

1911

Preserving a Special Appearance

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Recommended Citation

Sunderland, Edson R. "Preserving a Special Appearance." *Mich. L. Rev.* 9 (1911): 396-411.

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PRESERVING A SPECIAL APPEARANCE.

NO personal judgment against a defendant is valid unless the court which renders it has first obtained jurisdiction over the person of such defendant. This is elementary and fundamental, and goes to the essence of the judgment. And such jurisdiction must be secured through the actual service of process upon the defendant against whom the judgment is sought or through his voluntary appearance in the action.

In order that the service should be effective to confer jurisdiction, it is necessary that the writ or notice served should substantially conform to the statutory requirements as to style, direction, designation of court and parties, statement of cause of action, signature, indorsements and any other features which the law prescribes as essential.¹ It is also necessary that the act of service should satisfy the requirements of the law in respect to the person or officer who performs it; the time when and the place where it is performed, and the manner in which it is done.² Especially in the case of service upon corporations is the manner of service subject to exact and technical regulation. Lastly, in order that the service may confer jurisdiction to render a personal judgment, an affidavit or return must be made by the person or officer making the service, showing that all those things have been done which the law declares are necessary to constitute a legal service of process.³ "Due and proper service must appear upon the record before the court is authorized to render a judgment by default."⁴

These various requirements are substantial, not formal. They are conditions of jurisdiction over the person, in the absence of a voluntary waiver on the part of the defendant. Failure to observe them may be fatal to the judgment. They are the primary elements of due process in judicial proceedings.

A voluntary general appearance, however, is ordinarily a full and complete waiver of all of them. Process is a means of coercion, and where the defendant freely does that which the process is designed to compel, the occasion for it ceases.

If the defendant against whom a personal judgment is sought wishes to stand upon his rights, and refuses to waive substantial defects in process, service or return, he may, of course, ignore the

¹ 32 Cyc. 428-444.

² 32 Cyc. 448-461.

³ 32 Cyc. 496-518.

⁴ 1 Black on Judgments, Sec. 83.

suit, and if the plaintiff succeeds in obtaining a personal judgment by default against him, he may attack the judgment on the ground of want of jurisdiction. This, however, is a dangerous method to employ, for the obvious reason that the court may not agree with his contention and may refuse to set aside the judgment. He may thus find himself bound by an adverse judgment in a case to which he had a perfectly good defense on the merits, with no opportunity to present that defense.

To avoid the serious consequences attendant upon this method of testing the jurisdiction of the court, the "special appearance" was devised as a means for obtaining a preliminary opinion from the court as to the necessity for submission to its jurisdiction, at a stage in the proceedings when a trial on the merits might still be had if desired in the event of an adverse ruling on the jurisdictional question.

The right to employ a special appearance for this purpose is almost universally conceded by American courts in the absence of a statute to the contrary.⁵ In a very few states the right has been expressly withdrawn by act of the legislature, and all appearances, whether for the sole purpose of questioning the jurisdiction of the court over the person of the defendant, or otherwise, are declared to be general appearances carrying a waiver of all defects in process, service or return. Thus, in Mississippi⁶ and Texas⁷ there are such statutes, and their validity has been sustained by the Supreme Court of the United States as against the objection that they constituted a denial of due process.⁸ The desirability of such legislation has not, however, commended itself to the federal courts, and they have refused to follow it when sitting in those jurisdictions.⁹ Recently an attempt on the part of the United States Circuit Court for the ninth circuit to compel every party to waive the benefit of his special appearance in case his contention was not sustained by the court, was declared invalid and ineffectual by the Supreme Court of the United States.¹⁰

Conceding the right of a defendant to enter a special appearance for the sole purpose of objecting to the jurisdiction of the court over his person, a most interesting and difficult question arises when the objection is overruled. What is the defendant to do in such event? How can he preserve his special appearance for review?

Hardly another question of practice can be found which has given

⁵ 4 Enc. L. & P. 1015.

⁶ Code, 1906, Sec. 3946.

⁷ Rev. St. Art. 1243.

⁸ *York v. State* (1890) 137 U. S. 15.

⁹ *Southern Pacific Co. v. Denton* (1892) 146 U. S. 202.

¹⁰ *Davidson Marble Co. v. Gibson* (1908) 213 U. S. 10.

rise to a more hopeless conflict of authority than this. One line of cases holds that the defendant must choose between two courses: either he must refuse to proceed further and withdraw from the case, allow judgment to go against him by default, and then attempt to have that judgment vacated on the ground of want of jurisdiction; or, abandon his special appearance entirely, appear generally and try the case on its merits. Another line of cases holds that he is forced to no such harsh choice, but may note an exception to the order overruling his objection to the jurisdiction, plead to the merits, and on appeal or error may have the benefit of his exception on the jurisdictional question, if he desires to avail himself of it.

