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Pleading and Practice--Service of Process--Venue and Jurisdiction

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PLEADING AND PRACTICE—SERVICE OF PROCESS—VENUE AND JURISDICTION.—*P* sued a corporate and a natural defendant in Nicholas County for injuries growing out of an automobile accident. The summons was directed to the sheriff of Nicholas County, where the cause of action arose, dated March 8, 1938, and returnable to the first Monday in March, 1938, this being the day before the summons was issued. Subsequently another summons, labelled an "alias" summons, was issued against the codefendants returnable to April Rules, and was served only on the natural defendant in Harrison County. In this original action judgment was rendered against the codefendants, and the execution being returned unexecuted, this present motion for judgment was started against *D* insurance company to enforce the judgment on the basis of a public liability insurance policy under which the company agreed to pay whatever sum the insured became obligated to pay, the policy by express terms including the natural defendant. The insurance company defended on the ground that the court had no jurisdiction to render such judgment in the first action because of the invalidity of the process and therefore the judgment should be declared void. *Held,* one judge dissenting, that the invalidity of the first process did not affect the second; that, since the first was a nullity, the second may be treated as an original; and that the judgment against the natural defendant is valid. *Hall v. Ocean Accident & Guarantee Corp.*[1]

Service of process being essential to the jurisdiction of a court, unless waived,[2] the corporate defendant, not having been served with process, since the original process was void, cannot be bound by the judgment.

Process which is returnable to a day which under the law cannot be a return day, or to an impossible return day, is no summons at all and of no effect.[3] The original summons was, therefore, clearly void. An "alias" process, having been issued, might have cured the original, but where the original is void on its face, there is no suit pending on which to issue an "alias".[4] The question now presents itself as to whether an "alias", labelled as such, must

[1] 9 S. E. (2d) 45 (W. Va. 1940).

[2] McCoy's Ex'r v. McCoy's Devisees, 9 W. Va. 443 (1876); White v. White, 66 W. Va. 79, 66 S. E. 2 (1909); Smith Ins. Agency v. Hamilton Fire Ins. Co., 69 W. Va. 129, 71 S. E. 194 (1911).

[3] Coda v. Thompson, 39 W. Va. 67, 19 S. E. 548 (1894); Lebow v. Macomber & Whyte Rope Co., 81 W. Va. 21, 93 S. E. 939 (1917); Kyles v. Ford, 2 Rand. 1 (Va. 1823).

[4] Gorman v. Steed, 1 W. Va. 1 (1864); United States Oil & Gas Well Supply Co. v. Gartlan, 58 W. Va. 267, 52 S. E. 524 (1905).

be accepted and stand or fall solely as an "alias", or may stand as an "original". There are cases holding that the mere fact that the writ is designated as an "alias" cannot affect the essential character of the writ or render it less effective as a process to bring the defendant before the court,[5] and an "alias" process which cannot be held good as an "alias" should be held good as an "original".[6]

If the "alias" is held good as an original, a further problem of venue and service of this "original" is presented. Under section one of the general venue statute,[7] actions at law may be brought in the circuit court of any county wherein any one of the defendants resides, and the second section of this statute[8] provides that actions may be brought in any county wherein the cause of action or any part thereof arose, although none of the defendants reside therein if one of the defendants is served therein, or one of the parties is a corporate defendant. If process, therefore, had been issued under the first section of the venue statute, the process would ordinarily have been directed to the sheriff of that county, but the West Virginia Code specifically provides that such process may be issued to the sheriff of any county.[9] The defendant, however, bases its argument against the legality of the process in question and the service thereof on the assumption that the natural defendant was a resident of Harrison County and the only ground for the cause of action being brought in Nicholas County was the fact that the

[5] Davis v. McCall, 133 Va. 487, 113 S. E. 835 (1922) holding the fact that the writ is designated as an "alias" or as an "original" cannot affect its essential character or render it less effective as a process for bringing the defendant before the court. *Accord*: Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

[6] Dunaway v. Lord, 114 W. Va. 671, 173 S. E. 568 (1934); Fulbright v. Tritt, 19 N. C. 491 (1837) in which case a statute similar to the West Virginia statute was construed; Danville & Western R. R. v. Brown, 90 Va. 340, 18 S. E. 278 (1893) where Virginia followed the same rule in applying the prototype of our own statute; Frantz v. Detroit United Ry., 147 Mich. 199, 110 N. W. 531 (1907).

