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Special Appearance in a Federal Court - Effect of the Conformity Act

Edward W. Hinton

PRACTICE—SPECIAL APPEARANCE IN A FEDERAL COURT—EFFECT OF THE CONFORMITY ACT.—[Federal] A decision[1] by the United States district court presents several interesting questions. The suit was brought in the federal court against a foreign corporation, and the officer's return showed service on defendant's agent.

Defendant appeared specially by attorney and moved to quash the service on the ground that the person served was not in fact the defendant's agent. The plaintiff resisted the motion principally on the ground that it was in effect to a plea to the jurisdiction, and, under the established rule in Illinois, which the Conformity act required the court to follow, such a plea or motion by attorney amounted to a general appearance and submission to the jurisdiction.

The court thought that the proper disposition of the motion turned on two questions:

First, whether, assuming the Illinois practice to be as contended by plaintiff, the Conformity act required the federal court to follow it.

Second, whether, if not constrained by the Conformity act, the court should apply the rule invoked by plaintiff on general principles of common law procedure.

Answering both questions in the negative, the court quashed the return.

According to the English common law the sheriff's return of service was conclusive and could not be contradicted either by motion[2] or plea.[3] The sole remedy was an action on the case against the officer for a false return.

This harsh rule may have resulted, in part, at least, from the dislike of the court to try the question on motion and affidavits, and the fact that logically there could not be a jury trial of such an issue. To have an issue triable by jury a plea would be necessary, but there was no appropriate plea for that purpose.

If a return was vacated, or quashed for defects on its face, that did not abate the action or defeat the jurisdiction, because the plaintiff might have an alias summons.[4]

A false return, assuming that the falsity could in some way be made to appear, would have no greater effect to abate the action than if the return had truly stated the facts, which would then appear insufficient in law.

Whatever may be the explanation, the rule that the return was conclusive, was felt to be harsh and oppressive, and to work badly. Why should the party be forced to bring an action for damages for

1. *Joseph Frackman Co.* v. *Lloyds* 7 Fed. (2nd) 620 (East Dist. Ill.).
2. *Barr* v. *Satchwell* (1729) 2 Strange 813; *Goubot* v. *DeCrouy* (1833) 1 Cr. & M. 772; *Hollowell* v. *Page* (1857) 24 Mo. 590.
3. *Flud* v. *Pennington* (1601) Cro. Eliz. 872; *Slayton* v. *Chester* (1808) 4 Mass. 478; *Stenson* v. *Snow* (1833) 10 Me. 263; *Columbian Granite Co.* v. *Townsend* (1902) 74 Vt. 183; *Gould* "Pleading" (3rd ed.) ch. V sec. 135.
4. *Harkness* v. *Hyde* (1878) 98 U. S. 476; *Pratt* v. *Harris* 295 Ill. 504.

a false return, when damage might be obviated by allowing the truth of the return to be questioned in the original action?

In the United States there has been a strong tendency to break away from the doctrine that the truth of a return was not contestable. In an early Illinois case[5] there is a dictum that a return is not conclusive on the fact of agency. In a later case[6] it was decided that the truth of a return was open to contest. The reasoning by which this seemingly desirable result was reached is rather curious.

The court examined several cases where courts of chancery had given relief against default judgments based on false returns, and from these concluded that the matter was open to dispute at law. As a matter of fact, chancery gave relief because the truth of the return was not open to dispute at law, except in an action against the officer.

If the fiction, that equity follows the law, were reversed and turned into the proposition that the law follows equity, it would more nearly accord with the actual judicial process.

It has frequently been assumed that the Supreme Court of the United States follows the view that the return is not conclusive, but the cases usually cited[7] leave the matter in doubt, because of the further fact that in each instance the defendant was an absent non-resident.

Where the truth of the return is open to contest, the question naturally arose as to how the issue should be raised, whether by motion or plea.

