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GENERAL APPEARANCE AFTER JUDGMENT: THE DILEMMA OF RETROACTIVITY

By IRA H. LURVEY*

DESPITE modern adherence to substance over form, a pleader guilty of no more than impatience can still lose his entire day in court on the merits, where, as in California, distinctions persist between "general" and "special" appearances. At root is the undisputed rule that a general appearance constitutes absolute submission to the court, and a party so appearing waives all defects of personal jurisdiction.

There is a sharp dispute, however, over the effect of a general appearance after judgment. No court questions the existence of subsequent personal jurisdiction. The question is whether a general

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Federal courts have abolished this distinction. Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir.), cert. denied, 322 U.S. 740 (1944). Fed. R. Civ. P. 12(b) provides that: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." It has been held that joinder of jurisdictional with non-jurisdictional defenses will not constitute waiver of jurisdictional defenses in the federal system, although, ironically, non-joinder may constitute such a waiver. See generally 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 370, 509-25 (rules ed. 1950); 2A J. MOORE, FEDERAL PRACTICE ¶ 12.12 (2d ed. 1953); Pike, Some Current Trends in the Construction of the Federal Rules, 9 Geo. Wash. L. Rev. 26, 32-34 (1940).


3 Aetna Ins. Co. v. Earnest, 215 Ala. 557, 112 So. 143 (1927). But cf. Scott v. Price Bros. Co., 207 Iowa 191, 200, 217 N.W. 75, 79 (1927), which said: "It is not so much a question of waiver of special appearance or of the service of notice, although such is the argument in many of the cases, as it is of the moot character to which the question of effective service is reduced, when a general appearance is entered."


appearance is also applied retroactively,⁷ thereby curing prior defects of personal jurisdiction and rendering valid an otherwise "void" decree. A substantial majority permits such retroactivity,⁸ but a dedicated minority remains opposed.⁹ The problem generally arises incident to motions to vacate default judgments,¹⁰ but also has occurred in appellate¹¹ arguments.¹² So severe is the breach (or confused the situation?) that in adopting their respective positions, the opposing camps rarely even refer to, let alone critique, one another.¹³

The purpose of this article is to review and analyze these conflicting authorities to the end that (1) the minority is correct for incorrect reasons and (2) the majority is incorrect for correct reasons—i.e., those denying retroactivity have reached the proper conclusion but weakened their position by faulty logic which leaves even their leading cases susceptible to attack. Henceforth, retroactivity of personal appearance after improper default should be denied solely upon specified grounds of public policy rather than a tortured application of legal doctrines. Hopefully, such an enlightened approach would

⁷ Decisions vary in using terms "retrospective" and "retroactive." Compare Bank of America v. Carr, 138 Cal. App. 2d 727, 736-37, 292 P.2d 587, 593 (1956), with Godfrey v. Valentine, 39 Minn. 336, 337-38, 40 N.W. 163, 164 (1888). See also Martin v. Justice Court, 44 Nev. 140, 190 P. 977 (1920); Gallagher v. National Nonpartisan League, 53 N.D. 238, 243-44, 205 N.W. 674, 675 (1925). Since the subject at issue is a present action which alters the current effect of a past event, the proper term would appear to be "retroactive." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2129 (Unabridged 2d ed. 1951). A retrospective act merely takes into consideration the past, but does not alter it. Id. at 2130.

⁸ E.g., Farmers & Merchants Nat'l Bank v. Superior Court, 25 Cal. 2d 842, 847, 155 P.2d 823, 826 (1945), and cases cited note 34 infra.


¹² The problem of retroactivity appears to beset only direct attacks upon default judgments. Where the attack is collateral, such as an attempt to oppose enforcement of a judgment, the ordinary rules governing a direct attack have no bearing. Kaufmann v. Cal. Mining & Dredging Syndicate, 16 Cal. 2d 90, 91-92, 104 P.2d 1038, 1039 (1940). The only question then at issue is whether the invalidity of the collaterally attacked judgment affirmatively appears upon its face. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880 (1915). Moreover, it may be further argued that it is impossible to make a general appearance in a collateral attack, because the only relief being requested as to the default decree is that it be made unenforceable for want of personal jurisdiction. This is even less relief than is requested by a motion to vacate for want of personal jurisdiction, which, pleaded alone, constitutes a proper and therefore successful direct attack upon a judgment by special appearance. Cf. Doyle v. Jorgensen, — Nev. —, 414 P.2d 707, 710 (1966).

¹³ See Ivaldy v. Ivaldy, 157 Neb. 204, 59 N.W.2d 373 (1953); cf. Aetna Ins. Co. v. Earnest, 215 Ala. 557, 112 So. 145 (1927), which held: "There are a few cases to the contrary . . . but we prefer to follow the great weight of authority, which is based, we think, on sound principles."
be uniformly accepted, ending the present dispute and uncertainty.

The Dispute Examined

At the outset, the distinctions between general and special appearances must be understood. It has been held that any action by a defendant, other than an objection to the personal jurisdiction of the court, constitutes a general appearance, even if he merely objects to subject-matter jurisdiction. There are similar holdings as to general demurrers; motions to dismiss for want of timely prosecution; requests grounded upon the indulgence of the court for mistake, inadvertence or excusable neglect; service on opposing counsel of notice of retainer and appearance; the filing of answers or affidavits on the merits; resisting an interlocutory order; stipulating to a continuance; and moving for a change of venue. The matter is one of substance, not form. The controlling criterion is whether the defendant raised any question, or sought any relief, which could be granted only upon the premise that the court had jurisdiction of his person. If so, he has made a general appearance, "regardless of how

adroitly, carefully or directly the appearance may be denominated or characterized as special."\textsuperscript{27}

For purposes of the discussion to follow, it is immaterial how the defendant confused or mistakenly combined his pleadings so as to appear generally. Rather, it is assumed that for one reason or another a general appearance has occurred and the defendant has been held to have absolutely submitted to the personal jurisdiction of the court.\textsuperscript{28} Our concern is when such submission is construed to have occurred: that is, only prospective to default, or retroactively as well.

