BOOK REVIEW


The recent enactment of a new code of civil procedure and practice by the State of New York has aroused considerable interest in other jurisdictions, especially those where similar revision is under discussion. (Ed.)

At the writing of this review six volumes of the treatise have been distributed to the legal profession. Two of the volumes are still incomplete. The missing portions and two more volumes will be published shortly.

Adolf Homburger †

A review of a work of this magnitude presents obvious difficulties. An exhaustive study of the thousands of pages of the treatise now on the shelf would not have been possible in the short time since publication of the materials, some of which were distributed only a few weeks prior to the writing of this review. However, I believe that a preliminary evaluation may be based upon the impressions gained by a law teacher and former practitioner in the day-to-day use of the available text and upon the scrutiny at close range of a topic selected for the purpose of this Review. The final evaluation of the work after its completion must be made in the light of experience gathered over a number of years when the treatise has been exposed to the test of scholarly debate and extensive use on the battlegrounds of litigation.

Before attempting to judge the substance of the work, proper criteria for its evaluation should be fixed. The authors have indicated that it is their desire to place their work "before the Bench and Bar for whatever assistance it may give, in time for its use as the CPLR comes into operation." ¹ Assuming, therefore, that the principal purpose of the treatise is to assist judges, lawyers, and perhaps teachers, students, and legislators in the era of the new Civil Practice Law and Rules of the State of New York,² it would seem that the work should measure up to three basic tests.

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¹ Preface to 1 Weinstein, Korn & Miller, New York Civil Practice at xviii (1963) [hereinafter cited as WKM].

² Effective Sept. 1, 1963. "This chapter shall be known as the civil practice law and rules, and may be cited as CPLR [N.Y. Civ. Prac. Law & Rules] . . . Reference to a provision . . . may, except when such provision is being enacted or amended, be made without indicating whether it is a rule or section." N.Y. Civ. Prac. Law & Rules § 101 (N.Y. Sess. Laws 1964, ch. 252, § 101). However, this Book Review will refer to rules and sections; all such references are to the CPLR.

"The CPLR is perhaps unique in that it contains both a civil practice law and rules of civil practice in a single integrated document . . . ." WKM § 101.01.
First, it should be sufficiently comprehensive to provide information on all important topics, particularly in areas where the law has been changed. This may be called the encyclopedic objective. Next, it should be educational, aiding the reader in a deeper understanding of the subject by scientific classification and illuminating discussion. Again this requirement applies with particular force to areas of the law where there have been significant changes. This may be called the analytical objective. Finally, it should be imaginative, looking into the future, discovering trends, and participating in the shaping of the law that ought-to-be. This may be called the creative objective.

Before stating my general conclusions in the light of these tests, which I do in the latter part of the Review, I shall examine in some detail the portions of the treatise dealing with personal jurisdiction, appearance, and motions raising jurisdictional objections. These are areas of the law where changes of more than local significance have taken place and thus furnish a good testing ground.

I. JURISDICTION

A. The Expansion of Jurisdictional Bases: Sections 301 and 302

The CPLR has made drastic changes in the area of judicial jurisdiction. It retains all prior bases for exercising jurisdiction over persons, including particularly physical presence of the defendant and "doing business" by corporate entities within the state at the time of the suit's commencement. In addition it extends vastly the reach of New York courts by enacting a "single-act," or as it is sometimes called, "long-arm" statute. Section 302 gives the court personal jurisdiction over nondomiciliaries as to a cause of action arising from any of the following acts: the transaction of any business; the commission of a tortious act (with a minor exception); and the ownership, use, or possession of real property.

The authors' treatment of this subject exemplifies their analytical talents. A brief introduction familiarizes the reader with the three essential prerequisites for the exercise of judicial power: jurisdiction over the

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3 N.Y. Civ. Prac. Law & Rules § 301.
4 N.Y. Civ. Prac. Law & Rules § 302 provides as follows:

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.
subject matter, basis, and reasonable notice. At an early point the reader is reminded of the limits set upon the exercise of judicial jurisdiction by the due process clauses of the State and United States constitutions and of the necessity for the existence of state authority to exercise jurisdiction within these limits. Attention is called, in a brief discussion, to the doctrine of forum non conveniens. The authors anticipate a great future for that doctrine as a device against the overextension of personal jurisdiction over nondomiciliaries under the single-act statute and possibly also against the exercise of personal jurisdiction over transients on claims which are unrelated to the state. There is no doubt that the doctrine of forum non conveniens could be utilized to accomplish these ends were it not for the fact that the New York courts are committed to a rejection of that doctrine in actions brought by New York residents.

The all-important problem of basis is discussed under five headings: (1) presence of the defendant when the action is commenced; (2) continued presence of the defendant; (3) contacts related to the cause of action; (4) use of New York courts by defendant's appearance in court; and (5) presence of a res in New York.

