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## Vox Clamantis In Deserto

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# ST. JOHN'S LAW REVIEW

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## VOX CLAMANTIS IN DESERTO

**T**HE failure to recognize a distinction between the absence of jurisdiction over the person of the defendant because of a defective service of process and the absence of jurisdiction over the person of the defendant because of a defective complaint, has created unnecessary confusion and uncertainties in the law of practice in New York State. The Court of Appeals, as well as the statutes and rules of procedure, recognize and treat the two objections independently of each other. Nevertheless, many lower courts frequently base their decisions on the assumption that, since the objection concerns a want of jurisdiction over the person of the defendant, it makes no difference whether the defendant's objection consists of an irregular or unlawful service, or, on the other hand, an objection solely directed to the alleged cause of action. This situation arises most frequently in connection with the effect of the defendant's voluntary general appearance. Commonly, the defendant's objection will be disposed of in the following language, "The objection raised by the defendant is that the court has no jurisdiction over the person of the defendant, but it is the law of this state that such objection can be waived by a general appearance. If the objection herein were as to the cause of action, the result would be otherwise, but, since defendant has appeared, he has conferred jurisdiction over his person and, therefore, the motion must be denied." It is the purpose of this article to point out under what circumstances the above decision may be perfectly sound law and to demonstrate under what factual situations the decision would be, if not actually ridiculous, at least unsound law.

There are only two methods provided for the commencement of a civil action and, manifestly, if the one or the other is not employed, no judgment can be made or given therein. A thing not commenced cannot be finished. The practice act provides that a civil action may be commenced by the service of a summons on the defendant therein.<sup>1</sup> It also provides that a voluntary general appearance is equivalent to the personal service of a summons.<sup>2</sup> It will be noted as to these two methods, that the first calls for affirmative acts on the plaintiff's part which must conform to statutory requirements and that the second looks to conduct on defendant's part sufficient to imply an assent to a judicial determination of a controversy between parties. Both methods are not essential to commence the action. Frequently, we find the plaintiff taking the initiative but not succeeding in his attempt because of some omission or defect where, nevertheless, the court will hold that the action has been duly commenced under the second method. In such instance it will be said jurisdiction is acquired by defendant's consent.

In making provision for the commencement of the action under the first method, the legislature has enacted requirements that increase and become more complicated, depending upon who the person is that plaintiff intends to make a party defendant and the type of service which plaintiff will employ. Statutes must conform to defendant's constitutional right of due process and plaintiffs who fail to comply with these statutory enactments will not succeed in bringing their controversy before a court of justice. Consequently, as statutory enactments increase, the possibility of error and omission on plaintiff's part accelerates. The service provided for may be personal or constructive<sup>3</sup> and the latter includes a substitute service, service by publication, service on non-resident motorists,<sup>4</sup> service on appointed state officers as agents for foreign corporations licensed to do business in this state and, possibly, service on non-resident individuals doing business

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<sup>1</sup> N. Y. CIV. PROC. ACT § 218.

<sup>2</sup> *Id.* § 237.

<sup>3</sup> *Id.* art. 25.

<sup>4</sup> N. Y. VEHICLE & TRAFFIC LAW § 52.

here.<sup>5</sup> Even in the simple cases of personal service upon individuals the exactions vary. Service upon the adult differs from service upon the infant. Service upon the adjudicated incompetent differs from service upon the incompetent who has not been legally adjudicated as such. Then too, service upon the domestic corporation differs greatly from service upon the foreign corporation and as to the latter, a difference exists depending upon whether or not the corporation is licensed to do business in this state. If plaintiff seeks to commence his action by resorting to one of the constructive services, the statutory requirements are even more exacting and plaintiff more frequently is called upon to establish his conformity thereto in order to sustain the validity of the service. In these instances the problem presented to the court is first to ascertain whether or not there has been an omission or defect and secondly to determine whether it is an irregularity or a jurisdictional defect. In the latter case jurisdiction of the defendant is not acquired and the action is not commenced.

