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#1
PLEADING
MAYNARD H. JACKSON, JR.

50¢

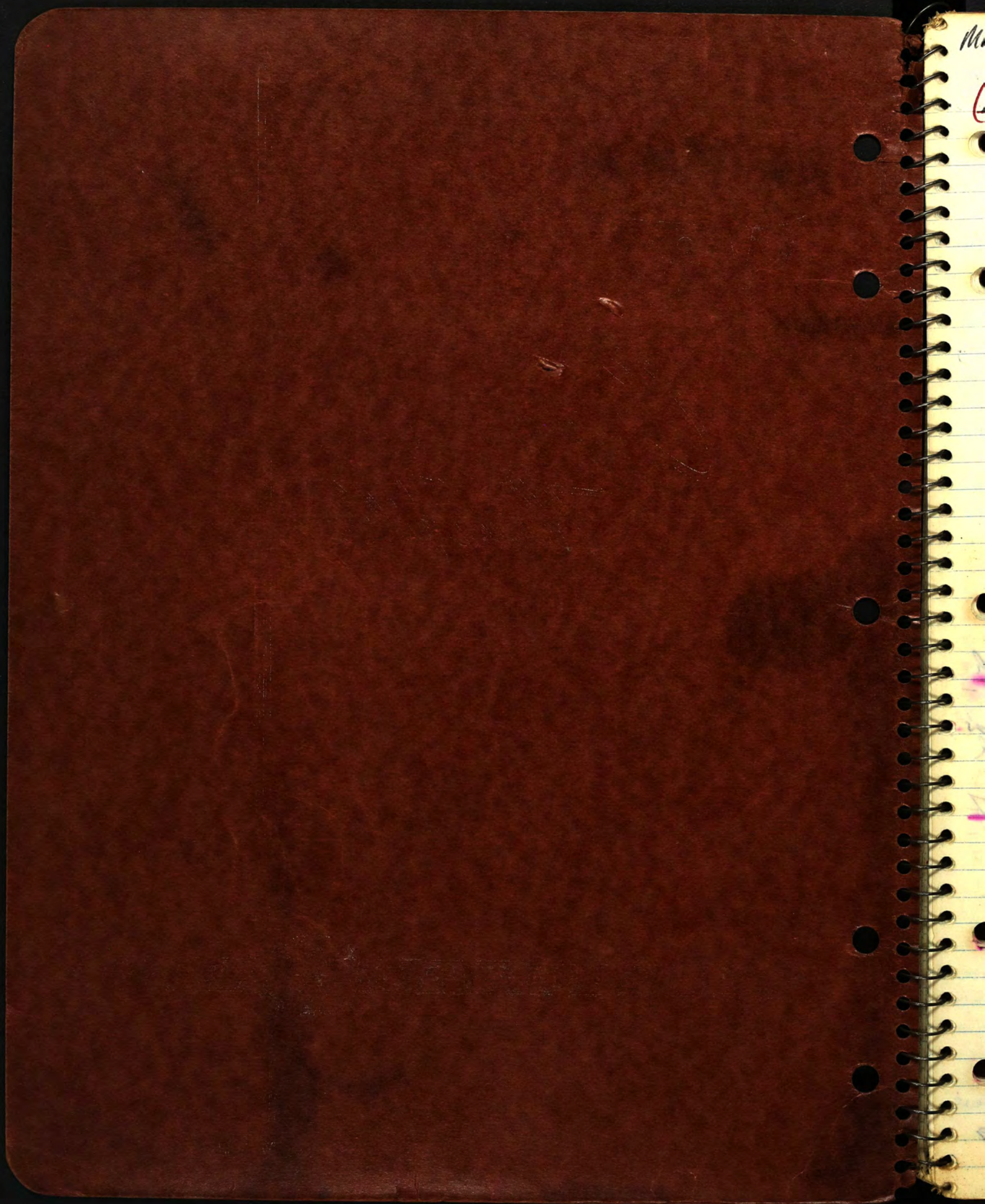
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CHAMBLEE, GA.

No. W-5063



(NOTES: 9-24-62)

Casebook - Chadburn & Levin - Cases and Materials on Civil Procedure.

There are two sides of law:

- (1.) Procedural - i.e., adjective law
- (2.) Substantive - body of law estab. by the courts.

Both are like two sides of the same coin.
Procedural law = the process by which the body of substantive law is enforced.

* Procedural law is concerned w/ the remedies, rather than the substantive rights. It is also concerned w/:

- (1.) Selection of the right court.
- (2.) Steps required getting to court.
- (3.) Manner of presentation of case to court to get proper adjudication.
- (4.) Methods of enforcing or executing judgment or decree.

In North Carolina today, there is complete integration of law & equity.

* English Legal History:

Until 1066 (the Norman Conquest and w^m. The Conqueror), English law was administered in several local courts. William brought an absolute monarchy.

It has been said that feudalism derives from Roman times.

- (a.) Patrocinium - Roman "institution" where freemen pledged services for food and shelter & protection.
- (b.) Proecium - (Roman) involved poss. of land also in return for services to the lord.

These two "institutions" merged into FEUDALISM. Feudalism and the absolute monarchy of William

existed in England at the same time.
— The King had all legislative, administrative, executive and judicial powers.

The King had special advisors and aides who met at a council called the Curia Regis. This marked the beginning of the court system and the separation of powers, i.e., functions. The Curia Regis had to try disputes to keep the King's peace. Certain activities became specialized.

① The first court was the Common Bench, i.e., the Court of Common Pleas (1178). Its function was settling disputes between two or more citizens. It could correct lower courts.

② Next was the Kings Bench which had original and appellate jurisdiction, sat in the King's presence and was composed mainly of the King's advisors.

③ Then came the Court of Exchequer handling matters relating mainly to the King's treasury (e.g., taxes).

These three courts came to handle exclusively judicial matters and became less & less advisory.

④ Court of Chancery —

When there was no relief afforded by the C.L. courts, there could be an appeal to the King for special dispensation; or the

3

Appeal could be made to the King's Chancellor (usually an ecclesiastic) who decided per equity and fair play. — This points up two parallel systems of courts administering two different systems of substantive and procedural law. The old manorial courts disappeared. They had admin. laws based on local customs.

Jerry Bentham - (1788-1833) urged merger of law and equity, but met much opposition.

David Dudley Field (N.Y.) led the way to reform of the procedural system and merger of law & equity. The Field Code said that all civil actions were to be commenced by the filing of a complaint containing a statement of the facts constituting the c/a in plain language, and a demand for a remedy. — This was considered a major development in procedure in the 20th Century. The principle of Code Pleading is now accepted by almost every Anglo-American jurisdiction.

C.L. pleading had become complex to the point of having pleading specialists: an absurd result.

Old C.L. Pleas took one of two forms:

- (1.) Common Pleas - real actions and actions between two or more private citizens.
- (2.) Pleas of the Crown - actions involving the State (i.e., Crown).

Common Pleas were made to:

- (1) Court of Common Pleas
- (2) King's Bench - land of the King and Revenue.
- (3) Ct. of the Exchequer

In England today, it is the Court of High Justice which has three parts:

- (1) King's Bench - general juris.
- (2) Chancery - matters of equity.
- (3) Probate, Divorce and Admiralty.

DEFINITION:

CODE -

[a code is any systematic compilation of laws affecting a given body of law.]

Outside Reading: Blume

pp. 270 - 283

Commencement of a Civil Action

* How Commenced: Involving juris. over Claim *

I. Common Law

A. In K.B., C.P. + Excheg., juris. to deal w/ a particular claim was given by a writ issued by a board or office called Chancery. The writ contained (a) names of parties, and (b) a brief description of P's claim.

B. Steps before the court:

- (1) Reading of the writ.
- (2) Oral stmt of P's claim - failure to declare = dismissal.
- (3) D's response - failure = judgment by default (for P) for saying nothing, i.e., NIL DICIT. If D did not appear, Ct. could render no judg. except in real actions. Act of Parliament of 1727: P could enter D's appearance in specified types of cases. Thus, for want of D's answer (plea), P could ask for a judg. by NIL DICIT. [*Judg. by default in the U.S. true since 1600's.]

C. Invoking Jurisdiction -

- (1) Old Common Law - writ, appearance & declaration.
- (2) Amer. C.L. - filing declaration (stunt. of claim) after service of valid summons or capias.

II. Chancery

Began by filing a Bill of Complaint w/ Clerk of Ct.

Under Amer. C.L., Waldron v. Harvey,

JURISDICTIONAL
REQUIREMENTS

54 W.Va. 608, 46 S.E. 603 (1904), held "I must be not only juris. re the person affected by the decree by having him before the Ct. by process or appearance, but I must be juris. of the matter acted upon by having it also before the Ct. in the pleadings."

STATUTE OF
LIMITATIONS

Statute of Limitations: filing of a Bill in Chancery stops the running of a time limitation provided the filing is followed by a bona fide attempt to bring D before the Ct.

RULE OF
PROCEDURE

Rule: Before a Ct. can act effectively, both the claim and the D or prop. must be before the court.

III. CODES

Under N.Y. Code of Civil Procedure of 1848, actions are commenced by the filing ~~the~~ service of process (summons). Next, commencement was called to the attention of the Ct. by filing the summons & all pleadings exchanged by the parties. (The summons could be subscribed by P or his atty.)

PROCEDURE

MAINLY FOLLOW-
ED TODAY.

Many states departed from the Code by requiring first a filing of complaint w/ Clerk & causing a summons to issue thereon.

IV. FEDERAL RULES

See Rules 2 and 4 (a).

State S/L rules in actions re state-created

6 Rule 3 (F.R.C.P.): A CIVIL ACTION IS COMMENCED BY FILING A COMPLAINT W/ THE CT.

rights. Federal S/C rules in actions re federally created rights. i.e., the Fed. Rules of Civil Procedure will prevail.

* Bringing Ds Before the Court *

Except on a capias (arrest on civil process) is used, a D can be brought before a court only by:

(1) his voluntary appearance - two forms:

(A) Gen. appearance - by filing formal "appearance", filing a pleading, by making a motion, or by otherwise participating in the action.

(B) Special appearance - D may appear specially solely to object to juris. over his person w/o submitting himself to juris. of the court where so provided by statute. (Note problem of waiver here.)

APPEARANCE =
CONSENT TO
JURISDICTION

DEFINITION

* Ordinarily, an appearance for any purpose = consent to juris. over ~~the~~ his person (D) for all purposes of the case.

Service means the manner of calling a summons to the attn. of a D. There are three (3) types of service:

(1) * Personal service - in hand or w/in the hearing of D and w/in the juris. of the court. This may be varied by stat. at the risk of raising a constitutional question. See Fed. Rule 4(d)(3).

(2) * Substituted service - service on an agent. Must be author. by stat. See Rule 4(d).

(3) * Constructive service - by publication (see Pennoyer v. Neff) or by mail and publication. While it has been held that publication plus notice by mail is sufi, publication alone in the manner usually author. by stat. does

not make it highly unprobable that the D will receive actual notice to satisfy the requirements of due process.

Service by mail is suff. when the carrier delivers the notice to D in person, and obtains a return receipt. This is a type of personal service.

PROOF OF SERVICE

Proof of service must be made before Ct. can properly enter a default judgment. W/o same, judgment is erroneous, but not void. i.e., it is the service that brings D before the court.

(NOTES: 9-25-62)

- References: (1) Douglas - N.C. Forms.
(2) Mc Intosh, N.C. Practice & Procedure.
(3) Clark, Code Pleading.
(4) Shipman, Code Pleading.

GA.

Code - a systematic compilation of laws. Georgia is code state, i.e., has a code.

Code Pleading - a narrower sense w/ reference only to pleading. Refers to Field Code in its orig. form or a modified form. A generic term relating to a code covering, in substance, civil procedures.

There are differences between states in wording and sometimes in substance.

Objections to C.L. pleading:

- (1) Arbitrary & useless distinctions between actions at law & suits in equity.
- (2) Forms of action (these still have bearing today on how today's pleadings can be made).
- (3) Rules re parties were crude & inequitable (e.g., there was no joinder of parties).

- (4) Formal + archaic language obscured issues.
- (5) Technical distinctions between kinds of pleas.
- (6) Limitations on rights of joinder, e.g., set-off.
- (7) Strict rule of construction - all pleas were construed strictly against pleader. (N.C. - changed by statute to favor pleader.)
- (8) Fictions + untrue allegations used.
- (9) Ds could conceal real defenses via broad gen. issues. e.g., "Not guilty" was a defense to Trespass.
- (10) Harsh consequences of mere defects in the pleadings. Could be res adjudicata.
- (11) Methods of raising objections to pleadings were highly technical + inconvenient, could be fatal. Today, rarely fatal.
- (12) Amendments not permitted w/ suff. liberality.

Know. of C.L. pleading T.I. today because:

- (1) Most of our substantive law has grown up around these C.L. pleadings. Stats. have not abolished the substantive law resulting from the forms of action.
- (2) Lawyer, even in a code pleading state, cannot draft an intelligent pleading (complaint or declaration or petition in equity) w/o know. of the essential elements of declarations of the C.L. actions.
- (3) Know. of proceedings subsequent to the declaration necessary because it is in the light of these later pleadings that many of these elements are interpreted.

66 N.C. 442 - Oates v. Gray - Even in a code state, the P must state clearly & w/ certainty the c/a.

* Characteristics of Code Pleading:

(1) One form of action - civil action. The old terms like Tres., Replevin, etc., are still used, but they now refer to the SUBSTANTIVE and not the adjective law. The necessary allegations must be made for each form, but it is only one form of action. (Lawt & Eq. have been fused to varying degrees.)

(2) Fact pleading - no longer issue pleading (complaint, answer, rejoinder, etc.) This has not been as successful as orig. hoped. A matter of degree here.

32 states, all terrs. & all fed cts. have code pleading. Some states still require labelling (e.g., "in Chancery").

Codifiers relied heavily on Eq. procedures and use many of them. e.g., split judgments.

* Federal Code -

Before 1938, fed. cts. under the Conformity Act were required to follow the procedure of the forum state. * In 1934, an enabling stat. gave Sup. Ct. power to draft rules and adopt them re fed. procedure. The F.R.C.P. were effective in 1938 by action of Congress (as per clause in the act). - Difficult to amend the F.R.C.P. & this is bad.

* JURISDICTION AND VENUE *

Juris. = power to hear and try certain c/a.

Juris. has several meanings depending on the context in which it's used:

JURIS. IN PERSONAM AND IN REM.

In the broad sense, "JURISDICTION" is the power of a state to speak w/ binding effect concerning legal relations."

SUBJECT MATTER JURISDICTION

SUBJ. MATTER JURIS. IN CONFLICT OF LAWS SENSE

(1) To indicate whether a ct. is acting against a person (in personam) or against a thing (res) (or in REM). Refers to courts' power to protect the rights of persons and/or things in the particular case before it.

(a) Juris. in personam usually depends on validity of service of process.

(b) Juris. in REM depends on the ability of the court to bring the res under its power and w/in its reach for the purposes of the instant case.

(2) Subject matter juris. - act's power to act in that gen. type of case. Usually depends on statute. Also, power over a specific res (tangible or intangible; e.g., auto, furniture, status of a relationship). Also, power to act in general or to furnish a particular remedy (e.g., a procedural requirement [some are jurisdictional, some are not]).

(3) Subject matter juris. in conflict of laws sense - depends on whether the subj. matter is so completely outside the power of the STATE to act that the cts. therein CANNOT act.

(NOTES: 9-27-62)

STATE A

- 1) PERSON
 - a) INDIV.
 - b) CORP.
- 2) RES
 - a) LAND
 - b) PERSONALTY

STATE B

RES
ACT

See Secs. 42 + 43.
 "As used in the Rest.
 of (Conflict of Laws),
 the word "juris-
 diction" means
 the power of a
 state to create
 interests which
 under the prin-
 ciples of the C.L.
 will be recog.
 as valid in
 other states." §42.

Rest. of Conflict of Laws (§§42 (e) + (f)) deals
 w/ juris. in this respect largely
 under the heading of "Legis. juris."
 In some cases, a STATE (and ∴ the
 cts. in) cannot act. Reasonableness
 is the test in some juris. cases.
 The practical limitations of a State to
 act thru its courts are found in
 the Const. of the U.S. In other cases on
 the court refuses to act, the ct.
 acts discretionarily even though it
 could have acted. This question is
 T.I. in cases: why did ct. refuse
 to act? Was refusal discretionary
 or based on inability to act due to
 legis. or Const. restrictions?
 Cts. of one State CANNOT
 effect any change of title in a res
 in another stat. However, State A's
 courts could entertain suits in-
 volving a res in State B, but
 their judg. must be in the
 form of an in personam judg-
 ment. Massey v. Watts, 104 U.S. 148. But
 that cannot directly affect title
 of B/A in State B. State A could
 grant decree directing sp. perf. of
 K to convey title (affecting title
 indirectly).

NAME CASE

Courts of one state lack power to
 command acts to be done in another state.

And, That other state (B) has power ~~and~~ right to regulate or even prohibit the act if same is offensive to state B. (a good defense.)

If this last rule were not true, then state A would not have power to command that a D do an act inoffensive to state B. e.g., Paying support of children. However, state A can refuse to exercise juris. due to expediency and other reasons.

The U.S. Const. does not prohibit state A from ordering an act in state B. This is left to state B to take appropriate action if it desires.

Due Process:

① Notice of intended action affecting prop. in forum state.

② Opportunity to be heard.

If party then fails to appear, D.P. has been still satisfied. A D need not appear if there is some basis of juris., but that would be default.

12 Ill. 2d 204, 145 N.E. 2d 625 (1957)

— state issued valid injunction re-
straining another state's officials
from acting re a bridge in Ill.

On state law permits ct. to act in a given case, and fed. law does not prohibit the action, state ct. has power to act, i.e., JURIS.

U.S. Const. prohibits state^{et.} action in some areas dealing w/:

- (1) Interstate
- (2) Intrastate
- (3) Extrastate.

These = conflict/laws laws.

PENNOYER v. NEFF (1878) - U.S. Supreme Ct. said that since the adoption of the 14th Amend., state judgments may be questioned on the state Ct. lacked juris. to entertain the case; due process has not been met. - On a juris. question exists, the Const. question of D.P. exists.

JURISDICTION - power to act effectively re persons or things.

If State A is not inferior to any other state or fed. govt., then it has absolute physical power w/ respect to persons and things w/in its terr. boundaries. On this is true, the only limits on State A's juris. are those it cares to make. - On any of these factors is missing, then restrictions increase.

Between two states, juris. is the relationship between the person or prop. and the state, which makes it reas. for the forum state to act in such a manner that will be recog. abroad.

If it is reas. for State A to act in a given case, then other states MUST give full faith and credit to that judg. - 210 U.S. 230 at 237.

Thus, a judg. not founded on due process is void, and other states need not give F.F.C. to that

FULL FAITH
AND
CREDIT

The void judg.
would be void
even in forum
state.

judg. Pennoyer v. Neff.

Civil Suit Steps:

1. Service of Process. - ? of juris here.
2. Pleadings - (this course)
3. Trial
4. Judgment

Hypo: A = resident of Raleigh in Wake County. A holds \$30,000 mtge. on B/A in Durham. B/A owned by B (resident of Calif). B is in default on pymts. to A and does not pay voluntarily. Quere: If A retains you, where would you bring action? = Must consider:

1. What is object of action? = To adjudicate status of res. If brought in Durham, the Ct. would need juris. IN REM. (An action affecting realty is tried in the county on the realty is situated.)

Hypo: Durham Ct. above grants \$20,000 Judg. A. A then sues for a deficiency judg. Neither Durham Ct. nor any N.C. Ct. would have juris. because this would be IN PERSONAM, and y would have to be personally served with process, and D would have to be personally before the Ct.

NAME CASE

PENNOYER V. NEFF

HOLDING

There must be personal service on a party (D) in an IN PERSONAM proceeding.

NOTES: 9-28-62

IN PERSONAM JUDGMENT -

The in personam judg. is binding only on the parties to the personam action (inter partes = between the parties), or the agents or successors in interest. Juris. here based on courts power over the parties.

IN REM JUDGMENT -

Affects the interest of ALL persons in prop. Action is against the prop. (e.g., action to quiet title). Juris in rem based on ct's power over the res.

QUASI IN REM JUDGMENT -

The judg. is to affect the interest of particular persons in prop. Juris. in in rem + quasi in rem. Actions is based on courts power ~~to~~ over the prop.

Fed. cts do not have orig. quasi in rem jurisdiction.

Admiralty proceedings v. a ship are strictly in rem. Also, action v. prop. confiscated by fed. or state govt. wh prop. was used illegally. (e.g., car wh carried dope).

The TEST: whether the judg. affects the rights of the parties only (in personam), or the rights of all as re the prop. (in rem), or the rights of some re the prop. (quasi in rem).

Some actions in rem:

- (1) Divorce - the res is the status.
- (2) Probate
- (3) Eminent Domain
- (4) Escheat

(5.) Estat. of ownership in corp. shares.
 (6.) In some juris. —

(a.) To compel conveyance.

(b.) To estat. trust in prop.

TEST OF
QUASI IN
REM

If a P is not seeking to estat. a pre-existing claim, but is proceeding v. a person and seeks to subject D's prop. to satis. of the claim, that would be quasi in rem. e.g. Attachment and garnishment.

ATTACHMENT AND
GARNISHMENT

⊗ Attachment + garnishment — Ct. may have no personal juris. over D, but has juris. over the prop.

⊗ However, judg. is good only to the extent of the property's value. Ct can order sale of D's prop. to satis. claim.

Attachment — realty and tangible personalty

Garnishment — intangible personalty, e.g., debts.

⊗ Where a ct has juris. over neither the D nor any of D's prop. which could be attached, a default judg. in this case would be void and null everywhere. Seizure of D's prop. after judg. would be void and unconst. (14th Amend.).

York v. Texas —

In Texas, stat says that if one "appears specially" to attack juris. of Ct, that person will be deemed to have submitted to juris. of the Ct.

Special appearance must be permitted by statute in States.

ATTACHMENT AS A BASIS OF JURISDICTION

Attachment is used as a basis of ~~juris~~ ^{juris}. (statutory) on D is a non-resident, and the prop. has been brought under the ~~juris~~ ^{juris} of the Ct (if in the state), and judg. is rendered to the extent of the prop. This is used in quasi in rem proceedings.

No deficiency judgment w/o ~~juris~~ ^{juris} in personam

On the value of the prop. is insuffi to meet the amt. of judg., Ct has no power to render judg. for the difference w/o personal ~~juris~~ ^{juris} of D.

* IN PERSONAM JURISDICTION *

(1) AT C.L. - service of process on D necessary. This satis. the indispensable requirement of ^{C.L.} personal ~~juris~~ ^{juris}: the personal appearance of D. Ct. at C.L. would not render default judg., so by being obstinate and brawling, failing and outlawry, D could deprive P of recourse.

"Personal appearance" did not mean that atty. for D could appear initially. D could first appear and then appoint an atty. to represent him. (Actually, this negates theory that ~~juris~~ ^{juris} was based on actual phy. control of D.) Judgments at C.L. were based on quasi-crim. grounds because if would be execution against the person of D if he failed to pay. (Now, execution considered to be v. D's prop.)

(2) IN U.S. - deeply involved w/ DP Clause of 14th Amend. (Today, the concept of

juris. is expanding.) Here, the concept of territoriality prevails rather than concept of actual phy. presence before the ct.

Main bases of Juris. IP:

1. Presence

2. Service of process

3. Consent

When a ct. seeks to have ^{I.P.} juris. based on something other than one of the three above bases, then the question of IP will arise.

In Pennings v. Neff, ct. said only service of process and/or appearance (by D or his atty. initially) were proper bases of IP juris. and that it could not be IP juris. unless D merely has prop. in the forum state.

① Presence as a basis of IP Juris-

(1) Majority view - Today, it is always valid basis as long as it is notice by service.

(2) Minority View ("Better view") - presence is the basis of juris. and service of process is merely notification.

② Consent as basis of IP Juris-

Consent in advance generally considered and recog. to be basis of IP juris. Consent can be

(1) Actual - by k or cognovit note (debtor consents in advance to confession of judg. v. himself)

The difference between the two is really negligible.

upon default) on state permits that note (N.C. does). Also, actual consent = on D signs summons acknowledging and accepting it.

- (2) Implied - in states w/o statute providing for service on residents outside of the state, some states hold that it is implied consent to IP juris on D accepts service outside the state.

NOTES: 10-1-62

Presence as basis of juris. - suffi to give state juris. so long as D is in the terr. limits of the state. But, the 14th Amend. requires notice for satis. of D.P.

- (3) Doing of Act as basis of juris. - involved w/ expansion of the concept of IP juris. due to cars around turn of 20th Cent. and more inventions making possible greater mobility.

NAME CASE

Hess v. Pawlowski - Sup. Ct. of U.S. upheld the Mass. Motor Vehicle Statute for non-residents. This was held that merely driving on the ways of Mass. was equivalent to consenting that the Registrar of Motor Vehicles be his agent for the service of process. Rationale: the privileges and immunities clause of the U.S. Const. did not preclude state from requiring certain restrictions on persons operating a dangerous instrumentalities. Ct. reasoned that a state can exclude dangerous instrumentalities, the state can restrict same. - This implied consent was a fiction cover-

(248 U.S. 289) →
Held, "the mere transaction of biz in a state by non-resident natural persons does not imply consent to be bound by the process of its courts."

ing up a new basis of ^{I.P.} jurisdiction. ~~the~~ doing of an act. Fictions are used to disguise changes in the law. — This doctrine of Hess v. Pawlowski was limited, and a further extension was needed.

Flexner v. Farson — (10 years before Hess Case) outlined the lines along which an expansion of "juris I.P." was needed. But here, Sup. Ct. said that the Ky. stat. was in viol. of the privileges & immunities clause of Const. saying that a state has no right to exclude a national citizen. ^(244, 52) Hess Case distinguished Flexner Case on basis of a car (in Hess) being a dangerous instrumentality.

