secretary of State).²⁰⁷ It should be noted that the thirty days do not begin to run until service is complete. Similarly, Rule 3012(c) of the CPLR provides that if the complaint is served with the summons, in the same situations enumerated in

²⁰⁶ Rule 320(a) accords a defendant 30 days in which to appear when:

- a. service is upon a defendant by delivery to an official of the state authorized to receive it. CPLR R. 320(a);
- b. service is upon an attorney of a plaintiff not subject to the personal jurisdiction of the court for a cause of action that would be a counterclaim to the plaintiff's action. CPLR R. 320(a), § 303;
- c. personal service is upon a natural person by a means other than delivery. CPLR R. 320(a), § 308(2), (3), (4);
- d. service is without the state. CPLR R. 320(a), §§ 313, 314;
- e. service is by publication. CPLR R. 320(a), § 315.

There is some question whether or not a corporate defendant whose agent (appointed pursuant to rule 318) has been served is entitled to the 30 day rule. This is so because rule 320(a) refers to the "318 agent" in section 308(2) which is concerned with service upon natural persons.

²⁰⁷ Some of the other statutes which provide for the completion of service after it has been made upon a state official are:

- a. N.Y. BUS. CORP. LAW §§ 306(b), 307(c). Service on a domestic or licensed foreign corporation is complete when service is made upon the Secretary of State. § 306(b). Service upon an unlicensed foreign corporation is complete ten days after filing with the court clerk. § 307(c). (Effective September 1, 1963.)
- b. N.Y. GEN. BUS. LAW § 250, as amended, 1962 N.Y. Sess. Laws 983. Service is complete when papers are filed with the court clerk. (Effective September 1, 1963.)
- c. N.Y. INS. LAW § 59-a(2)(d), as amended, 1962 N.Y. Sess. Laws 1003. Service complete when process and papers are filed. (Effective September 1, 1963.)
- d. N.Y. NAV. LAW § 74. Service is complete ten days after filing with court clerk.
- e. N.Y. VEHICLE & TRAFFIC LAW § 253, as amended, 1962 N.Y. Sess. Laws 1138. Service is complete when papers are filed with court clerk. (Effective September 1, 1963.)

Article 3 of the CPLR also provides for completion of service when service is made pursuant to § 308(3) (substituted service) or rule 316 (service by publication).

rule 320(a), a defendant will have thirty days within which to serve an answer.²⁰⁸

In addition to the methods of appearing, and the time within which an appearance must be made, the effect of appearance should be considered. The CPA provides that a general appearance is the equivalent of personal service upon a defendant.²⁰⁹ Thus, once a defendant appears generally, he has waived his jurisdictional objections.²¹⁰ The CPLR declares that an "appearance" has the same effect unless jurisdictional objections are raised either in a pre-trial motion or in the answer.²¹¹ When jurisdiction is predicated on section 302, a plaintiff might include another cause of action in his complaint. When this occurs a defendant might wish to "appear" in the 302 action, while preserving his jurisdictional objections to the other cause of action. Section 302(b) allows a defendant to do this.

In order to permit a defendant to challenge the court's jurisdiction over him, New York has always recognized the procedural device of a special appearance.²¹² While a general appearance under the CPA cures jurisdictional irregularities in a plaintiff's pleading,²¹³ waives any objection to jurisdiction of the person,²¹⁴ and is tantamount to personal service within the state,²¹⁵ a special appearance enables a defendant to appear without submitting to jurisdiction.²¹⁶ Under Section 237-a of the CPA, jurisdictional objections can only be raised by motion. And while that section only authorized objections to in personam jurisdiction, the courts have held that one could appear specially in a quasi in rem,²¹⁷ and presumably in an in rem,²¹⁸ proceeding, and that the provisions of section 237-a would apply.²¹⁹ The section allows a defendant who made an unsuccessful special appearance to defend

²⁰⁸ CPLR § 3012(c). This section provides for the 30 day extension in every situation enumerated by rule 320(a), except one. Section 3012 does not provide for service upon a natural person by means other than delivery. It would seem that this was a misprint because the revisers clearly indicated that it should cover this. See FIFTH REP. 265, 418.

²⁰⁹ CPA § 237.

²¹⁰ *Reed v. Chilson*, 142 N.Y. 152, 36 N.E. 884 (1894).

