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Civil Procedure - Process - Amendment When a Partnership is Served as a Corporation

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RECENT DECISIONS

CIVIL PROCEDURE — PROCESS — AMENDMENT WHEN A PARTNERSHIP IS SERVED AS A CORPORATION—Plaintiff instituted a negligence action for personal injuries by serving a summons and complaint on one Moriarty as an officer of Moriarty Manufacturing Company, intending thereby a substituted service on this company. Plaintiff believed the named firm to be a corporation, but it was in fact a partnership of which Moriarty was a member. There was no appearance or answer. Two and one-half years after the initial service, an amended summons and complaint were served on all of the partners. In answer, defendants pleaded a two-year statute of limitations[1] and moved for a summary judgment, which was granted. On appeal, *held,* affirmed. The first process was defective since it was not served on the partners individually but was directed at a nonexistent corporation.[2] The second service could not qualify as an amendment to the first since to allow this would have the effect of bringing a new party before the court. *Ausen v. Moriarty,* (Wis. 1954) 67 N.W. (2d) 358.

The wording of statutes with regard to the amendment of pleadings is often general;[3] consequently conflicts with older, more stringent concepts of pleading and practice arise. As in the principal case it frequently cannot be determined from a reading of the statute whether an amendment should be allowed where one of these older concepts is involved. Traditionally jurisdiction over the defendant is obtained by service of process. If there is a defect in this service, the court has no jurisdiction over the defendant.[4] Lacking this jurisdiction, there is no proceeding before the court and thus it cannot grant an amendment. Courts have avoided this reasoning in diverse ways, none of which is convincing. One method, perhaps the most common, involves two steps. First, the jurisdiction

[1] Wis. Stat. (1953) §330.19(5) provides for a 6-year limitation on actions arising out of personal injuries and includes a two-year notice of injury provisions: ". . . notice in writing . . . shall be served. . . . Such notice shall be given in the manner required for the service of summons. . . ." The purpose of the notice provision is to make the defendant aware of the pendency of the suit in time to investigate the evidence. Nelson v. American Employers' Ins. Co., 262 Wis. 271, 55 N.W. (2d) 13 (1952). The statute anticipates substantial compliance with the summons requirements. Budke v. Holvick, 255 Wis. 293, 38 N.W. (2d) 479 (1949). Emphasizing these two interpretations of the statute, the court in the principal case might well have reached the conclusion that sufficient notice had been given, thus bringing the normal 6-year limitation into play. But see Voss v. Tittel, 219 Wis. 175, 262 N.W. 579 (1935). Also questionable is the court's concern over "substituted" notice.

[2] Service against a partnership in Wisconsin is accomplished by service on each partner individually. Stangarone v. Jacobs, 188 Wis. 20, 205 N.W. 318 (1925). But see Wis. Stat. (1953) §260.21(3).

[3] "The court may, at any stage of any action . . . before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process. . . ." Wis. Stat. (1953) §269.44.

[4] "A civil action . . . shall be commenced by the service of summons. . . . From the time of such service . . . the court shall have jurisdiction and have control of all subsequent proceedings." Wis. Stat. (1953) §262.01. The Missouri court, in an action similar to that involved in the principal case, said, "Lack of jurisdiction is incurable and spells death to the cause sought to be maintained without it." Haney v. Thomson, 339 Mo. 505 at 514, 98 S.W. (2d) 639 (1936).

rule is restated or transposed (probably inadvertently) so that it reads: "No new parties can be brought into court by way of an amendment." Having replaced the jurisdiction rule with the new party rule, the court then begs the question by stating simply that no new parties are involved.[5] A second device is the entity theory; the court says that the plaintiff sued the "entity," the partnership, and merely misnamed it in the summons.[6] Both views are aided in some states by statutes permitting suit against a partnership in the firm name.[7] However desirable these results may be, the means are subject to attack. Save the situation where jurisdiction is acquired through an appearance of the defendant before the statute has run, neither of these analyses expressly answers the problem of the acquisition of jurisdiction. Perhaps it is felt that such conceptual logic of the common law has no place in modern pleading and practice.[8] The placing of the decision on this ground might be justified by the broad language of the amendment statute as well as the general trend of legislation in the field of procedure. By reasoning analogous to that of the Supreme Court in *United Mine Workers v. Coronado Coal Co.*,[9] it may be argued that the volume and trend of this legislation in any given state is enough to indicate that the legislature has attempted to supplant much of the common law symmetry and logic

[5] McGinnis v. Valvoline Oil Works, 251 Pa. 407, 96 A. 1038 (1916); Grand Lodge v. Bollman, 22 Tex. Civ. App. 106, 53 S.W. 829 (1899); Munzinger v. Courier Co., 89 N.Y. 575, 31 N.Y.S. 737 (1894). Admittedly, it follows from the concept of jurisdiction that no new party can be brought before the court by means of amendment. This, however, does not justify phrasing the basic principles of jurisdiction in these terms. Not all courts so expressing the rule go on to reach a result contrary to the dictates of the strict jurisdiction theory, e.g., the principal case.

Some courts add as a requisite to amendment that the defendant make an appearance. Markel v. Dowling & Co., 5 Pa. D. & C. 403 (1924); Boehmke v. Northern Ohio Traction Co., 88 Ohio St. 156, 102 N.E. 700 (1913). Clearly, if the defendant submits himself to the jurisdiction of the court all problems are solved. Appearance as a corporation by the party erroneously served would not seem to confer jurisdiction over the intended partnership defendant, however. This requirement seems to give an advantage to the defendant who completely ignores the suit. See generally the language of the dissent in Lindsey v. Drs. Keenan, Andrews & Allred, 118 Mont. 312 at 323, 165 P. (2d) 804 (1946).

[6] Goldstein v. Peter Fox Sons Co., 22 N.D. 636, 135 N.W. 180 (1912). See also World Fire & Marine Ins. Co. v. Alliance Sandblasting Co., 105 Conn. 640, 136 A. 681 (1927); Ex parte Nicrosi, 103 Ala. 104, 15 S. 507 (1894), involving individuals instead of partnerships. See generally, Sturges, "Unincorporated Associations as Parties to Actions," 33 YALE L.J. 383 (1923).

[7] Gozdonovic v. Pleasant Hills Realty Co., 357 Pa. 23, 53 A. (2d) 73 (1947); Craig v. San Fernando Furniture Co., 89 Cal. App. 167, 264 P. 784 (1928).

[8] In reaching decisions consonant with modern concepts of substance rather than form, several cases have recognized such modern principles as notice [Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175 (1947); McGinnis v. Valvoline Oil Works, supra note 5] and the right of plaintiff to a day in court [Waugh v. Steelton Taxicab Co., 371 Pa. 436, 89 A. (2d) 527 (1952) (involving an individual rather than a partnership), noted in 14 PITT. L. REV. 284 (1953) and 26 TEMP. L.Q. 347 (1953)]. Cf. Duff v. Zonis, 327 Mass. 347, 99 N.E. (2d) 47 (1951).

[9] 259 U.S. 344, 42 S.Ct. 570 (1921). Referring to the trend in labor legislation, the Court concluded that Congress probably intended the right to sue and be sued in the association name as an incident to the greater rights and responsibilities conferred by the modern labor enactments.

with modern practicality—a shift of emphasis from formalities of service to actualities of notice, from the technical, cat-and-mouse element of lawyer versus lawyer to the functional element of settling differences between the litigating parties. An attack of this type involves nothing more than an emphasis on the liberal language of the statute at the expense of common law conceptualism.

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