The difficulty at the bottom of this conflict in the cases arises from the fact that an order overruling a special appearance is not a final order and is not appealable.¹¹ No review of the order can be had directly. Consequently there is no way to obtain it other than on appeal from the final judgment. If this final judgment is by default, rendered after the overruling of the special appearance and the refusal of the defendant to proceed further, the question of jurisdiction to render the judgment is of course open on appeal or error, for it cannot be claimed that the defendant has done anything to waive his right to raise it. But if he does not withdraw from the case upon the overruling of his objection to the jurisdiction, but, after merely taking an exception, proceeds to plead to the merits and enjoy the benefit of a trial, the case is not so clear. Has he done anything which may be construed as a waiver of his jurisdictional objection? Has he, in other words, by proceeding to the merits under such circumstances, in fact made a general appearance in the action and thus submitted himself to the jurisdiction of the court?

The question is a clean-cut one. Either pleading over and going to trial *is* a waiver, or *is not* a waiver, of the jurisdictional objection. Reasons may be found in support of each doctrine, and the authorities are quite evenly divided. But no question of law or practice has come under the writer's observation which has been passed upon by the courts with so little consideration as this one. One would expect just the converse to be true, in view of the great importance always attaching to jurisdictional questions. But with a few conspicuous exceptions, judicial discussions of this question are trivial and super-

¹¹ Kansas Rolling Mill Co. v. Bovard (1885) 34 Kan. 21, 7 Pac. 622; Brady v. Toledo etc. R. R. Co. (1889) 73 Mich. 457, 41 N. W. 503; McCoun v. New York Central R. R. Co. (1872) 50 N. Y. 176; Ryan v. Davenport (1894) 5 S. D. 203, 58 N. W. 568; Prussian Nat. Ins. Co. v. Northwest F. & M. Ins. Co. (1898) 19 Wash. 281, 53 Pac. 158; Welsher v. Libby (1900) 106 Wis. 291, 82 N. W. 143; Chappell v. O'Brien (1903) 22 App. Cas. D. C. 190; Reynolds v. Bank (1903) 66 Kan. 461, 71 Pac. 847; Powell v. Nolan (1903) 32 Wash. 403, 73 Pac. 349.

ficial. Most of the cases which pass upon the question contain no discussion whatever, even when the question is presented to the court for the first time. Often the opinions cite no authorities. Frequently they purport to rest upon cases which upon inspection are found to be not at all in point. In several states the courts have reversed themselves in the most naïve manner. The loose and unsatisfactory condition of the authorities may be readily seen from the following brief outline.

ALABAMA. The question seems to have been squarely raised for the first time in the very recent case of *De Jarnette v. Dreyfus*.¹² The court gave it no consideration aside from merely ruling on it, and cited no authorities. It was held that pleading over to the merits waived the objection to the jurisdiction.

ARKANSAS. In this state the only case seems to be the very early one of *Burriss v. Wise*.¹³ This was a mere ruling, with no reasons advanced and no authorities cited. The special appearance was held to have been waived by pleading over.

CALIFORNIA. In 1857 the supreme court of this state, in the case of *Deidesheimer v. Brown*,¹⁴ held that pleading to the merits after an ineffectual objection to the jurisdiction, was not a waiver of the objection. No reasons were given. No authority was cited. This case formed the sole apparent basis for a similar ruling in *Lyman v. Milton*¹⁵ and *Kent v. West*.¹⁶ In *Desmond v. Superior Court*,¹⁷ the court reversed itself completely. No reasons were given. No authority was cited. The previous contrary rulings were not even mentioned. In *Sears v. Starbird*,¹⁸ the Desmond case was followed without comment, and in the case of *In re Clarke*¹⁹ the same ruling was made, the court saying: "Some early cases in this state (*Deidesheimer v. Brown*, 8 Cal. 340, and *Lyman v. Milton*, 44 Cal. 631), seem to hold that a defendant having first objected to the process or service by which he was brought in, may then, if his objections are overruled, answer to the merits, and on appeal from the judgment still avail himself of his objections to the jurisdiction of the court over him. This rule seems unjust and illogical, and I think does not prevail elsewhere." At the time this opinion was written

¹² (1910) — Ala. —, 51 So. 932.

¹³ (1839) 2 Ark. 33.

¹⁴ 8 Cal. 340.

¹⁵ (1872) 44 Cal. 63.

¹⁶ (1875) 50 Cal. 185.

¹⁷ (1881) 59 Cal. 274.

¹⁸ (1889) 78 Cal. 225, 20 Pac. 547.

¹⁹ (1899) 125 Cal. 388, 58 Pac. 22.

that rule did nevertheless prevail elsewhere in a dozen different jurisdictions, including the United States courts.

