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Practice--Jurisdiction--Special Appearance to Plead the Merits

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Support and justification can be found for both views. It would seem to be self-evident, however, that the law on such a basic point must be clear and certain. The majority of jurisdictions, following *Adams v. Lindsell,* have chosen as the critical event in the formation of the contract, the overt act of the offeree in mailing the acceptance. Although this rule is subject to certain logical criticisms, the new rule too can be criticized in that it will create confusion and instability by undercutting the *Adams* rule when no basic policy consideration or great injustice has demanded it.

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PRACTICE — JURISDICTION — SPECIAL APPEARANCE TO PLEAD TO THE MERITS

The plaintiff, a Delaware corporation, filed suit in Delaware for an accounting against the defendant, a non-resident, for violation of his fiduciary duty to the plaintiff, and against the defendant's wife, also a non-resident, for conspiring with her husband in the alleged breach. Since the defendants were residents of the State of Florida and so not amenable to personal service, they were served by mail and ordered to appear in court in accordance with the provisions of the Delaware attachment statute.[1] Stock held by the defendants in the plaintiff corporation was seized by a sequestrator. The defendants sought leave of court to appear specially to defend their property without submitting generally to the jurisdiction of the court. Leave was denied.[2]

The court reasoned that the purpose of an attachment as set out in the statute is to compel the defendant to make a general appearance. Conceding that the defendants could make a special appearance to contest jurisdiction, the court felt that such a special appearance could not be expanded to allow the defendants to plead to the merits while limiting the court's jurisdiction to the value of the property attached.

There is a split of authority on the rule of law enunicated in the instant case. The view expressed is opposed by the famous federal case of *Salmon Falls Manufacturing Company v. Midland Tire and Rubber Company.*[3] The rationale of the latter case is not founded so much on the interpretation of the statute as on the intent of the defendant. In order to make a general appearance it was held that the defendant must have the intent to make such an appearance. The court concluded that the defendant could make a

[1] DEL. CODE ANN. title 10, § 366: "The court may compel the appearance of the defendant by the seizure of all or any part of his property which property may be sold under order of the court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. . . ."

[2] Leftcourt Realty Corp. v. Sands, 113 A.2d 428 (Del. 1955).

[3] Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co., 285 Fed. 214 (1922).

special appearance to plead to the merits of the attachment while limiting the court's jurisdiction to the value of the attached property. All that he is required to do is to declare at the proper time that he is only appearing specially.[4]

The court in the instant case, on the other hand, reasoned that there are but two types of appearances: (1) a special appearance to contest the jurisdiction of the court, and (2) a general appearance. Some courts expressing this view have argued that the purpose of a special appearance is to protect the defendant from being required to defend an action over which the court has no jurisdiction.[5] Others have asserted that the very word "appearance" means a voluntary submission to the court's jurisdiction in whatever form it is manifested, and one who participates in the proceedings for any other purpose than that of assailing the jurisdiction of the court, nothwithstanding that he states his appearance is only special, is deemed to have made a general appearance.[6]

Aside from the approach of the *Salmon Falls* court there is another view which allows the defendant to appear specially and plead to the merits. The advocates of this position point out that the manifest purpose of an attachment statute is not to compel the non-resident defendent, if he appears at all, to appear generally.[7] Their interpretation of the statute does not disclose the intent to impose upon a non-resident the burden of making a general appearance in order to protect his property rights. There are a number of courts which adopt his view by stating that the primary purpose of an attachment is merely to enable the plaintiff to acquire a lien upon the property which will be levied upon after judgment.[8] Where this view is accepted there would seem to be no reason to prohibit the defendant from protecting his property without subjecting himself to the general jurisdiction of the court.

As has been explained above, the instant case took a different view, the court stating that the main purpose of an attachment is to compel the general appearance of the defendant if he desires to protect his property.[9] The court felt that the wording of the statute required such an interpretation.

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[4] Bissell v. Brigg, 9 Mass. 462, 6 Am. Dec. 88 (1813); RESTATEMENT, JUDGMENTS § 40 (1942); Miller Bros. Co. v. State, 201 Md. 535, 95 A.2d 286 (1953).

[5] Kaiser-Frazer Corp. v. Eaton, 46 Del. 509, 85 A.2d 752 (1952); Blaustein v. Standard Oil Co., 43 Del. 516, 51 A.2d 568 (1947); Sanford Mfg. Co. v. Western Mutual Fire Ins. Co., 225 Iowa 1018, 282 N.W. 771 (1938).

[6] Wisniewski v. Wysocki, 36 N.Y.S.2d 712 (1942); Braman v. Braman, 236 App. Div. 164, 158 N.Y. Supp. 181 (1932); Citizens Trust Co. of Utica v. R. Prescott and Sons, 221 App. Div. 426, 223 N.Y. Supp. 191 (1927).

[7] Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916).

[8] McInnes v. McKay, 127 Me. 110, 141, Atl. 699 (1928); Poulan v. Gallagher, 147 So. 723 (La. App. 1933); Pierce v. Mallard 150 S.E. 342 (1929); Farmers and Merchants' Nat'l Bank v. Sprout, 104 Kan. 348, 79 Pac. 301 (1919).

[9] Omnium De Participations Industries De Luxe (SA) v. Spoturno, 39 Del. 100, 196

To fortify this conclusion some courts have reasoned that litigation on the merits is not limited to the right to hold a lien on the property proceeded against but also goes to the merits underlying the personal claim.[10] Expressed in the opinion is the idea that if defendant is willing to litigate his claim in part in order to protect his property, he should be required to let his defense to the merits determine the entire claim.

The court refused to accept the cases which expanded the definition of a special appearance and tried to distinguish the opposing cases by stating that the attachment statutes involved in those cases are different from the statute in the instant case. But the statutes are not so basically different that the Delaware court could not by interpretation reach an opposite result.[11]

Whether the court has found a true distinction is a matter of opinion, but it seems that the end result is equitable and the rule of the case a just rule. No matter what the intent of the statute or what definition is given to a special appearance, if the defendant wants to defend his property he ought logically to be made to defend himself against the personal claim as well.

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Atl. 194 (1937); Nazareth Cement Co. v. Union Idemnity Co., 116 Pa. Super. 520, 177 Atl. 64 (1935).

[10] Grant v. Kellogg, 3 F.R.D. 229 (1943); MOORE'S FEDERAL PRACTICE, § 12.12 (2d. Ed. 1948).

[11] MASS. REV. LAWS. c. 170 (1902)

"§ 1 or unless an effectual attachment of his property within this commonwealth has been made upon the original writ, and in case of such attachment without such service, the judgment shall be valid to secure the application of the property so attached to the satisfaction of the judgment, and not otherwise. "

"§ 6 Upon proof that service has been made as ordered, such defendant shall be held to answer to the action and no further service shall be necessary. "