JUDGMENTS - DEFAULT JUDGMENTS RENDERED WITHOUT JURISDICTION - VALIDATING EFFECT OF A SUBSEQUENT GENERAL APPEARANCE

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Judgments — Default Judgments Rendered Without Jurisdiction — Validating Effect of a Subsequent General Appearance — The effect of a general appearance by the defendant following a default judgment rendered without jurisdiction over the person of the defendant has been again raised by the recent Wisconsin case of Schwantz v. Morris.¹ In this case the original judgment was invalid for lack of jurisdiction over the defendants, but the Supreme Court of Wisconsin held, that by joining non-jurisdictional grounds with jurisdictional grounds in a motion to set the judgment aside, the defendants had waived any defects in or objections to the jurisdiction of the court and that this waiver related back to the time of the entry of the judgment and validated it as to them. The decision in this case appears to express the general rule of that state as indicated by a long line of similar decisions.²

The term "general appearance," as used in this comment, covers any act of the defendant which is inconsistent with an assertion that the court had no jurisdiction to render a judgment against him in the action. It has usually consisted of an assertion of a non-jurisdictional ground for relief from a default judgment, with or without the assertion of a jurisdictional ground for relief. In most states a defendant may appear specially in the case for the sole purpose of questioning the jurisdiction of the court and may remain out of court for all other purposes. But this comment is limited to a discussion of the rule that a general appearance after judgment is a waiver of defects in the process or the service of process, or is a waiver of a total lack of process

¹ 219 Wis. 404, 263 N. W. 379 (1935).
² Dikeman v. Struck, 76 Wis. 332, 45 N. W. 118 (1890); Coad v. Coad, 41 Wis. 23 (1876); Blackburn v. Sweet, 38 Wis. 578 (1875); Alderson v. White, 32 Wis. 308 (1873); Anderson v. Coburn, 27 Wis. 558 (1871); Grantier v. Rosecrance, 27 Wis. 488 (1871).
or the service of process, and that this waiver relates back in time so as to validate a judgment that was voidable or void when rendered. That this rule creates a technical procedural situation which is often a trap for unwary defendants who inadvertently fail to appear specially, and that it may result in a complete denial of an opportunity to present a defense, can be easily shown.

The Nebraska case of *Leake v. Gallogly*\(^3\) is a clear example of the dangers of this procedure. In this case an action was commenced against two defendants and neither of them appeared in the action until after a default judgment had been entered in favor of the plaintiff. One defendant was never served with process and had no notice that the suit was pending, and the other was served only two hours in advance of the hearing instead of being given three days notice as was required by the statute. Shortly after the judgment was rendered, both defendants appeared generally and moved to have the judgment set aside. This motion was denied, and on appeal the Supreme Court of Nebraska held that the action of the defendants constituted a general appearance that validated the judgment as to them although when originally rendered the judgment had been void. In this case the application of the rule deprived the defendants of their day in court.

In *Burdette v. Corgan*\(^4\) the action was to foreclose a mortgage, and jurisdiction of the defendants was acquired by publication, but a minor defendant was not named in the published notice and was given no personal notice. A default judgment was rendered against all the defendants. Five years later and while she was still a minor, this defendant joined with the other defendants in appearing in the action to have the original default judgment set aside on non-jurisdictional grounds as well as jurisdictional grounds, and this was held to constitute a general appearance. The Supreme Court of Kansas admitted that this judgment had been void when it was rendered and of no effect on the title of this minor defendant, but decided that the general appearance related back in time and validated the judgment to make it binding upon her. Again the application of this rule took from a defendant an opportunity to present a defense.

The Supreme Court of Wisconsin in the case of *Anderson v. Coburn*\(^5\) found that a default judgment had been rendered upon service by publication which was so defective as to give the trial court no jurisdiction of the defendant and to make the judgment void. When the defendant learned of the suit some years later he attempted to have

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\(^3\) *34. Neb. 857, 52 N. W. 824 (1892).* The dissent in this case stresses the fact that the defendant had had no day in court.

