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SPECIAL APPEARANCES IN MISSOURI

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Lawyers are occasionally confronted with the problem of whether a client is really "in court," so as to be bound by a judgment. The following hypothetical case illustrates the problem: A Missourian files suit in Missouri against an Illinois corporation for breach of contract. Defendant has no established office in Missouri so one of defendant's traveling salesmen is served in Missouri. This salesman has some managerial duties, thus raising a question of his status as a managing agent. Defendant also claims that it does not do business in Missouri. Does service of process on this salesman give the court jurisdiction over defendant? ("Jurisdiction" as used in this article, unless otherwise stated, means jurisdiction over the person rather than over the subject matter.)

If defendant simply files an answer, it is clearly "in court," for by this act it has voluntarily appeared in court. The question of adequacy of process thus becomes moot and defendant cannot thereafter complain that the court lacks jurisdiction over it.[1]

If defendant is confident that the service was inadequate to give the court jurisdiction, it can ignore the suit and suffer a default judgment. If defendant's analysis is correct, the judgment would be void and could be collaterally attacked.[2] This course may be acceptable to the lawyer with steel nerves and supreme confidence, but the majority of lawyers would prefer some alternative.

Historically, the alternative was the "special appearance." A defendant who wished to deny the court's jurisdiction over him appeared in court for the *limited* purpose of challenging the court's jurisdiction over his person. Special appearances were used where there was improper service,[3] insufficient

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1. Insufficiency of service of process may be raised by motion under Mo. SUP. CT. RULE 55.31. Rules 55.36 and 55.37 provide in substance that the objection is waived if not raised by a motion filed before the answer or with the answer.

2. York v. Texas, 137 U.S. 15 (1890).

3. Newcomb v. New York Cent. & H.R.R., 182 Mo. 687, 81 S.W. 1069 (1904).

process,[4] service on one exempt from service,[5] where the officer's return was insufficient,[6] and where the venue was wrong.[7]

There were, however, special perils in raising the objection that the court lacked jurisdiction over defendant's person. Even though the court did in fact lack jurisdiction, defendant by his method of protest might confer the very jurisdiction he meant to dispute. Such conduct was referred to as "entering a general appearance." The Missouri courts found that general appearances had been entered by defendants who demurred,[8] filed a motion for a change of venue,[9] set a case for trial,[10] stipulated for a continuance,[11] stipulated for a transfer to another court,[12] obtained leave to answer,[13] filed a motion for security for costs and requested a more definite statement,[14] objected to lack of jurisdiction over the subject matter,[15] and answered on the merits.[16] In each case the court concluded that defendant's conduct constituted a recognition of the court's jurisdiction. He could not thereafter deny it.

What about the lawyer who must raise this jurisdictional question in

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4. State *ex rel.* Rakowsky v. Bates, 286 S.W. 420 (Spr. Ct. App. 1926).
5. Byler v. Jones, 79 Mo. 261 (1883).
6. Thomasson v. Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 S.W. 1092 (1909).
7. Massmann v. Pollock, 53 S.W.2d 1105 (St. L. Ct. App. 1932). Perhaps it is technically incorrect to refer to cases of improper venue as being examples of "lack of jurisdiction over the person," but such terminology is commonly used. In Roberts v. American Nat'l Assur. Co., 201 Mo. App. 239, 244, 212 S.W. 390, 392 (K.C. Ct. App. 1919), the court said: "The lack of jurisdiction is based upon improper *venue,* and not upon improper or defective *notice* or summons, or the service thereof." (Emphasis added.) In State *ex rel.* Ball v. Weinstein, 365 Mo. 1179, 1183, 295 S.W.2d 62, 65-66 (1956) (en banc), the court said: "We hold that, the venue being improper, the court acquired no jurisdiction over the person of the defendant by the purported service on its president in St. Louis County. The service statutes and the venue statutes are necessarily construed together."
8. Nodaway County v. Tilson, 129 S.W.2d 915 (Mo. 1939); Clark v. Grand Lodge, 328 Mo. 1084, 43 S.W.2d 404 (1931) (en banc). In neither case was the lack of jurisdiction apparent on the face of the petition. If it were so apparent a demurrer limited to the jurisdictional question would have been proper, and not a general appearance. See note 20 *infra* and accompanying textual material.
9. Feedler v. Schroeder, 59 Mo. 364 (1875).
10. Markey v. Louisiana & M.R.R., 185 Mo. 348, 356, 84 S.W. 61, 64 (1904).
11. Roberts v. Meek, 221 Mo. App. 974, 296 S.W. 193 (K.C. Ct. App. 1927).
12. State *ex rel.* Tighe v. Brown, 224 Mo. App. 844, 23 S.W.2d 1092 (K.C. Ct. App. 1930).
13. Harrison v. Murphy, 106 Mo. App. 465, 80 S.W. 724 (K.C. Ct. App. 1904).
14. State *ex rel.* Young v. Oliver, 163 Mo. 679, 690, 64 S.W. 128, 131 (1901) (en banc).
15. Hill v. Barton, 194 Mo. App. 325, 333, 188 S.W. 1105, 1108 (K.C. Ct. App. 1916).
16. Cherry v. Wertheim, 25 S.W.2d 118 (St. L. Ct. App. 1930).