It has been noted, however, that defendant's conduct may be construed as a voluntary general appearance and, conceding the omission or defect to be jurisdictional, the court may find against the defendant because the second method may overcome the objection raised under the first method. Defendant's general appearance is the equivalent of personal service. This appearance may be found in many ways. Defendant may have served a formal notice of appearance, or an answer or a notice of motion raising an objection in point of law.<sup>6</sup> He may have otherwise participated in the merits of the controversy so that it may be said of him, that becoming an actor in the controversy in a substantial sense, he has consented that the court has acquired jurisdiction of his person.<sup>7</sup> It would now be too late to complain. To avoid any inference of assent by defendant to a judicial determination of the controversy, defendant must make a special appearance and solely to object to plaintiff's attempt to com-

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<sup>5</sup> N. Y. CIV. PRAC. ACT § 229-b; see Prashker, *Service of Summons on Non-Resident Natural Persons Doing Business in New York* (1940) 15 ST. JOHN'S L. REV. 1.

<sup>6</sup> N. Y. CIV. PRAC. ACT § 237.

<sup>7</sup> *Henderson v. Henderson*, 247 N. Y. 428, 160 N. E. 775 (1928).

mence the action under the first method. He must limit himself strictly to this question. He is not even permitted to demand a copy of the complaint.<sup>8</sup> If he so protects himself under the special appearance the court must then determine the regularity of the service. If the service is irregular and not in conformity with the statutory requirements the spurious service is vacated and no action has been commenced against the defendant. Consequently neither plaintiff nor defendant is entitled to a judgment which must be the determination of the rights between the parties. Rights or liabilities in an action cannot be determined between a plaintiff and a person not yet made a party. It is under these circumstances and in instances where the defective service is cured by a voluntary general appearance, that the decision stated above would represent sound law.

Is there a recognized objection that the court has no jurisdiction of the person of the defendant which applies only to the cause of action alleged in the complaint? If so, is the objection independent of the same named objection applicable to improper service of process? Is the rule of waiver and consent or voluntary general appearance applicable to this objection?

That there does exist such objection appears to be so well established that it should be accepted as a self-evident truth. The objection is neither related to the service of process nor the jurisdiction of the subject matter. It does exist whenever the Constitution of the United States, or the constitution of a particular state or a statute imposes a limitation on a given court respecting the exercise of judicial power in an action and the limitation is a factor peculiar to the person of the defendant.

Under the Constitution of the United States, the original jurisdiction of the United States Supreme Court is limited to actions in which a state is a party and to cases affecting ambassadors, other public ministers or consuls. Here there are no limitations as to the subject matter nor the nature of the remedy sought.<sup>9</sup> The only requirement is that either one

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<sup>8</sup> *Muslusky v. Lehigh Valley Coal Co.*, 225 N. Y. 584, 122 N. E. 775 (1919).

<sup>9</sup> U. S. Const. Art. III.

or the other jurisdictional fact pertaining to the parties must appear. It would be absurd to argue that consent of the parties could under any circumstances waive the objection and confer authority upon the court to act.

When the Congress, pursuant to the United States Constitution, established and created the United States District Court, it enacted limitations to the exercise of judicial power, some of which related to the person of the defendant. In actions wherein the complaint demands money damages only, the District Court can acquire jurisdiction provided there is diversity of citizenship. The important question is a factor pertaining to the person of the defendant. The subject matter of the action definitely has no bearing on the question. Two actions might be identical, one against a citizen of the plaintiff's state and the other against a citizen of another state. The first action would have to be disposed of in the state court and the second might be heard and judgment rendered in the Federal Court. No one would argue, that by defendant's consent, the parties might accomplish that which Congress has denied. The jurisdictional fact is in no way connected with the service of process or the commencement of the action. It is a factor pertaining to the defendant and an integral part of the action. It must be established to validate the judgment.

In New York State there exists both constitutional and statutory limitations on the exercise of judicial power. Many of these limitations relate to the subject matter, others to the nature of the remedy sought, and others to the person of the defendant. All, however, are jurisdictional facts which must be alleged and proved.