**Majority Allowing Retroactivity**

It is said to be the general rule that

a general appearance by defendant after final judgment waives any and all defects and irregularities in the service of process and return, just as fully as it does where such appearance is entered before final judgment . . . .

As to the immediate parties to the action, a general appearance validates a judgment that was theretofore absolutely void for want of jurisdiction.\textsuperscript{29}

For its rationale, the majority depends almost entirely upon the logical inconsistency of a party professing to be outside the court's jurisdiction while simultaneously requesting assistance which the court could give only if it had jurisdiction\textsuperscript{30} (though in reality the pleader may merely be impatient to proceed with his defense on the merits). The majority therefore forces a defendant to an election\textsuperscript{31} of objections.\textsuperscript{32}

The singularity of argument relied upon by the majority is striking.\textsuperscript{33} Even early decisions looked only to inconsistency and bypassed any discussion of the minority viewpoint denying retroactivity.\textsuperscript{34}


\textsuperscript{28} Brumleve v. Cronan, 176 Ky. 818, 197 S.W. 498 (1917).

\textsuperscript{29} Aetna Ins. Co. v. Earnest, 215 Ala. 557, 112 So. 145 (1927), citing 4 C.J. Appearances § 64 (1916); see 6 C.J.S. Appearances § 20 (1937).


\textsuperscript{31} Taylor v. Sledge, 110 Tenn. 263, 265-69, 75 S.W. 1074, 1075 (1903).

\textsuperscript{32} Burdette v. Corgan, 26 Kan. 102, 104 (1881).

\textsuperscript{33} E.g., Wells Aircraft Parts Co. v. Kayser Co., 118 Colo. 197, 200-01, 194 P.2d 326, 328 (1947); Balfe v. Tumsey & Sikemeier Co., 55 Colo. 97, 100-01, 133 P. 417, 418 (1913).

\textsuperscript{34} A sampling of majority opinions illustrating this lack of discussion includes: Crane v. Penny, 2 F. 187, 194 (S.D.N.Y. 1880); Ryan v. Driscoll, 83 Ill. 415 (1878); Perkins v. Haywood, 132 Ind. 95, 105, 31 N.E. 670, 674 (1892); Frear v. Heichert, 34 Minn. 96, 24 N.W. 319 (1885); Boulware v. Chicago & A. Ry., 79 Mo. 494 (1883); Scarborough v. Myrick, 47 Neb. 794, 66 N.W. 887 (1896); McCormick Harvesting Mach. Co. v. Schneider, 36 Neb. 206, 54 N.W. 257 (1893); Warren v. Dick, 17 Neb. 241, 22 N.W. 462 (1885); Yourke v. Yourke, 3 N.D. 343, 55 N.E. 1095 (1893); Mayer v. Mayer, 27 Ore. 133, 39 P.
stead, majority attention focused upon what constituted a general appearance,\textsuperscript{35} the consensus being that any protest pointing to grounds other than those of personal jurisdiction constituted a waiver of personal defects.\textsuperscript{36} Since general appearance before judgment constituted waiver by inconsistency, the equal inconsistency, and equal waiver, of a general appearance after judgment was held indisputable.\textsuperscript{37}

A somewhat weaker position was asserted as to the effect of a direct appeal brought against an allegedly void judgment. Some courts considered the taking of an appeal in itself as an unrestricted protest to all occurring below and thus a waiver of prior defects in personal jurisdiction.\textsuperscript{38} Others referred to "restricted" appeals based solely upon questioned personal jurisdiction.\textsuperscript{39} California went a step further and, in effect, divided its views on retroactivity between motions and appeals.\textsuperscript{40}

**Motion to Vacate or Appeal: The California Distinction**

California has from the first followed the majority rule and applied general appearances retroactively after default.\textsuperscript{41} In *Bank of America v. Carr*,\textsuperscript{42} however, the court undertook an extensive review of the problem and concluded that while "with respect to motions to vacate judgment in the trial court both the cited encyclopedias state that the weight of authority is in accord with the California cases which hold that raising of nonjurisdictional matters cures defects of

\textsuperscript{35} Mortock Ins. Co. v. Pankey, 91 Va. 259, 21 S.E. 487 (1895); Pfister v. Smith, 95 Wis. 51, 55, 69 N.W. 984, 985 (1897); Coad v. Coad, 41 Wis. 23 (1876); Blackburn v. Sweet, 38 Wis. 578 (1875); Gray v. Gates, 37 Wis. 614 (1875); Insurance Co. of N. Am. v. Swineford, 28 Wis. 257 (1871); Anderson v. Coburn, 27 Wis. 558 (1871); Grantier v. Rosecrance, 27 Wis. 488 (1871).

\textsuperscript{36} Burdette v. Corgan, 26 Kan. 102, 104 (1881).

\textsuperscript{37} Alderson v. White, 32 Wis. 308, 310-11 (1873).


\textsuperscript{39} Fee v. Big Sand Iron Co., 13 Ohio St. 563 (1820); Taylor v. Sledge, 110 Tenn. 263, 265, 75 S.W. 1074, 1075 (1903).

\textsuperscript{40} Clark v. Forbes, 34 Cal. App. 524, 168 P. 155 (1917).


there was no reason to extend such retroactivity to a general appearance on appeal.