Dougherty v. Goodman — same type of facts as Flexner v. Farson but this Iowa stat. was held valid. Ct. held here that on one does biz in a state, and that person is a non-resident, service can be on an agent of the non-resident. However, Ct. said the diff. here from Flexner Case on ground that the type of biz done by Ds in Illus case (securities) is highly regulated by the state. "Blue Sky Laws" — securities. — Ct. indicated that Flexner v. Farson is dead, and that a state may use any act within its boundaries to gain juris so long as the c/c arose out of

the acts that support juris.

Dougherty and Hess Cases -

Different because Hess was dis-
tinguished on basis of dangerous activ-
ities.

Similar because in both, the
acts were of the types that the
states regulated strictly as under
their police powers.

(4) * Domicile as basis of juris I.P. -

Domicile is one's permanent place of
abode.

Mulliken v. Meyer - (p. 14 cbk.) If
state has stat. permitting service
w/o the state on a domiciliary
then outside of the state, okay.

GENERAL
RULE

The basic rule is still that a
ct. to have J.I.P., must serve
process on a D, and such
service must be w/in the
terr. of the state.

→ N.C. does not have statute on a
domiciliary (!) can be served w/o
the state.

State citizenship = domicile. State
citizenship is based on domicile.

Citizenship (5)
as a
Basis of J.I.P.

313 W. 69 - Speriotis v. Florida - sponge
fisherman here held w/in juris. I.P.
of Florida (for wrongful acts on high
seas) on basis of citizenship.
Question of citizenship as basis of J.I.P.
not clear.

Allegiance as Basis (6)
of J.I.P.

Blackmer v. U.S. - 284 U.S. 281, on Sup. Ct.

265 U.S. 47

upheld subpoena served on Blackmer in France. Ct. said here that, on a national basis, allegiance to U.S. held valid basis of J.I.P. See also 265 U.S. 47.

Sup. Ct. has recog. as bases of ^{state} J.I.P.:

- (1) Presence + notice by service.
- (2) Consent
- (3) Appearance
- (4) Doing of certain acts
- (5) Domicile.

C.L. bases (w/o statutes):

- (1) Presence
- (2) Consent
- (3) Appearance (general)

Must be delegated by stat. to be valid bases of state J.I.P.:

- (1) Doing of act
- (2) Domicile
- (3) Special appearance (Tex.)

One case held that N.C. statute alleging juris. J.P. based on article sold w/o state but known to be intended for use w/in N.C., was going too far. This case stopped at Circuit Ct. of U.S. level. Never reached Supreme Ct.

See bases of juris. over corps. See Inter-Shoe Case ("limited contacts" rule.)

NOTES: 10-2-62 * JURISDICTION RE CORPORATIONS *

Bases so far:

- (1) Presence
- (2) Consent
- (3) Domicile
- (4) Doing acts
- (5) Nationality or allegiance.
- (6) Appearance

(1) * Domicile as basis of Juris. over corps. -

Bank of Augusta v. Earle, 38 U.S. 538 -
Taney, J. (dictum) said that a corp.
can have no legal existence w/o
state of incorporation. So, domicile
was the orig. basis of juris. over
corps.

A corp. is subject to the juris.
of the state of incorp. Also, now,
corp. activities w/o state/incorp. may
subject corp. to juris. of the states
wherein the activities are carried
on.

A corp. could sue, however,
w/o state/incorp. So long as the
forum state had no regulation or
law to the contrary. This began to
point up holes in Taney's dictum
which was that corps. had legal
existence only in state/incorp.

(2) * Consent as basis re Corps. -

Doing biz = CONSENT
So, doing biz is the
real basis of juris.

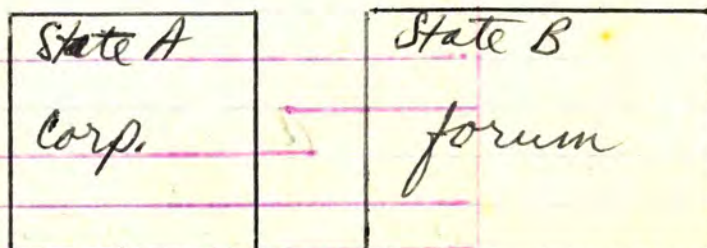
Paul v. Va., 75 U.S. 168 - landmark case
holding that ins. was not inter. com-
merce, and that corp. was not a
"citizen" under privileges & im-
munities clause of the U.S. Const. in
any state other than state/incorp.
(re ins. not being interstate commerce)

106 U.S. 350, Shelton v. Cox - Doctrine of

172 U.S. 602

Pennoyer v. Neff applied to corps,
thereby bringing corps under
D.P. clause of 5th Amend.

So, there were limitations placed
 on state to exclude corps.
 However, state could require
 that an out-of-state corp.
 to do biz therein appoint
 an agent for service of process.
All states have stat. re-
quiring such agent, and those
stat. held const. in
172 U.S. 602.



Problem here re acts w/o state B.

⊗ "Limited Contact" rule - arose from
International Shoe case. In St. Clair v.
Cox, Ct. said that a corp. by
doing biz in forum state, had
"impliedly consented" to juris. and
could be said to be "present" in
forum state, even on corp. has
not appointed an agent for the
service of process. The "agent
stats." have developed since St. Clair
case, but this recog. need for
expansion of juris.

237 U.S. 189 - mere presence of an agent
 not suff. to give the state juris.

273 U.S. 119 - mere presence of
 an agent even to promote biz of corp.
 not suff.

So, doing biz is the real

The "implied consent"
 theory is no longer
 valid as a basis of
 juris. over corps.
 Same for "corp.
 presence" theory.
 Int. Shoe Co. Case!

237 U.S. 189
 273 U.S. 119

Test of
"Doing Business"

[basis of juris. ^{Q.} But, what constituted doing biz? Implies a continuity of acts.

Quaere: What does "doing business" w/in the state by a foreign corp. mean? ?

Merely solicitation held not suff. Lambert v. Shell, 235 N.C. 21 (1953); 205 U.S. 530. 234 U.S. 579; Inter. Harvester: "something more than mere solicitation" held suff.

These tests known to be ambiguous.

International Shoe Co. v. State of Wash.
326 U.S. 310, 66 S.Ct. 154.

Name case in this area. State brought action to require this foreign corp. w/ salesman maintained in Wash. to pay to unemploy. comp. fund. Service on a salesman, & notice sent to home office. — State Ct. said this was something more than mere solicitation. Sup. Ct. upheld, but on diff. grounds: the corp. had suff. contacts and ties w/ Wash. to make it, w/in the bounds of fair play and concepts of justice, reasonable & just to subject corp. to juris. of Wash. This was "old contacts" rule.

Said "implied consent" and "corp. presence" fictions were out as bases of juris. over corps.

Ct. said that the corp. must have certain minimum contacts w/ forum state so as

205 U.S. 530

326 U.S. 310
 NAME CASE

Minimum Contacts Rule

officers of the corp.

to make it still reas. and fair to subject corp. to juris. of the forum state. (Stone J., delivered majority opinion) so as not to offend traditional concepts of justice and fair play.

Black, J. said that he concurred but that he felt the "limited contact rule" was still too vague.

Cases today seem to be refining this rule more specifically. See Hanson v. Denckhoff (p. 53 cbl.), 357 U.S. 235, 78 S.Ct. 1228 (1958).

As concepts of juris. change, state stats. change.
 Jur. types of statutes found today:

(1) Agent apptd. by corp. to receive service (55-13 of N.C. Gen. Stats.). Involved w/ concept of actual consent by corp. If a corp. failed to appoint agent, there was no juris. This + develop. of implied consent and presence fictions led to ...

(2) Agent ^{usually an officer of the corp.} appointed by STATUTE to receive service of process. - Found successful. These are Const. - Inter. Harvester Co. v. Kentucky. And, the c/a will not arise from acts within the forum state. 342 U.S. 437 (1952). See also 262 U.S. 312; Oboue not true if to impose juris. would work hardship on corp. increases burden on inter. commerce.

342 U.S. 437 (1952)

(3) Service upon state official -
 arose because agent could leave
 state under stat. type #2.

Most states have all these
 types.

So, corp. activities suff +
 service can be made on state of-
 ficials. (See N.C. G.S. 55-15.)

NOTE: all these rules re juris.
 over persons and corps. are
 substantive laws of juris.
 The procedure followed is
 another matter. There must
 also be satis. of the pro-
 cedural requirements for
 service of process.

Here, juris. limited to c/a aris-
 ing from local activities. - This
 is not good rule. 204 U.S. 8, and
 Perkins case (on sheet).

204 U.S. 8

NOTES: 10-4-62

Notice reas. calculated to give
Knowledge = requirement of due process.
Travelers Health, 339 U.S. 645 } no agent in the
McGee case, in cbk. } state, but
 notice was upheld on sent by
 mail.

The newer stats. ignore service
 of process in hand so long as
 the requirement of notice is
 satisfied. This relates to corps. only,
 because the Sup. Ct. has not
 gone far enough to apply above
 rule to private individuals.

Two decisions since Inter. Shoe Co. Case
 have upheld cts. below based on the
 interest of the cts. in the case.

*McGee v. International
Life Ins. Co.,
355 U.S. 220,
2 L. Ed. 2d 223,
78 S. Ct. 199 (1957)*

See *Traveller's Health* and *McGee Cases*. These cases involved ins. Co. ~~McDonald v. Maher~~ ~~McGee Case~~ - State has power over a foreign ins. Co. doing a mail order ins. biz in forum state. - This supports policy favoring expansion of jurisdiction. - The only contact D-corp. had w/ forum state was a ~~single~~ K made w/ a citizen of forum state, but the K was actually made outside of the forum state.

Two more cases since *Inter. Shoe* have upheld juris. based on the D's contact w/ the state.

Perkins Case (v. Benguet Consol. Min. Co.)
342 U.S. 437 (1952) • Foreign cpa here, and action being maintained by foreign non-resident. The corp. did biz in the state, but cpa was foreign (i.e., state had no interest in the cpa).

Corp. = D

The rationale was based on the fact that the corp. had done biz in the forum state to an extent that the D had sufficient contact w/ the state so as to make it reasonable that the state could hear the action.

Hanson v. Denckla, 357 U.S. 235 (1958)

Held, the issue was the trust & the trustee, & Fla. Ct. had no relation to either. So, the Delaware action stood as decisive.

Juris. sustained on basis of the relationship of D to the forum state (Del.) ~~rather than~~ on the interest of the forum state to the action (as in *Traveller's Health* & *McGee Cases*). But, Fla. Ct. had no juris. over the trust nor trustee.

Gulf Oil Co. v. Gilbert →
330 U.S. 501

Doctrine of forum non conveniens -
the ct. has juris. in the power
sense but declines exercise of the
power because it would be more
convenient for the parties. This can be
introduced by the parties or by the ct.
- Mainly used in fed. cts., and by
fed. statute this doctrine is a part
of fed. law. - Applicable only after
juris. has been established.

The emphasis today is on
the relationship of the indie. to the
state w/ this idea of reasonable-
ness running thru.

Quaere: whether a single contact
w/ the forum state is suffi-
to confer juris. over a
non-resident who has no other
contact w/ the forum state?

Quaere: whether any contact is
suffi. to estab. juris. in per-
sonam over a non-resi-
dent or cfa is foreign?

These questions have not been answer-
ed yet.

* Procedure *

(I.) Service of process w/in terr. limits.

(a) Not confined to service of summons.
52 Atl. 714 (N.J.).

(b) Notice - giving of suffi. actual or construc-
tive notice ~~to~~ compelling D to appear
or suffer default. A ministerial
function, and may be given by
someone like the sheriff.

(c) Methods -

(1) Actual - reading to D or manual
delivery to D of a copy of summons.
This is personal.

(2) Substituted Service - basically in-

52 Atl. 714

No valid service ²¹⁷ Stevens v. The Biltmore Co. (1938), 214 N.C. 217, ~~West v. Biltmore Co.~~
 of process can be had v. a nonresident D in an action IN PERSONAM. In an action
 quasi in rem v. nonres. D it is
 necessary to valid service by
 publication that D have prop. in
 the State, and that such prop.
 has been actually subjected to the
 control of the ct. by attachment. - N.C.
 213

cludes constructive:

- (a) leaving copy of service at residence.
- (b) Posting or publication and mailing copy to D. See

Legs. decides what is suff. ser-
vice along w/ Constitutional
requirements. 213 N.C. 767.

Service may be waived actual-
ly or impliedly. 242 N.Y. Supp. 408;
222 N.C. 731, Moxley v. Deans (1943) - a gen.

appearance cures all

defects and irregularities of process.
When not otherwise defined,
"service of process" means per-
sonal service of process.

Personal service ord. does not
include: (1) leaving copy at usual abode

- (2) " " " residence.
- (3) " " " office.
- (4) " " w/ someone

(like wife). See 217 N.Y.
Supp. 536. - service on D's
Husband held not suff.
245 N.C. 640, Harrington v. Rice
- true even on husband
promises to deliver. See also
80 N.C. 200.

Manner of Service -

- (A) D must be apprised in good
substantial form that service
is intended to be made. May be
by: (Personal Service)
(1) Reading to D. Copy need not be left.
(2) Explaining nature of process
to D.

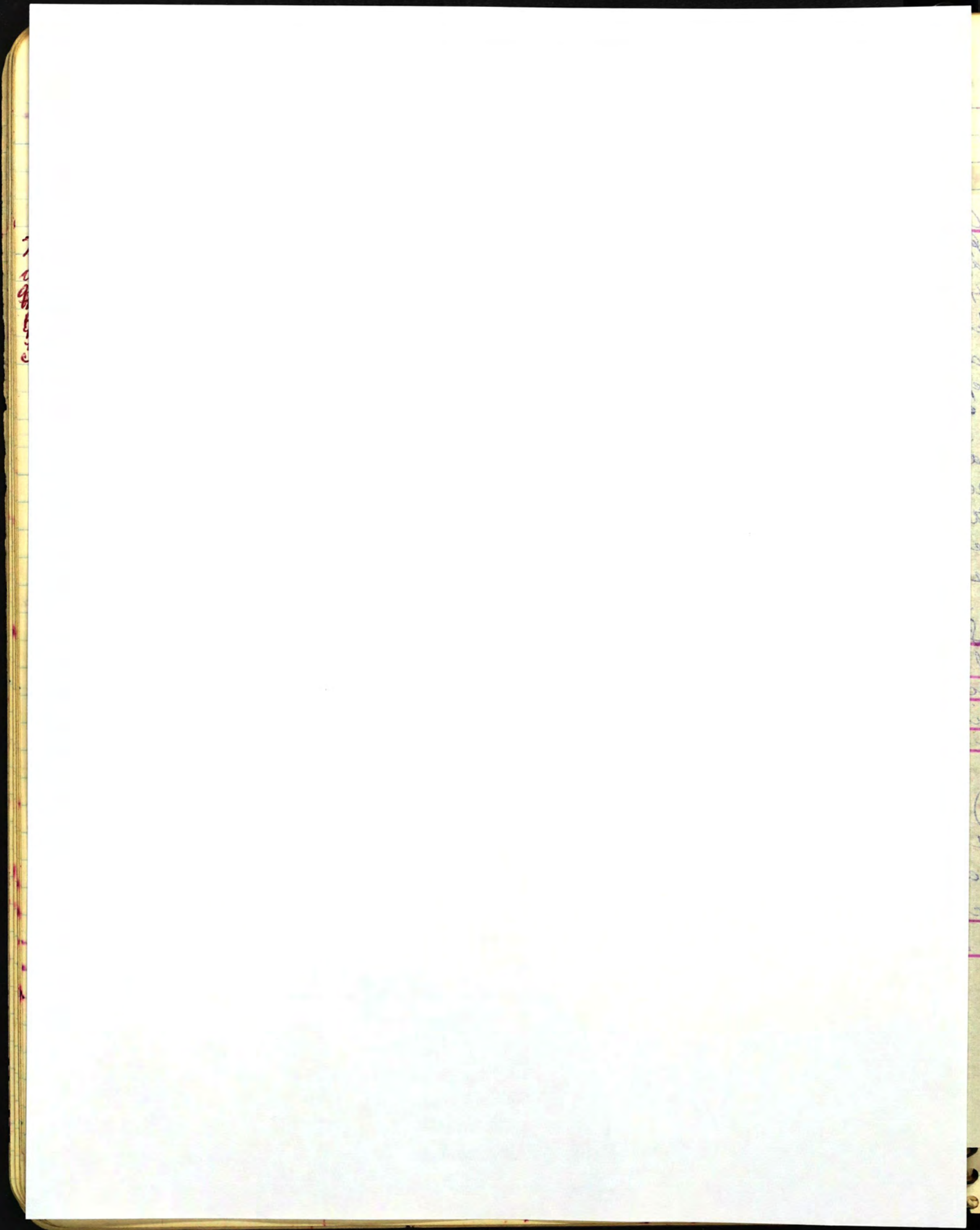
Gumperz v. Hoffman p. 1 chk.
245 App. Div. 622, 283 N.Y.S. 823 (1935)
Action: On appeal from Sup. Ct.

Facts: Dr. Herbert Hoffman (D), a resident of Buenos Aires, was visiting in a N.Y. hotel. Process served misrepresented himself to be a doctor w/ a letter from medical society. Sup. Ct. granted D's motion to vacate service of summons. P appealed from this order.

Issue: Whether deception to effect service of process on a person already in juris., will vitiate that service?

Held: No. J/D/Reversed (i.e., order revd., motion denied)
"... Service is not to be invalidated merely because secured by a deception practiced on the D, which, in no true, sense, was injurious to him...."

"It is a duty (legally unenforceable) upon persons in a juris. to submit to service of process." The deception here only induced D to do what he should have done voluntarily.



(3) leaving copy w/ D and telling D what is being left.

Reading over telephone not suff.
168 N.C. 16 - even on officer re-
cognizes D's voice.

(B) Substituted Service - purely stat. and
must be followed closely.

Broadly, means substituted
service means service by publi-
cation. 22 S. 2d 748; 242 Ala. 215.

This includes leaving service
at usual place of abode on
D is a resident of the state.

If a state, by stat., provides
for leaving copy of summons
at usual abode of D, this has
been held suff. even if D never
rec'd. actual knowledge. But see
80 N.C. 200(3) 245 N.C. 640, Hyman Supply Co.

V. Rice - (1957) -
husband Ref
instructions to
him to deliver
it to wife - D
not valid service
on the wife.

held, delivery of copy of summons at home to
place of service

Process cannot lawfully be
served w/o terr. limits of the
ct's. juris., even on D, in fact,
accepts service. Ct's juris. may
extend only to county, but every
state has stats. providing for service
w/o the county.

Gumpers v. Hoffman (1935) (p. 1)

If a party were fraudulently
induced into the state, the service
would be set aside. If, further,
service were so disguised that no
notice was given, no valid service.

However, on a non-resi-
dent is present w/in forum state
and service is effected by trickery,

deceit or fraud, service is still good.

In accord, 110 F.2d 465: one is within potential reach of process, he has no complaint. Because of information used by the server to effect service of process.

Rowinski v. Rowe

Test of Notice

(p. 3)
What best serves to give a D notice that he is being served process and that an action is being instituted against him? This satisfies due process. Also, D had actual notice here and this was probably the pivotal point.

The Fed. Rules of Civil Proc. will be liberally construed.

The Ct. however, did not really seek to define "usual place of abode."

Domicile — one's permanent home. Ct. would consider paying taxes, voting, etc. in deter. domicile.

Usual place of abode — Ct. agree that this is where a person is living at the particular time service is made.

*Cts. today will usually follow a liberal construction of usual place of abode where there is actual notice.

Ct. held that the mgr. was "then residing therein" and that the hotel was Chaplain's "dwelling house."

Pickford v. Kravetz (note p. 8).
 Charles Chaplain case. Ct said there was actual notice here and that the hotel was the manager's "dwelling place." Very broad interpretation.

See 33 Fed. Supp. 539 - service at N.Y. address of D. who spent most of his time traveling about by trailer, held valid as w/in 4(d)(1).

33 Atl. 168 - service at home of D. temp. out of state valid. (Pa.)

26 Atl. 600 - service at D's place of business not valid. (Pa.)

7 Fed. Rules Decisions 539 - service on janitor at rooming house on he spent only part of the time held not valid.

Patrick v. Brago (note D, p. 8)

Amendment of summons frequently allowed to correct name except on the mistaken name is that of a real person.

On amend. is allowed, the amend would relate back to the orig. time of the first summons so as to avoid a bar by the s/c.

Service of process must be sufficient to provide notice w/in D.P.

In Patrick v. Brago, James was never actually served. So Ct. on appeal said that an amend.

Rovinski v. Rowe p. 3 cbk.

131 F.2d 687 (6th Cir., 1942)

Action: In tort for ^{injuries} damages.

Facts: P (Rowe) v. D for damages arising from auto accident. P, citizen of Wisconsin, orig. sued D in State Ct. of Mich. on D averred he was resident of Mich. and that he had never estab. any other place of residence, and was, therefore, not amenable to service under the non-resident motorist stat. of Mich. Now, in fed. ct., D - appellant seeks to aver that he is not within the juris. of the ct. because no juris. had been obtained over his person by the attempted service under Rule 4(d)(1). D had always considered + held out 1308 Spies Ave., Menominee, Mich., as his home; kept phone y under his name; kept clothing y; kept ready bedroom y + never voted elsewhere than in Mich. (although D had held jobs in N.Y. and Minn. + had visited "home" only to see his mother and was employed in Minn. for the past two years). D considered his legal residence in Mich., but his dwelling place + usual place of abode elsewhere.

Issue: Whether service of process on D under the facts of this case constituted service "at his dwelling house or usual place of abode."

2 Rovinski v. Rowe (cont'd.)

re: the meaning of ^{Fed.} Rule 4 (d)(1)?

Held: Yes. J/P/Affirmed.

The Supreme Court Advisory Committee, in drafting the F.R.C.P., intended the rule to provide "a good deal of freedom and flexibility in service." Uncertainty of its applicability ^{to varying situations} would be increased by strict construction.

Held, "Rule 4(d)(1) should be construed liberally to effectuate service on ACTUAL NOTICE of suit has been received by D. On the facts of this case, the Dist. Ct. properly held the service of process valid.

It is an irreconcilable conflict among state cts. re meaning - interpretation of the expression "usual place of abode."

Facts cont'd. - D attacked service as not in conformity w/ Rule 4 (d) (1). Service was made by official by leaving copies of summons + complaint at the "dwelling house + usual place of abode + residence of appellant - D w/ his mother (at 1308 Spies Ave., Menominee, Mich.), a "person of suitable age + discretion then + there residing."

"Absolute accuracy in spelling names is not required in a legal document or proceedings civil or crim.; that if the name, as spelled in the document, tho' different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical w/ the correct name as commonly pronounced, the name thus given is a sufficient identification of the indiv. referred to, and no advantage can be taken of the clerical error. *Thompson v. State*, 58 Ga. App. 679, 199 S.E. 787, 788 - expands the doctrine (as do many modern decisions) to conform to the growing rule that a variance, to be material, must be such as has misled the opposite party to his prejudice." *Black's Law Dict.*, 4th Ed., 1951.

N.Y.C.P.A.S. 218
In Fed. Ct., "A civil action is commenced by filing a complaint w/ the court." Rule 3. "Upon the filing of a complaint, the clerk

would not cure the basic defect.

Close case because of question whether there was a misnomer.

Doctrine of Idem Sonans - "Same sound." Re the problem of misnomer. If the intended D is served, even on name sounds the same as the actual name of the intended D, but is misspelled, process is still valid. (e.g., Reed, Reid; Davison and Davidson. See *Davidson v. Bankers Fin. Co.*, 150 S.W. 713. See also 136 N.W. 535, upheld 234 U.S. 35.

The test usually used: whether the intended D was really served. If so, service valid.

Re misnomer in publication, the requirements are much stricter, and will usually be fatal on mistakes are made because publication, at best, is a weak way of giving notice and serving process.

Note "Hip Pocket" Action in N.Y. (p. 8). Action commenced in N.Y. by service of a summons, which is a mandate of the Ct. When is an action deemed "commenced?" What const. "issuance" of a summons? shall forthwith issue a summons.... "Rule 4."

(NOTE

Allen v. Superior Ct. In + For County of Los Angeles p. 12 cbk.
41 Cal. 2d 306, 259 P. 2d 905 (1953)

Action: Petitioner seeks a writ of prohibition to restrain the Super. Ct. of L.A. Cty. from taking any further proceedings in a tort action arising from an auto collision between Pet. and Bloombergs in Calif. on 11-1-47.

Facts: July 12 - 1948 - complaint filed & summons issued.
3-25-52 - second alias summons issued.

4-29-52 - order for publication of summons.

5-3-52 - petitioner personally served in Oregon.

5-29-52 - " appeared specially by filing a notice of motion to quash the order for publication of summons: in excess of ct. power, and (2) quash service of summons and complaint: ct. had no personal juris. because action was IN PERSONAM.

11-1-47 to 9-1-51 - petitioner was resident of Calif., then moved to Oregon in toto.

Trial ct. denied motion.

Calif. statute: "On juris. is acquired over a person who is outside of this State by publication of summons, the ct. shall have the power to render a personal judgment against such person only if he was personally served w/ a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service.

Issue - Whether respondent court acquired IN PERSONAM juris. over petitioner by virtue of service of process on him w/ the state?

Held: Yes, under the statute. Pet. was member of the class subject to court's power. "One incident of domicile is amenability to suit w/ in the state when during sojourn w/ the state, one is state

NOTES:

2. Allen Case (cont'd.)

has provided & employed a reasonable method for apprising such an absent party of the proceedings v. him." (Kilbuck v. Meyer, 311 U.S. at page 464) Also applies on a domiciliary at the time of the commencement of the action thereafter changes his state of residence and is personally served w/ process in the latter state.