COLORADO. The rule was established in this state by the case of *Union Pacific Ry. Co. v. De Busk*,²⁰ without reference to any authorities and without suggesting any reasons, that pleading over, after special appearance overruled and exception taken, was a general appearance. Subsequent cases merely repeated the rule and cited the ruling case.²¹

FLORIDA. It was held in *Florida Railroad Co. v. Gensler*,²² that pleading over waived the objection to the jurisdiction. No reasons; no cases. In *Lente v. Clarke*²³ the court stated *obiter* that no waiver would take place. But in *Stephens v. Bradley*²⁴ the first rule was reaffirmed on the sole authority of the Florida Railroad case, RANEY, J., dissenting.

GEORGIA. In *Medical College of Georgia v. Rushing*²⁵ the court held that an exception to the overruling of an objection to the jurisdiction might be preserved, and subsequently pleading to the merits was not a waiver. No reasons were suggested, no cases were cited.

IDAHO. The supreme court of this state held, in *Morris v. Miller*,²⁶ without giving any reasons or citing any cases, that an exception did not avail to preserve the special appearance.

ILLINOIS. The rule in this state, established without making any reference to any authority and without the disclosure of any reasons therefor, was stated in *Franklin Life Ins. Co. v. Hickson*,²⁷ to be that the objection to the jurisdiction is absolutely waived by pleading over to the merits to avoid a default judgment.

INDIANA. In the early case of *Secrest v. Arnett*²⁸ it was held, without reasons being given or authorities cited, that the jurisdictional question might be saved by an exception notwithstanding a plea subsequently made to the merits, and sixty years later, in *Chandler v. Citizens' National Bank*,²⁹ the court declared that this was the settled rule in Indiana, citing two New York cases which sustained the rule and an Indiana case which did not.

IOWA. In an early case the supreme court of Iowa, in a carefully

²⁰ (1888) 12 Colo. 294, 20 Pac. 752.

²¹ *Lord v. Hendrie & Bolthoff Mfg. Co.* (1889) 13 Colo. 393, 22 Pac. 782; *Ruby Chief Min. & Mill. Co. v. Gurley* (1892) 17 Colo. 199, 29 Pac. 668.

²² (1872) 14 Fla. 122.

²³ (1886) 22 Fla. 515, 1 So. 149.

²⁴ (1888) 24 Fla. 201, 3 So. 415.

²⁵ (1905) 124 Ga. 239, 52 S. E. 333.

²⁶ (1895) 4 Ida. 454, 40 Pac. 60.

²⁷ (1901) 97 Ill. App. 387.

²⁸ (1840) 5 Blackf. 366.

²⁹ (1897) 149 Ind. 601, 49 N. E. 579.

prepared opinion, based upon both reason and authority, decided that a special appearance was not waived by going into the merits after an adverse ruling.³⁰

KANSAS. The rule that there is no waiver by pleading over was announced in *Berg v. Eubank*,³¹ no reasons being given and no cases cited. In *Dickerson v. Burlington & Missouri River R. R. Co.*³² the rule was re-stated and followed on the sole authority of the earlier case.

KENTUCKY. The question was given some slight consideration in *Chesapeake, Ohio & S. W. R. R. Co. v. Heath's Adm'r*,³³ and the conclusion was reached, largely on the authority of *Harkness v. Hyde*,³⁴ that pleading to the merits was not a waiver of the jurisdictional objection. Later, in *Lillard v. Braamin*,³⁵ the question was again considered and decided in the same way, the prior case being cited as authority.

MASSACHUSETTS. The rule has been established in this state since 1837 that a special appearance is not waived by going into the merits after an adverse ruling by the court. It was first announced in *Ames v. Winsor*,³⁶ and has been followed in *Walling v. Beers*,³⁷ but in neither case did the court enter into any discussion of the question or cite any authority.

MICHIGAN. In no state have the decisions on this question been more confusing and inconsistent than in Michigan. In *Brown v. Kelley*,³⁸ Chief Justice CAMPBELL, speaking for the court, held that there was no waiver of objection to the jurisdiction over the defendant, by reason of a subsequent trial on the merits, after the overruling of a motion to dismiss for insufficiency in the affidavit upon which a warrant had issued. In *Manhard v. Schott*,³⁹ in an opinion by the same judge, the opposite rule was stated generally, and it was held that pleading over did waive objections to the jurisdiction, Judge COOLEY concurring. Six years later, in *Warren v. Crane*,⁴⁰ the court went back to the rule of the Brown case, Judge COOLEY writing the opinion and Judge CAMPBELL concurring. In the course of the opinion the court said: "Waiver is a voluntary act, and implies an

³⁰ *Converse v. Warren* (1856) 4 Iowa 158.