The rationale offered by Carr for this distinction was that a defendant has to include his substantive defenses on appeal or risk losing them entirely, while being restricted to only procedural matters below still allowed presentation of substantive arguments on appeal.\(^4\)

The rationale of Carr appears correct and probably is, or should be, the underlying motivation for the minority view denying retroactivity in all post-judgment proceedings.\(^4\) The difficulty with Carr is that its distinction between motions to vacate and appeals seems without foundation: (1) Treating erroneously-broad pleadings in a motion to vacate as a general appearance in effect deprives an otherwise deserving defendant of ever having his day on the merits regardless of whether he might thereafter still have an appeal as to certain substantive issues of law; and (2) the motion-to-vacate cases considered by Carr as firmly establishing retroactivity\(^4\) all could have been distinguished. There follows a review of these cases.

In Farmer & Merchants National Bank v. Superior Court,\(^47\) the court was dealing with a probate matter and determined only that a general appearance of the Alien Property Custodian, subsequent to an order admitting a will to probate, retroactively validated the order and made it effective. The Alien Property Custodian also filed an express notice of waiver of any failure or omission of service and appeared as amicus curiae on appeal to urge validation of the will’s probate. Thus the court’s discussion analogizing the probate situation to general appearances after judgment was at the least uncalled for and at the most dicta:

In accord with the great weight of authority . . . [citations], this court has held that a general appearance made after entry of judgment has the effect of curing any defect arising from the lack of jurisdiction due to the failure to serve or notify a person of the proceedings . . . [citations], and a judgment based upon such an appearance is valid.\(^48\)

In Thompson v. Alford\(^49\) the court faced the unique situation that the defaulting party objected to having her default set aside, apparently on the belief that so long as her default stood she could not face trial because she had succeeded in having the judgment against her vacated. The court said that by defendant’s general appearance after

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\(^43\) Id. at 735, 292 P.2d at 592.
\(^44\) Id. at 736, 292 P.2d at 593. To bolster its rationale, Carr concluded that denying retroactivity upon appeal was “the nearly unanimous . . . rule in other jurisdictions.” Id. at 735, 292 P.2d at 592. However, Carr presented no authority for such alleged unanimity. See cases cited note 38 supra.
\(^45\) See notes 123–25 infra and accompanying text.
\(^46\) See note 41 supra.
\(^47\) 25 Cal. 2d 842, 155 P.2d 823 (1945).
\(^48\) Id. at 846–47, 155 P.2d at 826.
\(^49\) 135 Cal. 52, 66 P. 983 (1901).
default "[a]ny irregularity in the service of process was therefore superseded. . . . [and] she became a party of record to the action, whose default the plaintiff was entitled to have entered, in case she should fail to appear therein." But in fact the trial court had vacated the judgment against her and simply neglected to set aside the default.

In Security Loan & Trust Co. v. Boston & South Riverside Fruit Co., a default and final judgment in an action to foreclose a mortgage lien were entered against defendant corporation, which had an interest in the mortgaged property. Thereafter defendant moved to vacate the judgment on grounds that it had not been properly served and also pleaded that the relief granted was in excess of that prayed for. The trial court held that defendant's pleading constituted a general appearance, retroactively curing any defective service, and denied the motions to vacate. On appeal, the court affirmed the application of retroactivity but reviewed the substantive argument that the judgment was excessive, and, on rehearing, amended the judgment to conform with defendant's objections. Thus defendant eventually did receive a hearing on the merits.

Douglass v. Pacific Mail Steamship Co., cited with apparent approval by Farmers & Merchants National Bank v. Superior Court, was an 1854 case in which the court upheld defendant's default in an action for breach of contract and wages due and denied defendant a hearing on the merits because defendant's motion to vacate for improper service had included an allegation that defendant had a good defense to the action, which pleading was held to be a general appearance. The court cited no authority and its holding, in full, constituted but two sentences:

> It is clear that a party ought not to be allowed the benefit of any proceeding, unless he also assumes the responsibility of it. His appearance for one purpose, is a good appearance to the action.

In Tolle v. Doak, a probate proceeding, the protesting defendant executor was found to have had actual notice of the creditor's proceedings involved "and had every opportunity to present any facts tending to show that the creditor should not have the relief asked."

In Shelley v. Casa De Oro, Ltd., the discussion as to a general
appearance retroactively waiving defects in service was dicta since the judgment was set aside for other reasons.

The gist of the above review is that the court in *Bank of America v. Carr* was not as bound to accept retroactivity in motions to vacate as it believed. In showing its disdain for the concept of retroactivity, it was not necessary for the court to draw what appears at best to be a tenuous distinction between motions to vacate and appeals.

Nevertheless, *Carr* still appears to be the most recent California pronouncement on the matter.

**Minority Refusing Retroactivity**

The minority cases, which deny retroactivity, are equally reticent as to any confrontation of conflicting rationale. Generally, however, decisions denying retroactivity turn upon arguments that (1) a general appearance has no greater effect than service of process or notice, and therefore can confer jurisdiction only subsequent to such appearance; and (2) a judgment rendered without personal service is "void" and a total nullity, incapable of any effect or the power of resurrection. Unfortunately, both arguments lend themselves to ready attack.

The earliest definite denial of retroactivity appears to be that of the Minnesota Supreme Court in *Godfrey v. Valentine*, still cited as one of the leading minority cases. In *Godfrey*, defendant moved to set aside a default judgment on grounds that the return of published summons was defective. It is unclear whether the defendant re-

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61 Typical is a casual reference to the opposition found in Lore v. Citizens' Bank, 51 Ariz. 191, 194, 75 P.2d 371, 372 (1938): "Appearance after such a judgment [without personal jurisdiction] entered against a party, whether general or special, will not cure a want of jurisdiction as to the judgment previously obtained, general statements in the texts and decisions to the contrary notwithstanding."
64 See notes 83-93 infra.
65 However an intimation that such denial might be forthcoming occurred three years earlier in Kanne v. Minneapolis & St. L. Ry., 33 Minn. 419, 421, 23 N.W. 854, 855 (1885), where, in dicta, it was said that: "While there is no doubt of the correctness of the proposition . . . that if a party does not limit his appearance to jurisdictional questions, but also calls into action the powers of the court for other purposes, it is a general appearance, and he thereby submits to the jurisdiction of the court thereafter, yet it may admit of doubt whether the proposition was not misapplied in making such appearance relate back in point of time so as to validate a void judgment previously rendered."
66 39 Minn. 336, 40 N.W. 168 (1888).
quested any other relief, though the court discussed the record as if he did:

The course of the moving party in thus seeking to have a void judgment set aside,—to which relief he is entitled as a matter of right,—but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as in an action pending in which the defendant has voluntarily appeared. But in thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by an authorized judicial proceeding, was not merely voidable, but void, and in legal effect a nullity.