The New York Supreme Court, under the state constitution, exercises general jurisdiction in law and equity. Nevertheless, there are statutory limitations. For example, under Section 225 of the General Corporation Law, it is provided that the Supreme Court may exercise jurisdiction *only* in certain specified actions when the controversy is between a non-resident or foreign corporation plaintiff and against a foreign corporation defendant. In respect to contracts made in New York or affecting property situated in New York at the time the contract was made, an action to re-

cover money damages for a breach might be brought, but specific performance or reformation or any other equitable relief would not be within the court's jurisdiction. In this instance the jurisdictional fact relates to the remedy sought. In the same section it is provided that an action may be brought to recover real or personal property situated in New York. The limitation applies to the subject matter and the objection could be taken that the court lacks jurisdiction of the subject matter. Another limitation applies to the person of the defendant and the jurisdictional fact required is that the foreign corporation is doing business within the state. In all of these instances, consent of the parties cannot waive the essential jurisdictional fact and none of these requirements is connected with the commencement of the action by service or consent.

The County Courts exercising civil jurisdiction in the counties outside of New York City, have many limitations on their exercise of judicial power.<sup>10</sup> This court is vested with authority to foreclose mortgages upon real property situated within the county but cannot exercise judicial power to reform the mortgage for mutual mistake. This limitation pertains to the remedy sought. Consent of the parties cannot confer authority and if the court proceeded the judgment would be void.<sup>11</sup> The objection is independent of the commencement of the action by service or consent. The defendant is no longer a stranger to the controversy but, rather, a party to an action. As to him the court is authorized to determine rights or fix liabilities. So, in an action for money damages, the court has jurisdiction providing the damages do not exceed \$3,000. The limitations here pertain to the subject matter. Consent of the parties cannot confer judicial authority. If the complaint demands \$6,000 no jurisdiction exists permitting plaintiff to amend the complaint to demand an amount within the limitations. As in arithmetic, so in law, one-half of nothing is nothing and can never be otherwise. The constitution and legislature in this type of action has added a further jurisdictional fact, to wit, the defendant or defendants must reside in the county where the

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<sup>10</sup> N. Y. Civ. Prac. Act § 67.

<sup>11</sup> *Thomas v. Harmon*, 122 N. Y. 84, 25 N. E. 257 (1890).

action is brought.<sup>12</sup> The limitation here pertains to the person of the defendant as it does in the United States Supreme Court and the Federal District Court. So, again, in this instance there is no reason why consent of the parties can substitute that which the legislature requires. Again, the objection has no connection with the commencement of the action. It is a jurisdictional fact essential to the exercise of judicial power by the court.

If reference is made to the Rules of Procedure and the Practice Act the distinction between jurisdiction of the person of the defendant in connection with the service of process and the allegation in the complaint is also apparent. Rule 106 provides that defendant may make a motion for judgment, dismissing the complaint for various objections appearing on the face of the pleading, including the objection that on its face the complaint shows that the court has not jurisdiction of the person of the defendant. The court would have no authority to enter a judgment if the action had never been commenced. The question of defendant's consent is not before the court. The judgment is the final determination of the rights of the parties, and although not *res adjudicata*, is an adjudication. All of the other objections under Rule 106 pertain to the complaint and it would be illogical and unreasonable to treat this objection as an exception applying to the service of the summons. Similar provision is made under Rule 107, except in this instance the objections do not appear on the face of the pleading and, therefore, defendant is permitted to use affidavits to explain the objections. Again, the determination, if in defendant's favor, is a judgment for defendant dismissing the complaint.

In a decision by the Court of Appeals this distinction was made with precision and discernment almost one hundred years ago. In the case of *Burckle v. Eckhart*,<sup>13</sup> one of the questions decided was the jurisdiction of the vice-chancellor. The statutory limitation required residence within the circuit. On page 137, the court said:

The jurisdiction of courts is conferred by law, and in no case by consent of parties. When jurisdiction of the subject and *person* is

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<sup>12</sup> N. Y. CONST. Art. VI, § 11.