I would have preferred a classification which places more emphasis upon the distinction between personal jurisdiction based on a past intrastate contact related to the cause of action and personal jurisdiction based on a relationship existing at the time of the commencement of the suit. This approach would have highlighted the growing strength of the idea that "presence" of the defendant in the state at the commencement of the action, although still considered sufficient to acquire personal jurisdiction, is no longer necessary to establish a jurisdictional basis in many cases. The idea that once a nondomiciliary has established sufficient contact with the state there exists a basis for the exercise of personal jurisdiction as to a related cause of action, so that the remaining problem is merely being one of reasonable notice, is still novel to New York lawyers. Holding fast to the Pennoyeran jurisdictional tradition and to the equation of power with basis, the New York lawyers still hobble along on the crutches of "implied consent," "implied appointment of an agent," and the fiction of "presence"
of foreign corporate entities by “doing business” within the state.\textsuperscript{14} Reared in the tradition that presence in the state at the commencement of the suit is a \textit{sine qua non} for personal jurisdiction over nondomiciliaries, they are accustomed to consider the New York Nonresident Motorist Statute\textsuperscript{15} as an instance of implied appointment of an agent and exercise of police power rather than a contact statute. \textit{International Shoe}\textsuperscript{16} had its chief significance in New York as a rationalization of the fiction of “presence” of unauthorized foreign corporations by “doing business.” Personal jurisdiction over absent New York domiciliaries, though not based on physical presence of the defendant, likewise presupposed an existing relationship at the commencement of the suit. And the few instances of true contact jurisdiction in New York which antedate the CPLR\textsuperscript{17} were too limited in scope to make a dent in the conceptual approach of the New York lawyer. The much broader provisions of section 302 now require a complete reorientation with respect to the subject of personal jurisdiction.

Praise is due the authors for their critical examination of New York’s long-arm statute.\textsuperscript{18} According to the authors, “it is not clear that the New York provision needs to be interpreted, as is that of Illinois, as going to the outer limits of permissible jurisdiction.”\textsuperscript{19} Even though the Advisory Committee in its statement of objectives announced that the jurisdictional sections have been drafted “to take full advantage of the state’s constitutional power of persons and things,”\textsuperscript{20} there are indications in the notes of the Committee that the section was designed to subject nondomiciliaries to personal jurisdiction only when they commit acts within the state.\textsuperscript{21} The authors’ viewpoint has been adopted by New York courts in recent decisions involving claims for product liability against out-of-state manufacturers.\textsuperscript{22}

There is a full discussion of the recurrent question of applicability of the jurisdictional provisions in situations where the defendant’s act on


\textsuperscript{15} N.Y. \textit{Vehicle & Traffic Law} § 253. See also N.Y. \textit{Gen. Bus. Law} § 250 (applicable to operation of aircraft within the state).


\textsuperscript{17} E.g., N.Y. \textit{Workmen’s Comp. Law} § 150-a; N.Y. \textit{Ins. Law} § 59-a; N.Y. \textit{Gen. Bus. Law} § 352-b.

\textsuperscript{18} See note 4 \textit{supra}.

\textsuperscript{19} \textit{WKM} § 302.01.


\textsuperscript{21} Id. at 39.

which jurisdiction is based preceded the effective date of the law. The subsequent decisions of New York courts sustain the authors’ viewpoint that jurisdiction should be upheld in these cases.

The vital question of what constitutes the transaction of any business within the meaning of section 302(a)(1) is given a comparatively slight treatment in the treatise. The authors are unquestionably correct when they point out that the statutory phrase “transacts any business within the state” may refer to one single transaction, and that it should not be confused with the concept of “doing business” required to establish “presence” in the traditional sense of the territorial doctrine of jurisdiction. However, the meaning of the word “business” is obscure and needs clarification. No explanation of the statutory language is offered either in the notes of the Advisory Committee or in the treatise. What are the policy considerations in support of one or the other?

If the courts were intent on giving a restrictive interpretation to the statutory language, it might possibly be construed as referring to single commercial transactions within the state in the business or trade in which the nondomiciliary is generally engaged outside the state. Although most cases reported in other jurisdictions are concerned with transactions of that kind, it is unlikely that the courts will give such restrictive interpretation to the phrase. The use of nontechnical language by the statute would seem to invite a nontechnical interpretation. The word “transacts” points to any kind of voluntary dealing between plaintiff and defendant within the state. Common usage would indicate that the word “business” may refer to any isolated bargaining transaction within the state, such as the purchase of an automobile by a transient tourist or an agreement for rendering services, professional or nonprofessional, by or to the nondomiciliary. Until the meaning of the statute has been clarified by judicial decision, a transient tourist might be subject to litigation in New York on tenuous claims arising from his activities far away from his home. Perhaps he could stake his hopes on the wording of section 302 which says that the court “may” rather than “shall” exercise personal jurisdiction.