the Missouri courts today? What must he plead and how must he plead it? Unfortunately, the answer is not as clear as it should be. The confusion is due largely to the failure of the courts to discuss the post-1943 cases in terms of the 1943 code.[17]

The pre-1943 cases were divided into three categories. These were: (1) where lack of jurisdiction appeared on the face of the petition; (2) where lack of jurisdiction did not appear from the petition but appeared elsewhere on the face of the record (such as in the process or in the sheriff's return); and (3) where the lack of jurisdiction did not appear from the petition or record but required independent proof. The pre-1943 statutes dictated this division of the cases.[18]

Because the courts still refer to and apparently rely on the older cases, some understanding of the pre-1943 decisions is necessary. Each of the three classes of cases had its own boundaries, beyond which a defendant could not go without thereby entering a general appearance and waiving the jurisdictional objection.

If lack of jurisdiction appeared on the face of the process or return, it was properly challenged by a motion to quash. The defendant could do nothing more. If the trial judge overruled his motion, defendant either "withdrew" from the case and suffered a default judgment or pleaded to the merits and waived the question of jurisdiction.[19]

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17. In 1943 the Missouri legislature enacted a new code of civil procedure, "relating to and providing a general code governing the pleadings, practice and procedure in civil cases in the trial and appellate courts of the state . . . ." Mo. Laws 1943, at 353.

18. Section 922, RSMo 1939, provided: "The defendant may demur to the petition, when it shall appear upon the face thereof, either: First, that the court has no jurisdiction of the person of the defendant, or the subject of the action . . . ."

Section 926 provided: "When any of the matters enumerated in Section 922 do not appear upon the face of the petition, the objection may be taken by answer. . . ."

These provisions were originally enacted in 1855 and remained unchanged until 1943.

The third category, lack of jurisdiction appearing on the face of the record but not from the petition, was carved out by the courts. In Newcomb v. New York Cent. R.R., *supra* note 3, at 707, 81 S.W. at 1073, the court said:

> A question of jurisdiction may arise on the face of the return on the summons, or on the face of the petition, or by reason of some fact not appearing either in the return or in the petition. If it arises on the face of the return, it is only a question of whether defendant has been properly served, and that is met by a motion to quash. If it arises on the face of the petition, it is a question of law, and is met by a demurrer. If it arises from some fact that appears neither in the return nor in the petition, it is presented by a plea.

19. Newcomb v. New York Cent. R.R., *supra* note 3. In Mercantile Town Mut. Ins. Co., 217 Mo. 685, 116 S.W. 1092 (1909), the court said that when a de-

If the lack of jurisdiction appeared on the face of the petition, it was properly met by demurrer.[20] By pleading to the merits the objection was waived.[21] The situation was aggravated because a trial judge's order overruling defendant's objection to jurisdiction was not an appealable order.[22]

Only where the lack of jurisdiction required proof outside the record was the jurisdictional objection properly included in the answer.[23] And only here could a defendant plead to and defend on the merits without automatically waiving his objection to jurisdiction.[24]

The St. Louis Court of Appeals summarized the pre-1943 law when it said:

> The distinction drawn by the decisions is this: . . . If the defect is want of jurisdiction over the person, and that appears on the face of the record, by pleading over, or by appearing and participating in the further defense of the case, as by appearing at the taking of depositions, taking a continuance, taking leave to plead, the defect is waived. But, if the defect is one arising in pais, one which is not disclosed by the pleadings, then it must be taken advantage of by answer, as in the nature of a plea in abatement; and in that answer pleas in bar, counter-claims, or any other proper defenses may be united, separately stated, without waiving the defense of want of jurisdiction over the person . . . .[25]

Although the distinction was severely criticized as being without rational basis,[26] it persisted.

