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Supplementary Service of Process

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SUPPLEMENTARY SERVICE OF PROCESS

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One must approach the inquiry hereby launched, impelled by consideration of the rule that a judgment or decree of court is absolutely void as against a person over whom the court has not obtained jurisdiction.[1] From this, one proceeds to the corollary that the mere fact that one has been summoned into litigation does not invest the court with jurisdiction to enter any judgment or decree it may please against that person, and have such decree immune from any but direct attack.[2] That is envisaged in the query: May a defendant who has been brought into a case by proper service of summons, and who has examined the complaint filed and found the relief sought therein not distasteful to him, thereupon pay no further attention to the proceeding? May he disregard the possibility of the complaint being amended, or the issues being complicated by counterclaim, in reliance upon service of additional summons upon him, as his protection against such amendment or counterclaim?[3]

The problem thereby projected, it will be seen from what follows, may best be pondered by considering the effect in the various situations of the filing of amendments of complaints, on the one hand, and of the filing of counterclaims on the other.

I. CONCERNING AMENDMENTS OF COMPLAINTS

Some jurisdictions, notably Illinois,[4] announce the rule that where a defendant is once brought into court, he is required to be present and take notice of every step taken in the progress of the cause. The effect of the application of such a rule to amendments of complaints seems

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[1] "Jurisdiction is of two kinds,—jurisdiction of the subject matter and of the person,—and both must concur or the judgment will be void in any case in which a court has assumed to act. The difference is that jurisdiction of the subject matter is given by law and cannot be conferred by consent, but jurisdiction of the person may be obtained by consent." Rabbitt v. Weber & Co., 297 Ill. 491. 497, 130 N. E. 787, 790 (1921).

[2] "If the court of chancery should decree one of its suitors, standing in its presence, to be hanged or sold, that would be void; or if it should order a piece of land, though within its territorial jurisdiction and belonging to a party to the suit, but not mentioned in the pleadings, to be sold or transferred, that decree would be void, for the want of jurisdiction over the subject-matter." Curtiss v. Brown, 29 Ill. 201, 229 (1862).

[3] As a general proposition it would seem safe to include within the term "counterclaim" the terms recoupment, cross-petition, cross-bill, cross-action, etc. Any distinction between those terms necessarily depends upon the mode in which they are employed in the particular statute or rule in question.

[4] Ruppe v. Glos, 251 Ill. 80, 95 N. E. 1033 (1911).

necessarily to call for a holding which binds a defendant to whatever amendment might subsequently be made of the pleadings in the cause, without right to be summoned anew. This has been the result reached by the cases in that jurisdiction,[5] as well as by those in other jurisdictions recognizing a similar rule.[6] Indeed, in one case,[7] this result was reached even where the amended pleading was made after an order had been entered striking the original pleading, though a case in the appellate court of that same jurisdiction might be pointed to as requiring that an appearance shall have been entered by the defendant to bind him to such result.[8]

The rule is subject to qualifications, however. In some jurisdictions[9] an appearance by the defendant is necessary to save the need of serving process upon him anew, where an amendment of a complaint changes the cause of action substantially. One of these jurisdictions requires that those who have appeared must be served with the amendment.[10] And in another,[11] by statute, an amendment may not subject additional property to the suit without new summons.

As a general proposition, however, it has been held that a substantial amendment cannot be made without the service of new summons.[12] In one jurisdiction this was recognized to be true where the original summons was only by publication.[13] However, this right of a defendant

[5] Niehoff v. The People, 171 Ill. 243, 49 N. E. 214 (1898); Shippert v. Shippert, 371 Ill. 267, 20 N. E. (2d) 597 (1939); see Phenix Banking Co. v. Owens, 250 Ill. App. 1, 4 (1928). But this rule has been qualified by local rules of court requiring the giving of notice, failure of which has been held to deprive the court of jurisdiction. North Ave. Bldg. & Loan Ass'n v. Huber, 286 Ill. 375, 121 N. E. 721 (1919); Kemper v. Weber, 318 Ill. 494, 149 N. E. 478 (1925).