\(^4\) *26 Kan. 102 (1881).*

\(^5\) *27 Wis. 558 (1871).*
the judgment set aside and inadvertently entered a general appearance. The Wisconsin court held that this related back in time and validated the prior judgment as to him.⁶

A similar decision was handed down by the Supreme Court of Oklahoma in *Trugeon v. Gallamore.*⁷ In this case one of three joint defendants was never served with process and apparently had no notice of the suit until after judgment. Judgment was rendered against him as well as the other two defendants, and he then joined with them in appearing to move for a new trial. On appeal, this defendant was not made a party. The court dismissed the appeal because of this defect of parties, indicating that the judgment originally entered was binding on all three, as the general appearance of the one defendant was dated back to validate the judgment as to him. In all of these cases the application of the rule clearly deprived the defendants of their day in court.

It seems impossible that there should be a satisfactory reason to support a rule that will allow a judgment, which was of no effect when it was rendered because the court lacked jurisdiction of the defendant, to be made valid and binding against him because he came into court to assert its invalidity and in so doing made technically inconsistent assertions. Yet the rule has been quoted and followed as laid down in the decision of the Supreme Court of Wisconsin in the case of *Alderson v. White,*⁸ where it was said,

"The party seeking to take advantage of a want of jurisdiction... must object on that ground alone, and keep out of court for every other purpose. If he goes in for any purpose incompatible with the supposition that the court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make the objection. It is a general appearance on his part, equivalent in its effect to proof of due personal service of process."

In this case the general appearance was entered after a judgment by default had been rendered on process so defective as to give the court

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⁶ After the entry of the judgment, which if valid would have been a lien on defendant's land, the defendant sold the land, giving a conveyance before his appearance validated the judgment. The court held it validated as to him only and not to his grantee, who had taken the conveyance while the judgment was void. This raises questions in regard to the effect of such judgments on purchasers and others who might have relied on them, and of the effect of such judgments on actual and record titles, but these and similar problems are beyond the scope of this comment.

⁷ 28 Okla. 73, 117 P. 797 (1911).

⁸ 32 Wis. 308 at 312 (1873).
no jurisdiction of the defendant; but the court made no distinction
between such an appearance entered after judgment and one entered
before trial, and held that the appearance related back in time and
validated the judgment. Similar and even stronger statements of this
rule have been made by other appellate courts, particularly those of
Kansas,10 Oklahoma,10 and Nebraska.11 It seems incredible that today
courts of last resort should give the technical meanings of the simple
phrases “general appearance” and “inconsistent position” a signifi-
cance that results in the validation of a void judgment against one who
has had no opportunity to be heard in his own defense. Such cases can-
not be too strongly condemned.

While this general rule appears to have been adopted in more
than half of the states where the courts have been forced to pass upon
the point,12 many of the decisions have not been as extreme as those
discussed above. It is an encouraging thing that in a great majority of
cases in which this point has been decided there has not been a total
lack of jurisdiction over the defendant but the default judgment has

Co., 78 Kan. 630, 97 P. 962 (1908).
10 Trugeon v. Gallamore, 28 Okla. 73, 117 P. 797 (1911); Willett v. Blake,
39 Okla. 261, 134 P. 1109 (1913); Morgan v. Stevens, 101 Okla. 116, 223 P. 365
(1924).
11 Leake v. Gallogly, 34 Neb. 857, 52 N. W. 824 (1892); Warren v. Dick,
17 Neb. 243, 22 N. W. 462 (1885).
12 Corley v. Shropshire, 2 Ala. 66 (1841); Touchstone v. Harris, 22 Ark. 365
(1860); Burrows v. Burrows, 10 Cal. App. (2d) 749, 52 P. (2d) 606 (1935);
Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913); Miller v. Mosely, 311 Ill.
157, 142 N. E. 509 (1924); McCarthy v. McCarthy, 66 Ind. 128 (1879); Curtis
v. Jackson, 23 Minn. 268 (1877) [but this was expressly overruled by Godfrey v.
Valentine, 39 Minn. 336, 40 N. W. 163 (1888)]; Shilling v. Reagan, 19 Mont.
508, 48 P. 1109 (1897); Boulware v. Chicago & Alton Ry., 79 Mo. 494 (1883);
Crowell v. Kopp, 26 N. M. 146, 189 P. 652 (1919); Scott v. Mutual Reserve Fund
594, 104 N. Y. S. 77 (1907); Marsden v. Soper, 11 Ohio St. 503 (1860); Fildew
v. Milner, 57 Ore. 16, 109 P. 1092 (1910); Borough v. Roehein, 197 Pa. 230, 47
A. 283 (1900); Henry v. Henry, 15 S. D. 80, 87 N. W. 522 (1901); Taylor v.
Sledge, 110 Tenn. 263, 75 S. W. 1074 (1903); Blyth & Fargo Co. v. Swenson,
15 Utah 345, 49 P. 1027 (1897); Lake Bowling Alley v. Richmond, 116 Va. 429,
82 S. E. 97 (1914).

