Wyoming Law Journal

Volume 12 | Number 3 Article 8

December 2019

Procedure in Lieu of Special Apperances

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"Simplified pleading is basic to any program of civil procedural reform. With it the modern remedies of discovery, pre-trial, and summary judgment acquire increased significance and effectiveness."[38] This approach is exemplified by the new rules and the appendix of forms. In pleading negligence it should be remembered that general allegations are sufficient in most cases. It the court can reasonably infer that the defendant owed a duty to the plaintiff and that this duty was violated, the allegation is sufficient. A short statement to the effect that as a result of such negligence the plaintiff was injured is also sufficient. Of course if the plaintiff is seeking special damages these should be specifically stated in the demand for relief. With these simple, direct requirements the pleader is no longer required to squander time and effort perfecting long and formal pleadings. Through discovery procedure, a mutual knowledge of the true issues is gained by the parties, the possibility of surprise is reduced, and the door to the pre-trial conference is opened where the issues may be further narrowed. The litigants will be assured of a greater opportunity for a just, speedy and inexpensive determination of their rights.

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PROCEDURE IN LIEU OF SPECIAL APPEARANCES

Under the former practice in Wyoming if the defendant had objections based on the defenses of improper venue, lack of jurisdiction over the person, insufficiency of process or insufficiency of service of process, he had to come into court under a special appearance in order to avoid submitting himself to the jurisdiction of the court. Under this practice the defendant was in court only for the purpose of objecting to the jurisdiction. If any action was taken which would recognize the jurisdiction of the court over the merits of the case, the objections based on jurisdiction were deemed waived and the defendant was held to have made a general appearance.[1] The problems encountered in this situation are illustrated by the case of *Honeycutt v. Nyquist*[2] in which the defendant appeared specially on a motion to quash service. Later, in the court room, he agreed to a continuance of a hearing on a motion made by the plaintiff. The court ruled that any action which recognized the case as in court constituted a general appearance, and that by agreeing to the continuance the defendant had made a general appearance. A more recent Wyoming case decided before the adoption of the rules defined a correct special appearance by saying that it is made properly when the appearance is for the sole purpose of objecting to the jurisdiction.[3] It is obvious that under

38. Clark, Simplified Pleading, 2 F.R.D. 456 (1943).

1. 6 C.J.S., Appearances § 9 (1937).
2. 12 Wyo. 183, 74 Pac. 90 (1903).
3. Vanover v. Vanover, ... Wyo. ...., 307 P.2d 117 (1957).

the former practice the requirements of a special appearance had to be met and any motion which combined objections to the jurisdiction and to the merits of the case amounted to a waiver of the jurisdictional objections, and the defendant lost what might have been a valid defense.

In federal courts, Rule 12(b) has for all practical purposes done away with the reason for special appearances, and this change has no doubt been achieved in Wyoming where the same rule is now in effect. This rule sets out the defenses that may be made by motion and adds, "no defense or objection is waived by being joined with one or more other defenses." One of the most frequently cited cases construing this rule is *Orange Theater v. Rayherstz Amusement Corp.*[4] It held that objections to the jurisdiction of the court can be combined in the answer with motions or answers going to the merits and that the defendant waives nothing by so doing; consequently, special appearances are no longer necessary. There are many cases which hold as the *Orange Theater* case does, and the law is well settled that special appearances are no longer necessary.[5]

Even though appearing specially for the purpose of asserting objections to the jurisdiction is no longer required, the defendant may still waive his objections under rule 12(h) which provides, in effect, that the defendant must raise his objections to jurisdiction at the time he objects to the merits or he will be held to have waived any objections not raised. In a recent federal case the defendant made a motion to dismiss which went only to the merits of the case without raising any objections to the jurisdiction and the court held that under 12(h) the defendant had waived any objections he had to the jurisdiction and had entered a general appearance.[6]

Another problem involving incorrect procedure under the rules is that of using words of special appearance in the pleadings. Words of special appearance gain nothing[7] and if the defendant makes all of his objections contemporaneously, the language that "defendant appears specially . . ." will be nothing but surplusage.[8] However, if the defendant fails to raise his objections, such objections will be deemed waived and if the defendant has happened to use langauge saying that he has appeared specially it will gain him nothing. Emphasis is not on the nature of the appearance, but rather upon the nature of the defense interposed.[9]

Another difficulty involved in avoiding waiver of objections to jurisdiction is that of taking depositions before answering the complaint.