<sup>13</sup> *Burckle v. Eckhart*, 3 N. Y. 132 (1849).

required as a prerequisite to judicial action, a defendant may waive any irregularities in the mode by which his person is sought to be subject to the jurisdiction of the court, by a voluntary appearance. He may dispense with the service of process, as he may waive any other personal privilege. But when defendant is in court as a party, the *law* gives jurisdiction of the person, without regard to the question whether his appearance was voluntary or by compulsion. This is all that is meant by giving jurisdiction of the person, and all that is decided in the cases to which we have been referred. (Words in italics in opinion.)

From these considerations it is apparent that there does exist a distinction between the two objections concerning the absence of jurisdiction of the person of defendant and that they are necessarily independent of each other.

Finally, is the rule of waiver and consent or voluntary general appearance limited to improper service of the summons? In this connection there exists no doubt that the defendant's conduct can and does correct an irregular or defective service of the summons. His voluntary appearance is a manifestation of cancelling any jurisdictional defects in the service. Therefore, the action is deemed commenced and the defendant is made a part thereto. But what is the situation when the objection pertains to the complaint? The Court of Appeals in the *Muslusky* case<sup>14</sup> has limited the special appearance to objections concerning the service of the process and defendant can and ought not be permitted to be heard on questions arising as to the pleading. However, objections to the pleading founded on the lack of jurisdiction of the person of the defendant may and do arise. Our statutes and rules of practice provide for such contingency and the Court of Appeals recognizes their existence. How may defendant proceed if the court must apply the rule that a voluntary general appearance waives this objection? Assume that defendant does not serve a notice of general appearance but merely a notice of motion to dismiss the complaint on the grounds stated. This procedure can afford him no protection because the Practice Act provides<sup>15</sup> that the service of a notice of motion raising an objection in point of law is equiv-

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<sup>14</sup> See note 8 *supra*.

<sup>15</sup> See note 6 *supra*.

alent to the notice of general appearance. If the defendant attempts to take the objection as a defense in his answer, again, he is not protected. The Civil Practice Act also provides that the service of an answer is the equivalent of a service of a notice of general appearance.<sup>16</sup> Thus the defendant is confronted with this dilemma. If he serves the notice of special appearance, he will preserve his appearance but cannot be heard on his objection. If he will be heard on his objection and raises the same by either motion or answer, his relief will be denied because his general appearance has waived the objection pertaining to the person of the defendant. If the court still insists that a general appearance waives this objection, another peculiar result follows. Assume the action is commenced in the Oneida County Court by the service of the summons without the complaint, and defendant having no objection to the service, because it conforms strictly to the statutory requirements, serves his notice of general appearance with the usual demand. On receipt of the complaint defendant learns for the first time that the complaint demands a money judgment for \$2,500 and alleges his residence in Herkimer County. The defendant's proper remedy would be to move to dismiss the complaint for want of jurisdiction of the person. Is relief to be denied because of the service of the notice of general appearance? As one scholarly judge so aptly stated in a different situation:

Such a holding would not only bring a reproach upon the administration of justice, but would be an impeachment of the universal dictates of common sense. It requires no other knowledge of the law than to know that its basis is reason and justice, to be able to determine the right of this question.<sup>17</sup>

In *Daidsburgh v. Knickerbocker Life Insurance Co.*,<sup>18</sup> the action was brought in the City Court of Brooklyn against a domestic corporation having its principal place of business in New York City. The defendant appeared generally in the action, and in no manner before trial complained that it was not regularly in court, or that the court had not jurisdiction

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Bulkley v. Bulkley*, 6 Abb. Pr. 307 (N. Y. 1858).