By 1904, North Dakota considered a denial of retroactivity so established a view that a citation of supporting authorities was deemed unnecessary:

The fact that defendant has by this motion made a general appearance in the action, which she did by asking to be permitted to answer and proceed to trial on the merits, will not avail respondent. Such general appearance did not relate back, so as to validate the void proceedings. Its only effect was to confer jurisdiction over the person of defendant from its date.

Washington followed with a "bootstrap" theory to sustain a post-judgment attack upon both jurisdiction and the merits, holding that the jurisdictional protest was not weakened by the concurrent argument to the merits, and that the argument to the merits was not fatally vague because a jurisdictional protest may stand alone.

Nevada, too, vigorously denied retroactivity. In Nevada Douglas Gold Mines v. District Court, it was held to be "self-evident that [a general appearance] could not relate back to date of the rendition of the so-called judgment so as to vitalize that which never had life." Shortly thereafter, Nevada added that though defendant may have entered a general appearance by moving to set aside the default and judgment, "such appearance did not operate to vitalize the antecedent proceedings."

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68 The recited facts speak only of the motion protesting sufficiency of the return of publication. 39 Minn. at 336, 40 N.W. at 163.
69 Id. at 338, 40 N.W. at 164-65.
70 Simensen v. Simensen, 13 N.D. 305, 100 N.W. 708 (1904).
71 Id. at 311, 100 N.W. at 711.
72 Bennett v. Supreme Tent, 40 Wash. 431, 82 P. 744 (1905), relying on Woodham v. Anderson, 32 Wash. 500, 505, 73 P. 536, 538 (1903), which cited no authority.
73 Bennett v. Supreme Tent, 40 Wash. 431, 434, 82 P. 744, 746 (1905).
74 In its most recent review of retroactivity, the Nevada Supreme Court said that the subject was one in dispute, indicating a possible future reappraisal of the state's rationale for denying retroactivity. Doyle v. Jorgensen, Nev. --, 414 P.2d 707 (1966).
75 51 Nev. 206, 273 P. 689 (1929).
76 Id. at 212, 273 P. at 660.
77 Perry v. Edmonds, 59 Nev. 60, 84 P.2d 711 (1938).
78 Id. at 66-67, 84 P.2d at 713.
Recent decisions are equally direct. In *Ivaldy v. Ivaldy*,70 Nebraska reviewed six of what it considered the leading minority cases80 and concluded that denial of retroactivity was "the correct rule."81 Four years later, in a rather impassioned dissertation which failed to cite *Ivaldy*, Oregon repeated that a void judgment was impenetrable:

[W]hen one moves to vacate a decree void on its face as a futile attempt at a judgment in personam, even if the motion be by a general appearance, it will not infuse a void judgment with the vitality which it lacks. . . . The validity of a judgment is determined as of the date of its rendition and, if void, it remains so forever.82

The difficulty with the minority view as presently articulated is that despite the obvious logic of its conclusion, its supporting arguments, relying as they do on inapplicable legal doctrines, have failed for 75 years to win majority approval.

First, the minority incorrectly attempts to present general appearance as a philosophical substitute for notice, and thus encourages the majority to a "waiver" rebuttal.

Though a general appearance may produce, in certain situations, practical results identical to notice,83 this would seem merely coincidental. Viewed for purposes of personal jurisdiction, general appearance and notice are distinguishable activities. They depend upon actions of different parties. While notice basically is governed by the behavior of the plaintiff seeking personal jurisdiction over his adversary,84 general appearance depends upon the behavior of the defendant over whom personal jurisdiction is sought.85 True, characterizing

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70 157 Neb. 204, 59 N.W.2d 373 (1953).
80 Mills v. State ex rel. Barbour, 10 Ind. 114 (1858), which held that: "The error might probably be waived by the appearance of the defendants to the action, without any motion to set aside or quash the summons; as, indeed, the issuing of a summons at all might be waived; but we do not think the appearance of the defendants below, after judgment by default had been entered against them, and making an unsuccessful motion to set aside the default, will operate as a waiver of error." Doyle v. Wilcockson, 184 Iowa 757, 169 N.W. 241 (1918) (which held that parties could not stipulate to acceptance of a decree void for want of subject jurisdiction); Godfrey v. Valentine, 39 Minn. 336, 40 N.W. 163 (1888); Nevada Douglass Gold Mines v. Dist. Court, 51 Nev. 206, 273 P. 659 (1929); Simensen v. Simensen, 13 N.D. 305, 100 N.W. 708 (1904); Bennett v. Supreme Tent, 40 Wash. 431, 82 P. 744 (1905).
81 *Ivaldy v. Ivaldy*, 157 Neb. 204, 211, 69 N.W.2d 373, 377 (1953).
82 Wiles v. Wiles, 211 Ore. 163, 170, 315 P.2d 131, 134 (1957), wherein the court cited extensively from Pennoyer v. Neff, 95 U.S. 714 (1877), a case quite unrelated to retroactive application of general appearances after judgment. See notes 112-18 infra.
general appearance as notice should preclude retroactivity, because notice implies that the party so noticed is susceptible only to all obligations subsequent to such notice. But such characterization would relieve the plaintiff of the burden of bringing the defendant properly before the court and, in effect, shift that burden to the defendant himself.