[6] Goodman v. Ft. Collins, 164 Fed. 970 (C. C. A. 8th, 1908); Kahle v. Crown Oil Co., 180 Ind. 131, 100 N. E. 681 (1913); United States v. Rio Grande Dam & Irrigation Co., 13 N. M. 386, 85 Pac. 393 (1906) (where a new cause of action was presented, by supplemental complaint, in facts subsequently arising); Reynolds v. Alexandria Motor Bus Line, 141 Va. 213, 126 S. E. 201 (1925); Smith's Adm'r v. Nelson Bros. & Co., 69 W. Va. 550, 72 S. E. 646 (1911).

[7] Kahle v. Crown Oil Co., 180 Ind. 131, 100 N. E. 681 (1913).

[8] See Panty v. Panty, 74 Ind. App. 485, 488, 129 N. E. 283, 284 (1920).

[9] W. H. Marston Co. v. Kochritz, 80 Cal. App. 352, 251 Pac. 959 (1926); Hill v. State, 190 S. W. 255 (Tex. Civ. App. 1916); Puntney v. Moseley, 237 S. W. 1116 (Tex. Civ. App. 1922).

[10] W. H. Marston Co. v. Kochritz, 80 Cal. App. 352, 251 Pac. 959 (1926). Probably the same holding is called for by Rule 5 of Rules of Civil Procedure for the District Courts of the United States, and MINN. STAT. (Mason, 1927) §§9240-9242; N. Y. CIVIL PRACTICE (Cahill, 7th ed. 1937) R. C. P. 101; WASH. REV. STAT. ANN. (Remington, 1932) §262.

[11] Broughton v. Humble Oil & Refining Co., 105 S. W. (2d) 480 (Tex. Civ. App. 1937).

[12] Steele v. Booker, 205 Ala. 210, 87 So. 203 (1921); Lucky Boy Min. & Mill. Co. v. Moore, 23 Ariz. 291, 203 Pac. 556 (1922); Arbaugh v. West, 127 Ark. 98, 192 S. W. 171 (1917); Fearon Lumber & Veneer Co. v. Lawson, 166 Ky. 123, 178 S. W. 1121 (1915); Metropolitan Trust Co. v. Tracy, 171 Ky. 781, 188 S. W. 782 (1916); Schuttler v. King, 12 Mont. 149, 30 Pac. 25 (1892); Stevens v. White, 2 Ohio Dec. Reprint 107 (1859).

[13] Wood v. Nicolson, 43 Kan. 461, 23 Pac. 587 (1890).

to have summons served anew in case of a substantial amendment may be waived by appearing in the cause and contesting the merits.[14]

Since it appears that the necessity of service of summons anew depends, in most jurisdictions, upon whether the amendment makes a substantial change in the cause of action, a question is at once raised as to what constitutes such a substantial change. Setting up, by amendment, a mortgage different from that set up in the original complaint was held not to make a substantial change, because the different mortgage was one given in lieu of the first.[15] It has been held that a substantial change was not effected either by amending a complaint so as to supply the signature of the plaintiff, omitted from the complaint as filed,[16] or by an amendment changing the prayer of the complaint so that judgment was asked for both the debt and interest, where it had before been asked for interest only, it being apparent that failure to ask judgment for the debt in the first instance was an oversight.[17] The same result was reached in the case of an amendment which merely set forth the notes, evidences of the debt for which judgment was sought in the original pleading,[18] and in the case of one which stated separately and numbered what already appeared in the original.[19]

Amendments which deal with changes of parties present various conclusions. A change in the names of parties plaintiff to conform to the present owners of the claim sued on did not constitute such a change as to require service of summons anew,[20] and neither did the change of the name of plaintiff from an individual capacity to a representative capacity.[21] Opposed to that holding appears a New York case[22] where the amendment changed the name of the plaintiff from that of the agent to that of the principal. The court, in holding that this constituted a substantial change, distinguished it from a situation where a mistake was made as to the name of the defendant by suing him in a representative capacity when he should have been sued in an

[14] Smith v. Kiene, 231 Mo. 215, 132 S. W. 1052 (1910); International & G. N. R. R. v. Howell, 101 Tex. 603, 111 S. W. 142 (1908).