23 WKM ¶ 302.04.
25 WKM ¶¶ 302.06-08.
27 See cases reported in ILL. ANN. STATS. ch. 110, § 17 (Jenner & Tone Supp. 1963); WIS. STAT. ANN. § 262.05, Revision Notes (Supp. 1964). For recent New York cases, see notes 22, 26 supra.
28 C.J. WIS. STAT. ANN. § 262.05, Revision Notes, at 28 (Supp. 1964).
It would seem that this permissive language vests the court with a broad discretionary power to decline jurisdiction even in cases where under the present law the doctrine of forum non conveniens is inapplicable.\textsuperscript{29} Notwithstanding the broad sweep of the section, there remains a residue of activities which cannot easily be fitted into the concept of "transacting any business within the state." Suppose that a nondomiciliary, while present in the state, impregnates a woman who thereafter institutes paternity proceedings to press a claim for support of her child and for expenses incurred in connection with her pregnancy.\textsuperscript{30} The state in that case would have an interest in permitting the prosecution of the claim in the mother's home state since filiation proceedings touch basic moral and economic interests of society. Likewise, the many legal consequences which flow from the making of a gift may raise a question as to whether a nondomiciliary by making or accepting the gift within the state has "transacted any business" there. Activities of this kind would not come within the purview of the single-act statute unless the court were willing to equate the phrase "transacts any business within the state" with "doing of an act within the state which produces legal consequences." The authors do not concern themselves with these questions except in their discussion of quasi in rem jurisdiction where they express doubt that "matrimonial activities" are covered by the single-act statute.\textsuperscript{31} It may be surmised that "extra-matrimonial activities," as well as other activities commonly not associated with "business," will be likewise excluded even though they established a firm "contact" with the state.

The treatise contains a lucid and thorough discussion of tort cases encompassed by the long-arm statute. The problem posed by the jurisdictional threshold question, whether a tortious act has been committed by the defendant in New York, and the effect (or rather lack of effect) of the determination of that question upon the merits of the case receive careful treatment.\textsuperscript{32} Particular attention is given to products-liability cases where the negligent act occurred without the state and the injury within the state.\textsuperscript{33} Illinois case law and the Illinois model, on which section 302 is based, as well as the corresponding provisions of the recent Uniform Inter-

\textsuperscript{29} See note 9 \textit{supra}.

\textsuperscript{30} N.Y. \textsc{fam}ily \textsc{ct.} \textsc{act} \textsection\textsection 513, 514, 515, 521, 525. See also N.Y. \textsc{fam}ily \textsc{ct.} \textsc{act} \textsection 165 providing: "Where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved."

\textsuperscript{31} WKM \textsection 314.04.

\textsuperscript{32} WKM \textsection 302.09.

state and International Procedure Act and the Wisconsin statute are care-
fully examined. The authors conclude their discussion of section 302 with
a brief analysis of the broad provision conferring personal jurisdiction over
nondomiciliaries in connection with causes of action arising from the owner-
ship, use, or possession of any kind of interest in New York real property,
including tenancies.34

B. Trends in Jurisdiction

The decision of the United States Supreme Court in International
Shoe gave impetus to a trend towards easier acquisition of personal juris-
diction over nondomiciliaries. The trend has gained momentum during
the past decade.35 Has it spent its force36 or will it continue in the future?
If it continues, will there be a further piecemeal expansion of the contact
document? May we expect the gradual emergence of a doctrine of forum
conveniens, accompanied by the eventual demise of the "transient rule" of
jurisdiction?37 Or are we perhaps moving towards "an institution akin
to that of civil-law competency (subject-matter jurisdiction on a national
basis combined with procedural safeguards as to notice and fair hear-
ing)?"38 The authors' views on these questions would have been welcomed
by the reader.

Of particular interest to both theoretician and practitioner would have
been the question whether, within constitutional limits, the contact doctrine
may be finally converted into a workable doctrine of forum conveniens. In
International Shoe the United States Supreme Court fixed the outer limits
to which states may constitutionally extend their judicial jurisdiction in
personam over nondomiciliaries in terms of "'fair play and substantial
justice.'"39 An "'estimate of inconveniences'" is relevant in this con-
nection.40 "[T]he trend in defining due process of law is away from
the emphasis on territorial limitations [and thus] . . . from the court
with immediate power over the defendant, toward the court in which both
parties can most conveniently settle their dispute."41 While the states have
made forays toward this borderline of constitutionality with increasing fre-