<sup>18</sup> *Daidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526 (1882).

either over it or the cause of action. The court said on page 529 :

In the present case the defendant did not take the objection by its answer, but at the end of the plaintiff's case. The point of time does not seem material. The court could not acquire jurisdiction by consent, and might, whenever its attention was called to the defect in the proceedings, refuse to exceed the powers conferred by the law of its creation. There are, no doubt, many cases where the court, having jurisdiction over the subject-matter, may proceed against a defendant who voluntarily submits to its decision; but where the state prescribes conditions under which a court may act, these conditions cannot be dispensed with by litigants, for in such a case the particular condition or *status of the defendant* is made a jurisdictional fact. (Italics are new.)

If, in the hypothetical decision stated above, the factual situation presented an objection to the lack of jurisdiction of the person of the defendant respecting a defect in the complaint, it is apparent that the decision is not sound law.

It may be that the apparent error and resulting confusion is due to Section 278 of the Civil Practice Act which does provide under what circumstances an objection to the complaint may be waived if not taken by motion. The objections include :

- (a) That the court has not jurisdiction of the person of the defendant in cases where jurisdiction may be acquired by his consent;
- (b) That the plaintiff has not legal capacity to sue;
- (c) That another action is pending between the parties for the same cause;
- (d) That there is a misjoinder of parties plaintiff;
- (e) That there is a defect of parties, plaintiff or defendant.

It must always be borne in mind that under all of these circumstances, there can be a waiver only when the objection appears on the face of the complaint. If the objection does exist but it is not apparent on the face of the pleading, the objection might be taken as a defense in the answer or by

motion. There is a further limitation in respect to defendant's waiver. In Section 279 it is provided that an objection as to the jurisdiction of the court, except as provided for in section 278, is not waived by failure to raise the same before trial.<sup>19</sup> Now the only objection "to the jurisdiction of the Court" found in Section 278 and applicable to the complaint is under subdivision (a), "want of jurisdiction of the person of the defendant", and that is again limited by itself, to the instances "where the jurisdiction may be acquired by his consent". Reading the two sections together, it may be said, if

- (1) the objection appears on the face of the complaint, *and is*
- (2) that the court has not jurisdiction of the person of the defendant, *and is*
- (3) a case where jurisdiction (of the court) may be acquired by his (the defendant's) consent:

then the defendant *must* take the objection by motion. If he fails, he has no right to object. The court, of course, is not limited by this section and on its own initiative may proceed to grant such relief as to it may seem just and proper.

Again, a necessary corollary follows from Sections 278 and 279.

(1) If the objection does not appear on the face of the complaint *or*

(2) If the objection is that the court has no jurisdiction of the person of the defendant *and is also*

(3) A case where jurisdiction of the court may not be acquired by his (defendant's) consent, then the objection may be taken under Section 279

(a) by motion

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<sup>19</sup> N. Y. CIV. PRAC. ACT § 279: *Certain Objection Not Waived.* An objection as to the jurisdiction of the court, except as otherwise provided in the preceding section, and the objection that a complaint, or a statement herein of a separate cause of action, or a counterclaim, does not state facts sufficient to constitute a cause of action, or that a defense is insufficient in law upon the face thereof, are not waived by failure to raise the same before trial.

- (b) as a defense in the answer
- (c) at the trial.

It would therefore follow that whenever a factor pertaining to the person of the defendant becomes a condition to the exercise of judicial power, it ripens into a jurisdictional fact entirely independent of defendant's control or consent. If the fact does not exist, the court lacks authority to pronounce a judgment in the action. Section 278 does not apply in such instances because the jurisdiction cannot be acquired by defendant's consent. Defendant may raise the objection by motion, in his answer or at the trial. The court, not being limited by Section 278, should rule on the objection whenever the defect is called to its attention.

