Volume 68 | Issue 2 Article 32

February 1966

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Petitioners brought a mandamus proceeding to compel rescission of an order closing a public school. Process was issued pursuant to Rule 4 of the West Virginia Rules of Civil Procedure. Respondents appeared specially to challenge the jurisdiction of the court. The court overruled the objection and ordered the parties to proceed with the taking of testimony. A writ of mandamus was awarded. *Held,* reversed. The West Virginia Rules of Civil Procedure do not apply to mandamus proceedings. Failure to comply with the statutory procedure for commencing a mandamus proceeding rendered the process utterly void. Respondents did not waive the objection made by the special appearance by obeying the court order to proceed with the taking of testimony. *Duncan v. Tucker County Bd. of Educ.,* 140 S.E.2d 613 (W.Va. 1965).

Under prior practice in West Virginia some confusion existed as to whether objections raised by a special appearance were waived by a subsequent general appearance. It was clear, however, that a general appearance as the initial step constituted a waiver. Carlin, *A Decade Of Pleading, Practice And Procedure,* 53 W. VA. L. REV. 1, 4 (1950). In the principal case the court acknowledged the confusion in prior decisions but limited its holding to the particular facts involved. The court intimated that an objection to process, raised by a special appearance, would be waived by a subsequent general appearance if the process were "merely defective." If the process were "void" no waiver occurred.

In *Stone v. Rudolph,* 127 W. Va. 335, 32 S.E.2d 742 (1944), process was forwarded by the state auditor to the wife of *D's* manager at *D's* place of business in West Virginia. *D* appeared specially and contended that process was not served on him in compliance with the Non-Resident Motorist's Act. *D's* motion was denied, and he subsequently made a general appearance on the merits. On the theory that the purpose of process is to bring *D* into court and to give him notice of the proceeding, the court held that *D* had waived his objection. The court stated that while *D* may appear specially to attack the defect, he cannot afterwards appear generally without waiving his objection.

In *Damron v. Williamson Constr. & Eng'r Co.,* 109 W.Va. 122, 153 S.E. 250 (1930), *D* appeared specially and moved to quash

the return of service on the ground that it contained no recital that the secretary of the corporation, upon whom service was made, resided in Taylor County. The motion was denied and *D* thereafter made a general appearance on the merits. The court held that the general appearance waived the objection raised by the special appearance.

In *Stone v. Rudolph, supra,* the court cited *Chesapeake & O. Ry. v. Wright,* 50 W.Va. 653, 41 S.E. 147 (1902), stating that while the case may not have been strictly applicable, the principle discussed was applicable. The *Wright* case was started before a justice. *D* appeared specially and moved to quash the return of service. The return did not show that the alleged agent of *D,* on whom service was made, was at the time a resident of Greenbrier County and in the actual employ of *D* at the time service was made. The motion was denied, and *D* thereafter made a general appearance. The court held that, under proceedings before a justice, a defendant who appears specially to attack the service must then elect to rely on such objection alone or waive it by going to trial on the merits.

If the process is "merely defective," what effect will Rule 12(b), West Virginia Rules of Civil Procedure, have on prior decisions which held a waiver occurred? West Virginia Rule 12(b) is identical to the Federal Rule. LUGAR & SILVERSTEIN, W. VA. RULES 101 (1960). An examination of federal cases decided under Federal Rule 12(b) indicates that West Virginia cases holding that any special appearance is waived by a subsequent general appearance should no longer be persuasive under West Virginia Rule 12(b).

In *Blank v. Bitker,* 135 F.2d 962 (7th Cir. 1943), *P* sued to recover on a guaranty. The action was started in Illinois, and process was served on *D* at his residence in Wisconsin. *D* took *P's* deposition and received four extensions of time in which to answer. In his answer *D* set up defenses to the merits as well as the defenses of lack of jurisdiction over the person and improper venue. *P* contended that taking a deposition and answering constituted a waiver of venue. Acknowledging that a general appearance would have caused a waiver of venue prior to the adoption of the Federal Rules of Civil Procedure, the court held that a special appearance to challenge the court's jurisdiction over the person and to object to improper venue was no longer necessary. Under the rules, defenses

to the merits may be joined with defenses of lack of jurisdiction over the person and improper venue without a waiver.

In *Vilter Mfg. Co. v. Rolaff*, 110 F.2d 491 (8th Cir. 1940), *D* appeared specially and raised the defense of lack of jurisdiction over the person. *D* moved to quash the service on the ground that it was not doing business in Missouri and even if it were, the cause of action arose in Wisconsin. The motion was denied, and *D* thereafter made a general appearance. *P* contended that the general appearance waived the objection raised in the special appearance. The court held that there was no waiver and stated that, under the Federal Rules, *D* could have combined his objection with defenses to the merits. In the event of an adverse decision, the right to raise the question of jurisdiction on appeal was preserved. *Accord, Speir v. Robert C. Herd & Co.*, 189 F. Supp. 436 (D. Md. 1960).

The Florida court has adopted the federal approach. In *State ex rel. Eli Lilly & Co. v. Shields*, 83 So. 2d 271 (Fla. 1955), *D* made a special appearance and raised the defenses of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. *D* contended that it was not doing business in Florida and that the person upon whom the sheriff purported to serve process was not authorized by law to be so served. The motion was denied, and *D* filed a suggestion for a writ of prohibition to stay the proceedings. *D* feared that the defenses raised would be waived by a subsequent general appearance. The court admitted that *D's* fear was supported by prior case law. But since those decisions Florida had adopted a rule based on Rule 12(b) of the Federal Rules. The court pointed out that there was no waiver under federal practice and specifically held that the practice was now the same in Florida.

If West Virginia follows the federal practice under Rule 12(b) and the reasoning of the Florida court, a defendant would be allowed to make a special appearance and, losing thereon, make his defense on the merits without waiving the defenses raised by the special appearance. This conclusion would appear to be valid whether the process was considered "void" or "merely defective."

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