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fendant not only challenged jurisdiction but also answered on the merits, this act conferred jurisdiction although defendant thereafter withdrew from the case and did not participate in the trial.

20. § 922, RSMo 1939. This, of course, referred to a demurrer directed only to the jurisdictional question. See notes 8 and 18 *supra.*

21. This rule appears as dictum in many cases, including Mertens v. McMahon, 334 Mo. 175, 66 S.W.2d 127 (1933), Harris v. McQuay, 300 S.W. 305, 307 (St. L. Ct. App. 1927), and Kingman-St. Louis Implement Co. v. Bartley Bros. Hardware Co., 137 Mo. App. 308, 118 S.W. 500 (St. L. Ct. App. 1909).

A contrary view appears in Johnson v. Detrich, 152 Mo. 243, 53 S.W. 891 (1899), where the court stated that even though the lack of jurisdiction appeared on the face of the petition, defendant could raise the objection by answer together with his answer on the merits. The conflict did not seem to bother the courts, since the jurisdictional allegations rarely appeared in petitions and the problem was seldom raised.

22. Mertens v. McMahon, *supra* note 21, at 189, 66 S.W.2d at 133; Case v. Smith, 215 Mo. App. 621, 625, 257 S.W. 148 (K.C. Ct. App. 1928); Tamblyn v. Chicago Lead & Zinc Co., 161 Mo. App. 296, 143 S.W. 1095 (Spr. Ct. App. 1912).

23. Mertens v. McMahon, *supra* note 21.

24. *Ibid.*

25. Kingman-St. Louis Implement Co. v. Brantley Bros. Hardware Co., *supra* note 21, at 317, 118 S.W. at 503.

26. 40 Mo. LAW BULL. L. SER. 34 (1925). The court in Mertens v. McMahon, *supra* note 21, at 195, 66 S.W.2d at 136, said: "The rule that an error or defect

Even where the defect did not appear on the face of the record, so that defendant was permitted to answer on the merits, defendant's conduct was still limited. He had to raise the jurisdictional objection at the earliest possible moment, and he could not take "any affirmative action in the case showing that he [was] willing to submit the trial of the whole of the case to the court or jury before which it [was] pending, such as taking a change of venue . . . or asking a continuance of the whole case, and must not seek affirmative relief on his part such as filing a counterclaim, etc."[27]

Such was the peculiar nature of special appearances in Missouri prior to 1943. Then came the extensive revisions of the 1943 code, which on their face effected a radical change.

The 1943 code provided that eleven separate objections, including lack of jurisdiction over the person, might be raised by motion "whether or not the same appear from the pleadings or other papers filed in the cause."[28] In addition the code provided that:

> A party who makes a motion may join with it the other motions provided for and then available to him. *No objection is waived by being joined with one or more other objections in the motion, nor shall pleading over or entering into the trial of the merits be deemed to waive any objection properly raised by motion.*[29] (Emphasis supplied.)

With such an obvious and radical departure from the earlier statutes, it is surprising and confusing to find decisions which cite the pre-1943 cases as setting the permissible boundaries for post-1943 jurisdictional objections. The 1943 code appears to do away with the need for special appearances, but the decisions have not so held. Much of the language touching on the subject is dictum, but to the lawyer trying to avoid an accidental general appearance the problem is no less real.

Five years after the 1943 code the Missouri Supreme Court dealt with the question of whether a defendant had waived a jurisdictional objection.

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which is or can be reached by demurrer or an equivalent motion, being one of law only, is waived by answering and going to trial on the merits, though well established, is at best a harsh rule . . . ."