He, as a citizen, had certain responsibilities to the forum state arising out of his relationship thereto, one of wh was amenability to suit therein, and those responsibilities are not to be terminated by his subsequent removal to another state; and he may be served w/ process pursuant to a method reasonably designed to give him notice of the proceedings.

Writ of prohibition denied.

(NOTES: 10 -

McDonald v. Mabey

243 U.S. 90, 37 S.Ct. 343 (1917)

p. 16

ACTION: On a promissory note (in personam)

FACTS: D, Mabey, had been a resident of Texas. Shortly after he moved to Mo., ^{with intention to return} ~~he~~ ^{he} was served by publication ^{only} in a Tex. paper once a wk. for 4 successive weeks. D did not appear.

Issue: Whether service by publication alone on a non-resident D is suff. notice within the meaning of the due process clause of the 14th Amendment?

Holding: No, J/P/Rvsd. "An advertisement in a local paper is not suff. notice to bind a person who has left a state, intending not to return. * On juris. ^{in personam} purports to be based neither on ^{personal} service nor appearance, the substitute that is most likely to reach the D is the least that ought to be required if substantial justice is to be done.

The judg. here was not merely voidable, but was void.

(cont'd.)

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provided a copy of a readable
text for signing back on about
of the proceedings in "Hillock"
up, 311 U.S. at page 444. Also appears on
necessary at the time of the commencement
the action thereafter changes his state of
and is probably served up process
in other state.

He, as a citizen, has certain prop-
ties to the forum state arising out of
relationship thereto one of which was
ability to suit therein, and these
abilities were not to be terminated by his
removal to another state; and
up he served up process pursuant
which reasonably designed to give
notice of the proceedings.
What of prohibition denied.

4

(NOTES: 10-8-62)

Allen v. Super. Ct. In & For L.A. Cty. (p. 12)
 The c/a arose in Calif. and that is significant under this type of statute.

Very broad statutes here because the stats. purport to permit service upon any non-resident, but really they don't go that far. They are ltd. to former residents of the state.

State has power to prescribe a mode of service wh will be sufi to support a personal judg. on the D, via allegiance to the forum state, is deemed to have consented to jurisdiction.
147 A. 715.

N.C.

On a resident, has left the state to avoid service, publication (or personal service, a fortiori) will be sufi. N.C. has such statute.

This case goes beyond the Pennoy doctrine. Pennoy never defined "non-resident", and here D was a resident at the time of the c/a and the commencement of the action in July, 1948.

Commencement
 of Action in
 N.C.

N.C. = action is commenced w/ the issuance of the summons.

Alias summons (and pluries summons) are means of keeping an orig. summons alive.

McDonald v. Mabee

(p. 16)

D was only technically domiciled, and service on such a D merely by publication is insufi.
 When one moves from one

state to another, domicile re-
mains in the first state
technically until changed.

Note peculiarity here of D
asserting that the orig.
suit is valid & = a bar
here on the note. P says
that (since he is suing on
the note, and not on the
former judgment) the first
judg. was void because of
lack of juris and that that
judg. should not now be
a bar to this suit on
the same note.

Mary Jane Smith v. The Sup. Lodge etc. (p. 19)
Attachment Prop. must be attached at the
commencement of the suit.

Our prop. is attached at the
beginning the judg. can be
executed only to the extent
of the value of the prop.

Problem

Bush v. Aldrich - sp. perf.
of K to convey land to P.

The S.C. Ct. was held to
have juris. to compel

sp. perf. of a K by
nonresident vendor (D)
to convey lands w/in

315 Pa. 529, 531, 173 A. 305 (

the juris. of the Ct. &
w/in the State.

p. 22

This type of stat. has the
effect of converting this type
of action from in rem to in per
sonam to an action in rem.

This case is against the
weight of authority. But see
55 S.E. 567 and 96 S.E. 922, Bush v. Aldrich.

← The Atlantic Seaboard case is
against the weight of authority.
But, there would be no
essential difference between
this and the above case,
Alpern v. Col.

Name Case

Harris v. Balk

(p. 23) ^{notebook} ~~infra p. 40~~
Balk had notice of the Md. suit because Harris notified Balk. Harris here pleads the Md. judg. in bar to this action. Sup. Ct. said that the Md. judg. should be given full faith & credit.

Rule of Law

The debt follows the debtor and can be attached by getting juris. over the debtor.

NOTES: 10-9-62

Prop. is a legal relationship between the res and the person; the ownership one has in the res.

Act. can create in prop:

- (1) Title ^{good} as against the whole world.
- (2) Title good as against some specified or specific persons.
- (3) Torrens Act - titles of land are registered and transfer is by certificate (like transfer of corp. securities). This would really come under #1 and is strictly in rem.

G.S. 43-1 to 43-57

Gen. Rule of Notice

When prop. rights are to be affected in an action, there must be notice reasonably calculated to come to the attention of the party sought to be notified.

A ct. has constitutional power

Mary Jane Smith v. The Supreme Lodge

p. 19

Ancient Order of United Workmen

12 Cal. App. 189, 106 P. 1102 (1909)

Action: IN K.

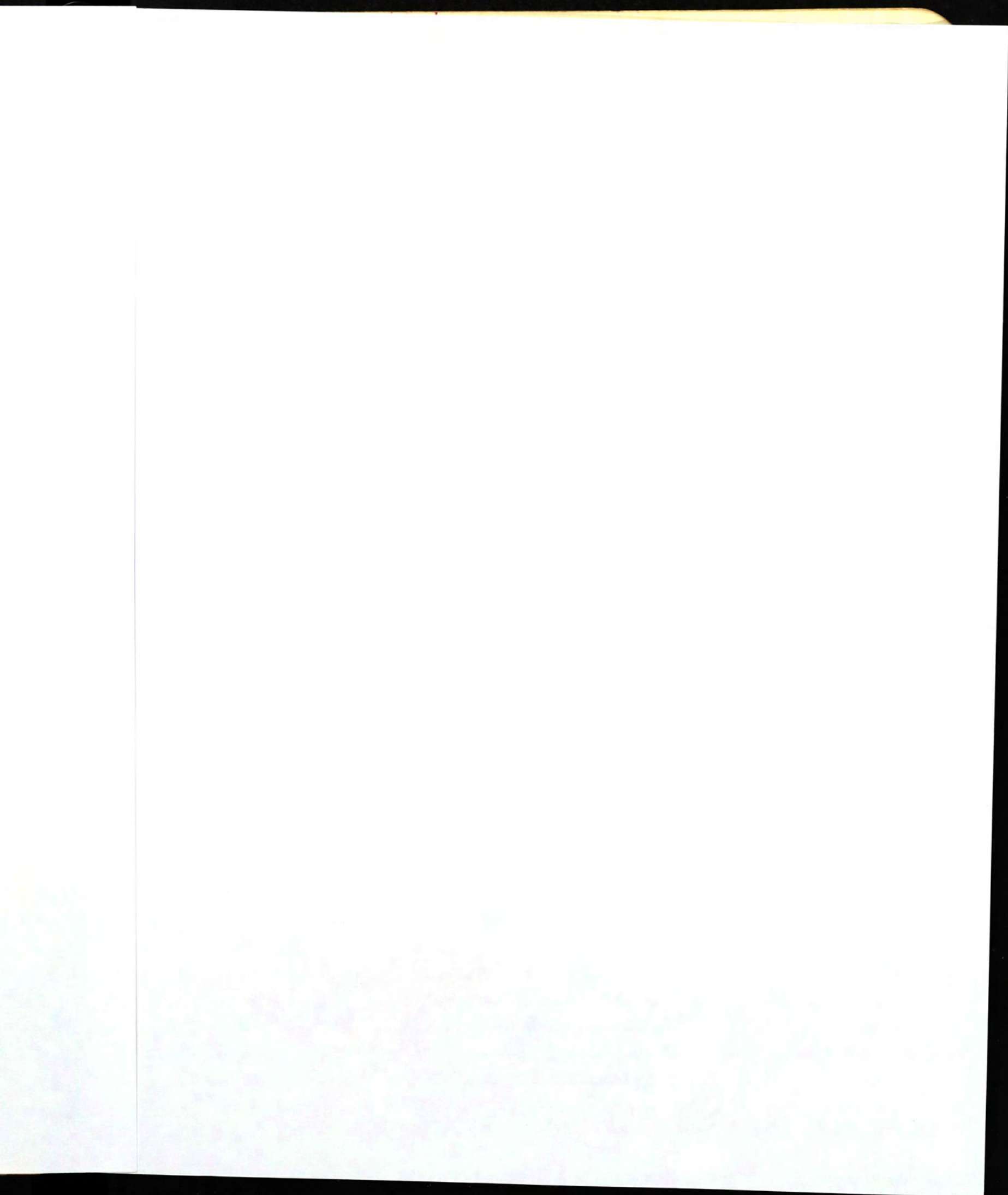
FACTS: P SUES TO RECOVER \$2000⁰⁰ upon death of her H, per terms of certificate issued by D (appellant). D = foreign corp. ^{of Nevada + Penn.} who any place of biz, agents, etc. in Calif.; Not doing biz in Calif. Service of summons by publication and mailing. No writ of attachment issued, and D failed to appear: default judg. v. D. — D later appeared specially, moved to vacate judg. and quash service of summons: denied below.

Issue: whether, in the absence of any attachment or seizure of prop. of D in Calif., the ct. obtained juris. in a purely personal action to render a personal judg. v. a D not within the State, by service of summons by publication and mailing a copy to D addressed to its residence in another state ??

Holding: Notwithstanding the publication of summons, no juris. until ct. has brought under its jurisdiction, by attachment or other proper procedure, prop. belonging to the D within the state. *Pennoy v. Neff*.

Attachment + service are both requisite to confer juris., but those two proceedings are distinct and separate. Judgment v. a non-resident is dependent upon both these proceedings, but neither of the proceedings is dependent upon the other.

J/P/Rvd; order denying motion to vacate judg. - rvd.
Motion to quash service: denied.



and statutory power. In either case, it can be the question whether the state has jurisdiction in the power sense.

Constructive service is allowable only on specifically authorized by statute. See 68 S.E. 1101 (Ga. case) - Ct. has no power to render decision in Annulment of marriage cases on constructive notice. N.Y. case agrees. Contra: 130 F.2d 809 (D.C.); 175 N.E. 533 (N.Y.!!).

130 F.2d 809 (D.C.)
175 N.E. 533

The constitutional question depends for its answer on whether the action is in personam, in rem, or quasi in rem. Under the Pennoyer rule, no jurisdiction in personam w/o personal service of process. But, it can be jurisdiction in rem and quasi in rem on it is adequate constructive process (i.e., service).

For a Ct. to pass on prop., the res must be within its jurisdiction (terr. limits).

Citus of a Judgment Debt:

Some cases hold citus of judgment debt is on it was rendered. Minor view. Major view - citus of a debt is on the debtor as located. - Note, debt = intangible, a chose in action. (N.C. follows major)

In most cases, author. of a Ct. to pass on certain prop. rights must

come from constitutional and statutory authority.

In some cases, long-standing custom may suffice to grant the authority, otherwise required to be granted by stat. 134 N.C. 316, *Arendt v. Briggs*.

Two types of statutes:

- (1) Ct. has power to transfer title. See G.S. 1-227, 1-228.
- (2) See G.S. 1-98.1 thru 1-104.

Trustee process = attachment or garnishment. Usually on the prop. is in hands of a third party.

One title is merged in a document (ins. policy, stock cert.), cases confused.

CITUS OF A RES

Gen., a res is w/o state's control where:

- (1) The res has a permanent situs elsewhere and is temp. w/in state.
- (2) Presence w/in forum state was procured by fraud.
- (3) It is in the course of interstate commerce (passing thru).

Res remains w/in juris. of State A where:

- (1) The res was fraudulently removed from State A.
- (2) The res is out of State A only temporarily.

A chose in action, if it has

a particular location, is clearly subject to juris. of that place.

Citus of a judg. debt is wherever the debtor is domiciled or wherever he may be found.

There must be service of a statute giving the ct. ^{jurisdiction} over such a res. must be existent. — Such a judg. must be given full faith and credit elsewhere.

Harris

v. Balk

(p. 23)

Harris owed Balk \$480. Balk owed Epstein (Md.) \$3000. Harris & Balk (both of N.C.) had their action in N.C., B being the P. Harris (D) set up a prior Md. judg. wh. attached the debt as a bar, alleging as defense the pmt. of the debt to Epstein. Epstein had sued Harris when Harris was temporarily in Maryland. Epstein sued out a writ of "attachment" (called foreign attachment some states) on this non-resident debtor. Harris was a garnishee in the Md. action.

Balk had actual notice because Harris was sued only a few days after the Md. action, and that is when Harris pleaded in bar the Md. judg. Sup. Ct. held Md. judg. valid and entitled to full faith and credit in N.C. (the basic issue here) and elsewhere.

Rule of Law

[Ct. held the debt followed the debtor and, could be attached or garnished even w/o service on the creditor.

A debtor would be protected from having to pay again to his creditor by the fact that the attachment action + its judg. would be entitled to full faith and credit.

If Harris had voluntarily paid Epstein, there may have been liab. upon Harris to later also pay Back. Like misdelivery.

Epstein's cpa would not merge in the Md. judg. because he could still get the remaining \$120⁰⁰ from Back so long as he could personally serve Back.

● The fed. cts. have no general original quasi-in-rem jurisdiction.

But if juris. was acquired in a state ct. and removed to fed. ct., fed. ct. retains juris.

NOTES: 10 - 11/62

See note on p. 27: Quære?

a state ct. and removed to fed. ct., fed. ct. retains juris.

● Agreed place of paymt. ^{of debt} is generally disregarded as determinative of juris over the res on the res is before the court of a state other than the one in wh agreement to make paymt. was specified.

A court may have quasi-in-rem juris over bonds on the party is not personally before the ct. 246 N.W.1 (this is on the debt is evidenced by a paper of the paper is before the ct.)

246 N.W.1

N.Y. Life v. Dunleavy
241 U.S. 518

Insurance:

Measure ins. policies?

See Hannah v. Skidman 130 N.E. 566,
230 N.Y. 326 - on ins. co.

sought to interplead conflicting claimants, that is not a proceeding in rem.

N.Y. Life Ins. Co. v. Dunleavy,

241 U.S. 518 - (N.Y. case) -

the ins. policy is not the res suff. to give a court in rem juris.

See 188 N.Y. Supp. 546, aff. 136 N.E. 227.

i.e., An action of interpleader on an ins. policy is not in rem.

⊗ The fed. cts. have no general original quasi-in rem juris.

Attachment cannot be used by fed. ct. as a means of getting juris.

However, this can be done in N.Y., N.C., D.C., Va., but the fed. cts. cannot, even in those states, initiate an action by attachment.

Rorick v. Devon Syndicate,
307 U.S. 299 (1939).

See also 229 U.S. 31 - Coal Co. Case - leading case. Commenced in fed. ct. & held that it can be no orig. juris. (w/o service) based on attachment. (Big Stone Coal Co.)

See also 245 Fed. Reporter 200

However, if juris. has been acquired by a state court and the action is removed to a fed. ct., the fed. ct. retains juris.

See Fed. Rule 64 - has been construed to mean that attachment in a fed. ct. cannot be used

as a basis of orig. juris.
in a quasi-in-rein
action.

Attachment = ancillary
remedy (supplemental) in
most jurisdictions.

See Davis v. Ensign - Bickford Co.,
139 F.2d 624 (8th Cir., 1944).

Central

Mullane, Special Guardian v. Hanover Bank & Trust Co. (p. 27)
(1950) (N.C. 36-47 to (9.S.) 36-52 - there

can be commingling of trust
funds. The Uniform Common
Trust Fund Act.

Re common trust fund
under a N.Y. statute (not
the Uniform C.T.F. Act) which
also provided for means of
service of process: service
by publication in newspapers.
N.Y. stat. said that was
adequate notice.

P was the special guard-
ian for several small
beneficiaries.

Issue: whether notice ^{by publication} of judi-
cial settlement of accounts
required by the N.Y. Banking
Law is incompatible with the
requirements of the 14th Amend.
as a basis for adjudication
depriving known persons
whose whereabouts are also
known of substantial
prop. rights?

Held, yes.

Publication alone not reas.
method of apprising known

Name Case

Ct. here says, however,
that a state can enter a
personal judgment in favor
of a trustee against non-
resident beneficiaries of a
trust even though they
are not served w/ process
in the forum state,
provided that it is ade-
quate notice to satisfy
the requirements of
due process.

parties of the pendency of
action wh may affect
their prop. rights.

On beneficiaries are unknown
may be service by
publication alone because
the state has an interest
of providing a forum for
deciding interests of its
citizens.

* Ct. said it is not ne-
cessary ^{for purposes of due process} to classify an
action as in rem or
in personam so long as
procedure of the state accords
full opportunity to appear
and be heard. (p. 306k).
— This was an import-
ant departure from the
historical classification.

Validity of statute was
upheld, however, w/ the
reasoning that it is ade-
quate provision for
notice to unknown
parties, but not as re-
known parties.

* Two questions in these
cases:
(1) Constitutional question
(2) Statutory question.

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Remember, we are dealing in this immediate area w/ juris in rem or constr. service is OKAY. The question here, then is the suffi of notice. In rem service can be by:

(1.) Publication

(a.) Includes posting

(2.) Mail

(3.) Personal service w/ the state.

This area also includes question of getting juris. w/in the substantive sense, too.

Walker v. City of Hutchinson

(p. 36)

Subjective test used here, too. The City knew of P's whereabouts, and the court here said that this notice by publication was not likely to fairly apprise P of the pendency of an action wh would affect his prop. rights. The stat. requirement, under these facts, was not due process even when complied w/.

Quere: Is publication suffi notice of a condemnation suit even where statute allows publication? — Held, no. Due process requires that an owner whose property is taken for public use must be given a hearing in deter. just compensation, and must be given "suffi notice!"

Generally, governmental agencies are held to a lower standard. 268 U.S. 276; 1934 U.S. 79. Rationale — expediency of govt. agencies in taking care of their biz in behalf of public. So, publication has been upheld as suffi notice in some cases.

Covey v. Town of Somers (1956)

351 U.S. 141 — policy change re govt. agencies. N.Y. Stat. provided ~~that~~ written notice to any

Lappager, including minors and mental incompetents, by letter of foreclosure of tax liens was suffi. Sup. Ct. said that the stat. was invalid as it applied to minors and incompetents. Here, Ct. used a SUBJECTIVE STANDARD (as in Walker Case) and looked at the particular facts. Here, city fathers knew the Lappager was a mental incompetent.

So, the Ct. is sort of tailoring the notice requirements to the particular person and facts of the case. This subjective standard of suffi. of notice is applied prior to govt. agency cases.

Covey case said that set. rules of notice will no longer be recognized, and that the suffi. of notice will be based on the particular facts.

Subjective standard used in crim. case. 342 U.S. 165.

G.S. 105-377 - re foreclosure of tax liens in N.C. Says that one is conclusively presumed to have notice by virtue of the stat. G.S. 160-219: condemnation -

nation proceedings. (These statutes have not been tested in light of Walker Case. The stats. in N.C. were enacted in 1950.)

Synthesis re
Suff. of Notice in
Govt. agency cases:

So, Mullane, Covey and Walker cases are trend toward use of subjective test of suff. of notice in cases involving governmental agencies.

NAME CASE

Hess v. Pawloski

See G.S. 1-105 = N.C.
Nonresident Motorist Stat.
(Service ^{is} Commissioner of
Motor Vehicles).

Mass. Nonresident Motorist
stat. held constitutional. (p. 39)
State has a right to
provide forum for its
citizens.

Every state has this
type of statute. N.C. 1-105 of the
G.S. (found revised in the
pocket supplement.)

Hess rationalized on the
basis of a car being a
dangerous instrumentality.

Tardeck v. Bank Line

(p. 43)
"Use of waterways" statute. Ct.
here said that the fiction of
Hess re consent to service
need not be used. (G.S. 1-107.2-
N.C. waterways statute.)

"The constitutionality of these
statutes rests on the right
of ~~that~~ a state under its
police power to protect its
citizens, and others within its
borders, by providing a forum

in which actions arising out of accidents on its highways (and waterways) may be litigated. Such statutes do not violate due process for they do not offend "traditional notions of fair play and substantial justice."

Michigan Case held that these nonresident motorist statutes do not apply to waterways. So, it must be a specific statute relating to nonresident users of the waterways.

Peters v. Robin Airlines - (see note, p. 46) - Ct. said that this stat. went too far and was invalid and unconst. insofar as applicable to accidents that occurred neither in nor over N.Y. There would be, otherwise, a violation of due process and N.Y. Const., too. Further, there were no minimum contacts as required by the International Shoe Co. Case; thus, even the barest minimum requirement was not satisfied so as to give N.Y. jurisdiction.

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Nonresident motorist stats. are within the police power of the state, but that police power does not extend beyond the terr. boundaries of the state.

Note (B), p. 47 - Pa. Nonresident Prop. Owner's Act. Realty must be located in Pa.

* Note (C) - even though I had actual notice, Ct. held that since γ was not in compliance w/ the Pa. Statute, γ was not adequate notice.

Retroactive Application of Statutes

Footnote 18, p. 47 - S.C. statute. Case said no, the statute could not be construed to have a retroactive effect unless plain words of statute require it or unless the plain implication necessitates retroactive application.

N.C. says, in accord, (98 N.C. 369, Ashville v. Brown) that the relationship between the state official who receives service and the nonresident D, is qual and that is a substantive right wh prevents retroactive application.

On statute is considered procedural, it may be retroactively applied. 236 N.Y. Supp. 381; 80 S.E. 636 (Ga. case) *

2d 44 Supp. 381
80 S.E. 636 (Ga.)

McCree v. International Ins. Co. (p. 48)

This case said that a single contract alone was suff. basis for Calif. juris.

This went beyond the "minimum contacts" rule of Inter. Shoe Co. v. Washington. (See abstract.)

Ct. was unanimous here.

357 U.S. 235 (1958) HANSON v. Denckla - 78 S.Ct. 1228 (p. 53)

Fla. ct. failed to follow Fla. law that the trustee is an indispensable party to litigation re validity of the trust. (Gen. rule, too.) The trust nor the trustee had even "minimal

This showed the Supreme Court backing away from the extreme application of juris in personam. contacts w/ Florida.

* SERVICE OF PROCESS: PROCEDURE *

A ct. always has juris to deter whether it has juris. to hear + deter the merits of the case.

Process - broadly, includes documents other than summons.

(1.) Subpoena - document ordering a person to appear at a trial.

(a.) Subpoena ad testificandum - witness must testify

(b.) Subpoena duces tecum - bring papers or documents to be used.

Commencement of action:

1. Gen. Code Rule - when there is service of process.
2. Fed. Cts. - filing a complaint.
3. N.C. - issuance of summons.
4. N.Y. - issuance of summons by P's atty.

Steps under Codes:

- (1.) Summons issued by Court. Some states allow P to issue this as simple notice. - This is service of process. Types:

- (1.) Orig. process
- (2.) Mesne process - during case. e.g., attachment.
- (3.) Final process - e.g., writ of execution (a judg. is not self-executing, so must get a writ of execution).

These summons are based on C.L. writs which alleged jris. of Court and summoned D to appear.

Writ of capias - told sheriff to physically hold D for trial and to bring him in.

At C.L. - If all writs failed, D was declared an outlaw. But, if was no default judgment at common law.

The summons today serves two purposes:

- (1.) Commences action.
- (2.) Notifies D that a proceeding has been started against him, and tells D when and where to appear.

§ 5.1-14: In N.C., an action is deemed commenced when the summons is ISSUED. Date and Time

5
McGee v. International Ins. Co. (p. 48)
355 U.S. 220, 78 S.Ct. 199 (1957)

ACTION: TO RECOVER ON A JUDGMENT.

FACTS: P's deceased Son had made ins. w/ Empire Mut. Ins. Co. Respondent (D) assumed all of Empire's ins. obligations. Respondent sent reinsurance certificate to Son in Calif. where he lived. Son later died.