³¹ (1884) 32 Kan. 321.

³² (1890) 43 Kan. 702, 23 Pac. 936.

³³ (1888) 87 Ky. 651, 9 S. W. 832.

³⁴ (1878) 98 U. S. 476.

³⁵ (1891) 91 Ky. 511, 16 S. W. 349.

³⁶ (1837) 19 Pick. 247.

³⁷ (1876) 120 Mass. 548.

³⁸ (1870) 20 Mich. 27.

³⁹ (1877) 37 Mich. 234.

⁴⁰ (1883) 50 Mich. 300, 15 N. W. 465.

election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon. But that action is in no sense voluntary which a party cannot decline to take except at the peril of liberty or property, as was the case here. The defendant made his objection and was overruled; if he persisted in it afterwards he would have stood undefended in the case, and might have been kept in confinement until judgment. It would be unreasonable to compel a party to submit to this as the condition on which he should be allowed to question the unlawful arrest. *Brown v. Kelley*, 20 Mich. 27, is directly in point."

The Warren case has been cited by several courts in other states as authority for the general rule that proceeding to the merits after a special appearance is not a waiver of the jurisdictional question. But its authority did not last long in the state of its origin. In 1887 the question came up again, in *Dailey v. Kennedy*.⁴¹ The *Brown* and *Warren* cases were sought to be distinguished on the ground that they were cases of arrest, where the liberty of the citizen was at stake, and the *Manhard* case was approved and followed. In support of the rule the court cited several Massachusetts cases which were not in point, though that court had twice announced the contrary rule.

The above distinction, between cases where the defendant is deprived of his liberty and those where there is no arrest,—a distinction which seems to have been made by no other court,—was followed in *Durrell v. Richardson*⁴² and *Improved Match Co. v. Michigan Mutual Fire Ins. Co.*,⁴³ and it is now the settled law in this state, that pleading over and going to trial is a waiver of objections to the jurisdiction of the court over the person in all cases in which the liberty of the party is not involved, but not otherwise.

MISSOURI. Many cases in this state hold that jurisdictional objections are waived by pleading over.⁴⁴ None of them discuss the question with any fulness.

NEBRASKA. In *Walker v. Turner*,⁴⁵ without giving any reason or citing any authorities, the court held that pleading over was a submission to the jurisdiction of the court. *Grand Lodge v. Bartes*⁴⁶ held the same way, merely citing the *Walker* case, and the rule was

⁴¹ 64 Mich. 208, 31 N. W. 125.

⁴² (1899) 119 Mich. 592, 78 N. W. 650.

⁴³ (1899) 122 Mich. 256, 80 N. W. 1088.

⁴⁴ *Kronski v. Missouri Pac. Ry. Co.* (1883) 77 Mo. 362; *Newcomb v. New York Central R. R. Co.* (1904) 182 Mo. 687, 81 S. W. 1069; *Meyer v. Insurance Co.* (1904) 184 Mo. 481, 83 S. W. 479; *Thomasson v. Mercantile Town Mutual Ins. Co.* (1909) 217 Mo. 485, 116 S. W. 1092.

⁴⁵ (1889) 27 Neb. 103, 42 N. W. 918.

⁴⁶ (1902) 64 Neb. 800, 90 N. W. 901.

followed in the still more recent case of *Sampson v. Northwestern National Life Ins. Co.*⁴⁷

NEW JERSEY. *Duke v. Duke*⁴⁸ held that there was no waiver by pleading over. Brief discussion, quoting *Harkness v. Hyde* (infra), the leading federal case.

NEW YORK. As early as 1817, in *Wheeler v. Lampman*,⁴⁹ a defendant made a special appearance, was overruled, took an exception and pleaded over, and was allowed the benefit of his exception on appeal. There was no discussion of the question and not even a statement of the rule on the subject. The practice thus inaugurated has been expressly approved in several subsequent cases.⁵⁰ In the Avery case, Judge COWAN states the reason upon which he bases the rule in a brief but terse way. The Stephens case has a well considered and full discussion by Judge DAVIS, speaking for the Appellate Term. The other cases merely recite the rule.

NORTH CAROLINA. The question seems to have been passed on but once in this state. In *Mullen v. Norfolk & Carolina Canal Co.*⁵¹ it was held that pleading over after special appearance does not waive objection to the jurisdiction. No discussion; no reasons. Two cases cited, neither of them in point.

NORTH DAKOTA. In *Miner v. Francis*⁵² the court discussed the subject with thoroughness and care, and came to the conclusion that no waiver could be deemed to result from pleading over.