What are the objections that may be made and will be waived if not taken by motion under Section 278? The New York Supreme Court may entertain an action by a non-resident plaintiff against a non-resident defendant to recover damages for a tort committed outside the state. A discretion is vested in the court as to whether or not it will proceed with the action.<sup>20</sup> The objection definitely does not pertain to the remedy plaintiff is seeking or the subject matter of the action, but involves a factor pertaining to the defendant, to wit: his non-residence. If this objection appears on the face of the complaint under Section 278, plaintiff must take it by motion. It is an objection that the court has not jurisdiction of the person of the defendant where the jurisdiction can be acquired by consent. Prior to the adoption of the Civil Practice Act, the defendant might take such objection by demurrer, by answer or at the time of trial. In the case of *Burdick v. Freeman*,<sup>21</sup> the objection was raised at the conclusion of the trial and, although denied for *laches*, there was no criticism respecting defendant's practice. It might be reiterated that if the objection did not appear on the face of the complaint, it might be taken by motion, answer, or at the time of the trial, since it is an objection to the want of jurisdiction of the court, and Section 279 does apply.

Again, in an action brought by a non-resident or foreign

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<sup>20</sup> *Burdick v. Freeman*, 120 N. Y. 420, 291 N. E. 949 (1890).

<sup>21</sup> See note 20 *supra*.

corporation against another foreign corporation *doing business within the state*, to recover damages for a tort occurring outside the state, the court has discretion whether or not it will entertain the suit.<sup>22</sup> If the objection appears on the face of the complaint, defendant must take it by motion or defendant is deemed to have waived it. If the objection does not so appear, defendant may take it under Rule 107 or by a defense in its answer, or raise the objection at the trial of the action.

So too, in actions instituted in the county courts, the defendant may reside in the county where an action for money damages has been instituted. The residence satisfies the jurisdictional fact essential to the court's exercise of judicial power. However, the complaint may omit the allegation. Jurisdiction might be acquired by consent and, therefore, under the Civil Practice Act, the objection appearing on the face of the complaint, the defendant must raise it by motion. It will be too late to interpose the objection as a defense in the answer or upon the trial. In the case of *People v. Bailey*,<sup>23</sup> Mr. Justice M. Kellogg stated this principle clearly and concisely. On page 619 he said:

The County Court has no jurisdiction of an original action brought therein, unless the defendant is a resident of the county. Section 14, art. 6, CONST. N. Y.: CODE CIV. PROC. 340. Consent of the parties will not confer jurisdiction where the statute or Constitution has actually denied it. In this case, therefore, if the defendant had not been a resident of the county of Albany, the judgment against him could not stand. The defendant was in fact a resident of that county, and therefore the plaintiff had the right to bring this action against him to recover the penalties sought. As the defendant was a resident of the county, we are remitted to a simple question of practice, and may safely assume that the plaintiff should have alleged in his complaint the facts showing that the County Court could entertain the action.

A question of practice may be waived, and a suitor by his laches may put himself in a position where he cannot take advantage of a mistake in the practice of his adversary. In *Bunker v. Langs*, 76 Hun 543, 28 N. Y. Supp. 210 the defendant was actually a resident of the county, but the complaint in the county court did not allege that

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<sup>22</sup> *Waikoski v. Philadelphia & Reading C. & I. Co.*, 173 App. Div. 538, 159 N. Y. Supp. 906 (1916), *aff'd*, 228 N. Y. 581 (1920).

<sup>23</sup> *People v. Bailey*, 136 App. Div. 130, 120 N. Y. Supp. 618 (1909).

fact. The defendant answered without raising any question as to the omission in the complaint, and it was held that he had waived the question and was not able to take advantage of it upon the trial. That case establishes that the defendant has waived in this case the right to take any advantage on account of the omission in the complaint. In *Henneke v. Schmidt*, 121 App. Div. 516, 106 N. Y. Supp. 138, the defendant was a resident of the county, but the complaint did not allege the fact, and upon the trial the court dismissed the action, holding that it had not jurisdiction to try it or to allow the plaintiff to amend his complaint. The Appellate Division reversed the judgment, holding the trial court had the power to grant the amendment, and should have done so. In effect that case treats the matter as we do, as one of practice if the defendant is in fact a resident of the county. If the question was waived, it was not error to receive evidence that the defendant resided in the county, and, if necessary, the court should have permitted the amendment to the complaint which the plaintiff asked and to which the defendant objected. The defendant is not therefore in a position to urge that he has been prejudiced with reference to these matters.