It is dangerous to assert that this is the rule that will be followed in each of
these states, but it has been expressed in each state in at least one decision. In Arkansas,
California, Colorado, Illinois, Indiana, and New York, there are decisions which are
either inconsistent and a denial of this rule, or place a limitation on it on the basis
suggested later in this comment (infra, at note 40). That the rule is carried out to
the limit in Kansas, Nebraska, Oklahoma, and Wisconsin has already been indicated.
The United States Supreme Court also follows this rule, as is shown by Sugg v.
Thornton, 132 U. S. 524, 10 S. Ct. 163 (1889). See Ann. Cas. 1914C 694, and see
2 ENCYC. PLEADING & PRACTICE 625 (1895).
been voidable only because of a failure to follow all the details of statutory legal notice. In *Boulware v. Chicago & Alton Ry.*\(^{13}\) there was defective jurisdiction of the defendant only because the summons, which had been properly served, had failed to state the nature of the action. The Supreme Court of Missouri held that a subsequent general appearance of the defendant related back and validated the voidable default judgment which had been rendered on the defective process. Another example of a less extreme case is seen in *Fowler v. Continental Casualty Co.*,\(^{14}\) in which the Supreme Court of New Mexico found that the statute had not been strictly followed in serving a statutory agent of a foreign insurance company. It was admitted that there was service in fact and that until after the default judgment the defendant had considered itself properly served. The trial court had rendered a default judgment against the defendant which this defective service made voidable, but the supreme court held that a general appearance after the judgment related back and validated it as to the defendant.

The Appellate Court of California applied this rule in the similar case of *Burrows v. Burrows.*\(^{15}\) The case held that a general appearance after a default judgment related back in time and validated the judgment although it had been voidable when rendered as it was based on an unauthorized alias summons. Even the Supreme Court of the United States has declared in favor of this rule in the similar case of *Sugg v. Thornton,*\(^{16}\) in which it cited and quoted from the Kansas decisions. In this case the defendant was served by publication and notified by letter. This was an insufficient service and made voidable the personal judgment which was rendered in default of the defendant's appearance, but the Court held that the judgment was validated by his later appearance in the action. There is little objection to any individual decision in cases of this type and the development of the rule in such cases can be easily understood.

It has long been recognized that certain acts of a defendant before trial will constitute a general appearance, thus waiving any and all objections by the defendant to the jurisdiction of the court over his person.\(^{17}\) It is easily understandable that the courts, in striving after justice, should have little sympathy or patience with a defendant who attempts to cause a delay, or to avoid a trial of the action on the merits by taking advantage of a technical defect arising from a failure to follow minutely the statutory provisions for the service of process.