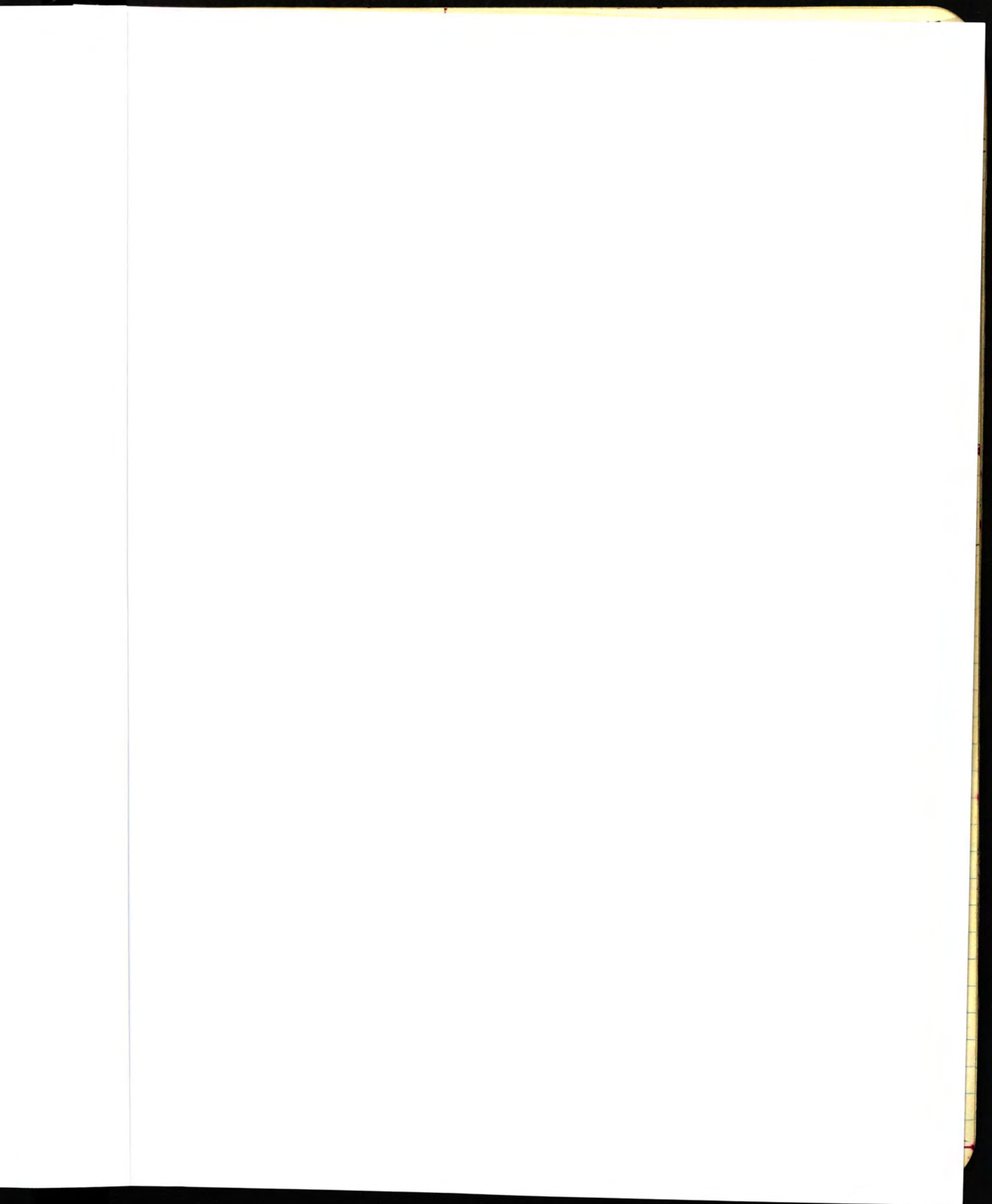
Respondent maintained no office, agents, etc., in Calif., and did no soliciting there. Premiums were sent by mail to Texas office of Respondent.

Respondent: refused to pay: Son had committed suicide. — In Calif., under stat. (providing for subjecting of foreign corps. to suit in Calif. on ins. Ks of residents of Calif. even tho' such corps. cannot be served w/ process w/in its borders), J/P. — P takes judg. to Texas: J/D because Tex. ct. said, the judg. was void for lack of due process.

Issue: Whether "due process requires only that in order to subject a D to a judg. IN PERSONAM, if he be not present w/in the territory of the forum, he have certain minimum contracts w/ it such that the maintenance of the suit does not offend traditional notions of fairplay and substantial justice?" (Later. Shoe Co. Case)

Held: YES. Calif. has a manifest interest in providing effective means of redress for its citizens + residents, when their insurers refuse to pay their claims. J/D/Rusd.

HELD: Post-K stat. did not improperly impair the Kual obligations. Stat. was purely remedial; provided Calif. forum. This suit was based on a K w/ had substantial connection w/ Calif.



In North Carolina,
issuance of summons =
commencement of action:
Cherry v. Whitehurst.

In N.C., a civil action is
commenced (only if service
by publication or personal
service on a nonresident) by
the filing of an affidavit.

are stamped on the sum-
mons. T.F. because of:

- (1) S/L
- (2) Juris. of a particular ct.
to hear case on yis
concurrent juris. The
ct. from wh the
summons ISSUED
would have juris.
on yis concurrent
juris. (Bar exam ques-
tion).

So, in N.C., issuance and
not service determines
commencement of action.
164 N.C. 125; 16 N.C. 340; - Cherry
v. Whitehurst (1939)

G.S. 1-88 - When is summons
"issued?" = G.S. 1-88.1 - after
filled out and dated, it is
signed by officer having
authority to issue sum-
mons. (old N.C. rule -
"issued" meant when sum-
mons was given to
sheriff for serving. The
law was changed to
1-88.1 in 1951).

Date summons bears
= prima facie evid. of
date of issuance, i.e.,
this is rebuttable.

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while act. may have juris. to take juris. over a particular action and parties, it will not do so at its own initiative.

In N.Y., an action under some circumstances may be begun w/o service of process. This is done by filing a proper stmt. signed by all the parties.

In N.Y., action is commenced by ~~service~~ issuance of a summons by P's Atty. See N.Y. R. Civ. Practice, Rule 45.

In N.C., see 1-89 (revised).

If major functions of summons are fulfilled re due process, then technical ~~errors~~ irregularities will not hurt it. 167 N.Y. 421 (1901).

If a summons does not fulfill the functions, it is void, not merely irregular. It would be void on basis of no juris. See. 249 N.Y. 122 at 132.

Void = juris. defect.

Gen. Rules

functions of summons = commencement of action and notice.

No name:

D's name not on face of summons & served w/o complaint even where D's name is on the back - void. 28 N.Y. Supp. 2d 266.

No address:

No address on summons but on

249 N.Y. 122

28 N.Y. Supp. 2d 266

Doctrine of Idem
Sonans
(See p. 34, infra)

accompanying complaint OK.

Misspelling of name is
curable by amendment. (167
N.Y. 421) so long as the
D is fairly apprised he is
the one intended.

So long as pleadings disclose
(187 N.Y. 262 [1907]) representa-
tive capacity, omission of
"as" not defective.

Saprin v. Friedman Hat Co.

No substitution of different
name in summons. See
91 N.Y. Supp. 2d 372 (1949). e.g.,
John L. Smith rather than
John C. Smith.

Supplemental summons
(called simply "summons"
in N.C.) may be served
on additional party. Rule 48,
R. Civ. Proc. of N.Y. — 251 N.Y.
Supp. 130 (1930).

SPECIAL PROCEEDINGS w/o SUMMONS

born under the Code on
there is only a "civil action,"
it can be SPECIAL PRO-
CEEDINGS. These are begun
same as civil actions. See
N.C. G.S. 1-394. 132 N.C.
644.

- (1.) Summons unnecessary in
confession of judgment cases
on D files affidavit
w/ ct. authorizing the ct. to
enter judgment against him in
favor of his creditor. Same as

coignovit note, See 117 N.C. 348;
143 N.C. 353. G.S. 1-247

191 N.Y. Supp. 194 - confession of
judg. for specific sum.

(2.) Controversy w/o Action (G.S. 1-
250, N.C.) - on y is no con-
test, no summons ~~of~~ ne-
cessary. This is on old facts
are agreed but y is con-
fusion re law, 120 N.C. 176

(3.) EX PARTE PROCEEDINGS - All
parties join and ask for
same relief. See 150 N.C. 261.
G.S. 1-400, 1-401.

(4.) Voluntary appearance of D -
true in all courts. See N.C.
G.S. 1-103. 160 N.C. 339 (1912).

Commencement on Dis Nonresident -

(1.) P files affidavit swearing
y can be publication and
that D cannot be found
w/in state of forum. G.S. 1-98.1,
1-104. Civil action here begins
w/ filing of affidavit.
In N.C., there must be
complaint. 228 N.C. 578.

Juris.
In Personam

No matter what commences
action, juris. in personam
is only gotten when D is served.
233 N.C. 239.

See G.S. 1-89 - re who issues
the summons. Issuance of
summons = ministerial act, and

120-176

150-261

"Volunt. appearance of D
is equivalent to
service upon him.

216-340

228-578

233 N.C. 239

1-89

a de facto clerk (a fortiori, de jure) may issue a valid summons.

Judge will take judicial notice of summons to deter. time of issuance. Can be rebutted. 1-88.1

[Summons runs in the name of the State:

N.C.
Durham Cty. } In the Superior Court

G.S. 1-64 - If P = infant w/o guardian, he will be represented by his next friend apptd. by ct.

D = infant represented by guardian ad litem. G.S. 11-65, 1-66.

All parties must be named individually.

* Partnerships - on recog. as legal entities, may sue & be sued in partnership name. Vice versa.

G.S. 1-69.1 - unincorp. associations may sue and be sued in association name, EXCEPT PARTNERSHIPS.

* Best bet - name all names of parties. This avoids situations where you may sue association or partnership & be unable to reach assets of

some members.

Corps. sued in corp. name, G.S. 55-17.

Unknown parties may be sued (in all states by stat.) as a class. These stats. are strictly construed. e.g., G.S. 46-6; 179 N.C. 14. — Ct. must have juris. of subject matter.

Fictitious
Names

If identity of party is known, but name is unknown, may use fictitious name and later amend summons when name is discovered.

Summons should be directed to the sheriff of the D's Cty. G.S. 1-89; 122 N.C. 411.

G.S. 162-14, 162-16 — re procedures of Sheriff. Art. 4, sec. 24 of N.C. Const. re sheriffs, constables.

Summons must be served by sheriff within 20 days after ~~issuance~~ ^{issuance}. If not, it must be returned to the court.

Local
v.
Transitory
Actions

If local ^{action} must be brought in that county. If transitory ^{action}, may be brought anywhere in the state.

Some states don't say that sheriff has 20 days from date of issuance, but set a

Specific return date.

G.S. 1-89: D has 30 days to answer after sheriff serves him.

In N.C., complaint is served w/ the summons. True in Fed. Cts.

N.Y. and N.C.
v.
Fed. Cts.

In N.Y. and N.C., P may request permission to extend time for filing complaint. Not true in the Fed. Cts. because action is commenced by filing a complaint.

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Elbrang v. Abernethy & Joseph
189 N.C. 278 (1925) - the purpose of C.S. 476, 479, in requiring the seal of the clerk of ct. to a summons issued to be served outside of the county, is to evd. the authenticity of the summons, and its omission from the copy alone becomes immaterial on it is in all other respects a replica of the orig. & the Ds could not have been prejudiced by the lack of information concerning the action they were called upon to defend.

Failure of clerk to sign summons not fatal provided yis some evd. in the summons that he issued it or that it came from clerk's office. 237 N.C. 707; 223 N.C. 839.

No seal necessary (G.S. 1-89) when summons is addressed to same county sheriff. If addressed out of issuing county, seal necessary.

If seal is required, but if the summons was duly issued, served and returned, it may be amended! See name case,

147 N.C. 209; also 189 N.C. 278; 211 N.C. 627, Rushing v. Ashcraft - process may be amended to justify orig. service or to validate previous action taken only when rights of third persons have not intervened. (1937)

(1908) Phillips v. Little

189-209
147-209

* SERVICE OF SUMMONS *

Must be served by the proper party, usually the sheriff.

If no sheriff,

(1) Coroner of city may serve, and summons should be addressed to him. If no regular coroner, one may be apptd. (G.S. 152-8)

(2) 1-91 of G.S. - may be issued to sheriff of adjoining county or if no county officer who can serve, P must file affidavit w/ Ct. stipulating is no city officer who can serve. See G.S. 1-90, 1-91 and 1-93.

Several Summons maybe issued indicating the same action on the D may be found in anyone of several counties.
G.S. 1-90.

G.S. 1-93 - limitations on summons issued outside of the county: cannot run outside county if the action is in K for not more than \$200, or in Tort for not more than \$500. Exceptions:

- (1) on Superior Ct. has exclusive orig. juris.
- (2) Tax cases.

Re Justice of the Peace Courts,

7-135

7-136

5/7, 1-184 - crime

See 7-135 + 7-136. Re forms of summons used, see 1-189.

Service is a jurisdictional requirement unless waived. 182 N.C. 330.

Service in another state not usually valid; except on stat. provides for service by publication outside the state, then it may be personal service w/o the state in lieu of publication. G.S. 1-104.

In personam juris. requires in-state personal service. It may be substituted personal service or allowed by statute.

If D refuses to accept service, you may tell him what it is and leave it in his presence or w/ someone in his presence. 137 N.Y. Supp. 2d 628. 80 N.C. 200.

If summons is merely bad, amend. If service is bad, it may be quashed.
See 37 N.Y. Supp. 1635.

Sunday
Service
(okay in N.C.)

In N.Y., if service is on Sunday, it is void. 25 N.Y. Supp. 2d 582 (1941).

46 N.Y. Supp. 961 - if served on Sat. maliciously to one to whom Sat. is the holy day, appears to be void in N.Y.

N.C. was in accord re Sunday service. ~~103-3~~ before 1953! Now, its okay. Gr. S. 103-3. No cases re Sat. service. However, it is assumed okay, a fortiori.

Gen.
Rule

[Service, generally, must be confined to the territorial limits of the courts juris.]

State ex rel. MS Lead v. Pearson →

208 N.C. 539 - leaving copy at usual place of abode (or home, 183 N.C. 617). not suffi for in personam juris. Copy must be given to D in N.C. and N.Y.

Delivery to some other person even if it is certain that it will get to D - invalid in N.C. Accord: 215 N.C. 640; 206 N.Y. Supp. 423.

Failure to object to service waives all rights to object thereto.

When P of State A goes into State B and sues D, P is opened up to service of process on any action arising out of the P's action. P's Atty. may be served. See 303 U.S. 59 at 67.

Return by officer of service is presumed correct, but that is rebuttable.

206 N.Y. Supp. 423

215 N.C. 640

303 U.S. 59 at 67

Alias & Pluries G.S. 1-95

1-95
1-96

Hodges v. Home Ins. Co. (1951)
of N.C. On action begun prior to the bar of the applicable S/L is dismissed for want of service of process on the D; a second action on the same C/P commenced w/in 12 mos. after the dismissal, but after tolling of S/L, is **BARRED**. (2) One P, who has commenced his action prior to the bar of the S/L, fails to obtain valid service upon D, he is required to sue out **ALIAS or PLURIES** summons if he desires to prevent a discontinuance.

as to such party; and if a summons is served after a break in the chain, it is a new action as to such party begun when the summons was issued." G.S. 1-96. Under this section, discontinuance occurs only when the summons has not been served.

If orig. summons is returned unexecuted, should have several alias summonses issued. If they are returned unexecuted, the original date will continue so long as you keep the orig. summons alive by a **PLEURIES** summons. (G.S. 1-95). G.S. 1-96 - "penalties" for failure to keep summons alive; discontinuance. Also, in N.C. you may keep summons alive by subsequently endorsing anew the summons.

233 N.C. 289 - re discontinuance under G.S. 1-96. P sued in K one week before tolling of S/L. P failed to make out a case. - P now has one year w/in wh to institute a new action under the "new action statute" (G.S. 1-25). This all presupposes proper service w/o wh y never was any action begun.

Read re publication, service on corps, substituted service.

DISCONTINUANCE - a failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party begun when the summons was issued." G.S. 1-96. Under this section, discontinuance occurs only when the summons has not been served.

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* Service on certain classes *

Infants G.S. 1-97.2 s.g. service on infants. If over 14 yrs old, service is by delivery to the infant of a copy. If under 14, copies to the infant and a parent or guardian or one standing in loco parentis. In N.Y., if 14, copies to infant and parent, etc. In N.Y., if under 14, same as N.C. May serve a copy on the infant's employer. In 1958 1-97.2 was amended to say that if under 14, need not serve copy on infant provided that guardian or parent is served.

Insane: service on guardian and the insane.

If Supt. of asylum says D could not be served w/o harm to him, no service required. 1-97.3. Same for jailed insane.

On D is not confined, service may be postponed upon a physician's declaration of possible harm. 1-94. See 223/273.

* Service on Corps *

G.S. 55-17 - corp. should be named (171 N.C. 113) by the corp. name.

225.371

225.2

223/273

Re public corps. N.C. stat. does not name a specific person (129/281) upon whom service may be made.

Private Corps:

1. Domestic Corps. - 55-13 requires maintenance of a registered office by dom. corp. - Also, must be a registered agent.

Corps. pre-1957 - must have at least registered agent. After 7-1-1957, G.S. 55-7 required registered office and registered agent.

55-14: procedure for changing reg. officer & reg. agent.

55-15 - procedure for service of any process, notice, or demand on dom. Corp. Sub. A - service on officer of corp. binding on Corp. Subsec. B - if corp. has no reg. agent, the Sec. of State is deemed an agent for service of process.

Sheriff need only search for reg. agent at reg. office. If unfound, may serve Sec. of State.

The Sec. of State must send copies of summons and complaint to reg. agent. From the time Sec. of State is served, the Corp. is deemed "in Court" for

May also serve
Secy. of Corp. Dept.
of the Office of
Secy. of State.

all purposes. - Quaere?

(2) Foreign (Alien) Corps. - G.S.
55-143 Same as dom. corp.
 re reg. agent & office & sub-
 stitute service of Secy. of State.
 To get a Cert. of Author.
 to transact biz, foreign corp.
 must sign Consent pledge for
 service on Secy. on required.

220/815 (1952) ; 225/733 (1945) -
 the holdings here are
 changed by 55-143 (c) wh
 allows substituted service on corps.
in transitory c/a.

55-146 - Sheriff serves Secy.
 of State. Unlike dom. corp.,
 if is no provision for service
 on the Secy. of the Corp. Dept.
of the Office of Secy. of State.

G.S. 1-97 - general rules re
 service on any party & in
 all cases.

[It has been held that the
 N.C. stats. are cumulative
 and any one or more
 may be considered and
 used to get juris of a corp.]

Nonresident Directors of Dom. Corp.

In personam actions here
 (for e.g. fraud, misuse of
 corp. funds). Now, it can
 be service on the nonresident
 directors w/o personal service.

* Service By Publication *

This may be done in actions in rem and quasi in rem and in personam. By statute.

G.S. 1-98 - procedure required.

G.S. 1-98(2) - types of actions on this service can be used.

These stats. are in derogation of the C.L. and must be strictly construed.

In quasi in rem actions, it must also have juris. over the res, and attachment must be made at outset of action. Pennoyer v. Neff.

If a D who is a resident of N.C. leaves the state to defraud creditors, or avoid service of process, may be juris. in personam by publication. (This type of statute was held constitutional in Milliken v. Meyer.)

Also applies on the resident who secretes himself w/in the State of N.C. — This whole section is a new departure in the law. Most states have this type.

Application to the court must be made for publication...

(1) By sworn affidavit showing:

(a) C/a

(b) D cannot be found w/in the state after

- due diligence.
- (c.) D has prop. in state or is proper party to the action.
- (d.) That one of the following exists:
- (1.) D is for. corp. w/ local prop., or chartered by state.
 - (2.) D = nonres. w/ local prop or Ct. has juris.
 - (3.) ~~nonres~~ D = nonres who left state to defraud creditors, or
 - (4.) Subject matter is w/in juris. of Ct. w/o requirement of local prop. (e.g., annulment, adoption, divorce), or
 - (5.) Ds = unknown interested parties.
- (2.) Or by verified complaint.

is strict construction of these stats.

If some minor defect of form is extant in one of these affidavits, or applications etc., amendment will usually be allowed.

After these requirements, judge may (G.S. 1-99) at his election order pub. or service on D w/o the state.

See also 1-597.

Service by publication allowed served seven days after last pub. G.S. 1-100. There must

be continuous publication for four weeks.

D has 30 days after 7 days after last pub. to answer. 1-25.

D may defend, upon sufficient cause shown, at any time after service by publication. 1-108.

D may defend upon 8th year after judg. and within five years after revocation of judg. 1-108.

This applies only on y was service by publication, and the reason is that concessions should be made because publication is the least likely method of notifying a D.

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In N.Y., P must submit a verified complaint (sec. 232(A) of N.Y. Civil Practice Act) and an affidavit before the court will allow service by publication.

Service by pub. ^{on a nonresident} can only be gotten by in actions

(1) In Rem

(2) Quasi in rem.

Per statute, y can be juris. in personam, based on publication, over a RESIDENT in some cases. G.S. 1-98.

The affidavit must show the D's prop. has been levied upon by a warrant for

attachment.

Because I may never really see the newspaper ad, I must swear under oath in the affidavit the truth of all allegations of the complaint.

In service by publication, notice by mail is required ALSO in N.Y. See Rules Civ. Prac. 52. The newspapers which can be used and the requirement of 6 consecutive weeks are set out in N.Y. R.C.P. 51. I must make affidavits of mailing notice and actual publication from the newspaper, N.Y. R.C.P. 53.

Service Outside of the forum State:

If service is made personally w/o the State on D, it must be made w/ an order (V.C.), or in N.Y. w/ or w/o an order, and must be made in same manner as personal service w/in the State. This is service in lieu of publication and can be used only on " " could be used.

On D is domiciled w/in the State but personally served w/o the State, in all cases it is juris in personam. But if D is not domiciled w/in the state and is served w/o the state, it can only be in rem or quasi in rem juris, and D's prop. must be attached at the commencement of the action.

* VENUE *

Venue means the place of trial. Under fed. law, it's the district.

This refers to geographical location of trial.

A venue stat. is not a qualification upon the power of a Ct. to adjudicate, but a limitation designed for the convenience of litigants and, as such, may be waived by them.

Orig., venue meant the neighborhood from which the jurors, who were familiar w/ the facts, came. Thus, at C.C., all actions were local and were no transitory, c/a. This was "fact venue."

Later & developed "venue of the margin" by wh transitory actions were brought in a place on the c/a occurred.

Today, on the whole the action need not be brought necessarily on the facts occurred.

Venue, being a matter of procedure, is governed by the forum on the action is sought to be enforced.

Generally, a court has venue but it has juris. over the D.

Statutes of venue are generally construed to favor D.

Venue v. Juris
Jurisdiction (168 U.S. 437) - The

of the subj. matter
jurisdiction cannot be conferred on a court by the parties unless otherwise present.
Venue can be conferred by the parties by agreement or failure to object to venue.

power to adjudicate on the merits.
Venue - the place of trial. This can be conferred by agreement of parties.

Generally, the action must be brought on the D resides unless exceptions require the action to be brought

- (1) On the c/a arose, or
- (2) On the land is situate.
- (3) On the parties otherwise agreed.

Transitory Actions

K actions - K actions generally are transitory, 250 N.C. 106; 9 S.E. 2d 454; G.S. 1-82, and, absent stat. to the contrary, must be brought on D resides or is summoned. This is true regardless of:

- (1) where K was made.
- (2) On it (K) is to be performed.
- (3) whether K concerns realty.

Under some statutes, K actions may be brought on c/a arose; under some states, on breached; under some, on supposed to be performed. See 89 N.Y. Supp. 2d 307.

California (273 P.2d 1) says the venue depends on where K was made.

Tort actions - generally considered transitory and may be brought anywhere it has juris. But, freight Quaere clausum fregit must be brought on land is. 207/144. See also 251/812.

62 p. 64
1960, 1961
273 P.2d 1

207/144
251/812

Local Actions

to land

148/375

Title (215/649) must be directly affected for the action to be local. But, if title is only incidentally involved, not usually, (249 S.W. 2d 642) considered local.

Actions to recover (66 N.Y. Supp. 931) poss. of land = local.

Some Local actions:

- (1) 143 S.W. 2d = to recover mineral rights.
- (2) To try title (164 S.E. 73).
- (3) Forcible entry & detainer.
- (4) Foreclosure of mortgage or other liens, 205/533. The lien may be merely equitable. Lien must (10 S.E. 2d 555) exist at beginning of action.
- (5) 46 N.Y. Supp. 2d 370 - enforcement of mechanics lien. But see 184/494 for exception.
- (6) Declaratory actions (194 S.E. 10) re land and trees, crops (245 S.W. 2d 577) grass (254 P. 1054), negligent (153/117) burning of trees. But, if action (130 S.W. 538) is for value of timber taken, it is transitory.

TEST

The test of local actions is whether title to land is directly affected by the action.

Unexecuted
v.
Executed
K for transfer
of land:

Actions for rescission (18 S.W. 235) of ^{unexecuted} trans-
fer of land Ks gen. considered transitory.
action to rescind executed K for
sale of land and recover amts.
paid is a local action.

Actions (162 S. 356; 83 S.E. 2d 593 (Ga.)) for spec. perf. of K = transitory.

Removal of cloud over title = local.

Injunctions - whether these (198 N.C. 701) are local or transitory (216/240) (141 Ed. 674 - to restrain trespass) depends on what is sought to be achieved by the injunctions.

See 223/375; 190/474. Bankruptcy; preference of creditors: 227/230.

Liens on Personality

Foreclosure of lien or charge on (171/165) personality: local & must be brought on the personality is located.

See 24 N.Y. Supp. 2d 79 (corps.); 2 N.E. 154 (foreign corps. & agents of foreign corp.); 47 N.Y. Supp. 2d 861.

See G.S. 1-76 — 1-87.1; cases in cbk. thru p. 94.

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Venue

(1) Local Actions - usually based on:

- (a) On subj. matter of suit located, or...
- (b) On c/a arose

(2) Transitory Actions - usually based on:

- (a) Residence

JURISDICTION

V.
VENUE

Parties can neither confer nor deny subj. matter juris. of a court, but they may be able to affect the juris. of a ct. over parties.

Parties can confer venue because failure of Ds to object to venue = waiver of the right to object.

TEST OF
Local Actions

If an action (183/318) ^{significantly} involves or directly affects title to realty or to personality, it's usually local. Neutral test is direct affect on title. 216/240.

Venue is based on statute.

180/245 - sale of land w/ contingent interests = local action.

Money Dams.
for Injury to
Land:
Generally local.

Action for dams. for injury to land generally held to be local even though the P seeks money damages. But, yes a trend away from this rule.

Theory of
Action:

To some extent, the classification of an action for venue purposes depends upon the theory of his (P's) action. E.g., one wrongful act may give rise to trespass q. c. f.; in tort for conversion (transitory) for value of the timber; tres. D.B.A. (transitory); action in K for assumpsit for money had and recd. (only the timber was sold by) - transitory. Assume wrongful act was the cutting of timber.