The obvious and natural method was by motion to quash the return of service since the object was to get rid of the false return, leaving the action to proceed by alias summons. And it is no objection to the use of a motion that a question of fact is involved. Courts decide all sorts of questions of fact on motions.[8]

Pleas in abatement, and pleas to the jurisdiction in the nature of plea in abatement, are based on the theory that the action has been misbrought, which is not the point in such cases. However, in the *Mineral Point Railroad* case[9] it was assumed that a plea was appropriate, and that apparently has been the accepted practice in Illinois ever since.

There would be a serious practical objection to this view but for the saving grace of sec. 45 of the Practice act. When a motion directed at the process or return is overruled, the defendant may plead in bar as a matter of right.[10] The same thing is true where

5. *Mineral Point R. Co.* v. *Keep* (1859) 22 Ill. 9.
6. *Sibert* v. *Thorp* (1875) 77 Ill. 43.
7. *Wabash Ry.* v. *Brow* (1896) 164 U. S. 271; *Mechanical Appliance Co.* v. *Castleman* (1910) 215 U. S. 437.
8. For example, motions for a continuance, motions to quash the panel, motions for a new trial, etc.
9. *Mineral Point R. Co.* v. *Keep* (1859) 22 Ill. 9.
10. Whether a subsequent plea waives an exception to the ruling on the motion is a question on which the courts differ. The federal courts hold that the exception is not waived: *Harkness* v. *Hyde* (1878) 98 U. S. 476.

a plea in abatement is held bad on demurrer, because the judgment in that event is respondeat ouster. But at common law when issue was taken on a plea in abatement and found for the plaintiff, the judgment was final, that the plaintiff recover.[11] Hence, by pleading in abatement a defendant had to take the chance of being cut off from any defense to the merits. This has been changed in Illinois in case of pleas in abatement contesting the truth of the return, or attacking the venue.[12]

In the federal courts a motion to quash has been recognized as the proper method to attack the truth of the return.[13]

The Illinois courts appear to require a plea to the jurisdiction, and apply to it that archaic rule, that where jurisdiction could be conferred by consent, such pleas must be pleaded in person instead of by attorney; and that such a plea by attorney amounts to a general appearance, thereby waiving the objection attempted to be set up.[14]

That was undoubtedly the ancient rule of the English courts, and is so stated, without explanation, in Williams' Saunders and Chitty. The old cases throw no light on the point. Bacon's Abridgement gives the only explanation which the writer has been able to find:

"The defendant must plead in propria persona, for he can not plead by attorney without leave of court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the court; and if the defendant puts in a plea by an officer of the court, that plea must be supposed to be put in by leave of court."[15]

If this is the true reason, it would apply equally to a motion by attorney to quash a return for defects on its face, because it was the appearance by attorney which required leave of court, and not the kind of step taken.

The Supreme Court of Illinois has allowed a motion by attorney to quash a return for defects on its face, and thus limited the rule to cases of objections requiring extrinsic proof.[16]

Many of the state courts hold that a subsequent plea in bar waives the exception: *Eddleman* v. *Traction Co.* (1905) 217 Ill. 409; *Newcomb* v. *Ry.* (1904) 182 Mo. 687.

11. *Thompson* v. *Colier* (1608) Yel. 112.

12. If the issue on any plea in abatement is the truth of a statement in the return on a summons, or that the defendant is sued out of his proper county, or is not subject to suit in the county in which the suit is brought, or that the court has no jurisdiction over the person of the defendant, and such issue is found against the defendant, the judgment shall be respondeat ouster: Hurd's Rev. Stat. ch. 110 sec. 45.

This statute impliedly sanctions the use of a plea in abatement for this purpose.

13. *Higham* v. *State Travelers' Assn.* (1911) 183 Fed. 845.

14. *Pratt* v. *Harris* (1920) 295 Ill. 504.

15. *Bacon* "Abridgment" I 2.

16. *L. & N. Ry.* v. *Industrial Board* (1917) 282 Ill. 136.

If the federal courts are free to decide the question on general principles of procedure they might well hold that they are no longer bound by the "dead hand of the common law."[17]

If the rule is really based on the theory of leave of court to appear by attorney, it would seem inapplicable to conditions in the United States where appearance by attorney has come to be regarded as a matter of right.