34 WKM § 302.12.
35 See statutes collated in Columbia University Project on International Procedure,
Uniform Interstate and International Procedure Act, app. A; Weinstein, Trends in
Civil Practice, 62 Colum. L. Rev. 1431, 1435 (1962).
36 See Hanson v. Denckla, 357 U.S. 235 (1958); Erlanger Mills, Inc. v. Cohoes
Fibre Mills, 239 F.2d 502 (4th Cir. 1956); cf. cases cited note 22 supra,
which evidence a trend towards a restrictive interpretation of the new jurisdictional provision
of the CPLR.
37 See EHRENZWEIG, CONFLICT OF LAWS 72, 119 (1962); EHRENZWEIG & LOUISELL,
JURISDICTION IN A NUTSHELL § 57 (1964).
38 EHRENZWEIG, EHRENZWEIG in Reply, 9 J. PUB. L. 328, 334 (1960); see Cleary,
The Length of the Long Arm, 9 J. PUB. L. 293, 296-97 (1960). See generally
Transient Jurisdiction—Remnant of Pennoyer v. Neff, A Round Table, 9 J. PUB. L.
281 (1960) (collected essays).
40 Id. at 317.
41 Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 440-41,
quency and on a widening basis, they have not as yet taken full advantage of the opportunities offered by that decision and by the followup cases. State legislation proceeded in a haphazard, casuistic, and unsystematic fashion by enacting various statutes addressed to specific contact situations. At times they came to a halt a considerable distance away from the constitutional boundary line. At other times they attempted to cross it, incurring the penalty of unconstitutionality. Whole areas of potential jurisdiction over nondomiciliaries were left untapped. New section 302, although proceeding on a broader front than its statutory forerunners, still follows the pattern of a limited and ill-defined piecemeal approach.

If we assume that further jurisdictional expansion through implementation of the contact doctrine is likely, and that a continuing relaxation of the strict rules of territorial jurisdiction within constitutional limits is dictated by our expanding complex economy and the interstate multiplicity of human relations, one wonders whether the New York approach is sound. Perhaps a more flexible comprehensive provision which utilizes the "contact" doctrine but emphasizes the convenience aspects of that doctrine would have been preferable. I realize that a general provision of this kind might be subject to criticism on the ground that it would lack definiteness and predictability, but such criticism could perhaps be met by pointing to the large area of present uncertainty in section 302 and in the traditional "doing business" test. Moreover, it might be possible to create an element of certainty by setting up guideposts limiting the scope of judicial discretion. Various criteria emphasized in the case law dealing with the constitutionality and construction of long-arm statutes could be used in establishing such guideposts oriented towards convenience and "fair play." For example, the statute might provide that the court, in ruling on the question of jurisdiction, shall consider the relative significance of any part of the transaction or occurrence which took place outside the state; the law which would apply if the court exercised jurisdiction; the convenience of witnesses and parties; the amenability of the defendant to personal jurisdiction in another state; and the existence of facts and circumstances tending to support the conclusion that the nondomiciliary did expect, or should reasonably have expected, that claims against him might arise within the state. None of these factors should necessarily be conclusive; however, they would be relevant as a matter of law and the court would be dutybound to consider them in the light of the facts and circumstances of the case.


44 See Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 248 (1955), pointing out three ways in which a rule may function: it may isolate a fact as determinative; it may provide that a fact is relevant but not conclusive; and it may specify facts which are irrelevant. "The second type directs or channels the exercise of discretion but cannot exclusively determine it." Id. at 249; cf. N.Y. Civ. Prac. Law & Rules § 1001.
II. Appearance and Motions Raising Objections to Jurisdiction

Rule 320 introduces two major innovations relating to the crucial problem of asserting objections to jurisdiction over the person or property of the defendant: (1) it abandons the ancient distinction between a special appearance and a general appearance; and (2) it outlaws the so-called "limited" appearance.45

A special appearance should not be confused with a limited appearance. A special appearance is a procedural device, widely used in the United States, which enables the defendant to appear solely for the purpose of raising the jurisdictional question, and if so limited does not subject the defendant to the consequences of a general appearance.46 A limited appearance, on the other hand, seeks to avoid conversion of in rem jurisdiction into personal jurisdiction by defending the action on the merits. It enables the defendant to appear "for purposes of litigating the merits but limited to those claims which could be constitutionally adjudicated by the court in his absence by virtue of its in rem jurisdiction." 47

Special appearances are no longer required in New York. It is clear under the new statute that a defendant may raise objections to the exercise of personal or in rem jurisdiction along with any other defenses going to the merits of plaintiff's claim by motion or in his answer without waiving the jurisdictional objection.48 On the other hand the door to a limited

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45 Rule 320, as far as here pertinent, provides as follows:

Defendant's appearance.

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

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

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

Section 314 provides for service without the state in in rem actions. Rules 3211(a)(8) and (9) provide for motions directed to jurisdictional defects in in personam and in rem actions.