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\(^{13}\) *Boulware v. Chicago & Alton Ry.*, 79 Mo. 494 (1883).
\(^{14}\) *Fowler v. Continental Casualty Co.*, 17 N. M. 188, 124 P. 479 (1912).
\(^{16}\) *Sugg v. Thornton*, 132 U. S. 524, 10 S. Ct. 163 (1889).
\(^{17}\) 2 *R. C. L.* 327-338 (1914); 4 *C. J.* 1329-1368 (1916).
With this thought in mind, it seems entirely reasonable that in cases such as those last discussed the courts should hold that the same acts which would constitute a general appearance and a waiver of all jurisdictional objections before trial will constitute a general appearance after judgment and cure any defects in the judgment. While realizing that this rule must prove a trap for the unwary who neglect to appear specially on the jurisdictional grounds alone, it may readily be conceded that there is no objection to trapping a defendant in such a case. A clear illustration of this line of development is seen in the frequent holding that an appearance of the defendant to contest the claim at a hearing on damages following a default judgment will validate the judgment as to jurisdictional questions. 18

While the individual decisions discussed above and even such decisions as a class may give a generally just result, the effect of a long line of such decisions in a state has been bad as to the ultimate result. In not a single case that has been found has the court analyzed the rule and made a clear distinction between cases where its application is urged on the basis of a mere technical defect which rendered the judgment voidable and a substantial defect or total lack of legal notice which rendered the judgment void. In some states which appear to have a line of conflicting decisions it is possible to draw this distinction in the decided cases, but in no case found has the court itself pointed out such a distinction from the prior cases. In the Indiana decisions, default judgments which were voidable because of a slight defect in the capias in one case, 19 and a defect in the sheriff's return after the summons had been served in another, 20 were validated by a general appearance after judgment. But when the default was entered after a total lack of service or a totally void summons, 21 the judgments were void and a later general appearance did not validate them. Although the line appears to be clear in this state, the cases do not express the distinction. 22

In the Illinois cases, also, there are decisions holding that a default judgment rendered in a garnishment case when there was a technical defect in the notice or attachment, 23 and in a land case when there were minor defects in the description of the land, 24 was voidable only and

18 Touchstone v. Harris, 22 Ark. 365 (1860); and see Ann. Cas. 1914C 694; Lake Bowling Alley v. Richmond, 116 Va. 429, 82 S. E. 97 (1914).
19 White v. Rankin, 2 Blackf. (Ind.) 78 (1827).
20 McCarthy v. McCarthy, 66 Ind. 128 (1879).
21 Mills v. State, 10 Ind. 114 (1858); Briggs v. Sneghan, 45 Ind. 14 (1873).
22 See the decision of the Minnesota cases, infra, notes 44 and 45.
24 Nicholas v. People ex rel., 165 Ill. 502, 46 N. E. 237 (1897); Miles v. Goodwin, 35 Ill. 53 (1864).
validated by a later general appearance of the defendant in the case. But the same jurisdiction held that a default judgment rendered when there was a total lack of service was void and could not be validated by later acts of the defendant. The California Appellate Court has also allowed default judgments which were voidable because of purely technical defects in the procedure of obtaining jurisdiction to be validated by a later general appearance of the defendant, while refusing to validate a judgment rendered by default when there was no service of process on the defendant and the judgment was void. If these courts, and others that have not gone to the extremes reached in the cases discussed at the beginning of this comment, could be depended upon to continue to draw this line of distinction, there would be no substantial objection to the rule as it would then be applied.

But since no court has clearly limited the application of this rule to cases where the original judgment was merely voidable, the existence in a state of a line of precedents holding that a general appearance after judgment will relate back and validate the judgment is clearly dangerous. Objections may be made along two lines. The first objection concerns the serious problem raised when there is an attempt to draw the distinction in any particular case, for there is no absolute test to show that a defect in following statutory procedure is so great as to make the judgment in the case void or that the defect is so small as to render the judgment only voidable. The difficulty that the courts have had in determining this point in other connections is well known, and no attempt is made in this comment to suggest where or how the line should be drawn. It seems, however, that the uncertainty in all but extreme cases as to whether a judgment is void or voidable is so great as to render difficult or impractical the use of the rule so limited. There is also the ever-present danger of an erroneous classification with a resulting gross injustice. To apply the rule to voidable judgments only would seem to be especially difficult in cases where there has been an attempt to obtain jurisdiction of a non-resident defendant by publication, and the point under discussion has been frequently raised in that type of case.