If the leave of court theory is not the true explanation of the requirement that such pleas be made in person, then the rule is simply a survival of a forgotten practice, no longer serving any purpose but to entrap the unwary, and might well be abandoned as out of harmony with modern procedure.

This appears to be the first case in which a federal court has been called on to determine whether the ancient rule is still a part of the living law of procedure. The cases cited[18] in the opinion as sanctioning motions by attorney to quash or vacate false and defective returns are not particularly in point. They all arose in code states, and the motions were probably made by attorney, but that fact was not noticed or questioned. In all probability the practitioners under the code who were engaged in these cases had long since forgotten such matters of common law technique.

But no matter how obsolete the rule has become elsewhere, it is still alive in Illinois.[19] The important question then is whether the Conformity act[20] requires a federal court in Illinois to follow it.

It has been held that in the service of process the federal court must conform to the state rule, because that is a matter of practice and procedure, and hence that a federal court could not acquire jurisdiction by a method of service not authorized by the state law.[21]

This does not mean that the federal court is bound to recognize service in accordance with the state rule as necessarily valid, because such service might be contrary to the due process[22] clause of the constitution.

So a state rule converting an attempted special appearance into a general appearance might conceivably violate the due process clause,[23] or might be invalid as unreasonably restricting the asser-

17. *Rosen* v. *U. S.* (1918) 245 U. S. 467.

18. *Harkness* v. *Hyde* 98 U. S. 476; *Goldey* v. *Morning News* 156 U. S. 518; *Meisukas* v. *Greenough Coal Co.* 244 U. S. 54; *Minter* v. *Weil* 261 U. S. 276; *General Inv't Co.* v. *Ry.* 260 U. S. 261.

19. *Pratt* v. *Harris* (1920) 295 Ill. 504.

20. The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District courts, shall conform as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in courts of record of the state within which such Circuit or District courts are held, any rule of court to the contrary notwithstanding: U. S. Rev. Stat. sec. 914.

21. *Amy* v. *Watertown* (1888) 130 U. S. 301.

22. *Minnesota Ass'n* v. *Benn* (1923) 261 U. S. 140.

23. So far the attacks on a state rule on this point as violation of the due process clause here failed: *York* v. *Texas* (1890) 137 U. S. 15; *Western Life Co.* v. *Rupp* (1914) 235 U. S. 261.

tion of a privilege or immunity under the laws of the United States.[24]

The rule in question, requiring an attack on jurisdiction over the person to be made in person and its corollary, that such an attack by attorney operates as a submission, is clearly a matter of practice, regulating the form and mode of proceeding in certain cases. It can not be pretended that it violates the due process clause or unreasonably restricts the assertion of a federal right or immunity, because it was a part of the common law from which we derive our notions of due process and unreasonableness.

If the words of the Conformity act mean anything, it would seem obligatory on the federal courts to follow the state rule on this point. But in two instances, at least, the Supreme Court has announced broadly that on a similar question the Conformity act was not binding.[25]

Whether these statements can be regarded as anything more than dicta is questionable. In the *Meisukas* case suit was brought in the federal court in the Eastern district of New York against a Pennsylvania corporation, alleged to be doing business in New York, and the process was served on the defendant's president while in New York.

Defendant appeared specially and moved to vacate the return on the ground that it was not doing business in New York, and that its president, while in New York was not representing it. Amongst other objections of this motion, the plaintiff contended that according to the New York practice the defendant should have used a demurrer, and that the Conformity act required the same practice in the federal court.

The Supreme Court did not undertake to determine what the New York practice was, but announced that its previous decisions had sanctioned the use of a motion, citing several cases.[26] It may be noted that in the cases cited, it was not suggested that a motion was not permitted by the local practice. In the *Meisukas* case the contention that the New York rule required a demurrer seems untenable. It is true that the New York Code[27] made want of jurisdiction over the person of the defendant a ground of demurrer. But the lack of jurisdiction in that case did not appear on the face of the complaint, and therefore could not have been reached by demurrer. In the absence of any New York cases holding that a motion could not be used for the purpose, the *Meisukas* case is very

24. *Davis* v. *Wechsler* (1923) 263 U. S. 22; *Davis* v. *O'Harra* (1924) 45 Sup. Ct. Rep. 104. For comments on such cases see ILL. LAW REV. 19: 567.