Instead, if general appearance places a defendant within personal jurisdiction of the court, it is not because such appearance constitutes notice to defendant of the proceedings, but because defendant by his general pleadings is implied to have waived notice. Viewed as a waiver, which appears the logically correct view, general appearance lends itself more readily to retroactive application. Courts denying retroactivity frequently speak of general appearances in terms of waiver.

Yet waiver is not the proper term. A strengthened minority would abandon its discussion of notice and look to estoppel. If, as the minority insists, a general appearance constitutes only future submission to personal jurisdiction, estoppel is the most accurate description of the principle involved. The appearing defendant is estopped from future jurisdictional protest. Yet, by continually referring to a general appearance as notice or waiver rather than estoppel, it seems that the minority courts are conceding that the appearing party has relinquished something of the past, i.e. retroactively.

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87 "Notice" is here presented as representing both notice and proper summons, though the two have been formally distinguished, summons being said to require a formal action by the court. See, e.g., Gilbert v. Lobley, 214 S.W. 2d 646, 650 (Tenn. App. 1948).
88 Simensen v. Simensen, 13 N.D. 305, 100 N.W. 708 (1904); Bennett v. Supreme Tent, 40 Wash. 431, 82 P. 744 (1905); Woodham v. Anderson, 32 Wash. 500, 505, 73 P. 536, 538 (1903). In general, "waiver" is the voluntary abandonment of a known right. Fay v. Noia, 372 U.S. 391 (1963). In contrast, "estoppel" need not be intentional, in that here the crux is that one party has caused another, in reasonable reliance, to change position (presumably to his detriment) and the inducer is thereafter precluded from denying his inducing conduct. Souter v. State Mut. Life Assurance Co., 273 F.2d 921, 925 (4th Cir. 1960). Waiver, therefore, may be said to turn upon an actor's intent, express or implied, while estoppel turns upon a reactor's reasonable reliance, actual or presumed. Unfortunately, the terms have become loosely interchanged to the confusion of all involved. See G. Amsinck & Co. v. Springfield Grocer Co., 7 F.2d 855, 860 (8th Cir. 1925).
89 By appearing generally, a party has in effect requested judicial assistance inconsistent with a denial of jurisdiction. If such a denial is only barred from future behavior, the party so appearing is simply being estopped from thereafter denying his appearance. Estoppel is said to turn on detrimental reliance. Flott v. Wenger Mixer Mfg. Co., 189 Kan. 80, 90, 367 P.2d 44, 51 (1961). Detriment, however, may here be implied from the court's having spent effort in considering, and perhaps even granting, the substantive and non-jurisdictional relief requested by the general appearance.
Too, the minority rests ponderously upon the alleged impenetrability of "void" judgments. Such reliance is misplaced, and seems primarily the result of confusing want of subject-matter jurisdiction, which is beyond the control of the parties and therefore cannot be waived, with want of personal jurisdiction. The confusion is furthered by interjecting the doctrine involving inconsequential defects of jurisdiction, both subject-matter and personal, which may be overlooked by a reviewing court, regardless of the parties, when equities so compel.

The Nevada Quartet: A Classic Example

The effect of the confusion of terms which besets minority opinions on retroactivity is evident from the chaos apparent on a close examination of the cases.

Considered a leading minority decision, Nevada Douglass Gold Mines v. District Court held that denial of retroactivity was a "self-evident" conclusion. No authorities were cited, but three Nevada

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Footnotes:

91 Jurisdiction of the subject matter means power to adjudicate the class of cases to which the instant dispute belongs. State v. Smith, 6 N.J. Super. 85, 88-89, 70 A.2d 175, 176 (1949). It is a power acquired solely from the act creating that court (see Samson v. Bergin, 138 Conn. 306, 84 A.2d 273 (1951)) and may not be conferred by the parties. Federal Underwriters Exchange v. Pugh, 141 Tex. 539, 541, 174 S.W.2d 598, 600 (1943). In contrast, jurisdiction of the person is gained by an individual being properly before the court pursuant to adequate notice and summons and thus subject to the court's decision within constitutional guarantees of due process. Mid-City Bank v. Myers, 343 Pa. 465, 23 A.2d 420 (1942). This is a requirement to protect the individual and therefore may be waived. See generally Haggerty v. Sherburne Mercantile Co., 120 Mont. 386, 395, 186 P.2d 884, 891 (1947).
92 Quare, however, whether even a judgment rendered without subject-matter jurisdiction might not, in practical effect, be only voidable, since (1) a judgment is generally presumed valid and (2) acquiescence by all parties thereto would leave the edict, unless invalid upon its face and so seized upon sua sponte by the court, unchallenged. Indirectly, the parties, by their lack of protest, would be conferring jurisdiction where none was possible. Many courts presume a judgment's validity. See generally Henderson v. Henderson, 85 Cal. App. 2d 476, 479, 193 P.2d 135, 138 (1948); Steffans v. Steffans, 408 Ill. 150, 158, 96 N.E.2d 483, 485-86 (1949).
93 Crawford v. Richards, 193 Md. 236, 241-44, 66 A.2d 483, 485-86 (1949); McGee v. Campbell, 202 Okla. 624, 627, 217 P.2d 174, 177 (1950). The court in the latter case reasoned as follows: "[T]he grounds for vacating a judgment as being void [are] that there has been a failure to do that required by law to give the trial court jurisdiction to hear and determine the cause. Such [grounds] cannot be held to include mere clerical errors committed in effectuating the requirements which give validity to the judgment rendered thereon."
94 See Invaldy v. Invaldy, 157 Neb. 204, 59 N.W.2d 373 (1953); 6 C.J.S. Appearances § 20, n.10 (1937).
95 51 Nev. 206, 27 P. 659 (1929).
96 Id. at 209, 273 P. at 660.
decisions in the same general legal area preceded *Douglass* and apparently had an influence. In *Thatcher v. Justice Court*, 7 years before *Douglass*, defendants asked to vacate a default judgment on grounds of inadvertence and excusable neglect. Upon denial, they sought a writ of certiorari, arguing that the judgment had been rendered without proper service. Plaintiff conceded service had been improper, but argued that defendants' general appearance after judgment, in pleading to excusable neglect, cured any want of personal jurisdiction. The court disagreed:

> It is not for want of process that relators attack the judgment, but for the failure of the plaintiff or the justice [court] to comply with what the court held in [Martin v. Justice Court, 44 Nev. 140, 190 P. 977 (1920)] to be a jurisdictional requirement of the statute.

In distinguishing between “want of process” and the defective process then before it, and implying that only the former was susceptible to subsequent ratification, that is, retroactivity, *Thatcher* could be said to hold that no service of process is less of a defect than service of an improper process. *Thatcher*’s authorities appear equally incongruous. For example, *Thatcher* quoted extensively from *Iowa Mineral Co. v. Bonanza Mineral Co.*, an 1881 Nevada decision which appeared to confuse minor clerical or procedural irregularities, which may be overlooked by the court, with defects of personal jurisdiction, which may be waived by the parties, and then went on to confuse both with material defects of subject-matter jurisdiction, which can neither be overlooked nor waived. By quoting *Bonanza* with approval, *Thatcher* renewed this confusion.

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97 *Thatcher v. Justice Court*, 46 Nev. 133, 207 P. 1105 (1922); *Martin v. Justice Court*, 44 Nev. 140, 190 P. 977 (1920); *Iowa Mineral Co. v. Bonanza*, 16 Nev. 64. (1881). Two of the three cases were authored by the same justice who authored *Douglass*. (One was per curiam.)

98 46 Nev. 133, 207 P. 1105 (1922).

99 *Id.* at 137, 207 P. at 1106.

100 16 Nev. 64 (1881).

101 “There is a marked, and in many respects, an important and substantial distinction, between defects in practical proceedings, which constitute mere irregularities, or such as render the proceeding a total nullity and altogether void. Where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of conducting it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity, and cannot be made regular by any act of either party.” *Id.* at 73.

However, *Bonanza*’s discussion as to irregularities versus fatalities was purely dicta and irrelevant in light of the facts at issue. In *Bonanza*, involving a disputed mining claim, plaintiff waited 3 years after filing his complaint before serving process. Defendant demurred generally and followed with an answer to the merits. Only then, 6 days after filing his answer, did defendant formally move to dismiss the complaint for want of diligent prosecution. The district court granted dismissal, but the supreme court reversed, holding
Thatcher also cited Martin v. Justice Court, where defendant's general demurrer was received through the mail on the same day that his default was entered. In opposing a reopening for defective process, plaintiff argued that the demurrer constituted a general appearance which waived prior errors of personal jurisdiction. Without citing authority, Martin held that the "uniform" rule denied such retroactivity. Martin may be discounted both for accepting a minority view as a general rule, and for confusing jurisdiction of subject-matter with personal jurisdiction.

In fact the lone consistency between Bonanza, Martin and Thatcher would appear to be a confusion between subject-matter and personal jurisdiction.

Nebraska's Accumulation

Equally confusing upon review is the list of minority authorities cited in reliance by the Nebraska Supreme Court in Ivaldy v. Ivaldy. Of the six cases cited therein, five turned upon apparent confusion between subject-matter and personal jurisdiction, and the sixth

that by his general demurrer and answer the defendant had waived any objection to the "irregularity" of plaintiff's otherwise defective delay in prosecution. Bonanza could, therefore, be considered as supporting the rationale of retroactivity. It is not without irony that Thatcher relied upon Bonanza for an exactly opposite approach.

102 44 Nev. 140, 190 P. 977 (1920).

103 "That a party who appears generally by demurrer cannot subsequently complain of want of proper service of summons upon him is a uniformly recognized rule, but applicable only where such general appearance is made prior to the judgment or other proceedings, questioned on account of such defective service." Id. at 145, 190 P. at 978.


105 157 Neb. 204, 59 N.W.2d 373 (1953).

106 Mills v. State ex rel. Barbour, 10 Ind. 114 (1858); Doyle v. Wilcockson, 184 Iowa 757, 169 N.W. 241 (1918); Godfrey v. Valentine, 39 Minn. 336, 40 N.W. 163 (1888); Nevada Douglass Gold Mines v. Dist. Court, 51 Nev. 206, 27 P. 659 (1929); Simensen v. Simensen, 13 N.D. 305, 100 N.W. 708 (1904) (to which Ivaldy referred as stating the correct rule); Bennett v. Supreme Tent, 40 Wash. 431, 82 P. 744 (1905).

107 Doyle v. Wilcockson, 184 Iowa 757, 169 N.W. 241 (1918), held that parties could not stipulate to acceptance of a decree defective simply for want of proper service. Godfrey v. Valentine, 39 Minn. 336, 40 N.W. 163 (1888), argued that mixed pleadings after judgment should not deprive a party of his right to demand a default be vacated for want of proper service: "The course of the moving party in thus seeking to have a void judgment set aside,—to which relief he is entitled as a matter of right,—but at the same time consenting and asking that the court shall now hear and adjudicate upon the cause, may justify the court in entertaining the cause and proceeding as thus urging his legal right, and thus invoking and consenting to the future action of the court, the moving party should not be deemed to have conferred jurisdiction retrospectively, so as to render valid the previous judgment, which, being unsupported by an authorized judicial proceedings, [sic] was not merely
concerned post-judgment pleading which in fact was sufficiently limited to constitute only a special appearance.