[15] Smith v. Smith, 190 Ark. 418, 79 S. W. (2d) 265 (1935).

[16] Manspeaker v. Bank of Topeka, 4 Kan. App. 768, 46 Pac. 1012 (1896).

[17] Highland Land & Bldg. Co. of Dayton v. Audas, 33 Ky. Law Rep. 214, 110 S. W. 325 (1908).

[18] H. Feltman Co. v. Thompson, 22 Ky. Law Rep. 757, 58 S. W. 693 (1900).

[19] Schuyler Nat. Bank v. Bollong, 28 Neb. 684, 45 N. W. 164 (1890).

[20] Citizens Bank & Trust Co. v. Jones, 167 So. 511 (La. App. 1936); Senter v. Garland, 298 S. W. 614 (Tex. Civ. App. 1927).

[21] Bolton v. White, 43 Ga. App. 13, 158 S. E. 436 (1931).

[22] Vanderveer v. Cohen, 139 App. Div. 296, 123 N. Y. Supp. 1033 (2d Dep't 1910) (the amendment consisted in striking the words "Vanderveer as agent of" from the style "Vanderveer as agent of the Royal Exchange Assurance Co. of London").

individual capacity. But merely joining another party plaintiff has been held not to amount to a statement of a new cause of action.[23]

So far as concerns parties defendant, some states indicate that a new summons is necessary where it is sought to render defendants who were brought into the case in their trust capacity, defendants in their individual capacity.[24] This seems contrary to the view in New York, as already noted in the distinction made in the New York case above.[25] North Carolina[26] found no need for new summons in an amendment which corrected a mistake in naming the defendant where it was already apparent from the pleading who the true party defendant was; though, even in such case, the authorities appear to be in conflict upon the question.[27] The converse, where one is sued in his individual capacity and then is sought to be held in his representative capacity, has been resolved in favor of liability without service of summons anew upon the theory that one, made defendant in his individual capacity, becomes a party for all purposes.[28] Therefore, no amendment at all would be necessary to make him liable in his individual capacity, and, of course, no new summons would be needed to support such amendment. There should also be noted here those cases[29] which hold that one who brings a bill to foreclose a mortgage in the form of a trust deed naming him as trustee, the indebtedness secured by which he owns, need not join himself as a party in his capacity as trustee. Likewise pertinent in this connection is a case[30] where a trustee, owner of a building in that capacity, was sued for damages in both his capacity as an individual and as trustee. The trial court erroneously dismissed the suit against him as an individual, and erroneously held him liable in his trust capacity. He appealed, and the judgment against him as trustee was reversed. But due to the plaintiff's failure to bring up for

[23] Wolford v. Copelon, 242 App. Div. 91, 273 N. Y. Supp. 186 (3d Dep't 1934); Larson v. Union Investment & Loan Co., 168 Wash. 5, 10 P. (2d) 557 (1932).

[24] Baskin v. Montedonico, 26 F. Supp. 894 (W. D. Tenn. 1939); Cochrane v. Forbes, 265 Mass. 249, 163 N. E. 848 (1928); New England Oil Refining Co. v. Canada Mexico Oil Co., 274 Mass. 191, 174 N. E. 330 (1931).

[25] See note 22, *supra*.

[26] Fountain v. Pitt County, 171 N. C. 113, 87 S. E. 990 (1916).