4. 2 F.R.D. 278 (D.N.J. 1941), rev'd on other grounds 130 F.8d 185 (1942).
5. Blank v. Bitker, 135 F.2d 962 (7th Cir. 1943); Emercon v. National Cylinder Gas Co., 131 F.Supp. 299 (D.Mass. 1955); Olshansky v. Thyer Mfg. Corp., 13 F.R.D. 227 (N.D.Ill. 1952); Bowles v. Underwood, 5 F.R.D. 25 (E.D.Wis. 1945); Smith v. Aeolian Co., 53 F.Supp. 636 (D.Conn 1943)
6. 1 Barron & Holzoff § 343 at 592 (Rules ed. 1950).
7. Foreman Co. v. Zachry Co., 127 F.Supp. 901 (W.D.Mo. 1955).
8. Hadden v. Rumsey Products, 96 F.Supp. 988 (W.D.N.Y. 1951).
9. 1 Barron & Holzoff § 343 at 592 (Rules ed. 1950).

Blank v. Bitker[10] dealt with this problem. The court held that the taking of depositions by the defendant did not constitute a general appearance; however, the court refused to lay down a general rule, and limited its decisions to the specific fact situation by saying that the depositions in the case were necessary in order for the defendant to answer. As a consequence of this decision the defendant is faced with uncertainty whether or not to take a deposition that he feels is necessary in order to answer the complaint. If the defendant decides to take depositions, then the court with the advantage of hindsight, may rule that the depositions were not necessary, thereby depriving the defendant of possible jurisdictional defenses. This result with its lack of certainty is not justifiable under the rules which were adopted for the purpose of providing an easier and simpler procedure,[11] and it should not be engrafted on the Wyoming rules.[12]

It has been pointed out that under the former practice in Wyoming the defendant had to appear, at least in the first instance, for the sole purpose of objecting to the court's jurisdiction. Under the rules the defendant is able to combine his objections without waiving any of them, and as a result appearing specially is no longer necessary. The desirability of this change is expressed well by Barron & Holzoff in their work on procedure where they say, "[this] simplication of procedure is a major step forward. It enables counsel to incorporate in one answer all his objections to the proceeding as well as defenses to the merits without fear that he may waive any valid objection."[13] Undoubtedly Wyoming practice will benefit from the change and the express purpose of the rules, to simplify the procedure and to bring about a more just, speedy, and inexpensive determination of the action, will be carried out.[14]

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THE MOTION TO MAKE MORE DEFINITE AND THE MOTION TO STRIKE

When the Wyoming Rules of Civil Procedure became effective on December 1, 1957, Wyoming entered into the modern phase of procedural development which has a philosophy of liberality and an objective of substantive justice. Although our new rules retain many features found in our recent Code of Civil Procedure, the operation of the rules will necessitate a change in the interpretation and usage of these features.

10. 135 F.2d 962 (7th Cir. 1943).
11. Wyo. Rules of Civil Procedure, Rule 1.
12. Another problem deserves to be mentioned in passing, i.e., the situation where both parties have filed their pleadings before adoption of the rules and the case is to be tried at a date when the rules are effective. Schaeffer v. Schlaeffer, 112 F.2d 177 (D.C.Cir. 1940), held that the question of appearances would be determined under the old practice because jurisdiction had been perfected under the former practice and, further, under rule 86, rules are not effective for further proceedings if there would be prejudice.
13. 1 Barron & Holzoff, § 343 at 592 (Rules ed. 1950).
14. Wyo. Rules of Civil Procedure, Rule 1.