Oregon's Argument

Whereas Nevada was motivated by its own confused precedents, and Nebraska relied exclusively on confused foreign authorities, Oregon, in *Wiles v. Wiles*, presented broad and impassioned arguments to support its denial of retroactivity, but nevertheless continued to confuse subject-matter with personal jurisdiction.

voidable, but void, and in legal effect a nullity.” *Id.* at 338, 40 N.W. 164-65. Nevada Douglass Gold Mines v. District Court, 51 Nev. 206, 27 P. 659 (1929), was based upon Nevada cases which confused void with voidable defects in jurisdiction; see notes 82-92 supra. Simensen v. Simensen, 13 N.D. 305, 310, 100 N.W. 708, 711 (1904), said: “Such general appearance did not relate back, so as to validate the void [for defective service] proceedings. Its only effect was to confer jurisdiction over the person of defendant from its date.” Bennett v. Supreme Tent, 40 Wash. 431, 436, 82 P. 744, 746 (1905), said only that “[a] party does not waive the question of jurisdiction or validate a void [for want of effective service] judgment by a general appearance in support of a motion to set the judgment aside.” The Bennett court cited as lone authority for this statement Woodham v. Anderson, 32 Wash. 500, 506, 73 P. 536, 538 (1903), which held a judgment “previously entered [upon defective summons] was void [and] general appearance . . . [after judgment] did not validate the void judgment, but simply brought [defendants] into court, without the necessity of new process, to be dealt with thereafter as the law of the case required.” Woodham cited no authority for its denial of retroactivity.

“The error of defective summons might probably be waived by the appearance of the defendants to the action, without any motion to set aside or quash the summons; as, indeed, the issuing of a summons at all might be waived; but we do not think the appearance of the defendants below, after judgment by default had been entered against them, and making an unsuccessful motion to set aside the default, will operate as a waiver of the error.” *Id.* at 116. The court did not discuss whether the motion to vacate was made solely upon grounds of defective service. There is reference in the opinion to the court below having jurisdiction of the subject matter, but it is unclear whether want of subject jurisdiction also was argued at the original motion, thus constituting a general appearance, or only was mentioned after the lower court already had found a general appearance and denied defendant's motion to vacate the default.

See cases cited notes 94-104 supra.

See cases cited notes 105-09 supra.

211 Ore. 163, 315 P.2d 131 (1957).

Five cases cited by Wiles appear equally confused. Langston v. Nash, 192 Ga. 427, 429-30, 15 S.E.2d 481, 484 (1941), expressly dealt with jurisdiction of the subject matter. *In re Hanahan's Will*, 109 Vt. 108, 121-23, 194 A. 471, 477-78 (1937), involved the appointment of a temporary guardian over Hanahan pursuant to an insanity hearing at which Hanahan neither was present nor had notice. Subsequently, Hanahan sought to have the decree vacated and pleaded lack of notice and that he was not insane. The court called this mixed pleading only a special appearance, then added that “a 'judgment' rendered without notice or appearance is no judgment at all. It is not merely erroneous, irregular, or voidable. Upon the plainest principles of natural justice, and under the Fourteenth Amendment, it is absolutely void.”
Also, by seeming to rely heavily on *Pennoyer v. Neff*\(^\text{114}\) particularly for the proposition that the validity of a judgment can be ascertained only at the time of rendition,\(^\text{115}\) *Wiles* confused a defendant's ability to waive defects in personal jurisdiction\(^\text{116}\) with the preclusion of a court from taking advantage of subsequent unrelated acts of a defendant over whose person the court originally lacked jurisdiction.\(^\text{117}\)

**Summary: Result or Rationale**

Having concluded that the minority view must fail for want of legal logic propounded by leading cases, we next turn to what seems a heretofore neglected point: whether denial of retroactivity is necessary to serve justice regardless of lack of support from traditional legal doctrine.

These doctrines seem to favor retroactivity: e.g., since waiver of defects in personal jurisdiction is unanimously permitted as to general appearance before judgment, the majority appears correct in finding

\[^{114}\text{Id. Hanrahan thus confused want of subject with want of personal jurisdiction. Obviously, the Hanrahan court was moved by the particular equities involved, which it recited at length. It was Hanrahan that first cited Pennoyer v. Neff, 95 U.S. 714 (1877), for the proposition, inapplicable in Hanrahan, that a judgment's ultimate validity is determinable only at the moment of its rendition. Id. at 121-23, 194 A. 477-78.}\]

\[^{115}\text{Riverside Mills v. Meneffee, 237 U.S. 189 (1914), the third case cited by Wiles, did not involve waiver; rather it held that the mere fact a corporate executive personally resides in a jurisdiction does not automatically give that state in personam power over the corporation, where no business or contact is conducted within the forum. In Martin v. Cobb, 77 Tex. 544, 546, 14 S.W. 162, 163 (1890), the court discussed the void nature of judgments rendered without personal jurisdiction, but also noted that "[t]he record does not show that the defendants filed the post-judgment general motion, or that it was done by their authority." Thus defendants never waived anything. Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873), also dealt with a factual lack of waiver, a guardian ad litem being appointed for an infant without proper notice. No subsequent appearances were made by the infant.}\]

\[^{116}\text{95 U.S. 714 (1877).}\]

\[^{117}\text{Wiles v. Wiles, 211 Ore. 163, 168, 315 P.2d 131, 133 (1957), quoting Pennoyer v. Neff, 95 U.S. 714, 728 (1877): "The judgment, if void when rendered, will always remain void; . . . the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."}\]

\[^{118}\text{See notes 91-94 supra.}\]

\[^{119}\text{Pennoyer, in speaking of ascertaining a judgment's validity only at the time of its rendition, was concerned with judgments in personam as distinguished from those in rem and held that a judgment could not be effected in limbo against a party outside personal jurisdiction, with hopes that the party subsequently might acquire property within the forum, which then might attach that property in rem. Thus the validity of a judgment in rem against an absent party is to be determined by the presence of property within the jurisdiction at the time of the judgment. In contrast, the subsequent entry of the defendant and submission to personal jurisdiction by waiving defects of prior service would constitute an entirely different situation.}\]
no doctrinal grounds for distinguishing general appearance after judgment. It is in attempting to attack such a doctrine rather than to distinguish pre- and post-judgment pleadings that the minority logic breaks down.