OKLAHOMA. It is held in this state that a special appearance may be preserved by exception. The rule was announced for the first time in *Chicago Building & Mfg. Co. v. Peuthers*,⁵³ where the question was given some consideration, but the ruling was expressly based upon the Kansas doctrine, Oklahoma having largely drawn its legal system from that state. The rule so laid down has been followed in several cases.⁵⁴

OREGON. *Sealy v. Cal. Lum. Co.*⁵⁵ held that pleading over waived the objection to the jurisdiction. The discussion is brief and super-

⁴⁷ (1909) 85 Neb. 319, 123 N. W. 302.

⁴⁸ (1906) 70 N. J. Eq. 149, 62 Atl. 471.

⁴⁹ 14 Johns. 481.

⁵⁰ *Avery v. Slack* (1837) 17 Wend. 85; *Dewey v. Greene* (1847) 4 Denio, 93; *Jones v. Jones* (1888) 108 N. Y. 415, 15 N. E. 707; *Lazzarone v. Oishei* (1892) 2 Misc. 200; *Boynton v. Keeseville Electric Light & Power Co.* (1893) 5 Misc. 118 (affirmed in 78 Hun 609); *Stephens v. Malloy* (1906) 50 Misc. 518.

⁵¹ (1894) 114 N. C. 8, 19 S. E. 106.

⁵² (1894) 3 N. D. 549, 58 N. W. 343.

⁵³ (1901) 10 Okla. 724, 63 Pac. 964.

⁵⁴ *Jones v. Chicago Building & Mfg. Co.* (1901) 10 Okla. 628, 64 Pac. 7; *Bee Line Construction Co. v. Schmidt* (1906) 16 Okla. 429, 85 Pac. 711; *St. Louis & San Francisco R. R. Co. v. Clark* (1906) 17 Okla. 562, 87 Pac. 430.

⁵⁵ (1890) 19 Ore. 94, 24 Pac. 197.

ficial, and the writer of the opinion disapproved the conclusion reached.

PENNSYLVANIA. The rule in this state is that objections to the jurisdiction are always waived by pleading over. The latest case is *McCullough v. Railway Mail Ass'n*,⁵⁶ which cites *Lycoming Fire Ins. Co. v. Storrs*⁵⁷ and *Borough of Jeannette v. Roehme*,⁵⁸ and they fully sustain the rule. But in none of these cases is there any discussion of the question.

SOUTH CAROLINA. *Garrett v. Herring Furniture Co.*⁵⁹ contains a statement of the conflicting rules on the question, but there is no consideration of their relative merits. The decision is based wholly on several South Carolina cases cited, none of which are in point.

SOUTH DAKOTA. The court gave some consideration to the question in *Benedict v. Johnson*,⁶⁰ and held, on the authority of the early California cases and the federal decisions, that pleading over after special appearance overruled, constituted no waiver of the objection to the jurisdiction of the court. The subsequent case of *Lower v. Wilson*⁶¹ recognized the same rule.

WASHINGTON. The very meagre case of *Woodbury v. Henninger*⁶² established the rule of no waiver in this state. The decision rests upon no disclosed reasons and no cited authorities. The rule was repeated, probably as dictum, in *Walters v. Field*⁶³ and *Larsen v. Allen Line S.S. Co.*⁶⁴

WEST VIRGINIA. By far the best opinion rendered by any court upon this question is that in *Fisher v. Crowley*,⁶⁵ in which the reasons and authorities are thoroughly canvassed and the conclusion reached that there is no waiver of the jurisdictional objection by pleading over after an adverse ruling. A dissenting opinion in the case gives a careful presentation of the opposite doctrine. The rule announced by the court had been previously laid down in *Quesenberry v. People's Building, Loan & Savings Ass'n*.⁶⁶

WISCONSIN. In the early case of *Lowe v. Stringham*⁶⁷ the court announced and briefly defended the rule that jurisdictional objections

⁵⁶ (1909) 225 Pa. St. 118, 73 Atl. 1007.

⁵⁷ (1881) 97 Pa. St. 354.

⁵⁸ (1898) 9 Pa. Super. Ct. 33.

⁵⁹ (1904) 69 S. C. 278, 48 S. E. 254.

⁶⁰ (1893) 4 S. D. 387, 57 N. W. 66.

⁶¹ (1896) 9 S. D. 252, 68 N. W. 545.

⁶² (1895) 11 Wash. 12, 39 Pac. 243.

⁶³ (1902) 29 Wash. 558, 70 Pac. 66.

⁶⁴ (1905) 37 Wash. 555, 80 Pac. 181.

⁶⁵ (1905) 57 W. Va. 312, 50 S. E. 422.

⁶⁶ (1898) 44 W. Va. 512, 30 S. E. 73.

⁶⁷ (1861) 14 Wis. 222.

are always waived by proceeding to the merits. This rule was followed in the recent case of *Corbett v. Physicians' Casualty Ass'n*,⁶⁸ where the question was considered at some length. This is perhaps the best case upon this side of the question.