46 RESTATEMENT, JUDGMENTS § 20 (1942).
47 Frumer & Graziano, Jurisdictional Dilemma of the Nonresident Defendant in New York—A Proposed Solution, 19 FORDHAM L. REV. 125 (1950). The term "in rem" jurisdiction also refers to cases of "quasi in rem" jurisdiction, and is used in the same sense in this Review.
48 WKM §§ 320.09, 3211.02. Defendant appears by serving an answer or a notice of appearance, or by "making a motion which has the effect of extending the time to answer." N.Y. CIV. PRAC. LAW & RULES R. 320(a). The last quoted phrase seems ambiguous. Does it refer only to a motion which has the automatic "built-in" effect of extending the time to answer or does it also include a motion which produces an order extending the time to answer? Neither the notes of the Advisory Committee
appearance has been closed. Rule 320 provides that a defendant who appears and "proceeds with the defense" of an in rem claim submits to in personam jurisdiction unless an objection to the exercise of in rem jurisdiction was timely raised and is sustained either by the court below or on appeal.\(^4\)

The elimination of the limited appearance involves an important policy decision. According to the notes of the Advisory Committee, "the conflicting policy considerations are simply stated: a rule prohibiting a limited appearance forces the defendant to choose between defaulting on the in rem claim or submitting to personal jurisdiction; on the other hand, it affords a lever for obtaining personal jurisdiction over absent or non-resident defendants, whereby all the claims between the parties may be settled at one time and a multiplicity of suits avoided."\(^5\) The same statement appears in the treatise.\(^6\) Neither the notes nor the treatise, however, indicate why the revisers decided against a limited appearance.

The CPLR makes no distinction between the three situations which come under the heading of in rem jurisdiction: matrimonial actions; actions involving property within the state; and actions in personam where plaintiff created a basis for in rem jurisdiction by levy of an attachment.\(^7\) Yet there is a vital difference between these actions as judged by public policy and procedural economy.

The sharpest distinction exists between actions involving marital status and other types of actions. "Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society."\(^8\) Since the state has an interest in the protection of the matrimonial relationship, it could be argued that a defendant should not be discouraged from resisting an unjustified attack on his matrimonial status by withholding from him the privilege of making a limited appearance. Yet the Restatement of Judgments, while permitting it in the attachment situation,\(^9\) does not sanction a limited appearance in matrimonial actions. Actually, from the point of view of procedural economy, a limited appearance is less desirable in attachment cases than in the other cases. If after defendant’s limited appearance the plaintiff is successful, but the attached property is not sufficient to satisfy his claim, then the plaintiff cannot rely on collateral estoppel when he prosecutes another action to collect the balance of his claim. Similarly, if

\(^3\) WKM § 320.17.
\(^6\) Restatement, Judgments § 40 (1942).
the plaintiff is defeated he may prosecute a second action based on the same claim after attaching other property of the defendant or subjecting him to personal jurisdiction. Neither bar nor collateral estoppel would stand in the way of the second action.55 The situation is different in matrimonial actions and in actions involving property within the state where the judgment disposes of all issues regardless of whether defendant made a general or limited appearance.

The revisers might also have examined the policy considerations involved in authorizing a "limited limited-appearance." It has been suggested that defendant's limited appearance should subject him to personal jurisdiction only as to causes of action stated in the original complaint plus any subsequently added which form part of the same transaction as the in rem claim.56 This might be an acceptable compromise in actions involving property within the state and in the attachment situation. It would hardly be workable in matrimonial actions where as a practical matter the disposition of a claim for alimony is tied in with an adjustment of all mutual claims, whether related or not.

Turning now to the technical provisions of the appearance statute, there is an excellent discussion of the three categories of jurisdictional objections specified in rules 3211(a)(2), (8), and (9), namely lack of subject-matter jurisdiction, lack of in personam jurisdiction, and lack of in rem jurisdiction.57 The CPLR for the first time has introduced a separate motion, specifically directed to jurisdictional defects in in rem actions. The authors attempt to define the areas covered by each of these objections. They point out that a technical distinction between lack of subject-matter jurisdiction (not waiveable) and lack of in rem jurisdiction (waiveable) is often problematical since the absence of the res not only destroys the basis for the exercise of jurisdiction in rem, but also deprives the court of jurisdiction over the subject matter.58 Likewise, a defendant may be faced with a delicate problem where plaintiff asked for in personam relief although he obtained only in rem jurisdiction. Under rule 3211 the defendant has only a choice between a motion to dismiss a cause of action because the court has no jurisdiction over the person of the defendant, and a motion that the court has no jurisdiction in an in rem action where service was made either by publication or outside the state without giving personal jurisdiction.59 The authors conclude that until experience clarifies the practice, a defendant would be wise to move under both paragraphs in that situation.60