Partition (g.s. 1-76(2); 46-2) proceedings are local.

Personal rep. or admn'r. who sells land or timber for proceeds = local. Same for selling to satis. creditors.

Action by Mtgee. to foreclose - 206/104 - local action.

To enforce (129/50) lien v. realty - local. Same (227/230) for personalty.

Transitory Actions Re Realty -

- (1) Action to set aside judg. wth const. a lien on the property. 192/148.
- (2) Actions for dams. for deficiency of acreage conveyed 176/473.
- (3) Action for br/covenant in a deed. 136/392.
- (4) To recover on a note (206/104) even on a deed of trust on land.
- (5) To get declaratory judg. for extension of time to cut timber under K. 215/649.

Transitory Actions Re Personality

- (1) To recover on a debt secured (273/375) by personality.
- (2) To set aside (207/144) fraudulent transfer of personality.

(3) For penalty for forfeiture.
108/164.

● Action v. public officer must be brought on the law was empowered (218/597) to act.
222/176. G.S. 1-77

Actions v. Counties, cities & towns not specifically covered by statute, but (233/546) usually covered by the statute re public officers. General rule same as public officers: must bring action at situs of town, city, etc.

1-78

G.S. 1-78 - actions v. sureties on their bonds must be brought on the arose.

actions (G.S. 44-14) on K's bond must be brought on the construction takes place.

Transitory actions usually based on the residence of the D.

* Domicile of H controls that of (187/840) wife except:

- (1) In divorce cases on wife estab. separate residence (222/556; G.S. 50-3).
- (2) Actions involving alimony, 219/765; G.S. 50-16. Can be brought anywhere any party resides.

Domicile of child is that of parents or guardian.

* In all actions not governed by some (211/523) special statutory provision, venue is based on residence of the parties.

If all parties are non-residents (1-82; 216/240; 1-87d) of N.C., P may bring action wherever he wishes w/in N.C.

On P is resident of N.C. but Ds are nonresidents, may sue on any P resides. G.S. 1-82.

Actions v. fiduciaries may be brought on they qualified as fiduciaries. 1-78.

170/424 - actions v. executors or administrators may be brought on either P or admin (or executor) resides.

212/543 (1937) - actions by admins or executors may be brought on they or P reside even if that is not the county or admin qualified.

Re Domestic Corps.

Residence of corp. is on registered (1-79) or local office is located. (Re foreign corps 1-80.)

1-82

1-78

233/546

Actions v. RRs. - G.S. 1-81. This (153/117) does not affect local actions re land v. RRs, because they must still be brought on the land is.

Hardenburgh v. Id.

(p. 65)

K here for sale of an interest in a business in Missoula City. Missoula was on the K was to be performed, but the other city was on the P's resided.

Gen. Rule

[Ct. said that actions, ^{generally} must be tried in the county on D resides at commencement of the action. This is the general rule based on the Montana Stat. So, if P wants to bring action elsewhere, P must show that fits into an exception. (*) On K sued upon specific ^{plaint} action may be brought other than D's place of residence, it may be so brought.

Here, Ct. said the K did not clearly show that action may be brought other than on D resided at commencement of action, Missoula County.

So, we must look closely at all venue stats.

In the absence of an express stipulation or of facts and circumstances showing that the parties intended perf. of a K to be elsewhere, the place of perf. is deemed to be the place on the K was made.

① Actions on K MAY be tried in the city in which the K was to be performed provided that the K sued upon indicates either in terms or by express implication therefrom a particular city in which it was to be performed other than the county in which D may reside at the commencement of the action.

Can a P object to venue? NO: right to object has been waived.

25 OCT. 62

Olberding v. Ill. Cent. R. Co.

(p. 77)

P = Ill. resident.

D = Indiana resident

Case in Ky. fed. dist. ct. on basis of diversity of citizenship. (At the time of this case, however, y was a stat. (28 U.S.C.A. §1391(c))
 coh made a corp. a resident of the state of charter or any state in which it is doing biz. But, this question was not raised by any party, so the question was ignored.)

Issue here was whether implied "consent" to service under a nonresident motorist statute constituted consent (by D) to be sued in a state on neither P nor D was a resident? **HELD, No.** Actual consent is required for waiver of venue objections.

217/443- a nonresident P may take advantage of the nonresident motorist statutes. These statutes apply to aliens, and fed. ~~statutes~~ by virtue of Fed. Rule 4(d)(7), may avail themselves of these statutes.

A D (28 U.S.C. 1406(a)) objecting to venue may:

- (1) Have action dismissed, or
- (2) Transfer the action to a dist. on venue would have been proper in the first place.

4(d)(7)

Under fed. rules, venue is proper on all the Ps or all the Ds reside. So, it is conceivable that suit could not be brought in a fed. ct. unless venue is waived: This is on Ds are residents of different states.

This case limited the doctrine of the Neirbo case (Neirbo Co. v. Bethlehem Corp., 308 U.S. 165) which held that "actual consent" to be served = consent to venue. However, in Neirbo, the corp. had an agent for service of process, and Alberding case held that was actual consent, whereby consent under nonresident motorist stats. is only implied and \neq consent to venue.

Dams, Actions
for Injuries to
Foreign Land

MIN. VIEW

MAJ. VIEW

Reason - Hill Corp. v. Harrison (p. 80)

This represents the minority view to the effect that the Ark. ~~case~~ ct. could entertain an action for dams. to realty in Mo. Ct. said that otherwise, I would have a right of remedy.

The majority upholds that actions to recover dams. for injuries to realty are local actions, and must be brought in the land is situated. Livingston v. Jefferson (Marshall, J.).

⊗ Minnesota, Ark., N.Y. and La. are the four states which follow the minority view.

Notes (p. 86)

Although equity cts. may have juris. in one sense and have the power to prevent a D from doing acts w/o the state or to do so. w/o the state, it might still be improper for the ct. to do so.
Adney v. Colebrook Guaranty Sav. Bank.

Gulf Oil Corp. v. Gilbert

(p. 87)

Doctrine of Forum Non Conveniens

Forum non conveniens - a ct. may resist imposition upon its juris. even when juris. is authorized by the letter of the venue law.

There is proper venue, but y is, also, alternative proper venue wh would be better for all concerned.

not all states follow this doctrine.

Factors considered in applying F.N.C. -

1) Private interest of the litigant

2) Relative ease of access to sources of proof.

3) availability of compulsory process for attendance of unwilling witnesses.

4) Cost of obtaining attendance of willing witnesses.

5) Possibility of view.

6) Enforceability of a judgment if one is obtained.

7) Relative advantages and obstacles to fair trial.

26 OCT. 62

Gulf Oil Corp. case = first formal recognition by U.S. Sup. Ct. of the doctrine of F.N.C.

Doctrine of F.N.C. - presupposes at least two forums in wh the D is amenable to process. The criteria are set out on p. 88 and p. 89. (LIST THE CRITERIA)

P argued that he could get a bigger judgment in N.Y. This argument met w/ disdain; but as a practical matter y are some "plaintiff jurisdictions," e.g., N.Y., Ill., Mass.

82

The P may not, by choice of an inconvenient forum, vex, harass or oppress the D by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.

But, unless the balance is strongly in favor of D, the P's choice of forum should rarely be disturbed.

Bases for invoking F.N.C.

- (1) One party's choice of forum is vexatious + oppressive to the other party (D). This was found in Gulf Oil Corp. case.
- (2) The tribunal itself is ill-fitted to deal justly w/ the legal + administrative matters involved.

Purposes of doctrine:

- (1) Protection of ~~party~~ party from trial in inconvenient + foreign cts.
- (2) Protection of ct. from cluttering their docket.

F.N.C. often invoked on a foreign corp. is involved on ground that the ct. does not feel equipped to deal w/ the internal affairs of the corp. This is in a class by itself: in generis, 288 U.S. 123. This is under basis #2.

Foreign torts are frequently refused by many states on both parties are foreign.

285 U.S. 413 - refusal of admiralty cases in fed. cts.

Refusal by fed. cts. of matters (319 U.S. 315) (284 U.S. 521) re state activities most frequent.

Fed cts. cannot refuse merely for their own convenience.
But, state cts. can.

Basis #1, ^{most} often used in suits in equity and seldom in actions at law.

28 U.S.C. § 1404(a) - Transfer Statute.

29 N.C.L.R. 61 - Doctrine of F.C.N. not recognized in N.C. Some states that don't recog. F.C.N. have "convenience of witnesses and ends of justice" statutes of venue (G.S. 1-83) wh serve the same purpose. Some states w/ F.N.C. have these "C. of W. & E. of S." stats. too (e.g., Minn. and N.Y.)

37 N.Y. Supp. 2d 201 - decision of trial judge to grant change of venue will not be upset on appeal w/o clear showing of abuse of discretion. 170 N.C. 224.

Procedure in Removal as matter of right:

- (1) 201/39 - must make separate motion for change of venue. Denial not suffi.
- (2) Pleading by answer = waiver of venue.

If venue is improper, ct. must remove upon motion by the party.

- (3) Demand in writing, apart from answer & w/in time.

179/224

- (4) Cannot be included in motion for dismissal for want of *juris*.
- (5) Made before clerk, then before judge in chambers.
- (6) 10 days notice to other party.
- (7) If may be appeal from judge's decision.
- (8) Motion automatically extends time to answer complaint 30 days.

* In N.C. and objects to venue, D must set out in his motion a proper county to ~~which~~ he wishes removal.

By bringing action in a court, the P has been deemed to have waived his objection to venue. This is true even if P wishes removal because of alleged inability to get a fair trial.

(SEC. 2)

IMMUNITY

State ex rel. Swinkley v. Duffield (p. 94)

General
Rule
of
Immunity

a party to a civil action and witnesses are immune from service of process re another action while on the case. Applies to Ps and Ds.

General
Rule

The doctrine of immunity is an exception to the general rule that a person who is a state is subject to *juris* of that state's courts whether temporarily and merely

Min. View RE
Immunity of
Plaintiffs

passing thru. 157 N.Y. Supp. 2d 90.

Substantial minority (253 P.2d 25) says immunity does not apply to Ps because they are voluntary. Contract w/ author - 242 U.S. 128.

242 45.128

Immunity attaches during travel to ct. and after, while leaving, for a reas. time.

Extends to other matters, e.g., hearing for deposition. Does not extend to meetings w/ counsel. 82 S.E. 576 (Ga.)

82 S.E. 576

285 U.S. 222 - 118 A. 2d 884 (N.H.) - both denied this privilege to attys.

Legislation, so far, provides for protection of Ds and witnesses per uniform act, adopted by N.C.

Fed. cts. follow law of state of forum. Erie v. Tompkins; and 81 F. Supp. 971.

81 F. Supp. 971
205 U.S. 349 (1907)
309 U.S. 495 (1940)

Fed. immunity (except K & tort) - 205 U.S. 349 (1907); 309 U.S. 495 (1940).

State immunity - 11th Amend. of U.S. Const.

108 F. 2d 101

(108 F. 2d 101) - aliens may sue U.S.

Greeks, Italians & Philipinos may sue U.S. by virtue of treaties.

In N.C., G.S. 15-79, a D in a crim. proceeding is not immune unless he comes into state under waiver of extradition but the immunity is ltd. (229/490; 228/440) to matters growing out of the same action in wh he is involved. (See 122/784 re gen. doctrine of immunity. 246/114, Shrush v. Id.)

Some cts. extend this privilege to attys. only ~~on~~ while they are actually engaged in trial. Otherwise, attys. are not generally immune.

29 OCT. 62

The issue in the Sivinsky Case was

whether a nonresident confined in jail on a crim. charge is subject to service of civil process on he was voluntarily in the juris. of the court at the time of arrest and confinement. **Held, yes.**

(p. 100)

Zumsteg v. American Food Club

A corp. agent for service of process in State X, also an atty., voluntarily accompanied the corp. Pres. into State of Ohio on the Pres. had been subpoenaed for a deposition. Zumsteg, the agent and atty., was not acting as atty. for the Pres., but went to Ohio in his capacity as agent. D served process on Zumsteg while in Ohio on this matter.

Ohio statute exempted "attys." et al from arrest (!) "while going to, attending, or returning from court", but another stat. plainly ltd. the applicability of the arrest exemption stat. by providing that it "does not privilege any person specified in such section(s) from being served w/ a summons or notice to appear."

Ct. held that the agent was legally served by this D. and that the ct. saw "no reason for indulging in a sophistry that would enlarge the privilege beyond the purpose for which it was founded."

Reason for
the
Immunity

"The privilege arises out of the authority and dignity of the court, it is founded on the necessities of judicial administration, it has for its primal object the protection of the court and not the immunity of the person, and is extended or withheld only as judicial necessities require."

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On service is gotten by artifice and deception, ct. usually uphold this, except on D was induced to come into the state by the fraud. 185/534. * The Ct. have juris. in the power sense, but don't exer. it in this area.

Cannot break into house to serve process. Can go into Eq. + have judg. set aside.

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(SEC. 4) OBJECTING TO IMPROPER SERVICE:THE PROCEDURES AND THEIR EFFECT.Swartzwelder v. Freeport Coal Co. (p. 104)

Plea in abatement suspends the proceeding and does not go to the merits of P's claim. It objects to the procedure of something of P's claim. It may be an objection to the time, place or mode of assertion of P's claim. Allows action to proceed again in a more proper place, or at a more proper time, or in a more proper way.

This plea has been abolished in N.C., but still you are motions in N.C. which are in nature of the plea in abatement. This plea was in common law. Most code states don't have this plea and provide rather for certain motions in the nature of a plea in abatement.

Plea in Bar — goes to the merits and can stop and bar forever P's claim, e.g., S/L; contributory negligence.

Verity Rule

Only nine states follow C.L. Verity rule w/ the proviso that impeachment can be made on fraud or collusion can be shown. (Mass., N.H., Vt., Ala., Va., et al.)

In a "verity" rule state, D's recourse would be v. the sheriff on his bond for false return.

Majority rule denies verity rule, and allows inquiry into defects of the service, papers, etc.

Proof

Generally, the quality of proof required to rebut the presumption of regularity is higher than "mere preponderance."

What quality of proof is required on return of process is attacked? = In (210/493) N.C., "clear and unequivocal proof." Remember, γ is a presumption of regularity wh must be rebutted by D. 1-89, 162-14 = manner of return. 108/264. 223/724. 162-16 - coroner may mail return. 1-592; 113/249.

No signature by sheriff ^{correction} return will be allowed at trial nunc pro tunc (now for then).

Fees must be paid in cash in advance. 65/48 - but failure to pay fees will not excuse return on service was made w/o fees paid.

GENERAL AND SPECIAL APPEARANCES

YORK V. TEXAS

(P. 110)

Re: Appearance for purpose of raising objection to jurisdiction, service or process.

Texas statutes here did not allow for special appearances, and held that appearance for any purpose = general appearance.

P. has alternatives:

- (1) Appearance of amicus curiae.
- (2) Suffer default judg., and attack validity of judg. in collateral proceedings.

Name case upholding constitutionality of statutes wh abolish special appearances.

223/490.
223/502.

Swartzwelder v. Freeport Coal Co. (p. 104)
131 W. Va. 276, 46 S.E. 2d 813 (1948)

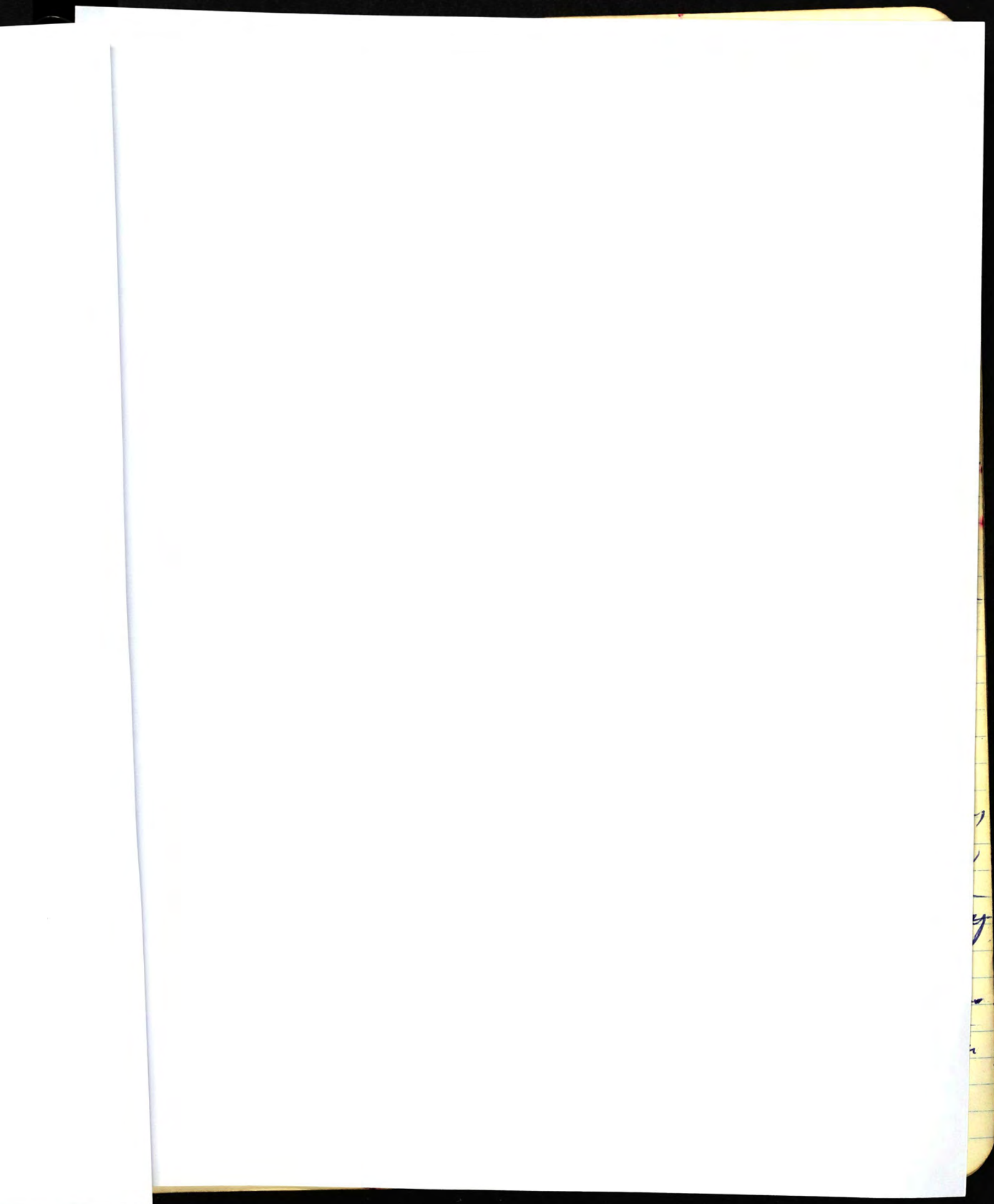
Action: To enforce vendor's lien.

Facts: D filed plea in abatement to P's complaint, saying that P did not execute the process by serving a copy of it to R. Hugh ~~Harvis~~ Jarvis, Pres. of the corp., and that the sheriff's return, stating he had done so, was false. P demurred (see reasons on Page 105).

Issue: Whether a plea in abatement which fails to show a just defense and that D was up to notice of the pendency of the suit or action, raises an issue of fact as to the truth of a sheriff's return on process.

Held: Yes. J/D and remanded. A timely attack on an officer's return may be made by plea in abatement, and it may not be assumed henceforth that a return of process by a public officer is beyond attack.

DISSENT: Pub. pol. requires, for stability of judicial proceedings, that the return of the sworn officer stand. A D should not be allowed to delay judg. w/o even having to state he has a defense + what that defense is.



1-B4H
12(b) FRCP

Quaere: What = gen. appearance? = If appearance involves in any way the merits of the case, all defects in service of process are deemed waived.

In N.C., you need not make an appearance designated "special", and may raise objection to juris. this may be done before or simultaneously w/ another motion that goes to the merits. BUT, motion before objection to juris. ^{of the parties} ~~waives~~ " " that service. G.S. 1-134.1. F.R.C.P. 12(b).

An immediate appeal may be taken, or an exception may be taken and preserved for appeal on the cause.

Never waived (G.S. 1-134):

- (1) Objection to juris. of Ct over subj. matter
- (2) " that P's claim fails to state a c/p.

Few states are as liberal as N.C., but most states allow for special or general appearances.

G.S. 1-103

In N.C., gen. appearance = submission to juris. of Ct. for all purposes and is may be in lieu of service of process. G.S. 1-103. Most majority of states in accord.

An objection to the court's juris. of the subject matter is never waived because a party cannot confer this type of juris. on a court in the first place. Statute usually decides what courts will hear what matters.

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Gen. appearance waives all objections to juris. over the person.

Exceptions: Fed. cts., N.C., Fla., Ariz., and a few more. See F.R.C.P. 12 (b)(2).

In the maj of states (other than those following Fed. rules, i.e.), the motion should not go to the merits because that may = gen. appearance.

Generally, on motion like 12 (b)(2) (N.Y. C.P.A. § 237(a)) is overruled, may still bring it up later for appeal.

*(N.Y.) Ways of making general appearance:

- (1) By serving notice of appearance.
- (2) " " Copy of answer.
93 N.Y. Supp. 2d 586 - true even on answer does not set up defense and goes only to juris. of ct. overperson.
- (3) By serving notice of motion wh raises question of law. Does not apply to corrective motions (e.g., more definite stat.). 205 N.Y. Supp. 949 (1924).
- (4) By participation on the merits. Mere fact that (223 N.Y. Supp. 191)

D says he appears only for special matters, ct. may treat it as a general appearance despite what D calls it.

Purposes of special appearance in N.Y.:

- (1) To raise question of juris of person.
- (2) To raise question (187 N.Y. Supp. 2d 798) of juris over subj. matter, set aside attachment.
- (3) 354 U.S. 416 (1957) - to question juris of status.

N.Y. ways to attack during sp. appear.

- (1) To set aside service as improper.
- (2) To strike the in personam part of complaint. 150 N.Y. Supp. 2d 482.

Objection to juris of person may be joined w/ objection to juris of subj. matter and not waived thereby.

In N.C., in addition to the two N.Y. ways to raise objections a motion to dismiss may be used. Also, answer + demurrer.

* In N.Y., raising objections by means other than the two ways set out = general appearance.

* N.Y. and fed. cts. don't use demurrer. N.C. does use demurrer extensively.

(p. 113.)

Ozaukee Finance Co. v. Cedarburg Lumber Co.

Remember that a judg. rendered v. someone over whom it has no juris. is void and may be attacked several ways. (e.g.)

collateral attack, equity,

Very narrow view of what constitutes a gen. appearance.

Yaffe v. Bank of Chelsea

(p. 116)

D recog. power of ct. to grant all of these motions, and that = gen. app.

C.S. Foreman Co. v. H.B. Zachry Co.

(p. 118)

Note, by filing a cc = submission to juris. on no objection to juris. is joined w/ the cc. Thus, whether compulsory or permissive does not matter so long as it is an accompanying objection to juris.

Note (B), p. 120

Both should be joined in the same motion. See 12(g).

Case held the motion could be amended to include lack of juris. as ground for dismissal. However, ct. held that it looks w/ disfavor upon such motions to amend.

State ex rel Eli Lilly Co. v. Shields

(p. 120)

Generally, ^{everywhere} interlocutory appeals cannot be taken (except as provided specifically by statute).

N.C. allows (1-134.1) interlocutory appeals from juris. rulings only.

General policy v. piece-meal appeals: waste of time, money.

Ozaukee Finance Co. v. Cedarburg Lumber Co.
268 Wis. 2d, 66 N.W.2d 686 (1954) (p. 113)

Action: ex contractu.

Facts: P v. D on cognovit note w/o service on D.

J/P. D moves, by alleged special appearance of his atty., to vacate and set aside the judgment and to dismiss the proceedings on ground that y was no service of process upon him or in any way authorized by law. P contends that when D made his motion he waived all defects in service and made a general appearance. Motion was denied. D appealed.

Issue: whether, in a special appearance juris, such a motion constitutes a gen. appearance and a consequential waiver of right to object to service of process?

Holding: Yes. J/P/aff. In making such a motion, the D assumes that the court has juris. to correct errors and irregularities in the rendition of the judgment. Having submitted to the juris to obtain that relief, it amounted to a waiver of all defects in the service of process. And, this is so in spite of the fact that the motion recited that it was made only for the purpose of the motion as is the case here.

DISSENT: majority holding has the effect of doing away w/ special appearances in Wis. - On some stat. is made incidental to and consistent w/ the relief sought by sp. appar., should be called sp. appar. on the intention so to do is apparent.

Later, Wis. statute agreed.

C. Foreman Co. v. H. B. Zachry Co. (p. 118)
127 F. Supp. 901 (W.D. Mo. 1955)

Action: On a garnishment.

Facts: D answered P's complaint and, also, moved against juris. of the ct. Garnishee seeks by motion to be released and discharged as garnishee, contending that D's answer = wavier of gen. appearance, and that P has not complied w/ Mo. statute by filing attachment bond w/in 10 days after D's answer, and, therefore, the attachment is "dissolved" as of course.

Issue: Whether an answer to the merits coupled w/ a motion challenging the ct's juris constitutes a general appearance w/in the meaning of Rule 12(b)?

Holding: No. Motion of garnishee denied.

Under Rule 12(b) F.R.C.P., a party must assert all his defenses in his responsive pleading, if one is required, but he may raise, by motion, any one or more of the seven defenses enumerated.

Special appearances, under federal law, neither gain nor lose anything and are unnecessary, and a D who has challenged juris either by motion, or by answer, or both, does not waive personal juris, even though the answer pleads, as it must, to the merits.

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Yaffe v. Bank of Chelsea
271 P.2d 365 (1954 OKla.)

p. 116

Action: on a promissory note for \$5000.00.