²¹¹ CPLR R. 320(b), (c).

²¹² SIXTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL 197 (1950).

²¹³ *Priceman v. Dankert*, 127 N.Y.S. 2d 194 (Sup. Ct. 1953); *accord*, *Sears, Roebuck & Co. v. Podgorny*, 200 Misc. 934, 109 N.Y.S.2d 329 (Sup. Ct. 1952).

²¹⁴ *Reed v. Chilson*, *supra* note 210.

²¹⁵ CPA § 237.

²¹⁶ CPA § 237-a.

²¹⁷ *Lynch v. Plesch*, 8 Misc. 2d 612, 167 N.Y.S.2d 885 (Sup. Ct.), *aff'd mem.*, 4 App. Div. 2d 945, 168 N.Y.S.2d 620 (1st Dep't 1957).

²¹⁸ See *Vanderbilt v. Vanderbilt*, 1 App. Div. 2d 3, 147 N.Y.S.2d 125 (1st Dep't 1955), *aff'd*, 1 N.Y.2d 342, 135 N.E.2d 553, 153 N.Y.S.2d 1 (1956).

²¹⁹ *Ibid.*

on the merits without waiving his jurisdictional objections for purposes of appeal.²²⁰ It is further provided that a special appearance results in a stay of all further proceedings until the court has decided the jurisdictional question.²²¹ However, there seems to be some uncertainty as to whether or not an unsuccessful special appearance in a quasi in rem proceeding would subject a defendant to in personam liability. In *Vanderbilt v. Vanderbilt*,²²² the plaintiff commenced a separation action and had the defendant's property sequestered. The defendant appeared specially, contending that since he had previously obtained a Nevada divorce the plaintiff was no longer his wife, and that therefore the court lacked jurisdiction since there was no marital *res*. The court overruled his objection and he then defended on the merits unsuccessfully. On appeal, his jurisdictional arguments were again rejected. Nevertheless, the Appellate Division held that he was not subject to a personal judgment for alimony, since the court had not obtained in personam jurisdiction despite the unsuccessful special appearance. But since the court indicated that this was not a "truly in rem situation," the uncertainty remains.

Before indicating how this quasi in rem problem has been resolved by the CPLR, it might be helpful to discuss the CPLR provisions comparable to special appearance under the CPA. An objection to jurisdiction under the CPLR²²³ can be raised in the answer or by motion,²²⁴ while under the CPA it can only be raised by motion.²²⁵ Since the distinction between general and special appearances is abolished under the CPLR²²⁶ a procedure had to be authorized that would allow a defendant to raise jurisdictional objections without submitting to the court's jurisdiction. This has been done by viewing appearance from two vantage points. Once a defendant appears by methods provided by rule 320(a) without joining jurisdictional objections, he has submitted to the court's jurisdiction.²²⁷ This is analogous to a general appearance under the CPA. A defendant can also proceed by joining his juris-

²²⁰ CPA § 237-a(2).

²²¹ CPA § 237-a(5).

²²² Note 218 *supra*.

²²³ Jurisdictional objections in in personam, quasi in rem, and in rem actions are expressly authorized. CPLR RR. 320(b),(c), 3211(8),(9). Under the CPA there is some doubt whether or not one can appear specially in a quasi in rem action. Cf. Peterfreund & Schneider, *Civil Practice*, 33 N.Y.U.L. REV. 1263, 1271 (1958). As is the case under a special appearance under Section 237-a(5) of the CPA a defendant is entitled to an extension of time in which to serve his responding pleading if his jurisdictional objection is not sustained. CPLR R. 3211(f).

²²⁴ CPLR R. 320(b),(c).

²²⁵ CPA § 237-a(2).

²²⁶ FOURTH REP. 184.