25. *Meisukas* v. *Greenough Coal Co.* (1917) 244 U. S. 54; *Minter* v. *Weil Corset Co.* (1923) 261 U. S. 276.

26. *Goldey* v. *Morning News* 156 U. S. 518; *Wabash Ry.* v. *Brow* 164 U. S. 271; *St. Louis Ry.* v. *Alexander* 227 U. S. 218.

27. "The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof: That the court has not jurisdiction of the person of the defendant: Code Civil Procedure sec. 488.

slender authority for the proposition that the Conformity act does not require a federal court to conform to the local practice as near as practicable.

In the *Minter* case the facts were these: Suit was brought in a federal court for the District of Connecticut, and the process was served on the defendant, as appeared by the return, in the state of New York. The defendant appeared specially and moved to strike the case from the docket. The plaintiff insisted that, according to the Connecticut practice, the objection should have been taken by plea. This contention seems untenable. Doubtless a plea to the jurisdiction might have been used, but the writer has been unable to find anything in the Connecticut practice act, or in the Connecticut decisions prohibiting the use of a motion based on objections apparent on the face of a return.

Without considering what the Connecticut rule of practice was on the point, the Supreme Court held that a motion was available for the purpose, observing:

"We have decided in cases which concern the jurisdiction of the federal courts that notwithstanding the Conformity Act, neither the statutes of the States nor the decisions of their courts are conclusive upon the federal courts, the determination of such questions being 'in this court alone': *Mechanical Appliance Co.* v. *Castleman* 215 U. S. 437, 443."

Unless the Connecticut law did not permit the use of such a notion, which seems unlikely, there was no failure to conform, and the statement, that the Conformity act was not binding, appears to be a dictum which finds little support in the case[28] from which the quotation was taken. In that case suit was brought against a Wisconsin corporation in a state court in Missouri. The sheriff's return showed service on the defendant's agent, apparently as authorized by the local Practice act.

The defendant removed the case to the federal court, and then pleaded that it was a foreign corporation, not doing business in Missouri, and that the person served was not its agent, etc.

The plaintiff contended that this question could not be raised because the law of Missouri made the sheriff's return conclusive. Notwithstanding the local law, this contention was clearly untenable.

If the plea was true, the state court could not by a false return acquire jurisdiction over the person of an absent non-resident.[29]

Under the due process clause the defendant was entitled to resist the attempt to exercise jurisdiction where none existed. Of course the Conformity act did not require the federal court to follow a state rule which denied to the defendant due process.

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28. *Mechanical Appliance Co.* v. *Castleman* (1910) 215 U. S. 437.

29. *Knowles* v. *Gas & Coke Co.* (1873) 86 U. S. 58. In the case of a resident the state rule making the return conclusive, and limiting the remedy to an action against the officer does not violate due process: *Meidrich* v. *Lauenstein* (1914) 232 U. S. 236.

In deciding this problem Mr. Justice Day used the following language:

"Moreover in cases which concern the jurisdiction of the Federal courts, notwithstanding the so-called Conformity Act, Revised Stats. section 914, neither the statutes of the State nor the decisions of its courts are conclusive upon the Federal courts. The ultimate determination of such questions of jurisdiction is for this court alone."

The question was not *how* the defendant might resist the attempted exercise of jurisdiction, but whether it might do so at all. The problem was not one of method of procedure, but of substantive right under the Fourteenth amendment.

The writer, however, is unable to see why this eminently sound doctrine should lead to the conclusion that the Conformity act is inapplicable where the sole question is as to the proper steps to be taken in raising an objection to process or the return of service, where the state rule merely excludes one of several possible methods.

But, as a matter of experience, we know that a repeated dictum is apt to become the basis of a decision.

So the language of Mr. Justice Day seems destined to create a new exception to the Conformity act.

E. W. HINTON.