[7] W. VA. CODE (Michie, 1937) c. 56, art. 1, § 1: "Any action or other proceeding at law or suit in equity, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(a) Wherein any of the defendants may reside. . . ."

[8] W. VA. CODE (Michie, 1937) c. 56, art. 1, § 2: "An action, suit or proceeding may be brought in any county wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein, in the following instances:

"(a) When the defendant, or if more than one defendant, one or more of the defendants, is a corporation;

"(b) When the defendant, or if more than one defendant, one or more of the defendants, are served in such county with process or notice commencing such action, suit or proceeding."

[9] W. VA. CODE (Michie, 1937) c. 56, art. 3, § 5: "Process from any court, whether original, mesne or final, may be directed to the sheriff of any county . . ."

cause of action arose there. There being a corporate defendant, the case falls within the second section of the venue statute, and the process did not have to be served on the natural defendant in the county in which the action was brought.[10] Though there had been no corporate defendant, there is nothing on the face of the declaration or in the writ to show that the defendant did not reside in Nicholas County; and where the declaration and writ are silent as to the residence of the defendant, and there is nothing to show improper matter for a court of general jurisdiction, we cannot assume that the action has been improperly brought.[11] Since there was nothing to show the want of jurisdiction of the court either on the face of the declaration or in the writ, the motion of the defendant to quash was properly overruled, and the proper way to have attacked it would have been to have appeared specially and pleaded the defect in abatement.[12] The defendant, not having so appeared and pleaded, is presumed to have waived any defects, and the judgment rendered against the natural defendant is valid under either section of the venue article.

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PRACTICE AND PROCEDURE—ALIAS PROCESS—WHEN IT MUST ISSUE.—A summons was issued in August, returnable to September Rules, and was returned unexecuted. An alias summons was then issued, returnable to October Rules, which was also returned unexecuted. On the first day of November Rules, two pluries summonses were issued, one returnable that day and the other returnable at December Rules, the latter pluries summons returned executed. The certified question from the circuit court was whether

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[10] There was no inhibition under the old statute, where suit was brought in the county in which a defendant resided, against sending the process to another county and serving it on the defendant there, and under the present statute it is expressly authorized; and it seems that it should not be different under the statute which presumably this action was brought, and the presumption in favor of the jurisdiction of a court of general jurisdiction should work in both instances.

[11] Empire Coal & Coke Co. v. Hull Coal & Coke Co., 51 W. Va. 474, 41 S. E. 917 (1902); W. VA. CODE (Michie, 1937) c. 56, art. 4, § 31.

[12] Wilson v. Eitz, 96 W. Va. 397, 400, 123 S. E. 63 (1924): "The bill clearly 'shows on its face proper matter for the jurisdiction of the court;' therefore, no exception for want of such jurisdiction could be taken except by plea in abatement."

Morgan v. Pennsylvania R. R., 148 Va. 278, 138 S. E. 566 (1927); Seaboard Air Line Ry. v. J. E. Bowden & Co., 144 Va. 154, 131 S. E. 245 (1926); Gunnoe v. W. Va. Poultry Ass'n, 115 W. Va. 87, 174 S. E. 691 (1934); Empire Coal & Coke Co. v. Hull Coal & Coke Co., 51 W. Va. 474, 41 S. E. 917 (1902); W. VA. CODE (Michie, 1937) c. 56, art. 4, § 31.