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56 Frumer & Graziano, supra note 47, at 125, 151.
57 WK&M ¶¶ 3211.08-23.
58 WK&M ¶ 3211.21.
59 N.Y. CIV. PRAC. LAW & RULES R. 3211(a)(8).
60 N.Y. CIV. PRAC. LAW & RULES R. 3211(a)(9), §§ 313-15.
61 WK&M ¶ 3211.22.
There is a related problem, not discussed in the treatise, which stems from a lack of coordination between New York's long-arm statute (section 302(b)) and the appearance rule in in rem actions (rule 320(c)). As stated above, rule 320(c) denies a defendant the right to make a limited appearance. Therefore, if defendant has no jurisdictional objection and "proceeds with the defense," he subjects himself to jurisdiction in personam. On the other hand, the long-arm statute recognizes a sort of "limited" appearance. Section 302(b) provides: "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." Suppose a New York plaintiff has a substantial claim against a Pennsylvania resident based on commission of a tortious act in New York. Suppose further that defendant has no other contact with New York except that he owns a savings account in a New York bank. Plaintiff, prior to serving the defendant personally in Pennsylvania, makes a levy on that savings account pursuant to an order of attachment. There is no question that the defendant is subject to personal jurisdiction under section 302(a)(2). Consequently, even if he were willing to abandon his New York property, he could not afford to default since the judgment would be entitled to full faith and credit in Pennsylvania. He therefore must appear in the action and "proceed with the defense." Has he now subjected himself to unlimited jurisdiction in personam as provided in rule 320(c) because the court's personal jurisdiction is no longer based solely upon section 302? If so, plaintiff could amend the complaint and assert other unrelated in personam claims which he may have against the defendant. I doubt that the draftsmen intended such a result. It is perhaps arguable that under the hypothetical fact situation the attachment served only a security purpose since the defendant was subject to in personam jurisdiction under the long-arm statute. Notwithstanding the fact that the defendant "proceeded with the defense," personal jurisdiction over the defendant nondomiciliary is still based solely on section 302 and not on rule 320(c), and an attempt to amend the complaint could be resisted by a motion to dismiss the added cause of action under rule 3211(a). The same result would be reached if section 302(b) were construed as limiting the effect of a subsequent appearance whenever the original acquisition of personal jurisdiction was based solely on the long-arm statute.

62 See note 45 supra.
63 Emphasis added.
64 N.Y. Civ. Prac. Law & Rules § 6201(1).
65 Cf. Everitt v. Everitt, 4 N.Y.2d 13, 16, 171 N.Y.S.2d 836, 838, 148 N.E.2d 891, 893 (1958) (dictum): "It may well be that if an action has been commenced against a nonresident by the service of a summons and complaint, the complaint cannot be amended by adding new causes of action after the defendant has left the State . . . ." See generally Lenhoff, Justice Halpern's Contribution to Conflict of Laws, 13 Buffalo L. Rev. 317, 319-21 (1964).
66 A motion by the defendant to vacate the attachment pursuant to § 6223 after defendant's appearance on the ground that the attachment is unnecessary to the security of the plaintiff probably would be of no avail. That provision "is intended
A final question deserves brief consideration. By permitting jurisdictional objections to be raised along with other defenses by motion or in the answer and by outlawing at the same time the limited appearance, the revisers created a problem of procedural mechanics. A point had to be fixed in the chronology of litigation at which the defendant, by participation in the litigation of an in rem claim, incurs the consequences of a general appearance. Since special appearances were abolished, this point had to follow the assertion of the jurisdictional objection by motion or in the answer. The revisers fixed this point at the moment when defendant "proceeds with the defense." However, the meaning of this term is quite obscure. Suppose defendant interposes an answer or serves motion papers asserting lack of in rem jurisdiction and other defenses going to the merits. Surely he has not "proceeded with the defense" at that moment.86 But assume that thereafter defendant places the case on the calendar and proceeds to trial, confining, however, his participation solely to issues pertaining to the question of in rem jurisdiction. Has he proceeded with the defense? Would a demand for change of venue,87 a motion for security for costs,88 or the argument of a motion under rule 3211 on any ground other than lack of jurisdiction constitute "proceeding with the defense"? Could it perhaps be argued that defendant has not "proceeded with the defense" unless he presents evidence after denial of a motion to dismiss the complaint at the close of plaintiff's case? Neither the notes of the Advisory Committee nor the treatise considers the problem.89

to permit vacatur of an attachment that was sought solely, or primarily, for jurisdictional reasons, after that function has been served." N.Y. ADVISORY COMM’N ON PRACTICE & PROCEDURE, THIRD PRELIMINARY REPORT 358 (1959). It is unlikely that the court would grant the motion where defendant is a nonresident individual or a foreign corporation not doing business in the state since there is a presumption that the local property of said defendant is less likely to be available to satisfy a judgment than that of a resident. See id. at 144-46.