[27] Baskin v. Montedonico, 26 F. Supp. 894 (W. D. Tenn. 1939) (which refers to the rule in Florida as holding that a personal liability is properly imposed on a defendant sued in a trust capacity); Schroeder v. Berlin Arcade Real Estate Co., 175 Wis. 79, 184 N. W. 542 (1921) (holding that one who sues in equity in a representative capacity does not thereby become a party in his individual capacity so that he can be held individually liable, without being impleaded in his individual capacity).

[28] Harris v. Lester, 80 Ill. 307 (1875); Breed v. Baird, 139 Ill. App. 15 (1907).

[29] Chandler v. O'Neil, 62 Ill. App. 418 (1895); Dearlove v Hatterman, 102 Ill. App. 329 (1902); North Ave. Bldg. & Loan Ass'n v. Huber, 187 Ill. App. 42 (1914).

[30] O'Connor v. Rathje, 298 Ill. App. 489, 19 N. E. (2d) 96 (1939).

review the erroneous dismissal of the trustee in his individual capacity, the trustee was thereby rendered fully exempt from liability.

The severing of actions which had been joined in one proceeding under modern practice acts, has been held not to require new summons.[31]

II. Concerning the Filing of Counterclaims and Cross-petitions

Generally, one who is before the court, either as a plaintiff or by virtue of service with summons to answer a complaint, is thereby charged with notice of any cross-petition which any defendant may file, if such cross-petition is germane to the complaint.[32] This rule has been held to apply to petitions of intervenors as well.[33] In two states, this result is accomplished by statute, expressly in one case,[34] and impliedly in the other.[35] In another jurisdiction, however, a new summons or notice of the filing of a cross-petition is unnecessary only where the cross-petition is filed before the expiration of the time for the defendant to answer the original complaint.[36] In still another, one is bound to a cross-petition filed before his answer to the original complaint is filed, without the need of new summons, even though neither the answer nor the cross-petition is filed until after the answer day fixed by the original summons.[37]

Several jurisdictions require new summons where the cross-petition is not germane to the original complaint.[38] In one of the states which apparently follows the rule that a party, once served, must take notice

[31] Rosen v. Goldstein, 234 App. Div. 872, 254 N. Y. Supp. 71 (2d Dep't 1931).

[32] Barnes v. Colorado Springs & C. C. D. Ry., 42 Colo. 461, 94 Pac. 570 (1908); Bevier v. Kahn, 111 Ind. 200, 12 N. E. 169 (1887); Hedges v. Mehring, 65 Ind. App. 586, 115 N. E. 433 (1917); Griffith v. Bluegrass Bldg. & Loan Ass'n, 108 Ky. 713, 57 S. W. 486 (1900); Littlefield v. Brown, 68 Okla. 144, 172 Pac. 643 (1918); Williams v. Lumpkin, 74 Tex. 601, 12 S. W. 488 (1889). But see Beekman v. Trower, 82 Kan. 327, 330, 108 Pac. 110, 111 (1910), where it is pointed out that the rule which makes service of new summons unnecessary has been modified in several cases holding that a judgment cannot be properly entered upon a pleading which has been amended in a material manner where the adverse party is in default or is absent.

[33] Board of Directors of St. Francis Levee Dist. v. Raney, 190 Ark. 75, 76 S. W. (2d) 311 (1934); Ball v. Red Square Oil & Gas Co., 113 Kan. 763, 216 Pac. 422 (1923).

[34] Louisville Title Co. v. Darnell's Committee, 149 Ky. 312, 148 S. W. 369 (1912).

[35] Miera v. Sammons, 31 N. M. 599, 248 Pac. 1096 (1926).

[36] Rice v. Bontjes, 121 Okla. 292, 250 Pac. 89 (1926); Glenn v. Prentice, 158 Okla. 73, 12 P. (2d) 170 (1932); Blakeney v. Ashford, 183 Okla. 213, 81 P. (2d) 309 (1938).

[37] Smith v. Allen, 63 Neb. 74, 88 N. W. 155 (1901).