27. Mertens v. McMahon, *supra* note 21, at 190, 66 S.W.2d at 134.

28. Mo. Laws 1943, at 374, § 61. This later became § 509.290, RSMo 1949, and is now Mo. R. Civ. P. 55.31.

29. Mo. Laws 1943, at 375, § 66. This later became §509.340, RSMo 1949, and is now Mo. R. Civ. P. 55.37.

The court said:

> The appearance may be express or it may be implied from the defendants "taking, or agreeing to some step or proceeding in the cause beneficial to himself * * * other than one contesting only the jurisdiction * * *" . . . . Thus the mere continuing of a case by agreement after a plea in abatement is an appearance conferring jurisdiction of the person . . . [citing a 1909 case]. Also, taking a change of venue and subsequently agreeing to a continuance is an appearance conferring jurisdiction of the person . . . [citing an 1893 case]. The appearances in these instances were as effective in conferring jurisdiction of the person as the filing of an answer and counterclaim.[30]

This was a correct statement of the law prior to 1943. It is difficult, however, to see its applicability after the 1943 code. Though the language was dictum, it confuses.

In *Jones v. Church*,[31] decided by the St. Louis Court of Appeals in 1952, the defendants were sued on a note. Defendants first moved to dismiss for failure to state a claim. No objection was made to the venue. The challenge to venue was raised for the first time on appeal. The venue objection might have been disposed of very simply by referring to Section 509.340 of the 1949 Revised Statutes of Missouri (now Rule 55.37 of the Missouri Rules of Civil Procedure), which provides that "A party waives all objections and other matters then available to him by motion by failure to assert the same by motion within the time limited . . . ." The court instead treated the subject as a problem of special appearance and said:

> Objection to venue, unlike jurisdiction of the court, can be waived by a party who might be entitled to assert it. Robison v. Field, 342 Mo. 778, 117 S.W.2d 308, loc. cit. 318. Defendants can submit themselves to the jurisdiction of a court (which has general jurisdiction of the subject matter) by any act that would constitute a general appearance. Lieffring v. Birt, Mo. App., 154 S.W.2d 597. The last cited case also specifically holds that the filing of a demurrer (to which the present-day motion to dismiss is equivalent) is a general entry of appearance.[32]

This broad language is hardly in harmony with the statutory provision that "No objection is waived by being joined with one or more other objec-

30. Mahan v. Baile, 358 Mo. 625, 630, 216 S.W.2d 92, 94 (1948).
31. 252 S.W.2d 647 (St. L. Ct. App. 1952).
32. *Id.* at 648.

tions in the motion. . . ."[33] There are other post-1943 decisions in which the dictum is equally misleading.[34]

On the other hand, in at least three decisions[35] the Missouri courts have recognized that the ground rules on challenging jurisdiction were materially altered in 1943. The clearest exposition on the subject is *Johnson v. Fire Ass'n of Philadelphia.*[36] Defendant, an Iowa insurance company, was sued in Missouri by serving the Missouri Superintendent of Insurance. Defendant filed a motion containing three objections: first, that the court lacked jurisdiction over its person; second, that the court lacked jurisdiction over the subject matter; and third, that venue was improper. The motion was overruled and defendant answered denying liability, pleading affirmative defenses and tendering fifty dollars into court as full settlement of plaintiff's claim. Plaintiff argued that this constituted a "general appearance" and thus the jurisdictional defect, if any, was waived. In support of his position plaintiff cited two pre-1943 cases. The court rejected the argument, stating:

> Those cases do announce that general principle of law, and before the adoption of our New Code of Procedure there would be much merit in this contention. However, Sec. 61 of this code, p. 374, Mo. R.S.A. § 847.61, specifies what matters may be raised by motion to dismiss, and the first is, "lack of jurisdiction over the subject

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33. Sec. 509.340, RSMo 1949 (now Mo. R. Civ. P. 55.37).

34. State *ex rel.* Ball v. Weinstein, 365 Mo. 1179, 295 S.W.2d 62 (1956) (en banc); Beckman v. Beckman, 211 S.W.2d 536 (St. L. Ct. App. 1948), *transferred to Missouri Supreme Court and affirmed in part,* 358 Mo. 1029, 218 S.W.2d 566 (1949) (en banc).