Defendants engaged in interstate commerce are guaranteed rights under the United States Constitution, against unreasonable and oppressive burdens upon their business of interstate or foreign commerce. If, in an action against such defendant, it definitely appears that orderly and effective administration of justice does not justify the maintenance of the action in the state, the court will refuse to exercise jurisdiction. The explanation here is not that the Federal Government has created a jurisdictional limitation to the exercise of judicial power by the state courts. Article 10 of the amendments prevents any such construction, but rather, that the Federal Government has conferred this privilege upon defendants so situated as an incident to the exercise of the absolute power vested in the Federal Government to regulate and control interstate and foreign commerce. It is a factor pertaining to the person of the defendant but it is not and cannot be made a jurisdictional fact. If the objection appears on the face of the complaint, under Section 278, the defendant would be obliged to take the same by motion and could not interpose it in his answer or at the trial. But the United States Supreme Court has held in the case of *Michigan Cen-*

*tral Railroad v. Mix*<sup>24</sup> that, "no local rule of practice could prevent the carrier from laying the appropriate foundation for the enforcement of its constitutional right by taking a seasonable motion." By judicial decision, therefore, this objection to the want of jurisdiction over the person of the defendant is treated as one where jurisdiction cannot be had by consent under Section 278 of the Civil Practice Act. The defendant may raise the same by motion, answer, or at the trial. There are, therefore, many instances where the objection may be waived by consent under Section 278 but they do not and cannot include instances where the constitution or the legislature requires a factor of the defendant to establish a jurisdictional fact before the court is authorized to exercise judicial power.

The following cases illustrate the confusion that results from the failure to distinguish between the two objections pertaining to the want of jurisdiction of the person of the defendant.

In the case of *Davidoff v. Roger Wurmser, Inc.*,<sup>25</sup> the action was commenced in the county court and the complaint demanded judgment for a sum of money. There was no allegation as to the defendant's residence within the county. The defendant's motion for judgment on the pleadings on the ground that the court had no jurisdiction of the person of the defendant was denied. The court found jurisdiction had been acquired by waiver or consent. The defendant's service of the answer constituted the waiver of the defense in this case. The court said on page 557.

In the instant case, the defendant served an answer on the merits which did not raise the question of jurisdiction of the person. Such an answer is equivalent to a general notice of appearance. See CIVIL PRACTICE ACT § 237. To be sure, the defendant, four or five days later, served an amended answer in which there was set up as a defense the Court's lack of jurisdiction of the defendant's person by reason of the failure of the complaint so to allege. However, I can see no distinction between this case and the case where the defendant, after filing a general notice of appearance, moves to dismiss for the

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<sup>24</sup> *Michigan Central Ry. v. Mix*, 278 U. S. 492, 49 Sup. Ct. 207 (1929).

<sup>25</sup> *David v. Roger Wurmser, Inc.*, 27 N. Y. S. (2d) 555 (1941).

jurisdictional defect with respect to the person of the defendant and is held to have waived his rights so to do.

Here the question was not as to the commencement of the action under such circumstances that defendant's consent might become material, but rather, concerned a jurisdictional fact, constituting a limitation on the exercise of judicial power. The fact was required by the legislature and beyond the control or consent of the parties.

The Appellate Division of the Second Department unaniously affirmed the order without opinion.

In the case of *Gardner v. Condon*,<sup>26</sup> the action was commenced in the Bronx County to recover money damages only. The complaint failed to allege that defendant resided in Bronx County. As a matter of fact, defendant was a resident of Queens County. The defendant served a notice of appearance and then moved to dismiss the complaint on the ground that the court had no jurisdiction of the person of the defendant. The motion was denied because of defendant's waiver or consent. In this case, the waiver was found because of the service of the notice of appearance in the action. The court said on page 757:

In this case before me, defendant served what is commonly called a general notice of appearance. In other words, he appears generally in the action. By so doing he waives his right to question the jurisdiction of the Court over his person. Had he wished to reserve that right, he should have appeared specially. *Muslusky v. Lehigh Valley Co.*, 225 N. Y. 584, 122 N. E. 461.