UNITED STATES. The case of *Harkness v. Hyde* is probably the leading case in this country.⁶⁹ It was held in that case that pleading over after an exception taken to an adverse decision on a special appearance did not waive the objection, but the question did not receive a very extended discussion. It was followed in *Southern Pacific Co. v. Denton*,⁷⁰ and in many decisions by the lower federal courts. See, particularly, *Central Grain & Stock Exchange v. Board of Trade*.⁷¹

The foregoing synopsis of the authorities shows that the question of preserving a special appearance has frequently arisen, but has almost invariably received the most superficial consideration. In respect to the number of jurisdictions which have adopted one rule or the other, there is almost an exact balance.

Thirteen jurisdictions have held that a special appearance cannot be preserved except by withdrawing from the case and allowing an adverse judgment by default, and that pleading to the merits waives the objection. These are Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Missouri, Nebraska, Oregon, Pennsylvania, South Carolina and Wisconsin.

Fifteen jurisdictions have taken the opposite view, that an exception will save the question notwithstanding subsequent pleading to the merits. These are Georgia, Indiana, Iowa, Kansas, Kentucky, Massachusetts, New Jersey, New York, North Carolina, North Dakota, Oklahoma, South Dakota, Washington, West Virginia and the United States Supreme Court. Michigan has straddled.

In view of the unsatisfactory character of the great majority of the cases, the numerical balance shown is of small significance. It may almost be considered fortuitous. So long as any of these decisions are unreversed they are of course binding as rules of practice upon inferior courts in the same jurisdiction. But to accord many of them any weight further than this seems hardly appropriate.

The few cases which present substantial grounds for the decision may be examined with more profit. Those which hold that pleading over amounts to a waiver rest upon the proposition that the contrary rule would give the defendant an unfair advantage over the plaintiff, in that it would permit him to admit jurisdiction in case

⁶⁸ (1908) 135 Wis. 505, 115 N. W. 365.

⁶⁹ (1878) 98 U. S. 478.

⁷⁰ (1892) 146 U. S. 202.

⁷¹ (1903) 125 Fed. 463, 60 C. C. A. 299.

he won on the merits, but to deny it in case he lost. Those cases which hold that there is no waiver do so on the ground that a defendant who resists the court's jurisdiction to the extent of his power cannot be deemed, when forced to plead over under penalty of an adverse judgment, to have voluntarily submitted to the jurisdiction.

The supreme court of Wisconsin has stated the reason upon which the doctrine of waiver rests, as strongly and clearly as any court in the following language: "We think it is also a waiver of such a defect for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this, would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes, except to make that objection."⁷²

This is the whole argument in favor of the doctrine of waiver. Is it valid?

The argument was well answered by the supreme court of North Dakota in *Miner v. Francis*, (supra). The court said: "Some of the courts which hold an appearance under such circumstances to be voluntary deem it unfair that the defendant should have the chance of defeating a judgment on the merits by sustaining the jurisdictional point on appeal, while he enjoys the certainty of sustaining the judgment, if favorable to himself. But it often happens that, upon the trial of an action, reversible error is committed by the court while plaintiff is proving his case. Must the defendant then be regarded as waiving such error because he proceeds, with the chance of reversal if defeated? It is well to put the responsibility for this condition where it belongs. That the defendant enjoys this advantage is owing to the action of the plaintiff, in persisting in his prosecution of the case after he has been fairly warned by the defendant that he will, at all stages of the action, insist upon his contention that the court has no right to take jurisdiction of his person. Let the plaintiff dismiss, and start anew, if he is unwilling that defendant should enjoy this advantage. We are aware that there are a number of cases in which the contrary view is adopted; but we feel that the rule which we establish in this case is more in accord with principle, and more equitable in its spirit, having in view the interests and rights of both plaintiff and defendant in the action."

⁷² *Lowe v. Stringham*, supra.

To illustrate this point, take the case of a challenge of a juror for cause, which is improperly overruled. This objection is one preliminary to the trial, and is in its nature jurisdictional, since it goes to the qualifications of the triers of facts. The party making the challenge is given the same advantage which it is said a defendant who specially appears should not in fairness have. The very language of the Wisconsin court in *Lowe v. Stringham*, quoted above, accurately describes the situation. Substituting a few words, as indicated by parentheses, it would read as follows: "We think it is also a waiver of such a defect for the party, after making his objection, to * * * go to trial on the merits. To follow him to do this, would be to give him this advantage. After objecting that he was not (given an impartial jury) he could go in, take his chance of a trial on the merits, and if it resulted in his favor, insist upon the judgment as good for his benefit, but if it resulted against him, he could set it aside upon the ground that he had (been prejudiced by the improper overruling of his challenge)." And yet the same courts which hold that this advantage must not be accorded to a defendant who makes a special appearance in which he is overruled, freely grant it to a party who suffers prejudice from an overruled challenge.⁷³