35. State *ex rel.* Toberman v. Cook, 365 Mo. 274, 281 S.W.2d 777 (1955) (en banc); Beckman v. Beckman, 358 Mo. 1029, 218 S.W.2d 566 (1949) (en banc); Johnson v. Fire Ass'n of Philadelphia, 225 S.W.2d 370 (K.C. Ct. App. 1949).

In State *ex rel.* Toberman v. Cook, *supra,* the defendants entered a special appearance to challenge venue. The Missouri Supreme Court said:

> In the motion to dismiss, as above stated, relators appeared specially and only for the purpose of the motion. . . . In refraining from asking any further or affirmative relief, relators did only what under the old civil code was generally done in order to avoid a charge of having invoked the jurisdiction of the court by asking affirmative relief and thereby pleading themselves into an entry of appearance, and which, *under the new civil code, they are no longer so strictly required to refrain from doing.* §§ 509.290(2) and 509.340. (Emphasis supplied.)

365 Mo. at 278, 281 S.W.2d at 780.

After Beckman v. Beckman, *supra,* was transferred to the Missouri Supreme Court, the court made this comment: "The special appearance of defendant did not confer on the court jurisdiction of his person, or waive jurisdictional defects. . . . Waiver of jurisdictional defects has been further limited by the new Civil Code. See Sec. 66, § 847.66 Mo. RSA." 358 Mo. at 1034-35, 218 S.W.2d 570. The section cited by the court provides in part that "No objection is waived by being joined with one or more other objections." See footnotes 29, 32 and 33 *supra.*

36. *Supra* note 35.

> matter"; the second, "lack of jurisdiction over the person," and third, "improper venue." These are the questions raised by defendant's motion. Sec. 66 of the same code, Mo. R.S.A. § 847.66, provides that no objection is waived if properly raised by motion by "pleading over or entering into the trial of the merits * * *." We understand plaintiff concedes that the mere pleading over and entering into the trial of the case would not waive any properly raised objection, but he does contend that since defendant's answer asked for affirmative action by the court on the question of tender, it thereby waived all objections raised by the motion. We cannot agree with this line of argument . . . .[37]

The case is particularly important because it specifically permitted a defendant to make a motion with multiple objections, including lack of jurisdiction, without waiving any objection. Unfortunately, the effect of the decision is diluted by the contrary dicta mentioned above.[38]

In spite of the many post-1943 references to special appearances, it can be argued with considerable logic that the 1943 code completely did away with the need for special appearances. In this connection the federal practice on the same subject is significant.

Federal rule 12(b)[39] provides that seven separate objections, including lack of jurisdiction over defendant's person, may be raised by motion. It also provides that "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."

The corresponding Missouri rule is 55.37.[40] It provides that "No objection is waived by being joined with one or more other objections in the motion nor shall pleading over or entering into the trial of the merits be deemed to waive any objection properly raised by motion."

The primary distinction between the two rules is that in Missouri all those objections which *can* be raised by motion *must* be raised by motion. Under the federal rule, those objections which *can* be raised by motion *may* be raised by motion *or* in the answer. But this distinction is not significant as to the question of special appearance. Both rules permit multiple objections by motion, including the objection to jurisdiction over the person, and both provide that no objection is waived by being joined with any other objection.

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37. *Id.* at 373.
38. Notes 30, 31 and 34 *supra.*
39. FED. R. CIV. P. 12(b).
40. MO. R. CIV. P. 55.37.

With rare exceptions[41] the federal courts have held that the need for special appearance disappeared with the 1938 arrival of federal rule 12(b). This rule expressly permits a defendant to join multiple objections, including lack of jurisdiction, without waiving any objection.[42]

Perhaps the clearest statement of the federal view is found in *Orange Theatre Corp. v. Rayherstz Amusement Corp.*[43] The court said:

> It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly. If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of paragraph (h) of Civil Procedure Rule 12 to be treated as waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the time prescribed by the rules. We conclude that within the time allowed for serving the answer the defendant may assert this defense unless he has waived it by some action other than his voluntary appearance. In so holding we are in accord with the decisions of other courts which have considered the question.