²²⁷ CPLR R. 320.

dictional objections to his defense on the merits in the answer. If he does this, while he has appeared in the sense that he prevents a plaintiff from taking a judgment by default, the appearance is not deemed a submission to the court's jurisdiction.²²⁸ This is comparable to the special appearance under the CPA. Assuming a defendant proceeds in this manner when a court claims to have in personam jurisdiction, his position will be the same as if he had made a special appearance under the CPA. However, with respect to the unsuccessful special appearance in the quasi in rem situation, where there had been confusion despite the determination in the *Vanderbilt* case, the CPLR resolves this uncertainty. Rule 320(c) now provides that an appearance, where jurisdictional objections are joined, is not a submission to the court's jurisdiction unless a defendant proceeds on the merits and an appellate court does not sustain his jurisdictional argument. Thus, a defendant can object to jurisdiction over his property and, if unsuccessful, may withdraw without becoming subject to in personam liability. If he defends on the merits after an adverse determination on the jurisdictional question, and an appellate court upholds the jurisdictional finding, the judgment will be deemed to be one in personam.

The quasi in rem proceeding is also linked with another procedural device known as a limited appearance. This device allows a defendant to defend on the merits, while limiting his liability to the value of the attached property which was the basis of jurisdiction over him.²²⁹ This is not recognized in New York under the CPA²³⁰ and is rejected by Rule 320(c) of the CPLR because an appearance without a joinder of jurisdictional objections is a submission to the court's jurisdiction.

Having thus seen how a defendant appears, in what time he must appear, the manner of raising jurisdictional arguments, the question now becomes who may appear for a defendant. Under both present and new law, an adult who is capable of defending an action may appear in his own behalf or by attorney, while a corporation or voluntary association must appear by attorney.²³¹

With respect to infants and persons judicially declared to be incompetent, the CPLR has enacted a change. Under the CPA, a guardian ad litem has to be appointed by the court.²³² Under

²²⁸ CPLR R. 320(b),(c).

²²⁹ 3 CARMODY-WAIT, CYCLOPEDIA OF NEW YORK PRACTICE 338 (1953).

²³⁰ *Burg v. Winquist*, 124 N.Y.S.2d 133 (Sup. Ct. 1953); SIXTEENTH ANNUAL REPORT OF JUDICIAL COUNCIL, 192 (1950). *Accord*, *Perlak v. Goodyear Tire & Rubber Co.*, 140 N.Y.S.2d 675 (Sup. Ct. 1955).

²³¹ CPA § 236; CPLR § 321(a).

²³² CPA §§ 202, 208.

the CPLR an infant may appear by the guardian of his property.²³³ If there is no such person, a parent may appear.²³⁴ The incompetent appears by the committee of his property.²³⁵ Where there are none of the above specified persons, a court must appoint a guardian ad litem.²³⁶

Before completing the discussion of appearance, reference should be made to the necessity for authority of appearance by an attorney in a real property action. The CPLR does not change the CPA.²³⁷ Thus, while a plaintiff's attorney must serve a defendant with written authorization, a non-resident defendant's attorney must file written authority with the clerk as if he were recording a deed, and serve the plaintiff's attorney with a copy of notice of the filing.²³⁸

Section 240 of the CPA provides that if a party's attorney died, became disabled, was removed or suspended before judgment, then no proceeding should continue until thirty days after a notice to appoint another attorney has been served. Section 321(c) of the CPLR changes this in one respect, and clarifies it in another. The CPA has been interpreted as giving the party an absolute stay.²³⁹ Under the CPLR the stay will only be granted if the court's permission has been secured.²⁴⁰ The revisers indicate that this change will allow a court "to vary the rule in cases where the stay . . . would produce undue hardships to the opposing party, as where the time to take an appeal . . . would run or where a provisional remedy is sought and speed is essential."²⁴¹ The clarification occurred with respect to whether or not a party who voluntarily discharges his attorney is entitled to the stay. Under the CPA, there was minimal authority to the effect that such a party should be entitled to the stay.²⁴² The rationale of such a position was that the discharge rendered an attorney "disabled" as to further participation. In opposition to this view, there was substantial authority based on the rationale that section 240 only applies where the disability was caused by some factor outside of the control of the attorney and his client.²⁴³ While a literal

²³³ CPLR § 1201.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ FOURTH REP. 191-92.

²³⁸ CPLR R. 322 (a), (b).

²³⁹ *Heller v. Alter*, 143 Misc. 10, 255 N.Y. Supp. 627 (Munic. Ct. 1932).

²⁴⁰ CPLR § 321(c).

²⁴¹ FOURTH REP. 191. While the statute authorizes a thirty day extension only, the above quotation might justify an extension of less than thirty days where neither party will be prejudiced by such an extension.