[38] Miller v. Mattison, 105 Ark. 201, 150 S. W. 710 (1912); Benbow v. Studebaker, 51 Ind. App. 450, 99 N. E. 1033 (1912); Amburgy v. Burt & Brabb Lumber Co., 121 Ky. 580, 89 S. W. 680 (1905); Huff v. Black, 259 Ky. 550, 82 S. W. (2d) 473 (1935); Schmitz v. Peterson, 113 La. 134, 36 So. 915 (1904); City Nat. Bank v. Lummus Cotton Gin Sales Co., 297 S. W. 563 (Tex. Civ. App. 1927), *aff'd*, 6 S. W. (2d) 728 (Comm. App. Tex. 1928).

at his peril of all orders thereafter entered in the cause,[39] the requirement for a new summons where the cross-complaint is not germane has been observed by an intermediate court of review.[40] Yet, the necessity of a new summons was denied by the highest court of that state in a cause in which an amended declaration had been filed setting up a different cause of action from that in the original declaration.[41] However, in reaching this conclusion the court relied upon an earlier statute[42] which has been retained in the law[43] presently in force in that state. Whether or not a similar result would be called for in the case of a filing of a counterclaim would seem to depend upon the statute in force relative to counterclaims and cross-complaints. For example, it would seem that such a result is called for in a statutory provision to the effect that any plaintiff, or plaintiffs, may join any causes of action, whether legal or equitable, or both, against any defendant, or defendants, and any defendant may set up in his answer any and all cross-demands whatever, whether in the nature of recoupment, set-off, cross-bill in equity, or otherwise.[44]

However, it has been held that a defendant who desires affirmative relief against a co-defendant on a matter germane to the issue presented by the complaint is required to file a cross-complaint to secure this relief and cannot set up this demand in his answer to the original complaint.[45] The basis of this decision is that to allow these demands to be set up in the answer would be unjust, because a person made defendant to an original complaint might well be content to suffer a default, relying upon the assumption that the subject matter of the suit in which he had been summoned as defendant would not extend beyond the scope of the complaint as to which he had suffered default, and that he could safely ignore the suit.

As a general proposition, it might be said that no summons is necessary where a defendant files a counterclaim against the plaintiff, even where the plaintiff is an infant. It is not even necessary in such a case to appoint a guardian *ad litem* for the infant, his next friend being considered sufficient protection.[46] However, some jurisdictions

[39] Ruppe v. Glos, 251 Ill. 80, 95 N. E. 1033 (1911); Shippert v. Shippert, 371 Ill. 267, 20 N. E. (2d) 597 (1939).
[40] LaForge v. Binns, 125 Ill. App. 527 (1906).
[41] Niehoff v. The People, 171 Ill. 243, 49 N. E. 214 (1897).
[42] ILL. REV. STAT. (Hurd, 1897) c. 110, §§23, 25.
[43] ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §170.
[44] ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §168.
[45] Chicago Title & Trust Co. v. Herlin, 299 Ill. App. 429, 20 N. E. (2d) 333 (1939). It may be noted that in New York it is apparently immaterial whether the counterclaim sets up a new cause of action or not, so long as a copy is served upon the party sought to be bound thereby, as by the statute in that state, the service of such copy is equivalent to the service of summons. Clearing Realty Corp. v. Pollaci, 133 Misc. 626, 233 N. Y. Supp. 136 (1929).
[46] Crawford v. Amusement Syndicate Co., 37 S. W. (2d) 581 (Mo. 1931).

which do not require the service of summons upon the filing of a cross-petition or counterclaim, do require the giving of notice in various ways to those to be affected thereby.[47] In one, the need of issuing summons anew upon the filing of a cross-petition against co-defendants depended upon whether the co-defendants had entered their appearance in the case in answer to the original complaint, as, unless the defendants had appeared so as to receive notice, a new summons would be necessary.[48] It was also held in this state that where a defendant filed a cross-petition against a plaintiff, and a separate cross-petition against the plaintiff's attorneys on an entirely different cause of action, citation to the attorneys concerning the cross-petition against them, and answer by them in this regard, did not dispense with the need of citation to the plaintiff as to the cross-petition filed against him.[49] Furthermore, citation has been held necessary where the counterclaim was filed by the defendant after the plaintiff had taken a nonsuit as against that defendant.[50]