Facts: P v. D in OKla. ct. and does not serve D personally w/ summons. D ≠ resident of OKla. D filed special plea objecting to juris of his person and of the prop. D had previously filed petition of reclamation w/ referee in bankruptcy, got it, but never called for it, so it remained in poss. of trustee in bankruptcy, and exceptions saved.
— Special plea denied. Then D filed motion to strike: overruled; motion to make more definite and certain, and a gen. and special demurrer: ct. had no juris of person nor subject matter; motion for joinder of indispensable parties; motion to dismiss for failure of P's complaint to state a c/p. None of these was passed on by the ct, except motion for joinder of indisp. parties: denied.
Then, D answered. J/P. D appealed from denial of his special plea.

Issue: Whether making of the motions (above) by D = general appearance and waiver of defects in service of process?

Held: yes. J/P/Affirmed
Generally held that a subsequent plea to the merits does not serve to enter a gen. appearance or one does not ask for affirmative relief. However, although D answered w/o a request for affirmative relief, the many motions (additional parties, juris over D's person and the prop.) and demurrers were "suffi to enter his gen. appearance."

(D) State ex rel. Eli Lilly & Co. v. Shields (P) p. 120

Action: For damages.

Facts: D filed a sp. appearance on grounds of lack/juris over its person, insuffi of process + insuffi of service of process. Motion was denied. D sought writ of prohibition. Rule nisi in prohibition was issued. Fla. stat. like 12 (6) F.R.C.P.

Issue: whether prohibition will lie to review the correctness of an order of a trial ct. overruling a challenge to its juris over the person of a D on that ct. has juris over the subject matter of the suit?

Holding: No. Rule nisi quashed.

Further, a D who has properly raised such question is not prejudiced by participation in the trial and defending the matter on the merits and may have the correctness of such ruling reviewed upon appeal after adverse final judg. in the cause should one so be rendered.

The ^{Fed.} Interloc. Appeals Act (p. 121) has been very conservatively construed.

(Fed. court) Salmon Falls Mfg. Co. v. Midland Tire (p. 122)

In rem ^{part} of juris could be limited to the value of the prop. attached, and I did not appear generally since he wanted only to limit extent of in rem juris.

Ct. said the test ^{of gen. appearance} is the intent, actual or implied, of the D objectively viewed. Most other courts say that the test is all other factors viewed together to determine gen. appearance.

Quaere: Does the Balanowski case seem to contradict any rule of pleading?

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U.S. v. Balanowski

(p. 125)
Quaere: Can a D, served by mail in an in rem proceeding, appear on the merits as to the prop. involved w/o submitting to the juris. of the Ct. as to the personal judgment juris. for purposes of rendering a personal judgment? = This court said no.

However, the question here is that fed. cts. have no original quasi in rem juris. (see p. 27, COK). The 28 U.S.C. § 1655, however,

provides an exception in cases of liens, thus, the Balanooski Case.

Since the Ds appeared and defended on the merits the court acquired power to render a judg. in personam conditional, ^{only} upon the validity of the orig. quasi-in-rem jurisdiction.

(Re-read this case carefully and compare w/ Salmon Falls Case).

So here the Ct. said that despite D's compliance w/ 12(b), there could be a personal judg. rendered against the D even on the D has said it was appearing ~~at~~ to contest juris. and to contest the merits. Salmon Falls Case contra, and points up the conflicts between fed. courts in different circuits.

The major authorities support the Balanooski Case (Clark and Moore) because here D appeared on the merits and should not be allowed to appear and contest only one part of P's claim. Mrs. Dymman agrees and says that it is not unfair to D.

* Venue in Fed. Courts -

- (1) In rem actions must be brought on prop. so situate even if neither party resides there.
- (2) A civil action based solely on div. / citizenship, action must be brought either on all Ps or all Ds reside except as otherwise provided by
28 U.S.C. §1391(a) law.

See Olberding Case, *supra*.

(3) A civil action in the fed. cts.
may be brought only in the
dist. on the Ds reside ex-
cept as otherwise provided
by law. §1391(b)

On 4 are two or more
 indispensable Ds, who reside
 in different cts., no action
 can be brought in fed. ct.
 unless ~~one~~ the Ds waive
 (332 U.S. 498) *Werner*.

1391(a) differs from 1391(b)
 in that (a) applies only on div/
 cit. as the SOLE basis of
 juris.; (b) applies otherwise.

(4) A corp. may be sued in
any dist. on it is
 1. Incorporated, or
 2. Licensed to do business, or
 3. Doing business.

1391(c), and a corp. is a
 resident of any of those
 states for venue purposes.

(5) 1391(d) - an alien can be sued
 in any district.

See 28 U.S.C. 1655 see 115 U.S. 58

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* PLEADING *

Pleading - Process performed by the parties of submitting writings alternately, each written pleading being responsive to the preceding pleading.

Pleadings - Formal allegations of the parties of their claims and defenses.

Two methods of determining claims and defenses:

- (1) Oral questioning - continental method.
- (2) Exchange of written formal allegations and claims & defenses.

Pleadings were oral at early C.L. Under later C.L. and today, under all codes, all pleadings are written.

Procedural steps in an action:

- (1) Commencement by service of summons.
- (2) Pleading stage - stmts. of claims of parties.
 - (A) P files first pleading setting forth his cla, or stmt. of claim for relief. Called declaration at early C.L., complaint under the codes, Bill at Equity.
 - (B) D replies. Known as plea. D can take any one of three positions:
 - (1) P fails to state a cla entitling P to relief, even if all of the allegations of P are true.

Called a demurrer. This is not a denial, and D makes no pleas of defense. D saying, "If all you say is true, so what?" The issue is solely one of law.

Demurrers are used in equity and widely used in the codes.

Some modern systems (N.Y., fed. cts.) use motion to dismiss instead of demurrer.

- (2.) D can file a plea. Types:
- (a) Plea in Abatement
 - (b) Plea in Bar - goes to merits.

If D denies P's allegations, called Traverse at C.L.
Called denial under fed. rules.

This raises issues of fact and makes case ripe for trial on the facts.

- (3.) D can say that the facts are true, but I failed to state everything. e.g., says he hit P as alleged, but that I failed to state that P hit and attacked D first.
Called CONFESSION AND AVOIDANCE at C.L. Called "pleading new matter" under codes.

Under most codes, pleading need not necessarily continue. If any response is allowed

under codes today, it would only be a REPLY.

Many statutes control matters of pleading after D's answer, e.g., "affirmative defenses of D shall be taken as denied by P."

* (A) Variance and Failure of Proof *

Messick v. Turnage (p. 130)

P alleged in her complaint that D failed to keep his "roof" in good repair, and should have known or knew that the "roof" was in bad repair. However, evid. showed that the falling plaster was not caused by a leaking roof, but was caused by overflowing basin in toilet on second floor. D moved for nonsuit (which tests the legal sufficiency of the evidence) but a demurrer (which tests the legal sufficiency of the pleading). Held, affirmed for D because P failed to prove what she had alleged, i.e., variance.

Variance - a discrepancy between what is pleaded and what is proved. Y can be no allegata vs probata, and vice versa.

This case is highly technical, and N.C. is noted for that.

Under the Codes, Y is a rule of liberal construction of pleadings.

This is a stat. change from the C.L. rule. G.S. 1-151 - liberal construction, and the evid. will be taken in the light most favorable to the P.

Variance types of: (G.S. 1-168, 1-169).

- (1) Inmaterial - some discrepancy, but it can be ignored & doesn't hurt anything.
- (2) Material variance - more serious. Allows dismissal, and amendments are freely given.
- (3) Failure of proof - only this "requires" dismissal. G.S. 1-169.

TEST

Test: on the variance is so substantial as to grossly mislead the D so that one cause of action is pleaded & another is proved.

One of the chief purposes of a pleading is to allow the opposition to formulate its stand intelligently and to raise the issues while avoiding surprise.

Judg. for nonsuit - whether it goes to the merits depends on whether it is dismissal w/ or w/o prejudice.

If dismissal is granted under 1-25 G.S. of N.C., called "New Action Statute", even on s/c has run, P has leave

to file new complaint w/in
12 mos. after dismissal.

Amendment is freely given in
vast majority of juris. P
may amend, as a matter of
right, once before D answers.
Thereafter, leave of ct. must
be gotten.

If γ is material variance, ct
should allow amend. D
must show mat. var. and
show that he (D) was misled
before ct. will order P to amend.

On γ is failure of proof, most
often γ will be a dismissal
w/ leave to amend.

N.C. will not permit amend
on there is failure of proof
and a different c/a is proved
from the c/a alleged. But,
after dismissal, amend. can be
made or a "new action" under
G.S. 1-25 may be started.

In material variance, γ will
not be leave to amend or
to do so would = substantial
prejudice to D.

Read many cases ahead.

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Wilkins v. Cory. Fir. Co.

(p. 132)

"Since a party must succeed, if at all, on the case, claim, or defense set up in the pleadings, regardless of what is disclosed or established by the evid., proofs, in order to be effective, must correspond substantially w/ the allegations of the pleadings."

P alleged oral agreement that D promised to get fire collision ins. to cover the P. However, there were written agreements w/ mentioned nothing of ins. Ct. held it was a material variance, and P's action was compulsorily nonsuited.

If P has alleged no c/a, a motion by P to amend complaint to conform to proof = denied.

If P has alleged a c/a, but there is an immaterial variance, P's motion to amend complaint to conform to the proofs = allowed in most cases.

Test of allowability of amendments: would it substantially prejudice the D?

241/685, Osborn v. Gilbray - (G.S. 20-71.1 - rule of evid. assisting P in proving agency on the operator of the car was NOT the owner of the car who allegedly caused injury.) But, here P alleged the owner's negligence on the fact was that the owner was not driving; so, P was not allowed to use G.S. 20-71.1 and the presumption raised thereby.

Functions of Pleadings

- (1.) To set forth claims and defenses of all of the parties.
- (2.) Means of forming issues.
- (3.) To induce parties to tell the truth. *Pleadings usually under oath.*
- (4.) To give notice to
 - (a.) The parties, and
 - (b.) The court
- (5.) Record of the issues litigated (*res judicata*).
- (6.) Formal basis for the judgment.
- (7.) Record of trial below on appeal.

Most important function is to give notice to all parties and the court of all the issues.

(No discussion ^{here} of Lewis Case, p. 138.)

(B.) THEORY OF THE PLEADING

Good to be as general as possible in your complaint.

The pleader must have a theory of pleading.

Lewis v. S. San Francisco Yellow Cab Co. (p. 138)

P alleged that while in D's cab, the DRIVER had threatened to attack her, that she ran from the cab and stepped into a depression as a result thereof. Proof showed that another passenger in the cab, at invitation of P, had made the overtures.

Ct. suggested that P could, perhaps, have recovered, under another, complaint, on the theory of br/duty by D to protect her from attacks by a fellow passenger, a duty that exists on part of all common carriers.

The motion for non-suit is the proper motion to raise ? of variance.

And, upon such a motion, the evidence will be considered in the light most favorable to the P. Accord: 238/437; 232/244; 241/312. Failure of judge to do this = grounds for reversal. No amendment will be allowed on, to do so, would bring on a new c/a.

Amendments

Effect of failure to request leave to amend:

If P fails to request leave to amend, and motion of D for nonsuit is granted, the motion will be upheld even though an amendment would have been allowed if leave to amend had been sought.

Appeal from Refusal of leave to amend:

Abuse of discretion in refusing leave to amend is not a ground for reversal except on the appellant can show a palpable abuse of discretion in refusing leave to amend.

238/437 - must favor D to P
232/244
241/312

Sturges v. Peter Hemenway (p. 143)

Action for trespass. The injury was indirect. So, P lost because an action in TRESPASS must allege & show a direct injury.

Indirect injury could be shown in an ACTION ON THE CASE. Case also laid for negl. actions.

Effect of wrong writ
at Common Law

So, if P at C.L. chose wrong form of action, he could not amend. A mistake was fatal, and = res judicata.

Read Mc Intosh, vol. I., on "Theory of Pleading."

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Mawson v. Voss Beverage Co. (p. 146)

Demurrer ore tenus

The objection of failure to state a c/a is not waived by answer, & may be taken at anytime before judgment (238/117), and may be taken even before the Supreme Court of the state (233/117).

Ct. held that this failed to state any c/a, not even a c/a in trespass as attempted by P.

Types of trespass:

1. Tres. quare clausum fregit
2. Tres. vi et armis
3. Tres. de bonis asportatis

Tres. on the case would not have been found here because P did not allege any negligence.

On complaint is framed solely on trespass, and fails on that theory, and the facts of the complaint would not support another theory, the complaint fails for failure to state a claim upon which relief can be granted.

The Codes in every jurisdiction have abolished all procedural forms of action.

Very liberal view; regardless of P's label on complaint, if facts are sufficiently alleged in the complaint, P will be allowed to recover on any theory that would fit.

While it is only one civil action in Code jurisdictions, the substantive law still has its requirements that must be pleaded. The codes do not affect the substantive law and the definition and classification of rights.

The Ct. here would not even remand, so P simply lost.

This case takes the narrow view and looks back to the old C.L.

The Ct's discussion is related more to substantive than procedural law.

Mawson case severely criticized as too severe and narrow.

G.S. 1-122 - (1) complaint must have (requirements of form), (2) a plain stmt. of ~~a c/a~~ facts suff. to state a c/a.

Substantive Elements of Tres. that must be pleaded:

- (1) Actual or constr. poss. of the prop.
- (2) Description of prop.
- (3) County name to set up juris. & venue (if realty).
- (4) Time of act.
- (5) Facts showing ultimate trespass force & direct injury.
- (6) ~~Damages~~ ^{Injuries} caused.
- (7) Resulting damages.

Reasons to deter theory of P:

- (1) S/L may differ depending on the theory.
- (2) To frame responsive pleading - D can answer w/a general denial, thus not making it particularly rough on D to answer. Ds are seldom really surprised: they participated in the facts pleaded by P usually.

Hilderbrand v. Anderson (p. 157)

They are "disfavored actions" wh. will find courts requiring much specificity and strictness for policy reasons. Fraud and deceit must be pleaded w/ particularity universally (fed. cts. too).

D moved to dismiss for failure of complaint to state c/a for deceit and fraud. Overruled. P said he could go to jury on theory of money had and received because P said the evd. would support it.

Judge gave instruction to jury re money had and rec'd.

Ct. on appeal held this instruction was erroneous because this was really fraud and deceit because of the wording of the complaint, demand for punitive damages (not allowed in assumpsit for money had and rec'd), and ~~Ps~~ insistence for the majority of the trial that this was an action for fraud and deceit.

Actions in assumpsit and restitution are favored actions.

The nature of action must be determined from the facts pleaded and the complaint as a whole.

Relief requested gives some hint as to theory of P's action.

Ct. held that the complaint failed to state any ~~cause~~ c/a for money had and received and failed to show fraud and deceit.

Dedman: This court is only paying lip service to modern pleading and is too narrow in its view. Ct's stmt. that D would be surprised is not really true as a practical matter.

A P cannot state one c/a and recover upon another c/a, the Ct. said. That is true, but here P did not state a new c/a, only a new theory; and under

modern code pleading w/ fact pleading, it should only be one form of action known as a civil action.

Monsuit goes suff of evd. to get to the jury.

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P may set out many claims in the same complaint.

Indiana follows strict theory of the pleading doctrine, and the label on the complaint will be decisive.

Under liberal construction, P is entitled to relief on the facts alleged and proved, even if the theory be wrong, and even if no prayer or an incorrect prayer for relief is made. The prayer will be looked at for a clue as to the theory of pleading, but the prayer will not be decisive.
 193 N.C. 590; 68 Conn. 459, 36 A. 862 (P proceeded on tort theory of conversion of consigned goods, but complaint was insufficient in this theory [plea in abatement = dilatory defense] because P failed to allege essential element of ownership being in P. But, P had alleged all elements of a K action, and Ct. allowed the shift because the facts in the compl. were substantially proved as alleged. P had preferred tort because under a Conn. statute, D could have been arrested for the commission of some few torts,

193/590
 68 Conn. 459, 36 A. 862 (1946)
 - good opinion (shift in theory permitted)

and this was one such fort.)

The distinction between fort and K has little importance under a true code state.

196/558

When a state says that a P cannot state one c/a and recover under another c/a, it really means that a P cannot state one set of facts and recover under a different set of facts.

"Claim and delivery" = statutory action that is the same as C.L. action of replevin. See 196 N.C. 558.

At C.L., forms of action demonstrate the dependence of right on remedy. There was not a writ for every right, so, in some cases at C.L., a right was not redressed because all facts did not fit the writs. This was one of the injustices of C.L. pleading.

* Waiving the Tort — (p. 162)

One allowed:

- (1) Breach of warranty — one P can proceed on negl. or K.

hypo: P's house on fire (124/328) & he called fire dept. Water pressure too low & house burns down. P could sue water ~~company~~ under tort theory for negligence or in K under a third party beneficiary K between water co. & city for benefit of

city dwellers).

(2) Express cos. for failure to deliver. But, only on K on C.O.D. (188/407; 36 A.L.R. 460 [noted]) delivery is involved.

(3) O.K. personally is wrongfully taken and sold. Can sue under conversion or, in K for money had and rec'd. whether sale is necessary, slight majority view in America says no sale is necessary, strong minority says sale is necessary.

Money had and rec'd is the field of quasi Ks (old term) for restitution (modern body of law).

N.C. follows minority view (70 N.C. 520) re sale (191 N.C. 369) being necessary.

In State of Mass. on action of replevin is provided for, P could not waive the tort and sue in assumpsit or no sale has been made, but must bring a new action in Replevin. In Mass, 3 forms of personal actions: (1) K, (2) Tort,

(3) Replevin.

In Mass., after Ash & Friend cases, statute was amended and joinder of tort and K was allowed on they arose out of the same transaction.

Waiving the tort and suing in

assumpsit is allowed in other cases, too.

- (4) Agency cases on agent knowingly misrepresents his authority - P can sue for br/warr. of author. (K) or misrepresentation (tort). Under the better view, this is only one ex. a.
- (5) Seduction (11/215) in anticipation of marriage.

* 185 N.C. 109 - the allegation of facts cannot be changed even on the theory of pleading based on the same facts would have been allowed. (See this case.)

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Theory of Pleading Doctrine usually refers only to those states that require strict adherence to one theory of pleading.

See 9 Ala. L. Rev. 66 w/ regard to the bus note on p. 163 col. This was Ala. case, 85 S.2d 436; a passenger may sue a carrier in assumpsit for negl. br/implied ~~warranty~~ of carriage or in tort (implied because y is no ticket).

Whether a count in a complaint sounds in K or tort depends on ct's approach:

- (1) On basis of presumptions (Ariz.,

85 S.2d 436

25 P.2d 272).

(2) Cts. wh ~~not~~ construe plead-
ing in favor of P will
say that on S/P has
run on K but not on
tort, the action was intended
to be in tort; and vice
versa. N.C. in accord, see
69 P.2d 573 (Ariz. in accord).

The cts. here will presume
the P intended to bring an
action wh supports the cts
jurisdiction.

(3) Whether relief would be more
complete upon the stated facts
in K or tort. 36 Miss. 660,
(punitive dams. not generally
allowed in K actions. Exception
br/ promise to marry.)

(4) Majority rule — look at
the gravamen of the
allegations by looking at
the complaint as a whole.

134 P. 993 — one is br/duty &
subsequent injury to a passen-
ger on a common carrier, the
gravamen is the injury to P
br/ public duty, and that
situation will be said to be in
tort. This applies in common
carrier situations. See also 114
S.W. 88 (1908).

76 N.E. 299 (Mass.) —
57 S.E. 507 (1917) (Georgia) — both
cases in accord.

* 114 S.W. 88, supra, allegation of K
required even in tort actions to

114 S.W. 88 (1908)

establish relationship between P and D out of wh arose a duty wh was breached. Keep this in mind !!! The mere allegation of a K, does not make the action one in K.

(p. 171)

Pearl Assurance Co. v. National Ins. Agency
Action in Tres. by ins. co. v. an ins. agent to recover for alleged conversion of a premium the agent had collected. P sued in trespass. D objected saying tres. would not lie because he had obtained poss. legally. Ct. held that pursuant to Penn. statute, in Penn. only is a fiduciary relationship (as here), tres. for conversion would lie. Another than an action in assumpsit for debt (only has been a conversion). See 249 N.Y. Supp. 430; 52 S.W. 1113. Most states under the code have similar view: that action for conversion will lie for any prop. that is subject of poss., and that money is ~~the~~ a subject of poss. (not so at C.L.). However, conversion today does not lie for intangible prop. except on such intangible right is merged into a tangible (14 N.E. 2d 486 [N.Y.] - check; 33 N.Y. Supp. 775 - bill of exchange; 483 N.Y. Supp. 583; 33/404, 127/417 - promissory notes) document wh has value. 300 N.Y. Supp. 331, 33/158 - Bonds, also, may be converted.

* (2) The Complications of Restrictive Joinder * (Pennsylvania v. Massachusetts)

Lock v. Confair (p. 175)

P sued in assumed for br/impld warr. of fitness for purpose, but failed to estab. a K of sale or an executed sale (No Uniform Sales Act in N.C. except sec. 13 thru 16). Pa. has Uniform Sales Act. Ct here said that since P failed to estab. K, her complaint failed to state a c/a because Pa. does not allow joinder of K + tort. This case follows the Laski case (Mass.) even though the Laski case differed by being against the immediate vendor.

- 19 N.C.L. Rev. 551 + 561 - privity of K between seller + buyer in br/ warr. cases.
- 65 N.E. 2d 305 - Laski Case (Mass.)
- 107 F.2d 203
- 186 S.E. 634 (Va.)
- 191 N.E. 827 - agency theory
- 24 N.Y.S. 2d 962 (3rd party bene.)
- 11 S. 305 - "covenant running with land" theory analogy.
- Re

Most juris. ^{DO NOT} allow joinder of causes of action in tort and K. Fed. Rules do allow joinder.

But, Pa. may allow joinder of theories of tort and K, and most juris. allow same.

Pa. and Mass. now in accord:
"Causes of action in K and in tort shall not be joined, EXCEPT on they arise out of the same matter and in such case they shall be stated in separate counts and be heard and determined together, and the P shall not be required to elect between them."

Mass. Gen. Laws, c. 231, § 7 as amended in 1939.

Handwritten notes at bottom of page, partially obscured and difficult to read.

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In Pa., dissimilar claims in Eq. may be joined provided they are all within the proper purview of equity (i.e. no joinder of Eq. claim + claim for damages.)

In Pa., no joinder of tort and K except.... (see p. 115 notebook). Thus, Pa. has not merged trespass and assumpsit even though most states have.

So, in Pa., you can have no joinder of legal and equitable claims (even if both are in K or both are in tort), two separate suits must be appropriately brought.

Three stages of pleading:

- (1) C.C. - issue pleading.
- (2) Code pleading - fact pleading (under "Field Code" states).
- (3) Modern pleading - notice pleading. In the true sense of the word, it is nowhere true "notice" pleading. The Fed. Ct. and a few states approach notice pleading.

(Pa.) Feder Roh v. Peoples Natural Gas Co. (p. 180)

"The discretion of the Ct. in acting upon applications for amendments is a judicial discretion as distinguished from mere whim or caprice. Accordingly, in the absence of a proper ground for refusing an amendment, leave must be granted."

Plaintiff were allowed leave to amend from tres. to assumpsit, but because Ps neglected to change the label from Tres. to Assump-sit, the action was dismissed. This was reversed upon appeal.

The form of action is amendable at any stage of the proceedings. 117
Amendments should be as freely allowed from law to equity as from one form of action at law to another. Refusal to permit an amendment of the form of action, under these facts, is an abuse of discretion. The Ct. intended to permit the P to institute a new action in equity. So, the form of the pending action should be amended to save the loss of time and the added expense involved in the institution of a new suit. * (3) The Complications of Equity *

Equity Rule 22, 28 U.S.C.A.

§ 723 Appendix, "That any time it appears that a suit commenced in equity should have been brought on the law side of the Ct., it shall be forthwith transferred to the law side and be proceeded w/ only such alteration in the pleadings as shall be essential."

Under fed. rules you don't get a jury trial unless you demand it. Under another view, some Ct.s. say that a demand for jury trial is presumed, and a demand for trial w/o jury must be made if no jury is desired.

Kessinger v. Burtrum (p. 189)
P sought rescission of K and purported to be proceeding in Eq. but she had failed to plead willingness to make restitution. So, Ct. found that this must be considered as an action at law. But, even at law the action failed because P did not show that prior restitution had been made.

55 Yale L.J. 826 - Read!!

* (C) Amendments *

May add or substitute new c/p. In answer, new defenses may be added or substituted.

Types:

(1) Amendments as of right (or course) - need not seek leave to amend this one time as a matter of course. This is statutory. Usually w/in 30 days after filing. But, in N.C.

95.1-161, there is one provision: if it seems the amendment as of right was intended to cause delay, the amendment will be stricken.

(2) Amendments by leave of ct. - usually freely allowed. Must be made to ct. on one amend. has been made or the right to amend has been waived. This is up to discretion of the court. See 95.1-163.

For the purpose of computing the S/L, when the amend. is by leave of ct., the amend. relates back to the orig. filing of pleading (or commencement of the action) provided that the amendment merely amplifies the existing c/a already pleaded. On allowed, D will have leave to amend his answer to plead the S/L.

Ways and some types allowed by discretion:

(1) By adding or striking names of parties except indispensable " who must be included, and (236/157) must be granted as it is not up to discretion of the ct.

(2) By striking a party except on c/a would be changed.

(3) To show a mistake was made.