But the Court of Appeals, in the *Muslusky* case,<sup>27</sup> held that under a special appearance the defendant was not even entitled to receive a copy of the complaint, and certainly not permitted to make motions in reference thereto. Again, as in the *Davidoff* case, the question did not concern the commencement of the action, but the presence of a jurisdictional fact and consisting of a factor pertaining to the person of the defendant.

In the case of *Yager v. Yager*,<sup>28</sup> the complaint in an ac-

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<sup>26</sup> *Gardner v. Condon*, 17 Misc. 97, 190 N. Y. Supp. 756 (1921).

<sup>27</sup> See note 8 *supra*.

<sup>28</sup> *Yager v. Yager*, 214 App. Div. 671, 212 N. Y. Supp. 707 (1925).

tion in the County Court of Erie County contained no allegation as to the residence of the defendant. The defendant appeared specially and moved to dismiss on the sole ground that the complaint did not state facts sufficient to constitute a cause of action. The court held the proper objection was one of jurisdiction of the person of the defendant and not the insufficiency of the complaint. The motion was therefore denied. The *dicta* in the case is confusing for the court states the rule of thumb that, "a general appearance in an action in the County Court waives the defect". This *dicta* is cited as authority in the two preceding cases. The special appearance interposed by the defendant to raise the objection under Rule 106 is meaningless. It amounts to saying this: "I specially appear to make a motion, the making of which under Sec. 237 of the Civil Practice Act is the equivalent of a general appearance."

In the case of *Meyers v. American Locomotive Co.*,<sup>29</sup> the action for negligence was brought in the County Court of Chautauqua County against a domestic corporation. The complaint alleged that defendant "has, operates and maintains one of its plants, shops or factories at Dunkirk, Chautauqua County. Defendant did not deny the allegation. The Appellate Division unanimously affirmed a judgment for plaintiff but an appeal to the Court of Appeals was allowed by one of the judges on the express ground that the case of *Bunker v. Langs*<sup>30</sup> had been questioned in other judicial decisions. The *Bunker* case held that an omission to allege in the complaint in a County Court action that defendant was a resident of such county is waived where the defendant appears and answers on the merits without objection. The defendant actually resided within Steuben County where the action was commenced. The jurisdictional fact was, therefore, satisfied and plaintiff was granted leave to amend the complaint to include the necessary omission. The Court of Appeals approved the decision in the *Bunker* case and affirmed the judgment for plaintiff in the *Meyers* case. It is true the opinion contains statements implying that a waiver might have the effect of dispensing with a jurisdictional fact

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<sup>29</sup> *Meyers v. American Locomotive Co.*, 201 N. Y. 163 (1911).

<sup>30</sup> *Bunker v. Langs*, 76 Hun 543 (N. Y. 1894).

but the authorities relied upon clearly do not sustain such rule. Reference was made to *Clapp v. Graves*<sup>31</sup> and *McCormick v. Penn. Central R. R. Co.*,<sup>32</sup> both cases holding, in connection with a defective service of summons, the defendant's voluntary general appearance waived the objection. Definitely these cases are not authorities for objections pertaining to a complaint. Unfortunately, the *Meyers* case is responsible for some of the uncertainties that now exist concerning this rule of practice.

The practice discussed herein is simple, accurate and sure. Difficulties arise only when a rule of thumb is sought to be applied to a repugnant factual situation. This swerving from the definite path of practice has created uncertainties and confusion. The path must again be made straight. If decisions as illustrated above continue, the path will soon be obliterated, and from a forest of upturned faces, the Bench, the Bar and the Litigants, with one mouth will exclaim "Vox Clamantis in Deserto"!

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<sup>31</sup> *Clapp v. Graves*, 26 N. Y. 418 (1863).

<sup>32</sup> *McCormick v. Penn. Central R. R.*, 49 N. Y. 303 (1872).