Rather, general appearances after judgment should be distinguished as a matter of public policy upon the following rationale:

A protest to lack of personal jurisdiction was traditionally a plea much disfavored by courts, which considered it "purely dilatorious."\(^{118}\) Such a plea was strictly construed, and was deemed "waived" at the slightest defect in the pleadings, particularly in the formative, formalistic years of judicial development.\(^{119}\) The decisions found an obvious inconsistency of a party pleading that he was outside the court but concurrently asking court assistance and readily penalized such mixed pleadings by depriving that party of his protests to personal jurisdiction. Thus arose the distinction between general and special appearances.

Viewed simply as a penalty for inconsistency, the implied waiver of a mixed or general pleading takes on sharply different attributes after judgment. Considered before judgment, the penalty only amounts to a loss of a jurisdictional argument grounded in improper notice, the function of which was to bring the party before the very court where he now stands. The party still has his full day in court upon the merits. Viewed after judgment, however, the penalty for a mixed pleading can fully deprive the negligent pleader of his entire day in court.\(^{120}\) This is too harsh an imposition for so slight an impropriety as procedural impatience.\(^{121}\) The minority appears to have reached the correct result in denying retroactive application to general appearances after judgment.

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\(^{118}\) Olcese v. Justice's Court, 156 Cal. 82, 85, 103 P. 317, 318 (1909).


\(^{120}\) For example, a default entered without personal jurisdiction and protested solely upon this ground must, upon an affirmative finding of the defect, be set aside. If, however, the defendant combines pleadings and also requires a setting aside for mistake, inadvertence, or excusable neglect, he has made a general appearance and, under the majority rule, the jurisdictional defect is retroactively waived. The court, therefore, no longer is under a mandate to vacate. Rather, in its discretion, it now may find there was no excusable neglect and refuse to set the default aside. Such discretion, if not abused, will be upheld upon appeal. The defendant will have suffered a judgment on the merits without ever having had his day in court.

\(^{121}\) In its essence, the erroneous pleading is simply a matter of impatience, since there is nothing to preclude a defendant from first seeking vacation of the default solely upon grounds of defective service and, being denied, then asking the court's indulgence for excusable neglect or disputing the decree on substantive matters.
The Problem of Illogic

Conceding that the minority has reached the correct result, the difficulty is that its illogical arguments serve to obscure the basic issue of whether or not possible denial of a defendant's trial on the merits is too harsh a penalty to impose for errors in pleading. Indeed, minority arguments do occasionally allude to such considerations but, more often, encourage direct and successful attack upon doctrinal grounds, perhaps even reinforcing the majority view that retroactivity is logically sound and does not even warrant reexamination.

If the minority were to discard its present rationale and replace it with a clear discussion on the harshness of forcing retroactive waiver upon a hapless defendant, the majority soon might be converted to a denial of retroactivity.

Factual inconsistency is no longer abhorred in pleadings. Justice upon the merits, not upon procedural niceties, is the goal of modern adversary proceedings. Federal courts already view procedural errors with tolerance, so long as the opposing party is not unduly prejudiced. Therefore it would seem that distinctions between general and special appearances are anachronisms. Pending the overall abolition of such distinctions, however, the effect of erroneous pleading as depriving a defendant of his jurisdictional arguments should not also deprive him of his day on the merits.

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122 In Bank of America v. Carr, 138 Cal. App. 2d 727, 737, 292 P.2d 587, 593 (1956), the court stated: "If the defendant is restricted in the lower court to the presentation of his defense as to the jurisdiction of the person only and is unsuccessful he still has the opportunity to raise his substantive defenses by appeal from the judgment, whereas failure to raise them in the court of last resort would be definitely fatal, so that the presentation of the jurisdictional matter on appeal would be more hindered by the restriction of retroactivity than the presentation in the trial court."

Similarly, in Simensen v. Simensen, 13 N.D. 305, 311, 100 N.W. 708, 711 (1904), the court stated: "[D]efendant never was summoned to appear and answer plaintiff's complaint, and hence never had her day in court. This she had an absolute right to, and no lapse of time would bar such right. We deem the citation of authorities unnecessary upon a proposition so well settled."


124 The intent and effect of the federal rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 8 (1954). See also Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

125 See note 1 supra.
Conclusion

Where distinctions remain between general and special appearances, a majority of courts hold that general appearances after judgment serve to waive defects of personal jurisdiction retroactively and render the original judgments procedurally valid. An entrenched minority, however, insists that the original judgment, lacking "jurisdiction," is void—a total nullity—and therefore is incapable of subsequent resurrection. In so arguing, the minority confuses want of subject-matter jurisdiction, a matter beyond the control of the parties, with want of personal jurisdiction, which can be waived, and exposes its logic to direct attack.

Nevertheless, the minority appears to have reached the right result. Allowing retroactive application of general appearances after judgment imposes too harsh a penalty upon a defendant for no greater offense than overanxious pleadings, and could deprive defendant of his entire day upon the merits. As a matter of public policy, general appearances after judgment should not validate previously void judgments, but should merely subject the appearing party to subsequent proceedings without further service. This still would permit defendant an opportunity on the merits and would be consistent with modern concepts of ordered substantive justice, aided rather than hampered by procedure.