28 The strict statutory requirements when the service is by publication against either a resident or a non-resident, and the usual holding that they must be exactly followed, naturally result in frequent defects which are often not noticed until after a default judgment has been rendered. Because of this, a large percentage of the cases raising the point here discussed were of this type. The known fact that this type of service frequently fails to give actual notice of the pending suit makes the problem particularly acute in this connection.
The second objection comes from the fact that the courts have not drawn a line between the two types of cases in the past and there appears to be a strong tendency to ignore in the beginning, or to overlook in later cases, such a difficult and finely drawn distinction in favor of a universal general rule. Especially does this tendency of the courts appear in connection with a procedural question such as this. The existence of a line of precedents in which it is declared that a general appearance after a default judgment validated the judgment although it was rendered after there had been a failure, more or less serious, to follow the statutory requirements in obtaining jurisdiction, and with no case pointing out that the rule is to be applied only where the defect is minor and the judgment merely voidable, is apt to lead the courts into following the general rule in all cases and allow any judgment to be validated as to all questions of jurisdiction if it is followed by a general appearance by the defendant.

That this result is more than a possibility, and has in fact occurred, can be shown by decisions in the four states from which cases were cited at the beginning of this comment as examples of the extreme lengths to which this rule has been carried. In *Keeler v. Keeler*, which seems to be the first case in which the Supreme Court of Wisconsin allowed a defective judgment to be validated by a later general appearance of the defendant, the original judgment was only voidable because of technical defects in the manner in which jurisdiction was obtained. The passage from the decision of the Wisconsin Supreme Court which is quoted above uses the phrase "defective service of process." This phrase would seem to connote a defect which would render a judgment only voidable, yet the rule has in fact been applied when there was a total lack of process or when the process was so defective as to render the judgment void. The earliest Kansas case on a related point uses language which would confine the application of the rule to cases in which the judgment was only voidable. But in *Burdette v. Corgan*, the first case directly raising this point, the Supreme Court of Kansas allowed a judgment which was void when rendered, because there had been no service of process, to be validated by a later general appearance of the defendant. In deciding this case, the Kansas Supreme Court relied on its earlier decision, on the Wisconsin precedents mentioned above in which the judgments had been

29 Supra, at notes 3, 4, 5, and 7.
30 Keeler v. Keeler, 24 Wis. 525 (1869); Grantier v. Rosecrance, 27 Wis. 488 (1871).
31 Supra, at note 8.
32 Anderson v. Coburn, 27 Wis. 558 (1871), discussed supra at note 5.
33 Cohen v. Towbridge, 6 Kan. 385 (1870).
34 26 Kan. 102 (1881).
only voidable, and on an early Ohio case\textsuperscript{35} in which a voidable judgment was validated by a later general appearance of the defendant.

In \textit{Leake v. Gallogly},\textsuperscript{36} another case discussed at the first of this comment, the Supreme Court of Nebraska allowed a judgment to be validated by a later general appearance although when rendered it had been void because no process had issued against the defendant. This decision followed a line of precedents in which the judgments validated had been only voidable because of technical defects.\textsuperscript{37} The same is true of the decision of the Supreme Court of Oklahoma in \textit{Trugeon v. Gallamore},\textsuperscript{38} although in this case the court relied, to some extent, on the Kansas decisions. In all of these states the original cases held simply that a voidable judgment might be later validated by general appearance of the defendant; but the rule was extended in later cases to allow void judgments to be validated, and in none of the decisions was it recognized that a difference in the rules applied might be based on the distinction between void and voidable judgments.\textsuperscript{39}

When a defendant has had some notice of an action commenced against him, although the notice is technically defective under the statute, and has failed to appear in the action but after judgment attempts to set up this defect as a purely technical defense, the application of this rule may lead to simplicity of procedure, speed, and justice in the majority of cases. When the process or service of it is substantially defective or totally lacking so that the defendant is never given an opportunity of being heard, the application of this rule gives a result which is arbitrary and unjust.