And so it is with many objections made in the course of the trial. If one party is improperly allowed to amend his pleadings to the prejudice of the other party, the latter may take an exception and proceed with the trial on the merits, and in such case he has this advantage over the other party,—he may accept the judgment if favorable to himself, but may have it reversed if unfavorable. Deprivation of the right to open and close, objections overruled to the improper introduction of evidence, prejudicial remarks of counsel, the erroneous overruling of a motion to dismiss the case or instruct a verdict,—all these and others are instances of errors which the prejudiced party may preserve for his own advantage, to be used, if needed, to reverse an unfavorable judgment after he has enjoyed the benefit of a chance to win on the merits.

The reason lying at the foundation of the contrary rule, namely, that which holds that pleading over and going to trial, after an unsuccessful objection to the jurisdiction, does not waive the point, was well stated by COWAN, J., in *Avery v. Slack*,⁷⁴ as follows: "But

⁷³ *Lambardi v. California St. Ry. Co.* (1899) 124 Cal. 311, 57 Pac. 66; *Quill v. Southern Pacific Co.* (1903) 140 Cal. 268, 73 Pac. 991; *Shane v. Butte Electric Ry. Co.* (1908) 37 Mont. 599, 97 Pac. 958; *Theobald v. St. Louis Transit Co.* (1905) 191 Mo. 395, 90 S. W. 354; *Martin v. Farmers' Mutual Fire Ins. Co.* (1905) 139 Mich. 148, 102 N. W. 656.

⁷⁴ (1837) 17 Wend. 85.

it is said the defendant waived the objection by pleading over. Not so. He made a specific objection in due season, and that being overruled, he was compelled to plead or give up all he had to say on the merits. Resistance, to the extent of a man's power, is certainly a new kind of waiver."

It is elementary that a voluntary general appearance waives all defects in process, service or return. But it is a waiver only because it is voluntary. "A waiver is the voluntary abandonment or relinquishment by a party of some right or advantage."⁷⁵ "A waiver is a voluntary relinquishment of a known right."⁷⁶ "Voluntary choice is the essence of waiver."⁷⁷ But it can hardly be said that a party acts from voluntary choice when he is subject to a default judgment if he does not take a certain course. To be sure, he may freely choose whether or not he will suffer the default, but that is not the subject matter of the waiver. The question is, has he a free choice as to whether or not he will abandon his objection to the jurisdiction. He cannot properly be said to waive this objection unless he voluntarily and without compulsion elects to do so. But he has no real freedom of choice if he is to be penalized unless he chooses a certain one of the alternatives.

In the course of the most exhaustive and able discussion of this question to be found anywhere, POFFENBARGER, J., speaking for the supreme court of West Virginia in *Fisher v. Crowley*,⁷⁸ says:

"A man may waive perfect defenses to any demand, however large, though without a shadow of merit, by a mere failure to appear and defend, but, by any law or decision which would prevent his appearance or cut off his opportunity to make defense, he would be more effectually robbed of his money than if it were taken from him by a highwayman. It must be voluntary and free from constraint, else it is not binding. Nor can he be deprived of any other legal right except by his own voluntary act. He has a perfect right to stay out of court until regularly and legally brought in, and, if an attempt is made to bring him in irregularly, he has a perfect right to object, on the ground of irregularity, in proper time, and manner. To force him to waive it by saying, if he does not do so, he can make no defense on the merits, is a palpable denial of a legal right. He must then determine whether he will rest his whole case on the question of insufficiency of the writ or return, as the case may be, how-

⁷⁵ *Draper v. Oswego County Fire Relief Ass'n* (1907) 190 N. Y. 12, 82 N. E. 755.

⁷⁶ *List & Son Co. v. Chase* (1909) 80 Ohio St. 42, 88 N. E. 120.

⁷⁷ *Voss v. Northwestern National Life Ins. Co.* (1909) 137 Wis. 492, 118 N. W. 212.

