February 1939

Pleading--Plea in Arbitration--General Appearance

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on which the forfeiture may be based is not given as liberal a construc-
tion in favor of the insured as it would where the liability has
\footnote{Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135 (1903); 7 Collyer, Briefs on Insurance (2d ed. 1928) 5918.
\footnote{Haymond, supra n. 1.
\footnote{195 S. E. 341 (W. Va. 1938).} }

It is further suggested that there is another distinction for
the purpose of justifying the \textit{Neill} case, as the \textit{Iannarelli} case is
still law. In the former, it is the disability insured against that
may defeat recovery by the insured, while in the waiver of premium
cases, the disability involved is not insured against but may be
taken advantage of by the insured as an excuse for nonpayment of
premiums. In the former it would be manifestly unjust to say
that the happening of the event insured against would defeat re-
coverly,\footnote{Morris v. Calhoun, Judge.}\footnote{195 S. E. 341 (W. Va. 1938).} and insurers would be unable to sell such policies.\footnote{195 S. E. 341 (W. Va. 1938).} Although the two rules are now well established in West Virginia, it
is arguable that as the courts abhor forfeitures and construe liberal-
ly in favor of the insured, the impossibility should be an excuse in
both cases, thereby permitting a similar recovery in the \textit{Iannarelli}
case.\footnote{195 S. E. 341 (W. Va. 1938).}
In the Virginias, all dilatory pleas are called pleas in abatement. This would include (1) pleas to the jurisdiction, (2) pleas in suspension, and (3) pleas in abatement of the writ, the declaration, or both. Some courts apply the term "plea in abatement" only to pleas to the writ or declaration, using it in its stricter sense. Even under the broad use of the term, it seems that pleas in suspension should not be included, because such a plea certainly, by its very nature, recognizes the case in which it is filed to be in court and constitutes a general appearance. This limits pleas in abatement to pleas to the jurisdiction and pleas in abatement of the writ or declaration.

Very few cases were found which involve the effect of these pleas as to waiver of defects in process. In the principal case, the filing of pleas in abatement averring lack of jurisdiction and defect in service of process was held not to constitute a waiver of defective service. This seems right, for as the court says, "It would be strange, indeed, if the very raising of the question of the court's jurisdiction would result in conferring on the court the jurisdiction challenged." An earlier West Virginia case, Parfitt v. Sterling Veneer & Basket Company, held that a plea in abatement for alleged variance between the writ and the declaration did constitute a waiver of defects in service of process. This, too, seems right and not inconsistent with the principal case, for here jurisdiction of the parties is not in dispute. In an Alabama decision, filing a plea in abatement to the writ for a defect therein was held not a general appearance. In a federal court case, a plea in abatement showing that the cause of action did not have its origin within the jurisdiction of the court was held not to amount to a general appearance, but there are other federal cases seemingly to the con-

3 Berks, Pleading and Practice § 51.
4 Some courts require that a plea to the jurisdiction must be pleaded in proper person, and not by attorney, for if pleaded by attorney it is a submission to the jurisdiction of the court. Pratt v. Harris, 295 Ill. 504, 130 N. E. 277 (1920); Davidson v. Watts & Flint, 111 Va. 394, 69 S. E. 328 (1910). Wolfe v. Jordan, 93 W. Va. 42, 116 S. E. 132 (1923) disapproved this technical rule as one belonging to a very early period in the common law when one could appear by attorney only by leave of court and this appearance before the court for such leave would be a general appearance, but the court did not state the law to be otherwise. However, W. Va. Rev. Code (1931) c. 56, art. 4, § 32, settled all doubt by allowing a plea in abatement to be pleaded by attorney.
6 Nabors v. Nabors, 2 Port. 162 (Ala. 1835).
trary. From these decisions, and speaking in terms of the form of the pleading, a rule might be stated that pleas to the jurisdiction and pleas in abatement of the writ are the only dilatory pleas which can be entered which do not operate as a general appearance.

Perhaps a better way to approach the question is by application of the general rules as to appearance, rather than by looking to the form of the pleading. "Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance." The rule, broadly stated, is that any appearance except to object to the jurisdiction of the court over the subject matter or to take advantage of defective execution or nonexecution of process, is a general appearance. This rule covers all appearances for any purpose and agrees with the conclusion reached from the examination of the cases as to the effect of pleas in abatement, and since it goes to the substance of the pleading rather than its form, is more satisfactory.

J. P. R.

WILLS — INTENT OF TESTATOR — "GRANDCHILDREN" AS INCLUDING CHILDREN OF ILLEGITIMATE SON. — T, the testator, bequeathed to each of his "grandchildren" the sum of $100.00. In the residuary clause of the instrument the residue of the estate was given in equal amounts to his three sons A, B, and C, C being an illegitimate child, and to his three daughters D, E and F. Held, 8 In Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co., 37 F. (2d) 695, 701 (C. C. A. 4th, 1930), where the defendant filed a plea in abatement of the court, the court said "Even the filing of a plea in abatement at rules — which is precisely what the defendant did in the present case — is held to waive all defects in the writ and service thereof." And in Budris v. Consolidation Coal Co., 251 Fed. 673 (E. D. N. Y. 1918), the court said that the interposition in a federal district court of a special appearance to question the jurisdiction over the cause of action or of the person of the defendant waives any defect because of serving a summons of the court in an adjacent district.


11 Furthermore, statutes are constantly changing the use of the plea in abatement, and new Federal Rule 12 (b), 8 F. C. A. 714 (1938) completely abolishes the plea in abatement.

It should be noted that the problem is the same whether the devise or bequest be to the "children" or "grandchildren" of the testator, the question in every case being whether the illegitimates or those who claim through them can take under the will. The discussion deals with the problem as if the word "children" had been used, as that is the usual way the question arises.

8 In Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co., 37 F. (2d) 695, 701 (C. C. A. 4th, 1930), where the defendant filed a plea in abatement of the court, the court said "Even the filing of a plea in abatement at rules — which is precisely what the defendant did in the present case — is held to waive all defects in the writ and service thereof." And in Budris v. Consolidation Coal Co., 251 Fed. 673 (E. D. N. Y. 1918), the court said that the interposition in a federal district court of a special appearance to question the jurisdiction over the cause of action or of the person of the defendant waives any defect because of serving a summons of the court in an adjacent district.