Justice Whittaker, in an opinion written while serving as a District Judge,[44] said: "While there are many early cases to the contrary, the now

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41. Smith v. Belmore, 1 F.R.D. 633 (E.D. Wash. 1941), *criticized in* Thorne, Neale & Co., Inc. v. Coe, 3 F.R.D. 259 (D.D.C. 1943); Johnson & Gould v. Joseph Schlitz Brewing Co., 28 F. Supp. 650 (E.D. Tenn. 1939), *criticized in* Devine v. Griffenhagen, 31 F. Supp. 624 (D. Conn. 1940). These decisions stand alone among scores of cases to the contrary. See 2 MOORE, FEDERAL PRACTICE ¶ 12.12, at 2262 (2d ed. 1948).

42. The specific question has been raised in countless cases since the federal rules went into effect in 1938. Examples are Coppersmith v. Stein, 14 F.R.D. 354 (D.D.C. 1953); Alford v. Addressograph-Multigraph Corp., 3 F.R.D. 295 (S.D. Cal. 1944). In W. H. Elliott & Sons Co. v. E. F. King & Co., 144 F. Supp. 401, 408 (D.N.H. 1956), the court said, "The authorities seem to be in complete accord that the joining of defenses in a motion creates no waiver."

According to Moore, "special appearances are no longer necessary in any case." 2 MOORE, *op. cit. supra* note 41.

43. 139 F.2d 871, 874 (3d Cir. 1944), *cert. denied*, 322 U.S. 740.

44. C. S. Foreman Co. v. H. B. Zachry Co., 127 F. Supp. 901, 902 (W.D. Mo. 1955).

settled judicial interpretation is that special appearances neither gain nor lose anything and are unnecessary. . . ."

The federal view on special appearances has been followed in a number of states with procedural systems patterned after the federal rules.[45] A Missouri decision specifically following the federal practice would clear the air and greatly simplify the lawyer's job of charting a safe course for his client.

The ambiguous state of the law in Missouri today creates a dilemma. On one hand are cases suggesting that a motion challenging jurisdiction may not be joined with any other objection without becoming a general appearance and waiver of the jurisdictional defect.[46] On the other hand is Missouri rule 55.37, providing that "A party waives all objections and all other matters then available to him by motion by failure to assert the same by motion within the time limited. . . ."[47]

Suppose a defendant wished to challenge the court's jurisdiction and in the alternative to require the plaintiff to give security for costs. Requesting security for costs would constitute "taking . . . some step in the cause beneficial to himself * * * other than one contesting only the jurisdiction."[48] According to the 1948 dictum of the supreme court, the jurisdictional objection would thus be waived. But if defendant fails to join the motion for security for costs, that motion is lost under the provisions of rule 55.37.

Perhaps undue weight is given to the quoted dicta of the Missouri courts. Perhaps if the question were clearly presented to the Missouri Supreme Court it would follow the federal decisions[49] and the language of the Kansas City Court of Appeals,[50] holding that special appearances are only relics of another pleading era. Perhaps it would hold with the federal courts that the jurisdictional objection is waived *if and only if* it is not

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45. *Arizona,* D. W. Onan & Sons, Inc. v. Superior Court, 65 Ariz. 225, 179 P.2d 243 (1947), *subsequent action of trial court affirmed,* 75 Ariz. 371, 257 P.2d 389 (1953); *Colorado,* Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956); *Florida,* Greenberg v. Greenberg, 101 So. 2d 608 (Fla. Dist. Ct. App. 1958); *Kentucky,* Weant's Adm'r v. Ellis, 287 S.W.2d 446 (Ky. Ct. App. 1955); *Minnesota,* Anderson v. Mikel Drilling Co., 257 Minn. 487, 102 N.W.2d 293 (1960).

46. See cases cited in notes 30, 31 and 34 *supra.*

47. Mo. R. Civ. P. 55.37.

48. Mahan v. Baile, *supra* note 30.

49. See cases cited in note 39 *supra.*

50. Johnson v. Fire Ass'n of Philadelphia, *supra* note 35.

asserted *within the time permitted* by the rules.[51] Such a clarification would make the lawyer's job a great deal easier. In the meantime, the cautious lawyer will probably continue to "intone that ancient abracadabra of the law"[52] and appear specially even at the risk of waiving less important objections which otherwise would have been joined.

51. Mo. R. Civ. P. 55.37.
52. Orange Theatre Corp. v. Rayherstz Amusement Corp., *supra* note 40.