Of the courts which have considered this point, almost half have refused to accept what may be called the general rule, that a general appearance after a defective judgment validates that judgment.\textsuperscript{40} The

\textsuperscript{35} Fee v. Big Sand Iron Co., 13 Ohio St. 563 (1862).
\textsuperscript{36} 34 Neb. 857, 52 N. W. 824 (1892).
\textsuperscript{37} Warren v. Dick, 17 Neb. 241, 22 N. W. 462 (1885); Crowell & Crowell v. Galloway, 3 Neb. 215 (1874).
\textsuperscript{38} 28 Okla. 73, 117 P. 797 (1911). See Williams v. Farmers' Gin & Grain Co., 13 Okla. 5, 73 P. 269 (1903).
\textsuperscript{39} But see infra at notes 44 and 45.
\textsuperscript{40} Baskins v. Wylds, 39 Ark. 347 (1882); Bunnell v. Wynns, 13 Cal. App. (2d) 114, 56 P. (2d) 267 (1936); Stubbs v. McGillis, 44 Colo. 138, 96 P. 1005 (1908); Gallup v. T. B. Jeffrey Co., 86 Conn. 308, 85 A. 374 (1912); Rupp v. Kearns & Pyle, 1 Houst. (6 Del.) 362 (1856); Correll v. Greider, 245 Ill. 378, 92 N. E. 266 (1910); Mills v. State, 10 Ind. 114 (1858); Molsberry v. Briggs, 176 Iowa 525, 156 N. W. 999 (1916); Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163 (1888); Abrams v. Fine, 28 Misc. 533, 59 N. Y. S. 550 (1899); McGuinness v. McGuinness, 72 N. J. Eq. 381, 68 A. 768 (1908); Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708 (1904); State ex rel. McCall v. Cohen, 13 S. C. 198 (1879); French v. Ajax Oil & Development Co., 44 Wash. 305, 87 P. 359 (1906); and Bennett v. Supreme Tent of the Knights of the Macabbees of the World, 40 Wash. 431, 82 P.
Supreme Court of Arkansas seems to have held in the case of Rose v. Ford 41 that there cannot be an appearance after judgment. But most courts following the minority rule, while agreeing with the majority that the joining of a non-jurisdictional ground for relief after judgment with a jurisdictional ground is a general appearance and waives all defects and objections to the jurisdiction of the court, hold that the appearance is effective only from the time it is entered and that it does not relate back to validate the prior judgment. 42 Following the appearance, no further proceedings are necessary to give the court jurisdiction to proceed to a hearing on the merits and judgment. And since the defendant may present his case in full, there seems little criticism of such a rule. It is also generally held by courts following either the majority or the minority rule that an appeal admits the jurisdiction of the appellate court to render a judgment after a trial de novo or admits the jurisdiction of the lower court if the case is returned there for a new trial. 43

As far as could be ascertained, only one state has ever adopted the unfortunate majority rule and later changed to the minority rule. 44 In several early cases in which defects in the obtaining of jurisdiction made the default judgments rendered voidable, the Supreme Court of Minnesota 45 held that a subsequent general appearance of the defendant validated the prior judgment. In Godfrey v. Valentine 46 there was a total lack of jurisdiction so that the original judgment was void. The Supreme Court of Minnesota then declared in favor of the minority rule saying, "But in thus urging his legal right, and thus invoking and

744 (1904). The majority rule has been denied at least once in each of the above states in favor of the minority rule, yet it cannot be safely asserted that the majority rule is never followed by any of these states. In at least six of them, Arkansas, California, Colorado, Illinois, Indiana, and New York, there are decisions which are either inconsistent or which assert the majority rule, and such decisions are in the majority in California. Compare the jurisdictions represented in the above citations with those cited in note 12, supra. No cases were found in which the point under discussion was decided from Arizona, Florida, Georgia, Idaho, Kentucky (although there are many Kentucky cases on the effect of an appeal), Louisiana, Maine, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, Rhode Island, Texas, Vermont, West Virginia, and Wyoming.