Rule of Pleading:
Relation

Back:
"Amplification" Test

- (4) In (224/323) add c/a ink to one in fort.
- (5) To conform the pleadings to the proof so long as the c/a is not changed, some degree of variance allowed w/o amendment. But, on the variance is material amendment must be granted. 233/377.

233/377

Methods:

- (1) Interlineation - on minor changes are involved.
- (2) Supplemental complaint can be filed (e.g., to add a paragraph).
- (3) Substituting amended complaint for orig. complaint on the amended matters are extensive. Thus, the amended (substituted) ~~com~~ pleading will replace the orig. and be the only one before the ct.

Cost of drawing up & filing will usually be charged against the amending party.

See 231 N.C. 233 - big name case
230/570 - not reviewable unless for clear abuse of discretion.
232 N.C. 65 - but on power to grant amend. is questioned, reviewable on appeal.

Surprise not ground for leave to amend, only for a continuance.

If the pleading is totally defective, no amendment will cure it. Matter of degree.

* N.C. says that if the complaint is a stmt. of a defective cause, amendment will not cure it. But, if it is a defective stmt. of a good cause, amendment can cure the pleading.

Q. 4 are different tests in different juris. used to deter. "relation back" theory. What are they? =

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Campbell v. Veith

(p. 199)

lessees influenced sublessees to not rent to P.

This was a defective stmt. of a c/a: tortious interference w/ Kual rels (the real c/a).

When a demurrer is filed, the Ct. will look at all the allegations in the light most favorable to the non-demurring party (P here).

DEMURRERS →

Demurrers at C.L.:

1. gen. demurrer - tests suff. of pleading w/o. specifically disclosing the reason. lays for defects in form and substance, but today, due to two old statutes, this demurrer reaches only to defects in substance.

Defects of form: duplicity, redundancy, hypothetical pleading, alternative pleading, etc.

(2) Special demurrer - tests the sufficiency of the pleading to which it is addressed by specifying the precise reason or ground of objection. (In N.C., every demurrer = special demurrer in the sense that all demurrers must set out the specific ground of objection.)

When can you seek to amend?

Amendments, by gen. rule, can be allowed on appeal, but "on a case has been tried upon one theory that theory will be adhered to on appeal."

Inaccuracies may be corrected or omissions may be supplied at any time before jury retires except (1) on that ~~moving~~ party is guilty of laches in seeking leave to amend, and (2) on the amendment does change the c/a, and (3) intro. new c/a, and (4) prejudices the adverse party.

Nature of a c/a is deter. from the facts alleged, not merely the label.

Ct. here held that on a complaint states facts suff. to const. a c/a, an order granting a motion for general demurrer w/o leave to amend is reversible error. However, on the orig. c/a sought to be stated would have been properly demurrable, and judge would have been

properly entered in favor of D. It is not error to award costs and atty. fees.

Whether the commencement of the action = fair notice of the claim sought to be stated is the majority test for deciding whether the S/L has been met. The test is not whether there was a c/a suff to withstand a demurrer except in a very few states like Illinois).

Whether an amend = new c/a depends on the test used by a given juris. Note the various tests:

Levey v. Newark Beth Israel Hosp. Co. 204

Ct. held that amendment would not be allowed to add an allegation that there was neg. by the doctors in diagnosing.

Ct. held that "It has been the firmly implanted rule that an entirely new and distinctly different c/a cannot by means of an amendment of the pleadings, be introduced after the statute has tolled the action."

This court applied a very narrow view to the N.J. statute (identical to F.R.C.P. 15(c)), and court used the "gist of the action test."

"GIST OF THE ACTION" TEST

The preferred approach is that of Tiller v. Atlantic Coast Line (Ky. (p. 206)) - "from law to law" test. Liberal view was taken of 15(C) and Rule 15 as a whole. "The effect of the amendment here

was to facilitate a fair trial of the existing issues between P and D. It is no reason to apply a S/L when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim v. it because of the events leading up to the death of the deceased in the respondent's yard."

Statute of Limitations

The main policy reason behind S/L = fairness to the D. Other reasons:

- (1) D should be secure from threat of ancient obligations.
- (2) Prevents making D defend when memories have faded and evid. is hard to find.
- (3) Promotes effectiveness of cts.
- (4) Avoids

Rules -

(1) S/L not a bar if the amended matter merely amplifies or explains, 223 N.C. 825, and the amendment relates back. N.C. = liberal state. Amendment from K to tort (136/345) on both arose out of same transaction was allowed.

"Same Evid." TEST of Relation Back

(2) New c/a not involved if both can be supported by the same evidence. 80 S. 2d 860. This is the "same evidence" rule.

"New Basis" Test

(3.) New c/a is involved if a new and different basis for recovery is set forth.
 132 N.C. 103! P changed from ejectment v. one person to an action on lien theory in equity v. 21 persons. Alleged damage was the same, but it held it was set forth a new basis.

(4.) If orig. complaint fails to state a c/a, an amendment even after s/p has been run, is allowable on the amendment supplies an essential element of a c/a, even tho' the amendment was de-
murable. This is the rule by wt/author.

However, the application of this rule is a bit harder because it is a matter of degree. e.g. N.C., in reg. actions requires great particularity & specificity. e.g., under this rule, adding a part of the element of "br/duty" by amend is okay. But, in N.C., on there is a total failure to allege "br/duty", that defect is fatal. On the other hand, if br/duty is only generally stated, amendment may be allowed to make more definite and certain the allegation of br/duty. 294 P. 28 258 (Kan.) — follows minority view that attempt to amend & supply essential element = new c/a if

Demurrer Test

orig. complaint failed to state a c/a. Kan. would probably apply Demurrer test.

Remember § 1-25 (new action statute), P, if hit by nonsuit, would have one year to bring a new action. Most states have this type of statute.

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At early C.L., no amendments of written pleadings, there were states later on this matter: "Statutes of Jeopards" ("I have failed") allowed amendments later at C.L. and Amendments."

Substitution of parties ≠ change of c/a (e.g., on P dies and c/a survives). This is substitution, not amendment. But, if a new D (200/582) is sought to be substituted = new c/a. In the first case, cts. say the substituted D stands in the shoes of the orig. D (e.g., executor).

96/416 - old view.
333/240

243/457 - new P - no. = new c/a.

243/457 - no new corp.

240/785 + 213/240 - no corp. in place of

partners. 212/523 - owner for agent = okay.

340 U.S. 543 -
re contribution
U.S. = okay

Note 89, p. 208 - § 2401(b) U.S.C.A. 28 (The Tort Claims Act S/L = two years).

The claim of P. v. U.S. govt. was properly dismissed because of S/L.

But, the claim of D-1 against D-2 (U.S. govt.) should not be dismissed. See this case: Keleket X-Ray Corp. v. U.S., 275 F.2d 167 (D.C. 1960).

Hayes v. Town of Cedar Grove, (p. 209)

128 W. Va. 590, 37 S.E. 2d 450 (1946) -

under the ref./author., a shift from a C.L. cfa to one under statute = shift from C.L. law to ^{stat.} law and that = a NEW cfa.

Quaere: What is an amendment that changes a cfa? ?

Cause of action -

Probably the majority view today.

(1) Liberal view - (Clark, J., view) A cfa under Code should be viewed as an aggregate of operative facts that gives rise to one or more relations of right - duty between two or more persons. So, the essence of this view is the facts rather than the rights violated, and this is ltd. only by trial convenience.

136 N.C. 39 - Trend in N.C. toward this view. N.C. is liberal on this.

(2) Strict view (Pomeroy view) - the right violated = a cfa, and each action is ltd. to one right violated.

G.S. 8-4 - requires judicial notice of laws of other states.

224 N.C. 323 - "but in applying the test (of what = c/a), we must consider the facts...."

(A) In N.C., a defective stmt. of a good c/a may be corrected by amendment, and this does not depend on liberal view of c/a. 121/118, 170/28, 134/236

(B) Also, an amend. may amplify, modify, supplement the c/a, 133/306, but a new c/a cannot be alleged by amendment. ~~134/236, 170/28~~ 153/148, 169/744 185/206; Amend. refused as new c/a: 121/369; 165/578.

* Re change "from law to law" - 226 U.S. 570, Mo. Ry Co. v. Wolfe, Accord 240/338 - this view says this type of amendment does not state a new c/a. This actually is the wt./author contra to Hayes v. Town of Cedar Grove, supra. (but change from C.L. to stat. law = new c/a, whereas, as here, change from stat. to stat. = no new c/a.)

No relation back allowed under (B): 121/392; 183/181.

Quaere: When will amendment be deemed to state a c/a? Tests of "new c/a" =

(1) Inquire whether recovery under orig. complaint would be a bar under the amendment. N.C. favors this.

(2) whether the amend. could have been added to orig. allegations so that recovery could have been gotten up on finding new c/a. N.C. has stayed this too but both of these tests are not helpful. 179/255.

179/255

3. "Same evid. test" - would same evid. support both? If so, no new c/a. (Not much help.)

Facts
Test

* [You actually must look at the facts of each case, see 136/345; 183/181.]

Quaere: When will amend. wh changes the c/a be allowed?

1. 218/601 - no amend. if for delay.
2. On amend. conforms pleadings to proof, amend. may be allowed except on it changes the claim or defense. B.S. 18/63. This test has also been applied to other cases.

1/63

N.C.
and LIBERAL
AND BETTER
VIEW

N.C. has now allowed amend. to conform the pleadings to the proof even on new c/a is stated, but it will not relate back. This is the liberal and better view and modern view.

TEST OF
"NEW C/A"

Change from one basis of liability to another basis of liability = new cause of action.

Green v. Walsh

(p. 212)

FED. CT. - Under Rule 15, Amendment was granted and allowed to relate back. Ct. set up certain guides ("good opinion"). "If the facts alleged show, substan-

tially, the same wrong with respect to the same transaction, or if it's the same matter more fully & differently laid, or if the gist of the action, or the subject of the controversy remains the same, the amendment should be permitted."

Read next section.
(Review theory of pleading)
See Rule 12(b)

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Green v. Walsh (p. 212)

In fed. rules cts., The liberal rule of relating back of amendments creates a problem under Erie v. Tompkins. But, the ct. will always use its own procedure. The problem is in the States, wherein the fed. cts. (re F.R. 15 (c) - 59 Col. L.R. 648 - see this!) sit, wh do not allow relation back.

Quaere:

How late can you amend under fed. rules? =

Amendments to show jurisd. may be allowed "upon terms" in the trial or appellate ct. 28 U.S.C. 1536.

207 F.2d 113, Finn v. Amer. Fire and Casualty Co. - Amend. to drop a party whose presence destroyed diversity was allowed after the case had gone to U.S. Sup. Ct. Fed. juris. bases:

- (1) Fed. question or
 - (2) Diversity of citizenship
- upon can drop an unnecessary, though proper, party.

347 U.S. 912 - cert. denied in Finn case.

If necessary party is sought to be dropped, no can do, and can't be brought in fed. cts. either party may move to drop an unnecessary party.

229 F.2d 714, Emich Motors Corp. v. G.M. Corp. - Amend. allowed after case had been tried, appealed reversed and remanded on other issues.

Amend. Too late =
abuse of discretion.

22 F.R.D. 252 (1958, D.C. Pa.)

No waiver of
jurisdiction:

Surprise →
As a basis for
disallowing

Surprise ≠ a ground for
leave to amend,
only for a continu-
ance.

Permitting an unusually late amendment, pleading, by D, the S/P would be an abuse of discretion. Ricciuti v. Voltare Inc., Inc., 277 F.2d 809 (2d Cir. 1960). See also 279 F.2d 141 - abuse of discretion by allowing amend. to D to attack juris. after 23 mos. of trial preparation and after the S/P had run. This puts a limit on the usual rule that juris. can never be removed and may be attacked even on appeal.

In fed. cts., the pleadings will not "hoist" a hearing on the merits unless Actual, not conjectural, prejudice to opposing party results.

Rule 15 (b), clause 1 is found in few states, and objections to evid., intro. at trial as not being raised as a question by the pleadings, will be overruled (fed. cts.) unless the objecting party can show ACTUAL sur-prise, not merely legal surprise.

On issues arising on the evidence, the pleadings must be amended even after judg. to show what was litigated. Under fed. rules, in this case, the pleadings are DEEMED amended, but, amendments are usually made.

→ Even on actual surprise can be shown, it is still up to the discretion of the court to allow amendments.

(D), p. 217 - Not safe for D to rely on the pleadings here.

Lomax v. U.S.

Under U.S. Tort Claims Act, brought v. "U.S. Post Office Dept.", but later was advised that the proper party was the U.S. (p. 217)

Ct. held the amend. could not relate back, and that the action was barred by the s/l.

Ct. was not bound by the agreement between the P and Atty. gen. that P could sue anyway although s/l had run.

Ct. held this was a

Substantive v. Procedural
S/L

SUBSTANTIVE STATUTE OF LIMITATIONS, and this type of stat. of limitations affects the claim itself and is a part of the claim itself. e.g., Wrongful death statutes have their own special S/L; requires allegation in the complaint itself of timeliness. N.C. used to comply w/ this but now N.C. wrongful death actions are under general tort S/L, a procedural S/L.

Substantive S/L - must be pleaded and proved by P. (detail)

Procedural S/L - an affirmative defense.

In a provision, as in this case, wh waives fed. immunity, the question is one of juris. of the Ct. to even hear the action. On the S/L = substantive, and s/l has run, the court

is not juris. to try case.

* Substitution v. ~~replaces~~ dropping or adding parties — F.R. 25 says that substitution of a dead or incompetent party by legal representative allowed.

* Replacement differs from substitution — replacement may be done under Rule 15 (amendments) to eliminate the orig. D and bring in the proper party.

Fed. rule 25 relates to only on proper parties were orig. joined, but because of intervening death or incapacity, substitution of a legal rep. may be made. The substituted party in all effects except name is the same party. See 58 F.2d 411.

General issue
in Replacement

An Amendment to replace parties, the question arises as to whether the replacement would constitute a new C/P.

See note (A) p. 220, very important. See 268 F.2d 280, 303 (9th Cir., 1959)

Caveat:

214/1
198/417

S/H will run against P and for D under amendment to bring in another party or replace the D until that amended party is brought in. See 214/1; 198/417; 209/806.

Assignment:
209/806

Read Hornbook of
Clark 493-498
Election of Remedies

What is ^a supplemental pleading? See Rule 15. May inconsistent pleadings or defenses be joined? Election of remedies? See Hornbook of Clark.

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Clark, On Code Pleading - Ch. 7, sec. 77

The Election of Remedies

The rule of election of remedies is that the choice of one among inconsistent remedies bars recourse to the others. The statement of the rule is somewhat anomalous because it actually applies to election in substantive law. There seems to be no final election merely between remedies until final judgment for the D or satisfaction of a judgment against the D.

Election in substantive law may depend upon many other things than the institution of suit. By the older view the beginning of suit signified a final choice of position on two or more choices were open, but by the more modern view, in accord w/ code ideas, the form of complaint does not necessarily signify a final election.

Though currently stated as applying to remedies, it is almost wholly limited to ELECTION as a choice of substantive RIGHTS.

Krudson v. Boren

(p. 221)

261 F.2d 15 (10th Cir. 1958)

Imputability of negligence to non-driver based on joint enterprise is an affirmative defense wh. should be pleaded by D; but on P brings up this matter by evd. during the trial, and this is an issue not raised by the pleadings but wh. is tried by express or implied consent of the parties, same shall be treated in all respects as if it had been raised by the pleadings. See Fed. ~~Rule~~ Rule 15(b).

* Amendments to pleadings as are necessary to cause them to conform to the evd.

228/574

136/89

-Lasater Case

may be made even after judgment.
See Fed. Rule 15(b).

228 N.C. 574 - important case.

* G.S. 1-25 - has been interpreted to say that a new action w/in one year, even on no c/a was orig. adequately stated, will not be deemed a new c/a. "Webb Rule."

253 N.C. 807 - re amendments. D moved for leave to amend his answer to plead imputed negligence so that P could be found contributorily negligent. (248/599 (1958) in accord. 219/869; 212/762.) Allowed on appeal.

255 N.C. 64 - (1961) D sought to amend his answer before trial. Allowed. P objected saying the defense was substantially changed. On appeal: affirmed. * Two classes of amendments under 1-63:

- (1) amendments before or during trial when opponent has opportunity to investigate.
- (2) Amendments offered during or after trial to conform the pleadings to the evidence offered or entered.

In the first class, it has sweeping power to allow amendments.

Under the second class, it is lth. power to grant because opponent has less opportunity to investigate and avoid surprise.

Note, (B) page 223 - No. Amendment of pleadings must first be had to conform same to the evid.

Texas Employers' Ins. Assn. v. Dillingham (p. 223)
State court, and Texas had statute like F.R. 15(b).

Holding

Ct. said that mere cross-examination by D on evid. of issues not raised by the pleadings \neq waiver of right to object to consideration by jury of such evidence.

This Ct. said that it would be conclusively presumed that D would be prejudiced. However, majority, N.C. included, says that the party alleging prejudice must bear the burden of (91/406) showing prejudice by showing what prejudiced him and how he was prejudiced.

"A new theory of recovery does not necessarily mean a new c/a."
Dedman.

Whether a new theory = new c/a depends on the definition of "c/a" followed by a court.

As a practical matter, look at how your juris. goes and what test of "new c/a" is applied.

Notes, p. 229

(B) S/K regarded by cts. as a technical defense, and it is unavailing.

(C) If docket is crowded, it makes a difference because ct. may refuse motion to amend or, to do so would keep it off docket for

a year or several years.
 Long delay is considered by courts in granting or denying amendments.

67 N.W. 2d 400
 More objection is suffi to bar claim of implied consent

One party has objected to evid. on an issue not raised by the pleadings, such evid. has not been tried by "implied consent" of the objecting party w/in meaning of 15 (b) F.R.C.P.

Supplemental Pleadings -

Definition

11 G.S. 1-167; N.Y. C.P.A. sec. 245.
 F.R.C.P. 15(d) - Set forth transactions or occurrences which have happened since the date of the pleading sought to be supplemented.

Some states allow this even on the moving party knew this supplemental matter at time of the orig. pleading.

Supp. Pleadings
 v.
 Amendments

These are unlike amendments (which supersede the orig. pleading) because these are only read in conjunction (147 N.Y. Supp 2d 745) w/ the orig. pleading.

In N.Y., Supp. pleadings may supersede the orig. pleading w/in discretion of trial judge.

Supp. pleadings are w/in discretion of judge and refusal of judge to allow same will most often = abuse of discretion.

Plea since the last continuance

= plea puis d'arriver continuans.

26 Nov. 62

* CERTAINTY IN PLEADING *

This often involves situations on pleader tries to protect himself v. all eventualities.

Clark says that except for intentional or grossly negligent misstatement, inconsistency or uncertainty should not be fatal.

Types of pleading not permitted:

(1) Material allegations cannot be by reference

(a) Recital - intro. to a stmt. e.g., "D knew the day was dark & rainy, (i.e., D should have slowed down)."

If P wants to allege weather cond's, P must state positively, "The day was dark and rainy."

118 N.Y. Supp. 452 - use of participles usually shows recitals.

GENERAL
RULE

[4 must be a plain and concise stmt. of the facts made directly and positively.]

Pleading by recital in most jurisdictions = defect of form, and right to object will be waived unless timely made. Sometimes, defect of form is so great that = defect of substance.

GSJ - 153 - motion to make more def. & certain

(33 Yale L.J. 365)

pp. 253-254, Clark.

79/524

METHODS OF ATTACK

and depends on degree.

Being usually a defect in form, the motion properly made must be one of procedure w^h goes to form, e.g., demurrer in some states, motion to make more definite and certain (G.S. 1-153).

(b) Inference - allegations of material facts cannot be made by inference unless same necessarily and logically follows from the allegation.

(c) Reference

(1) Incorporating documents by reference: Universally allowed.

(2) Incorp. by reference allegations in one count of another count. D.C. does not allow this under any circumstances. Many states do.

(3) See 144/330; 188/689 - reference to statutes and laws are okay. But, ~~our~~ foreign law is material, must be pleaded.

(d) Alternative allegations - Code states ~~also~~ often allow this, and F.R. 8(e)(2) allows. Not allowed at C.L.

Duplicity - more than one count. Okay in some states.

Repugnancy - inconsistent allegations alternatively pleading.

Even the simplest of alternative allegations could not be alleged in the same counterclaim. These are accepted everywhere today because they simply alter pleading, e.g., "servant or employee" ~~A change in meaning that is much.~~

~~Change of meaning with~~ ~~material difference =~~ ~~key.~~ This is a greater degree of alternative pleading.

Modern trend is to make any alternative pleading subject only to a motion for a more definite statement. Moving party must show that the pleading sought to be made more definite is prejudicial, and judge has discretion to allow or disallow.

Election of Remedies

In alternative pleas actually = different c/a, the doctrine of election of remedies may apply but only on the existence of one must disprove the existence of the other.

(p. 230)

* ALTERNATIVE PLEADING *

Schochet v. Gen. Ins. Co. of America
This case would be decided differently today because of new Minn. Stats. [see note bot. p. 231] same as F.R. 8(e)(2).
If may be inconsistency in fact or justice so requires. The test usually used to determine whether inconsistency renders the pleading no good is whether proof of one would necessarily disprove

the other.

Another test: inconsistency of law rather than inconsistency of fact.
An inconsistent law is usually all right, and inconsistent fact ~~is~~ is all right or necessary to avoid prejudice.

* Proper motion is the motion for an election.

See 100/46 - many inconsistent defenses may be made
 188/328; 149/249 (reps. old C.L. case)
 119/343.

* Defenses should be set out separately, and allegations should be in separate counts. They almost must be, but the result is that if they are not, a motion for a more def. stmt. will lie.

27 Oct. 62

* Calif., N.Y. and Fed. Cts. are most liberal, and don't require election and do allow inconsistent pleas and inconsistent theories. The latter is allowed, however, even in the more conservative states wh. would ord. require only consistent pleadings.

"This may cause difficulty" as re inconsistency of facts.

A TEST:

Verification - pleader swears to truthfulness of allegations of pleading in front of notary public.
 152/206 - unless the verification would necessarily = perjury on one pleading.

Young Case - "... Generally, a party should not be foreclosed from pleading any claim, 141 or defense, until all the facts on both sides, material to such party's position, are substantially known."

62 A. 1122

the pleadings do not fail for inconsistency. See also 62 A. 1122 - each plea will be looked at by itself. So, a gen. denial and a plea of fraud in the inducement are not inconsistent for the purpose of pleading.

Young v. Geo. C. Fuller Co.

(p. 231)

Inconsistency of law and fact may be allowed in N.Y. under the liberal rules of procedure, like F.R. 8(e).

Oklahoma Wheat Pool Terminal Corp. v. Rodgers

(p. 234)

Inconsistency in fact here was not allowed, even at the answer stage. - Narrow view, and this case is no longer law even in Okla.

For excellent discussion of pleading in the alternative, see McCormick v. Kopman, 23 Ill. App. 2d 189, 161 N.E. 2d 720 (1959), noted in 1960 U. Ill. L.F. 184.

"The true rule is that a party to an action can set forth in separate counts several grounds for recovery, or several defenses so long as they are not inconsistent to the extent that they are repugnant and the proof of one necessarily disproves the other."

Drain Shop Acts are penal in character & thus strictly construed. On the other hand, it is remedial (gives remedy not recog. at C.L.) and is liberally construed as far as giving remedy. Ill., N.Y., N.H., Ohio, W. Va., et al. Contrib. negl. no defense.

"Under the new practice, as distinguished from the old, not only is a party permitted to state his claims, in a simple yet liberal way, but if such stmt. sets forth a legal claim, it's immaterial

that such claims are inconsistent. Of course, these pleadings may be promptly dealt w/ if sham or otherwise improper or ineffective.

But, if proper, the pleadings, and the bona fide issues raised y/by both of fact and of law, are subjected twice y/after to the scrutiny of the ct., first at PRETRIAL and later at the trial itself, all to the end that the trial may be confined to the actual controversy on the merits. This added opportunity under the new pre-trial practice, to sift the wheat from the chaff, of itself = a reason

why the new rules give greater liberality to a party in asserting his claims during the pleading period, and why such party should not be unduly

restricted in asserting inconsistent claims, at least before he has had full opportunity to know exactly what facts his opponent may put him w/

(1955) Honeycutt v. Shelby Ins. Co. - 255/515 - D - ins. co. issued auto liab. ins. K to one Huskie covering a 1951 Ford. Huskie had been sued before on an accident involving a Chevy he owned. The judg. was not collected, so now injured party v. insurer for amt. of the unsatisfied judg. It alleged the Chevy was owned "by either Huskie, his mother or some other member of his household." If Huskie had owned Chevy, this policy would not cover it. But, if his mother or any other member of his household other than his wife owned the Chevy, the policy would cover it. — Upon demurrer by D, allowed: one is the good pleading and one defective one, they will neutralize each other and demurrer will lie. — strict view (and even inconsistent w/ the N.C. position on demurrers that a demurrer will fail if the complaint states any good c/f.) — Accord with Honeycutt case, 246 N.C. 68 (1957); 242 N.C. 145 (1955).

246/68 (1957)
242/145 (1955)

Wigton v. McKinley

(p. 239)
Action to quiet title. Ct. said that y were inconsistent pleadings by D here. — This decision is open to criticism, too. (S.T.D.). This inconsistency

was in legal theory.

Delivery is a very technical concept and should allow court to allow inconsistent pleadings.

(Assign: Election of Remedies & sec. 2, p. 249.)

29 NOV. 62

McKormick v. Kopmann, 161 N.E. 2d 720 (1959) —

Count of complaint against truck driver under Wrongful Death Act charging that truck driver was negligent in operation of truck and that decedent was free of contrib. negl. in operation of automobile and count brought in the alternative v. proprietors of taverns under Dram Shop Act charging proprietors w/ sale of alcoholic beverages to decedent wh rendered him intoxicated and caused collision, were mutually exclusive, but widow of decedent, as administratrix and individually, could plead the counts together when she was in doubt as to what facts were and what evid. would show, and in absence of a severance widow had right to go to trial on both counts and to adduce all the proof she had under both counts.