⁷⁸ (1905) 57 W. Va. 312, 50 S. E. 422.

ever full and complete he might be able to make his defense on the merits, or waive the defect and submit himself to a jurisdiction not lawfully obtained, in order to prevent his being forever deprived of his defense in case his objection to the writ or return should prove to be not tenable. A test of the court's jurisdiction could never be made except at great peril, a result of which would be that no attempt to do so would ever be made in a case in which a defense on the merits could be made. In order to do so, it would be necessary to suffer a judgment by default, then go back to the same court with a motion to set it aside for insufficiency of process, vainly ask the court to reverse itself, suffer an adverse ruling, and then, if possible, obtain a writ of error from this court and reverse the judgment for the defect in process alone, and, on failure of that, be forever barred of any defense on the merits. For a court to present to a party the alternative of waiving a jurisdictional defect or giving up his defense, and compel him to choose, is not to allow a voluntary submission to its jurisdiction, but to coerce such submission or a relinquishment of the defense on the merits, however ample and just it may be, and give the plaintiff what he is clearly not entitled to—the appearance of the defendant without process or relinquishment of defense in that action. How can the action of the court, in arbitrarily taking from one man a right, trivial and unimportant though it be, and conferring it upon another, be justified, either legally or morally? Is the right to stay out of court until legally brought in worth nothing? Is process a mere idle formality? If so, why allow a default judgment to be set aside for want of it? That this will be done all admit, and, in admitting, confess that the acquisition of jurisdiction by process is a matter of substance and not of form. To say in the same breath that a man may not test it without surrendering his defense to the merits is squarely and flatly inconsistent, contradictory of the admitted nature of the right, and violative of law in that it forcibly deprives the citizen of a substantial legal right."

There is another difficulty incident to the rule that pleading over waives a special appearance, which appears in certain jurisdictions. Under the Code System of pleading the defendant should plead all his defenses in the same answer, whether they are to the jurisdiction or in abatement or in bar, and the dilatory defenses are not waived by the simultaneous pleading of defenses going to the merits. This rule has been broadly announced in many of the same states which adhere to the doctrine of waiver in case of special appearances. According to these cases, a defendant may plead to the jurisdiction of the court over his person in the same answer in which he makes his defense on the merits; both defenses must be tried, and neither is

waived by the other.⁷⁹ In some states not under the Code procedure, the same rule is in force by reason of special legislation, as in Michigan.⁸⁰

Now, when the jurisdictional defect appears on the face of the record, a motion and not an answer or plea is the proper remedy. When it does not appear on the face of the record, but a showing of new facts is necessary to establish it, an answer or plea is a proper remedy. But in the latter case a motion supported by affidavits is usually held to be an equally proper alternative remedy.⁸¹ We have, then, this illogical result. When the defect is apparent on the face of the record, the defendant cannot preserve his objection, after it is overruled, without withdrawing from the case and abandoning his defense on the merits. When it is not apparent on the face of the record, and defendant uses a motion supported by affidavits as his means of raising the question, he waives it if he pleads over after the objection is overruled; but if, instead of using such a motion, he raises the same question in his answer, along with his defense on the merits, he does not waive it, but may try both questions and appeal from the judgment on either or both. In the Nebraska case of *Templin v. Kinsey*, supra, the court even held that where a defendant first employed a motion for his special appearance and was overruled, he might raise the same question again by answer, and thus get another decision on it which he might avail himself of on appeal after trying his defense on the merits.

To hold that error apparent on the record is waived, but that error not apparent on the record is not waived, is a distinction founded upon no substantial difference. And to say that an objection to the jurisdiction which is made by motion cannot in fairness to the plaintiff be preserved after pleading to the merits, but that the same objection to the jurisdiction may with entire fairness be preserved, if only it is raised by answer, is not only illogical but fantastic. In fact, the Code system of joining defenses in abatement and in bar, and trying both, is absolutely inconsistent in principle with the rule that a special appearance is waived by pleading over, and yet no less

⁷⁹ *Union Guaranty, etc. Co. v. Cradlock* (1894) 59 Ark. 593, 28 S. W. 375; *Little Rock Trust Co. v. Southern Missouri etc. R. R. Co.* (1906) 195 Mo. 669, 93 S. W. 944; *Templin v. Kinsey* (1905) 74 Neb. 614, 105 N. W. 89; *Dutcher v. Dutcher* (1875) 39 Wis. 651.

⁸⁰ *National Fraternity v. Wayne Circuit Judge* (1901) 127 Mich. 186, 86 N. W. 540.

⁸¹ *Wall v. Chesapeake & Ohio Ry. Co.* (1899) 95 Fed. 398; *Eldridge v. Kay* (1872) 45 Cal. 49; *Kingsley v. Great Northern Ry. Co.* (1895) 91 Wis. 380, 64 N. W. 1036; *Dawning v. W. J. Gow Mfg. Co.* (1894) 53 Kan. 246, 36 Pac. 335; *Houlton v. Gallow* (1893) 55 Minn. 443, 57 N. W. 148.

than nine out of the thirteen states holding to that rule are Code states.

Viewing the question in the light of both reason and authority, it seems clear that the better rule is that which holds, that after an objection to the jurisdiction of the court over the person of the defendant has been made and overruled, an exception will entitle the defendant to preserve his objection for review, notwithstanding his subsequent pleading to the merits.

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