²⁴² *Thomas v. Thomas*, 178 Misc. 349, 34 N.Y.S.2d 320 (Sup. Ct. 1942).

²⁴³ *Hendry v. Hilton*, 283 App. Div. 168, 127 N.Y.S.2d 454 (2d Dep't

reading of Section 321(c) of the CPLR might not answer this problem, the revisers clearly state that a voluntary discharge does not fall within the meaning of a removal or disability of an attorney.²⁴⁴

CONCLUSION

Article 3 of the CPLR represents a definite shift in attitude regarding the acquisition of jurisdiction in New York. The comprehensive scheme provided by section 302 has been designed to ultimately replace the piecemeal provisions which presently exist. However, in establishing the scheme, the draftsmen have left much to judicial construction. This is a wise policy in an area where the law is unsettled and where the facts of the individual case play such a significant role. By its emphasis on the distinction between jurisdictional predicate and service, article 3 at once reflects the constitutional theory utilized by the Supreme Court under the due process clause and simultaneously provides a better analytical approach for the practitioner.

Though the jurisdictional provisions are commendable on many grounds, certain problems will result for which the revisers could have provided certain guidelines. This is especially apparent in the "commission of a tortious act" area. The problems of where a tort is committed and of jurisdictional facts could well have been discussed by the revisers so as to at least demonstrate the basic approach intended in these areas.

However, the defects are minor and are outweighed by the clarification and simplification that article 3 accomplishes. This is reflected in the service provisions. Thus, by eliminating the need for a court order in making substituted service, the draftsmen have discarded a procedure which was somewhat burdensome and, since the orders were almost always granted, really unnecessary. Likewise, by providing for personal service without the state where the proper jurisdictional predicate exists pursuant to section 302, they have adopted an approach which is clear and simple and designed to insure actual notice. By discarding the distinction between foreign and domestic corporations in section 311, the revisers have provided uniformity which reflects the fact that in many instances the server does not know whether the corporation is foreign or domestic.

The draftsmen have continued the wise policy of the Civil Practice Act in the area of service—that these provisions be

1953); *Davalos v Davalos*, 283 App. Div. 699, 127 N.Y.S.2d 570 (1st Dep't 1954) (per curiam); *accord*, *Conn v. Conn*, 204 Misc. 1069, 127 N.Y.S.2d 55 (Sup. Ct. 1954).

²⁴⁴ Note 241 *supra*.

designed to in fact give notice. As already mentioned, they have expressly demonstrated the intent that service by publication be utilized only as a last resort.

The appearance provisions of article 3 are consistent with the revisers' attitude of streamlining and clarifying. Thus, the special appearance has been discarded. Consequently, a defendant can raise his jurisdictional objections by motion or answer. This obviates the Civil Practice Act provision which restricted jurisdictional objections to pre-trial motion.

In drafting the appearance provisions, the revisers have resolved certain problems that exist under the Civil Practice Act. For example, there is uncertainty as to whether an unsuccessful special appearance in a quasi in rem proceeding would subject a defendant to in personam liability. Under the CPLR, it is clear that such a defendant would not be subject to personal jurisdiction when: (1) he withdraws immediately after an unsuccessful determination on the jurisdictional issue, or (2) he is ultimately successful on the jurisdictional question in an appellate court.

The revisers are to be commended for largely accomplishing the goals which they had set. It should be noted, however, that while many problems are resolved, article 3 will itself present certain problems, the answers to which will have to be provided by judicial interpretation.



CORPORATE DISTRIBUTIONS: THE LIQUIDATION — REINCORPORATION SITUATION

Introduction

As a means of strengthening the financial condition of corporations, statutory nonrecognition of otherwise taxable gain or loss is permitted certain reorganization transactions.¹ These reorganizations are categorized by section 368.² In this way, where required by the exigencies of business, corporate structures may be reshaped by the transfer and exchange of properties without incurring tax liability.³ These transactions cannot, however, be

¹ SURREY & WARREN, *FEDERAL INCOME TAXATION* 1616 (1960).

² INT. REV. CODE OF 1954, § 368(a)(1)(A)-(F). See SURREY & WARREN, *op. cit. supra* note 1, at 1521-33.

³ Treas. Reg. § 1.368-1(b) (1961).