86 N.Y. Civ. Prac. Law & Rules R. 320(c) provides that an appearance is not equivalent to personal service of the summons upon the defendant if a jurisdictional objection is asserted "unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained." (Emphasis added.) See note 45 supra.


89 There is an excellent and elaborate discussion in the treatise of a serious inconsistency between rules 320(b) and 3211. The former requires the assertion of jurisdictional objections "at the time of the appearance by motion or in the answer." The latter permits jurisdictional objections to be raised by motion or in the answer, but does not require their assertion at the time of the appearance. It follows that under rule 3211 a defendant could raise a jurisdictional objection in his answer even though he has previously appeared in the action. See note 48 supra. The inconsistency is further aggravated where an action is commenced by service of a summons without complaint. Defendant then must serve a timely notice of appearance in order to avoid a technical default. However, the CPLR provides no method for raising jurisdictional objections in the notice of appearance before service of the complaint. WKM 3211.05. The problem has lost much of its significance since the words "at the time of the appearance" have been eliminated from rule 320(b) by Concurrent Resolution 174 of the New York Legislature, effective September 1, 1964.
III. Conclusion

The excellences of the treatise reflected in its treatment of the area of jurisdiction are confirmed by my general impressions of its treatment of the other areas. I conclude that the treatise as a whole has satisfied completely two of the basic criteria by which such a work is to be judged—the encyclopedic and the analytical, while at the same time fulfilling the creative function as an incidental objective.

The encyclopedic objective of the treatise has been accomplished by careful selection of the topics which deserve discussion. The authors exercised wise discretion in deciding what to discuss and—sometimes equally important—what to omit. Fulfillment of a misguided ambition to cover every detail would have rendered the attainment of the analytical objective more difficult. Too many other works are cluttered with disorganized shreds of information which are of little informative and of even less analytical value. True, there are instances when the researcher's hope of finding a quick and authoritative answer to a specific problem arising under the new statute will be frustrated. This is unavoidable and detracts nothing from the overall value of the work.

Since the usefulness of a work of this size and scope depends in part upon the accessibility of information without waste of time and effort it may be appropriate to discuss briefly the format of the treatise. The organization of the work is similar to that of Moore's Federal Practice. The new New Civil Practice Law and Rules of the State of New York is arranged in an organic and logical pattern, following roughly the chronology of a law suit. This made it possible for the authors to cover the subject by commenting on each provision in the sequence in which it appears in the statute. The text of each section or rule is set forth in full, and is followed by (i) a synopsis of topics which facilitates a quick reference to the specific area of interest, and (ii) a valuable introductory statement which refers the reader to the statutory antecedents of the CPLR, text materials, law review articles, reports of legislative committees, and other significant study materials and bibliographical references together with the applicable key numbers of the National Reporter System for the reader's independent research. This latter feature, which I have not seen in other textbooks, should save countless hours of purely mechanical preliminary research.

The treatise is at its very best in the analytical exposition of the material. The authors, taking great pains to make sure that the law is properly understood and applied by both Bench and Bar, assume the role of guardians of the new law. They hold their protective hands over it in an attempt to save it from destruction by misunderstanding, misconstruction, and misapplication—a fate which befell the Field Code. The arrangement

71 The reader need not worry about the authenticity of the transcripts of the text of the original laws since there is prefixed to each volume a certificate of the Department of State of the State of New York certifying that the transcripts are correct and entitled to be read in evidence. N.Y. PUB. OFFICERS LAW § 70-b.
and classification of the material is excellent, and the discussion is on a high and scholarly level. The authors are sound in theory; yet, they are not oblivious to the practical problems which confront the practitioner. With unfailing skill they concentrate on fundamentals, laying aside unimportant details, and penetrate through the mesh of rules to the depth of the problem. Ample space is given to the historical background and evolution of procedural concepts. Clarity of thought, simplicity of language, and conciseness of style are characteristics of their presentation. The authorities are chosen with painstaking care. In their citations the authors follow the great tradition of Wigmore who introduced the technique of stating "in half a line the distinguishing facts of the case in such a way that a lawyer searching the notes for authority may know at a glance which cases are worth his examination."  

In Wigmore's *Evidence* the exhaustive exposition of the existing law usually is a preparatory step leading to the creative conclusions of the great master. But perhaps the time for the creative treatise in the grand style of Wigmore has passed. Today's creative efforts in legal writing find their principal expression in specific research projects, legislative studies, and law review articles which are more adaptable to the accelerated pace of the development of the law. In the treatise under review, creativity on the whole is secondary to the analytical objective. But it should be remembered that much of the creative work of two of the three authors and their collaborators, including particularly the late Daniel H. Distler, to whose memory the treatise is dedicated, preceded the writing of the treatise.