When inconsistent counts are pleaded in the alternative, the legal sufficiency of each count presents a separate question, and it is not ground for dismissal that allegations in one count contradict those in another count.

Sound policy weighs in favor of alternative pleading so that controversies

may be settled and complete justice accomplished in one single action, but alternative pleading is not justified on the pleader's knowledge of the true facts.

* The allegations under the dram shop count did not = binding judicial admissions w/ respect to wrongful death count.

* The essential objective of alternative pleading is to relieve pleader of necessity and y/fore the risk of making a choice.

* Provisions of Civil Practice Act authorizing alternative pleading necessarily contemplate that pleader adduce proof in support of both sets of allegations or legal theories, leaving to the jury the deter. of the facts.

* The doctrine of "election of remedies" was not applicable and truck driver was not entitled to have widow required to elect between her alternative counts before going to the jury.

29 NOV. 62

(See mimeo material)

DOCTRINE OF ELECTION OF REMEDIES

* Applicable only on the aggrieved party has two or more inconsistent REMEDIES.

Really a part of the substantive law w/ procedural ramifications.

In K, action for damages is inconsistent w/ restitution.

This doctrine is an application of the doctrine of stop-pel: you cannot maintain inconsistent legal positions.

* This applies only on the inconsistent remedies grow out of the same c/d (what = c/a?)

Elements:

- (1) 2 or more remedies.
- (2) Must be inconsistent remedies.
- (3) There must have been a choice (election) made.

If any one of the elements is absent, no election of remedies will have been deemed made.

TEST:

Test of inconsistency: a certain state of facts relied on as the basis of one remedy is inconsistent w/ or repugnant to another state of facts relied on as the basis of another remedy.

Examples:

- (1) Actions for damages and restitution. You cannot affirm and disaffirm a K at the same time.
- (2) On seller v. Buyer, rescission of the sale and return of the res is v. affirming the sale and suing for the price. Same on Buyer v. Seller.

(3) Action by mtgor. for removal of cloud from title ~~v.~~

hypo: X wrongfully transferred P's lumber to D. D sold to Y, a BFP. Now, P v. D for conversion of P's prop. in tort. J/P for value of lumber. Judgment not satisfied. Now, P v. Y for return of lumber (in replevin at C.R., now called claim and delivery under many states). Did title pass to D by virtue of P's action v. D, or did title remain in P because of unsatisfaction of judg. against D. ~~Prevailing~~ rule is that title is not passed to a converter until judgment is satisfied.

Therefore, P can sue Y to recover in specie the lumber.

But, if P had sued D in replevin, P would be estopped as having made an election of remedies because there would have been, as against D, only one c/a and a choice of inconsistent remedies.

On this doctrine applies, it is irrevocable and precludes any other remedy on that c/a.

- (4.) Action by P against an agent, as opposed to P v. undisclosed principal. Under the substantive law (majority view) you cannot sue both an agent and undisclosed principal, or P had knowledge of the undisclosed principal. Sometimes called an election of parties rather than remedies, and properly so.

This doctrine always involves a choice between two substantive rights. Called "election of remedies," but is really an election of substantive RIGHTS.

"C/a" means different things for different purposes depending on the context in which it is used.

Note 24, (p. 243) - 53 Mich. L. R. 1195 (1955) - involved a case on it was held that an action in quasi K is a bar against an action in tort for fraud as being an election of remedies. The second action (in tort for fraud) was against a joint tortfeasor. 125 F. Supp. 131 (1954 Calif.), Sears + Roebuck Co. Case.

This doctrine is greatly criticized by most authorities. It is said this question could be better based on estoppel or choice of substantive rights.

This is not a procedural rule. It is substantive.

The mere fact that the second action was against another D does not preclude the application of "election of remedies".

This is the majority view. But, in contrast, res judicata must be applied, if at all, only between the same parties.

Q. When is it an election? = Majority view - commencement of action.

Minority (liberal) view - not mere commencement is suff.

~~Most~~ Most agree that reducing the claim to judg. = suff.

Our doctrine of election of remedies does not apply, satisfaction of judg. = election.

Better View N.Y. by statute says that, on election of remedies applies, satisfaction of judg. = election.

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18 F.R.D. 169 (P.A.D.C. 1955); 186 F.2d 464 (3rd C.C. 1950); Rest. of Judgments, pp. 239-240; U.S. v. Memphis Cotton Co., 288 U.S. 62.

— ALL OF THESE CASES CONCERN THE SHIFTING AND DEPENDENT MEANINGS OF "CAUSE OF ACTION." C/A DEPENDS ON THE CONTEXT IN WH IT'S USED.

VARIABLES THAT AFFECT APPLICATION OF DOCTRINE OF ELECTION / REMEDIES

- (1) DEFINITION OF C/A.
- (2) WHETHER THE CHOICE IS BETWEEN RIGHTS OR REMEDIES.
- (3) WHETHER IN THE PARTICULAR JURIS THE TWO (2) REMEDIES IN QUESTION ARE INCONSISTENT.
- (4) WHETHER THE ACTION WENT TO ~~FINAL~~ FINAL JUDGMENT.
- (5) WHETHER THE SUITS WERE BETWEEN THE SAME PARTIES.
- (6) WHETHER 1ST ACTION IS STILL PENDING WHEN, IN THE 2ND ACTION, THE DOCTRINE OF ELECTION/REMS. IS INVOKED.
- (7) WHETHER THE DOCTRINE IS RAISED IN SUCCESSIVE OR THE SAME PROCEEDINGS.
- (8) WHAT = AN ELECTION IN THAT JURIS. (SPLIT OF AUTHORITY. HERE, GA. SAYS COMMENCEMENT, IN ITSELF, IS CONCLUSIVE.) N.C. IS IN THE "UNCERTAIN CATEGORY. See p. 244.)

The general rule is that the party must make some act of selection sufficient to = election between the remedies. There must be some decisive act constituting an election. ~~Majority of states~~ Majority of states says that ~~the~~ commencement is the most unequivocal act and is conclusive as to election. Some of these states apply this rule even on the suit is later abandoned or dismissed before judgment.

Most states agree that judgment on the issues = conclusive election.

201/554 Bar exam in N.C.

Some authorities say that only satis. of judg should be deemed an election, & this is the better view altho most case law says that judg on the issues is suff.

See 201 N.C. 554, LITES V. GROVE. Has been on N.C. Bar exam. But, here, money dams. were allowed as incidental relief.

Assignment: Read McIntosh on Election of Remedies; Williston on K, §683

N.Y. has made statutory change re undisclosed prin - cipal - agent. §112 (b) of C.P.A.

Some states say there is inconsistency between an action to recover on the K, and ^{action for} reformation the K & then recovery on the reformed K.

N.Y. C.P.A. 112 (e) - re claims on K & reformation: no inconsistency.

On the adversary has relied on a course of conduct of P wh appears to be the one chosen, and D has changed his position in reliance upon to his detriment, the P will be ESTOPPED to allege a change of course. This does not mean, however, that a retail vendor, who requests a return of the merchandise upon default of cond. sales K,

has made an election. He can still sue for the balance due upon failure of vendee to return the merchandise.

* (E) THEORY OF THE PLEADINGS REVISITED *

Very small minority of States (e.g., Indiana) require one theory and you must make it or break it on that one theory.

POWER V. DARDEN

(p. 246)

Motion for nonsuit goes to sufficiency of the evid., and raises questions of variance between allegata and probata.

Ct. found that the granting of the motion for nonsuit was not in error.

Allegation of promise of P's daughter + son-in-law to care for P in return for an estate in the land, is of variance w/ proof of fraud in the obtaining of deed. Y was no basis for establishing a constructive trust when we look at the allegations of the complaint. So, proof of that contention was unsupported by the pleadings.

See 232 N.C. 669; 171 N.C. 579; obk. p. 245, paragraph 3.

If the pleadings & proof combine to estab. liability on ANY theory of recovery, okay, regardless of the theory intended by P, and the action should not be dismissed.

232/669

171/579

DEC. 65

* (SEC. 2) ALLOCATION OF THE BURDEN: THE AFFIRMATIVE DEFENSE

Now we begin to look more closely, also, at the pleading of D.

Burden of proof of an issue ord. rests on the party asserting the affirmative of the issue. This is the general rule.

B/P has two concepts:

- (1) B/P used to refer to the risk of non-persuasion of the jury. The quantum of proof will vary depending on the nature of the case. The usual quantum required in civil cases is "fair preponderance" or "greater weight"; and another standard in civil cases is "clear and convincing."

ASSIGN: NOTE THE SPECIFIC AFFIRM. DEFENSES, AND WHICH ONES DEPART FROM THE GEN. RULE.

3 DEC. 62

The risk of non-persuasion is the risk that the trier of fact will be left at equipoise.

- (2) Burden of Going Forward - comes into play at beginning or P has both B/P and the B/GF, and comes into play later.

on P has carried his B/P and
the D then has his B/GF.

Affirmative Defenses - pleading new matter in D's answer. The same rules that apply to P's clarity and plainness also apply to D.

If D demurs, nothing is asserted as fact, but it admits P's allegations for purpose of raising ? of law as to suff. of the complaint to set forth a claim upon which relief can be granted.

So, new matters like aff/defs. ~~is~~ set forth by way of Confession and Avoidance (covers all those matters that were made by plea in abatement and plea in Bar at C.L.). This admits and pleads affirmative facts that, un rebutted, will defeat P's claim. "New matter" includes matter wh. could not be included under a "general denial" (or "gen. issue" at C.L.). e.g. Not guilty. The general denial (Code term) does not notify the Ct. of anything. So, ~~there~~ no ^{could} of any new matter ~~can~~ be made under a general denial at C.L. — Gen. rule: under a gen. denial, the D will be allowed to controvert anything the P is bound or will be permitted to prove.

So in tort action, P alleges:

- (1) Right - duty rel.
- (2) Br/duty
- (3) prox. cause
- (4) Injury
- (5) Damages

In K Action, P alleges:

- (1) Mutual agreement
- (2) Consideration
- (3) Conds. precedent performed by P.
- (4) Br/K
- (5) Injury
- (6) Damages

So, D could controvert any of these matters under a general denial.

Although a P may not have the B/P on a matter, if he pleads it he may then have to prove it.

Ex: D fires P before 18 mo. K of employment expires. So, P v. D in K. D offers gen. denial in answer, and P had already alleged no justification. I D cannot intro. evd re justification at trial even though P alleged unnecessarily no justification. Justification is an affirm. defense & must be pleaded by D.

*** PLEA OF PAYMENT ***

In majority of juris, the plea of payment is unique.

(1) In action for paymt. only, P is required to plead but not prove non-paymt. e.g., action for purchase price; promissory note; or an acct. i.e. a liquidated amt. (This is an exception to the gen. rule that he who asserts must prove.)

(2) If D wants to prove paymt., he must plead it as an affirm. defense.

(3) If the action is not ^{on K} for paymt. only, but is an obligation ~~created~~ created by oper. of law or results from enforcement of ~~a~~ a lien, P must plead & prove non-paymt.

Majority rule: D has burden of pleading and proving payment, and P need not plead non-paymt. Generally, a party is not called upon to prove a negative allegation; so the matter of nonpayment is an exception to this rule because it is a part of the substantive claim of an action on K for payment.

So, a negative averment must be pleaded and proved only on the averment is matter which is a part of the substantive claim of the action.

Non-payment is a part of the substantive claim of K ~~for~~ action for paymt.

67 P.681 (A02)
(B02)

282 S.W.2d 200
216 P.2d 360

62 P. 93

85/77

14 P.C.L.R. 396 at 400 to 401.

8240/791 (1954)

B/P = substantive & not procedural right. See 233/585; 209/272. See also 196/237; 168/472; 205/585. This is the general rule has importance under Erie v. Tompkins.

*** PLEA OF CONTRIBUTORY NEGLIGENCE ***
Prater v. Buell (p. 251)

P alleged D was guilty of willful and wanton misconduct. D said the complaint failed because P failed to allege freedom from willful and wanton misconduct. Ct. upheld D.

Illinois and Iowa require P to allege freedom from contrib. neg. as a substantive element of an action for neg.

So, the Ct. here held that the rule re C/P also applied to w and w misconduct.

*** Majority rule** (N.C. 9.5.1-39) says that CN is an affirmative defense and must be pleaded by the D in the answer affirmatively.

Are there any other ways to get these affirm. defs. into issue other than by pleading them affirmatively?

4 DEC. 62

Majority rule is that C/N is an affirmative defense on D.

Another view is that P ~~need not~~ plead C/N but ~~must~~ ^{must} prove freedom from C/N. That = pleading by inference. See 132 N.W.1111.

The reasons for C/N being ^{not} deemed an affirm. def. on D:

1. Pleadings should be designed to ascertain the issues as soon as possible, ~~but~~ P should not be forced to anticipate defenses: good way to "plead yourself out of court." — Not a good reason.

2. A P is usually negl. to some degree anyway. — This reason ignores willful and wilful misconduct situation.

S/F, S/L and other unfavorable (policy) defenses are uniformly on theasserter to plead and prove the defense.

Kotler v. Lally

wrongful death action, and it held that the B/P re freedom from C/N was on the P, and P was put to the task of proving freedom of decedent (p. 254)

from C/P. - Harsh! Later changed by statute in Conn. because the holding favored hit and run drivers.

Dissent here: Ct. can change the rule because the Ct. adopted the rule; need not await legis. change.

Conn. does not follow the rule of B/P of C/P out in willful and wanton misconduct cases.

The Conn. stat. (1931) that adopted suggestion of the dissent and said that y will be a presumption of due care of P and the B/P of C/P will be on D.

C/P of Minors

In Conn., neg. of minors is ? of fact for the trier. Majority of states say that that age 3 or below will conclusively presume incapability of C/P.

In N.C., 7 or below = concl. presump. v. capacity for C/P; between 7-14, a rebuttable presumption of incapability of C/P; over 17, capable of C/P.

The majority rule uses an objective standard to deter. whether the child ~~perceived~~ exer. due care, and before that test comes a subjective test re whether the child perceived the risk.

Objective test: a child is required to exercise such

Objective Test

Care as may reasonably be expected of children of similar age, judgment and experience under the circumstances.

Ft. Dodge Hotel Co. v. Bartelt (p. 259)

Fed. Ct. sitting in Iowa.

F.R. 8(c) says C/N = affirm. defense. Iowa says P must plead and prove freedom from C/N.

Under Erie v. Tompkins, on diversity = juris. in fed. Ct., fed. Ct. must apply the state's substantive law.

You must look at state law to deter what = substantive law.

In Iowa, C/N is an essential part of P's case in req. So, in Iowa, the B/P of freedom from C/N = substantive require-

ment. Therefore, this fed. Ct. had to apply that law.

Pleading is procedural always, but B/P = substantive in some states, = procedural in most states.

Q. In fed. Ct. in Iowa, if you were atty. for D, and P has not pleaded freedom from C/N, would you plead C/N as an affirm. defense? = No, you would move for dismissal for failure to state a claim upon which relief could be granted.

28 U.S.C. 1552 - "Rules of Decision Act: laws of ^{the} several states shall be regarded as rules of decision in civil actions. Erie interpreted this and reversed Swift v. Tyson's interpretation. Read Clark pp. 303-307 re views of C/N.

N.C. - defendant must plead C/N, if at all, as an affirm. defense. 1-139.

C/N can be put into issue, when not raised by the pleadings, by implied consent of the parties or it is tried & contested by the parties.

Another way would be by demurrer (N.C.) or motion for dismissal for failure to state a claim for relief on the complaint shows plainly on its face that P was C/N. Bergen v. The Ry. 115 N.C. 673 - it must patently appear on the face of P's complaint that P was contributorily negligent.

Another way is on C/N appears in P's evd. during trial at close of P's evd., D may move for nonsuit, or, on allowed, demur to the evidence.

How may \$L be raised? Conds. in R actions? (e.g., conds. precedent, concurrent & subsequent)

209/165

6 DEC. 62

161

To be safe, D should plead ^{C/N.} unless it is absolutely patent on the face of the complaint that P was C/N.

N.Y.C. P.A. §242

If a D, under N.Y. law, intends to rely on a certain defense which may come as a surprise to P, D must plead that affirm. defense.

* PLEA OF STATUTE OF LIMITATIONS (S/L)

- ① C.L. Rule - S/L was an affirm. def. that must be pleaded by confession and avoidance, but NOT BY DEMURRER under any circumstances.
- ② Equity Rule - early cases allowed S/L to be raised by demurrer, later changed to C.L. rule, later changed back to orig. equity rule (now the majority rule under the Codes, too) on the complaint shows on its face that the S/L has run.
- ③ FED RULE - Under Fed. rules, no demurrer (has been on exam) but S/L can be raised by a motion to dismiss.
- ④ N.C. Rule - S/L can only be raised by answer. See 219/199; 238/351; 236/570; 249/90; ~~238~~ and G.S. 1-15. See exception infra, p. 166.

Exception:

In possessory actions involving title to land, unnecessary

219/199
238/351
1-15

162

138/476
117/351

226/371
223/146

B/P on P

to plead s/l, and the question can be raised by a general denial. The reason is that s/l (e.g., in A/P cases) can confer title and does not merely bar the remedy. See 138 N.C. 476; 117 N.C. 351 (certain matters must be specifically set out).

In N.C., as everywhere, the mode of pleading is by pleading the material facts and not conclusions of law. e.g., D pleads that ~~X~~ years have elapsed and D pleads this passage of time as a bar.

⊗ When D must plead the s/l and it is properly pleaded, the B/P is not on the D; the B/P is on the P. 226/371. Exception: actions re title to land; P has burden/prove re s/l and must plead it! 238 N.C. 215

When s/l is properly pleaded = ? of fact for the trier of fact. The real question of fact usually is when did the s/l begin to run.

⊗ The gen. rule is that s/l begins to run when the s/l accrues.

⊗ But, in tort cases, mere lack of knowledge of P of the tort is no defense and the c/p is deemed to

see exception

have occurred when the right was violated by a br/duty, except on D attempts to fraudulently prevent P from knowing.

In fraud cases, c/a accrues when P should reas. have known.

P need not reply to a D's plea of s/l, but it is advisable.

Sometimes (184 N.C. 55) s/l = question of law, e.g. on P's complaint shows patently a running of s/l, and D has pleaded in bar the s/l, ct. may consider dismissal as a matter of law on the facts admitted.

Failure to plead s/l = waiver.

Insane may take (1-16) advantage of s/l w/o pleading it. 124/90.

When s/l = a question of law (supra), and although N.C. does ~~not~~ allow admission, either party may move for JUDGMENT ON THE PLEADINGS. See Mobley case,

248 N.C. 54: P unlawfully arrested on 7-6-53, and then P sued cop for assault and false imprisonment (in tort) on 11-24-54. D-Cop pleaded in bar the 1 yr. s/l under 1-54(3).

248/54

154(3)

197/100

Then D moved for judgment on the Pleadings. Mal. Pros. or Abuse of Process = 3 yr. S/L, but P's Atty. stated his theory as being assault and F.I. - in open court. - Motion of D granted, even though the S/L had run two days BEFORE the crim. action v. P had been reversed by N.C. Sup. Ct. - Ct. in granting D's motion said that c/a for F.I. arises one day after arrest when the arrested party is released on bond; c/a for assault arises on day of arrest.

Motions for S.J.

* No summary judgment motion in N.C., but yes in N.Y. and under the Fed. Rules.

* Fed Rule - F.R. 8(c) says that S/L = affirm. def. and says that D must plead it. 8(c) has been interpreted by cases so that motion for Summary Judgment is appropriate under F.R. 56 (?), or D, under 12 (b) (6), may move for dismissal for failure to state a claim of relief. Motion for S.J. is preferred because, if granted, = res judicata.

Caution However, disputed facts cannot be disposed of by motion. On true answer must be made by D,

Allegations of Time and Place

and then trial on the facts.

Under F.R. 9(f), allegations of time and place are material to test the suff. of the pleading as stating a c.p.

4 F.R.D. 143 - (Pa. - big split in this district) says that due to 8(c), S/L can only be raised by answer. Pa. dist. (fed.) ct. case contra. - ~~majority~~ fed. rule is that S/L may be raised by motion.

Fed v State S/L:

(1) On non-federally created right is in question, the state S/L will govern. See Guaranty Trust Co. v. York, 326 U.S. 99.

(2) On y is federally created right and a fed S/L on the matter, the fed. S/L will govern.

(3) On y is federally created right at law and no fed. S/L, the state S/L will govern.

(4) On y is federally created right in equity and no fed. S/L, the state S/L will NOT govern, but the fed. ct. will apply equitable doctrines of laches in determining the case. 327 U.S. 392 (1946).

S/L does not run against fed. govt. or state govt. unless

326 U.S. 99
Guar. Trust Co. v. York

171 F. Supp. 10

327 U.S. 392 (1946)

that govt. has specifically provided for a s/l in a given case (e.g., Tort Claims Act = 2 years.)

7 DEC, 62

Knally adopted s/l:

Generally, agreements of parties cannot change s/l, tho' there can be K, w/ consid., not to plead s/l. However, s/l may be waived or the conduct of the parties may effect s/l. e.g., parties may by special term in K, fix a shorter period of time w/in wh action may be brought so long as it is "reasonable", and cts. will give effect to it not as a s/l, but as a term of the K. Most often found in ins. Ks + Ks for shipment of goods. 9.58-31 fixes minimum time limit to be used as a shorter period instead of s/l, and this period is deemed "reasonable." So, what is "reasonable" depends on state law.

Exception
to N.C. Rule

If a party, to such a K fails to bring the action w/in that agreed period of time (and P must plead this), D may DEMR (exception to usual rule against use of demurrer in raising s/l) on it is potent on the face of the complaint that the action was not timely w/in the K limitation.

* Plea of Statute of Frauds *

Written Ks - In K actions, there are three methods of pleading a written K:

- (1) Set it out in the complaint in full verbatim (in haec verbis or in ipissimis).
- (2) Plead it and incorp. by ref. to it, and append it thereto.
- (3) Pleading it per its legal effect (not verbatim, but the essence of the K). The danger here is that P may leave out an essential element or misinterpret the K.

Majority of States (and N.C.) allow all three. Some only allow one or two (Ohio, Wis.).

(1950) 231 N.C. 722
223 N.C. 344

* The effect of #2 ^(preferred) per one view, is that the attached document is a part of the compl. for all purposes. (Clark view) (N.C.)

* Another view re #2 is that the compl. must be suff. w/o the exhibit, and the exhibit (document) can be looked to only to deter. legal suff. of the Compl.

In either view, failure of suff. of compl. makes compl. subject to demurrer, as not stating a legal basis for recovery.

In Fed. Ct., the proper motion = dismiss under 12(b)(6).

If the K is short, #1 is pre-

Majority Rule:
S/F = affirm. def.

ferred. If K is long, #2 is preferred.

On P is bringing K action on K is w/in the S/F, must P allege that K was written? = Majority says No. That's a matter of defense on D to raise.

212 N.C. 535 - ord. it is adequate to plead by #3 method (legal effect) of pleading written K. But, if meaning of K is doubtful, use #2 method (N.Y. rule) and let it interpret.

On P must allege writing, P must plead same or be ~~to~~ suffer demurrer.

* Gen. demurrer is only available on the compl. is defective on its face.

* In most states, S/F may be raised by demurrer on compl. shows on its face that the K was w/in S/F but not written. C.I. Rule.

On P is not required to plead compliance w/ S/F, that of itself does not = demurrer. * Contra, S.C., Ga., Texas, Tenn., Ala., Calif.

Some states say that (177/318) demurrer cannot ~~raise~~ S/F. N.C., N.Y., Ala., Calif., Ga. (Some states go both ways)

* However, even in these states, on Compl. shows on its face that the K was not written but was ~~w/in~~ the S/F, demurrer will lie.

N.C. holds:

- (1) 220/318 - S/F must be pleaded by theasserter.
- (2) No S/F by demurrer.
- (3) 235/384 - no S/F by motion to dismiss.
- (4) S/F can be raised by ad-
mitting K (235/384; 218/146)
+ pleading in answer, S/F
in bar.
- (5) Denying K + pleading in
answer the S/F as a bar.
- (6) General denial can be
used along w/ objection to
parol evid. tending to prove K
and indicating ground of
(228/540) objection.
- (7) S/F may not be raised
merely by objection to charge
to jury even on K was
denied in ans. if D does
not except to parol evid.
and it has no notice
of D's reliance on S/F.
- (8) But, on D denies K, but
parol evid. is competent
on another theory of liab.
(205/363), failure of D to
object to the parol evid.
≠ waiver of S/F.

In N.C., demurrer does not
lie at all to raise the
defense of S/F. Burden of
proof is on D to plead and
prove the S/F and failure of
P to comply with.

* Pleading K Conditions *

In K actions, plaintiff must plead the essentials, and the performance of any conds. must be pleaded by P.

Three types of conds.:

① Precedent - any cond. that qualifies the offer. Notice by offeree of compliance w/ a cond. of K is a precedent cond. that is implied. P must plead compliance w/ conds. precedent (the facts per C.L.) or waiver of conds. by D-offeror.

G.S. 1-155 - allows pleading of perform. of conds. precedent in general terms ("I performed.") and need not plead specifically the facts under the C.L. rule. P may do either, but if he pleads per C.L. rule (facts in particular), P must meet the test of specificity.

177 N.C. 313 - on P has been stopped from perform. by D. P must allege this w/ particularity. Same for allegation of waiver by D of P's performance of the conds.

(Pages 171 thru ~~176~~ 176 of notes omitted. Continuity from p. 170 to p. 177 is complete.)

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