41 Rose v. Ford, 2 Ark. 26 (1839).
42 Ann. Cas. 1914C 694; 2 R. C. L. 332 (1914); 9 CAL. L. REV. 74 (1920); 5 MINN. L. REV. 140 (1921).
43 Ann. Cas. 1914C 694; 2 R. C. L. 332 et seq. (1914); 4 C. J. 1346 to 1347 (1916).
45 Curtis v. Jackson, 23 Minn. 268 (1877); Frear v. Heickert, 34 Minn. 96, 24 N. W. 319 (1885).
46 39 Minn. 336 at 338, 40 N. W. 163 (1888).
consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by any authorized judicial proceedings, was not merely voidable, but void, and in legal effect a nullity."

The court did not recognize the distinction, that the instant case was one in which there was a total lack of jurisdiction to render the judgment void in contrast to one in which a mere defect renders the judgment voidable, as a basis for applying the rule, but declared a general rule and expressly overruled the prior decisions.

Perhaps the best statement of the minority rule is found in the dictum of the New Jersey case of *McGuinness v. McGuinness,47* in which it was said:

"[The] appearance confers upon the court the jurisdiction to proceed to judgment. But a defendant who appears in court for the purpose of obtaining relief against a judgment which is coram non judice, and seeks that relief both upon jurisdictional and upon meritorious grounds, never has had his day in court, if a hearing on the meritorious ground is denied him. The judgment at the time when he appears is a nullity. If he seeks to have it declared void solely on the ground of want of jurisdiction of the court to pronounce it, the court must so declare it. If he further asserts that on the merits of the case the judgment should never have been rendered against him, and asks to have it vacated and an opportunity afforded him of being heard on the merits, on what theory of law is it to be said that he has, by this act, given life to a judgment which before had no legal existence, and by the same act has forever barred himself from the right to have it opened, no matter how complete a defence he may have on the merits? . . ."

This seems unanswerable in the face of the gross injustice possible when the contrary rule is blindly followed.

A consideration of the entire problem indicates that the minority rule, as expressed by the supreme courts of Minnesota and New Jersey, is preferable and should be generally followed. It seems impossible to support, as a general rule without exceptions, the proposition that a general appearance after any judgment validates that judgment as to all jurisdictional questions. There is less objection if this procedure is limited to those cases where the defendant has had actual notice of the action, although that notice was legally defective, but

has not appeared for a trial and after a default judgment attempts to take advantage of a technical defect in the manner in which the court obtained jurisdiction of his person. Even this has been criticised, however, as tending to encourage circuity of action and delay; it causes a cautious defendant to appear specially on the jurisdictional grounds alone and necessitates two hearings in any case or, if he is successful in having the process and judgment set aside, it requires the plaintiff to commence his suit de novo. It is argued that this would be done less often if the sole effect of the general appearance after judgment were to put the defendant in court from that time forward.⁴⁸ What the actual difference would be is not too clear, but at any rate this objection takes no notice of the justice of the final adjudication.

As is pointed out above, the most serious objection to applying the general rule to a limited class of cases, where it would do little harm and perhaps have a salutary effect, is the uncertainty as to its application in any particular case and the danger that such a narrow distinction will be ignored in favor of a general rule that can be easily applied in all cases. That in even a few cases the inadvertence of the defendant in submitting two grounds, technically inconsistent, for having a default judgment set aside will be punished by denying to him an opportunity to have a day in court tends to make the majority rule unsatisfactory or totally undesirable. In most cases it would be a sufficient punishment for a mere act of inadvertence that the defendant be held to be in court from the date of the appearance onward. For these reasons it is strongly urged that at least a clear statement be made in each jurisdiction limiting the application of the general rule to judgments which are voidable only, or preferably that the entire problem be disposed of by totally abolishing the general rule.

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⁴⁸ 9 Cal. L. Rev. 74 (1920); 5 Minn. L. Rev. 140 (1921).