Over a period of six years, while the new law was in the making, they undertook a series of pervasive and definitive studies dealing with a variety of controversial problems which were published in five *Preliminary Reports of the Advisory Committee on Practice and Procedure* and in various law review articles. The result of their labor found expression in the study drafts of the *Civil Practice Law* and *Rules of Civil Procedure* on which the new *Civil Practice Law and Rules* is based.

The authors are conscious of their creative responsibilities in those instances where the CPLR deviates substantially from the preliminary drafts. As originally conceived, the proposed new law and rules represented a modern code which incorporated some of the most advanced thinking in the area of procedure. Unfortunately, the CPLR as finally enacted into law takes severe regressive steps. In many respects it bears little resemblance to the preliminary drafts. To be sure, the form and also the substance of the old law have been vastly improved, but a number of funda-

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73 Research and drafting of the proposed provisions for the Advisory Committee were supervised by Professor Jack B. Weinstein, Reporter to the Advisory Committee. Professor Daniel H. Distler (deceased) was Associate Reporter. Professor Harold L. Korn was Director of Research. Professor Arthur R. Miller joined the team of authors after the death of Professor Daniel H. Distler in 1962.
74 See list of law review articles in Summary of Civil Practice Law and Rules Effective September 1, 1963, at 11-12 (Matthew Bender & Co. 1962).
mental ideas incorporated in the original drafts were eliminated; others were compromised beyond recognition.

The authors, who led the battle for improvement of the law, now are placed in the role of the historians who, with unemotional precision and guarded expression of regret, point to changes which were recommended by the draftsmen, but rejected by the legislators. Notwithstanding their detached treatment, the authors at times succeed remarkably well in building up an impressive case for the vindication of their original ideas. A good example is their critical treatment of CPLR article 31, entitled "Disclosure." 75 Another example is the subtle handling of the "Dead Man's Statute." 76 The legislature rejected a proposal of the revisers to make the hearsay declarations of a deceased or insane person as well as the testimony of the interested witness admissible in evidence and to require the court or jury to "take into account the inability of the deceased or insane person to contradict a witness and the fact that the deceased or insane person is not subject to cross-examination." 77 The treatise deftly sets forth the proposed provision, 78 the reasons for the proposal, 79 and a transcript, in excerpt, of the verbal duel between the warring factions at a panel discussion of the New York State Bar Association during its 1960 summer meeting. The transcript speaks for itself, and will be more effective to win converts for the revisers' cause than would have been a polemic statement by the authors. 80 Parenthetically, it should be mentioned that the treatment of the entire subject of evidence and of res judicata, both contained in volume five of the treatise, excels in originality of approach and exhaustiveness of coverage.

The authors are less effective in another vital area of the law. The rulemaking power, as originally proposed, would have lodged rulemaking in the Judicial Conference in all matters of procedure except those involving fundamental policy. 81 However, the law as finally enacted confines rulemaking power by the courts to a bare minimum; thus one of the essential earmarks of a flexible modern system of procedure was discarded. I would have welcomed a more positive stand and a more forceful

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75 Instead of adopting the revisers' streamlined version of a modern disclosure proceeding, the legislature, at the behest of a negligence bar which still clings to the old "sporting theory of justice," restored the former law. For example, the scope of disclosure was narrowed drastically from "full disclosure before trial of all relevant evidence and all information reasonably calculated to lead to relevant evidence," as originally proposed, N.Y. Temporary Comm'n on the Courts (Advisory Comm'n on Practice & Procedure, First Preliminary Report 117 (1957), to "all evidence material and necessary in the prosecution or defense of an action," N.Y. Civ. Prac. Law & Rules § 3101(a). This seemingly is even more restrictive wording than that contained in the old Civil Practice Act § 288 because of the use of the word "evidence" which did not appear in the prior law. But see WKM ¶ 3101.04.


76 WKM ¶ 4519.01.

79 WKM ¶ 4519.02.

80 WKM ¶ 4519.03.

81 See Preface to WKM x, xi, xii; WKM ¶¶ 102.01-.02.
expression of the authors' views in this area where, in deference to the sentiments of a legislature intent on preserving its prerogative in procedural matters, principle was sacrificed to political expedience.

Notwithstanding the few entries on the debit side of the balance sheet, the credit balance is overwhelming. The Bench and Bar, as well as law teachers and students, are indebted to the authors for giving us this comprehensive treatise on present-day New York civil procedure. In scope of coverage, originality of approach, and depth of analysis, it measures up to the highest standards. I predict that the work will be used by the Bar as an indispensable tool in the daily work of the practitioner; it will be quoted by courts and relied upon by scholars. There is no doubt in my mind that it will take its well-earned place among the important treatises of legal science.
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TAX POLICY ON UNITED STATES INVESTMENT IN LATIN AMERICA. Princeton: Tax Institute of America, 1963. Pp. xii, 275. $7.00.