It would seem that there could be no controversy on the point that the defendant who brings in a third person by his counterclaim is the one who must see to the service of summons to bring such a person in—not the plaintiff to the original action. This question has, in fact, been raised in litigation, and decided as just noted.[51]

III. Supplemental Proceedings

Whether or not service of summons anew is necessary to bind parties to a supplemental proceeding would seem to depend upon the nature of the supplemental proceeding. A new summons is necessary if the judgment or decree that was entered in the original proceeding is complete in itself and nothing further is necessary to afford the judgment or decree beneficiary the full benefit of the adjudication, and if what is desired by the supplemental proceeding is to present for satisfaction of the judgment or decree property which is not available otherwise.[52] This is also true of a supplemental proceeding to recover assets fraudulently obtained by a distributee in a receivership proceeding.[53]

[47] Rodgers v. Parker, 136 Cal. 313, 68 Pac. 975 (1902); Hough v. Porter, 51 Ore. 318, 95 Pac. 732 (1909); Wright v. McKenzie, 55 S. D. 300, 226 N. W. 270 (1929); Early v. Cornelius, 120 Tex. 335, 39 S. W. (2d) 6 (1931); Culmer v. Caine, 22 Utah 216, 61 Pac. 1008 (1900).

[48] Gregg v. Texas Bank & Trust Co., 235 S. W. 689 (Tex. Civ. App. 1921).

[49] Scarborough v. Bradley, 256 S. W. 349 (Tex. Civ. App. 1923).

[50] Thompson v. Gaither, 45 S. W. (2d) 1106 (Tex. Civ. App. 1932).

[51] Hailfinger v. Meyer, 215 App. Div. 35, 212 N. Y. Supp. 746 (4th Dep't 1925); Danziger v. Amalgamated Bank of the City of New York, 143 Misc. 126, 255 N. Y. Supp. 344 (N. Y. City Cts. 1932).

[52] International Moving Picture & Film Co. v. Smith, 211 Ala. 3, 99 So. 303 (1924); Smith v. Johnson, 321 Ill. 134, 151 N. E. 550 (1926); see Gridley v. Wood, 343 Ill. 223, 230, 175 N. E. 396, 399 (1931).

[53] Ledbetter v. Mandell, 141 App. Div. 556, 126 N. Y. Supp. 497 (1st Dep't 1910), *aff'd*, 205 N. Y. 537, 98 N. E. 1106 (1912). In this case a receiver ap-

On the other hand, the supplemental proceeding may be merely for the purpose of carrying out a decree of the court which did not include within itself that which was necessary to give it full effect; as where a decree of foreclosure for forfeited taxes, and a sale pursuant thereto, required, by constitutional and statutory provisions, that certain notice be given and certain affidavits be filed before a deed issued pursuant to the sale might be valid. In such case a supplemental proceeding to confirm the steps taken in compliance with such statutory and constitutional requirements might be filed without service of summons anew, notice to counsel in such case being sufficient.[54]

IV. Conclusion

It would seem from the foregoing that the various jurisdictions have aligned themselves into groups irrevocably in conflict upon the question under discussion, and, moreover, that the alignment of jurisdictions is not the same in the treatment of the question in respect of cross-petitions as in the treatment relative to amendments to the complaint. There are jurisdictions in which a defendant is charged with notice of amendment of a complaint, even though a different cause of action is thereby introduced,[55] while in the case of cross-petitions the extent to which most of the authorities have gone, it seems, has been to bind a defendant by a cross-petition of a co-defendant only where it is germane to the complaint.[56] It is very likely that the attitude thus apparent in the case of cross-petitions proceeds from the time-honored rule of equity which required a cross-bill to be germane to the original bill, for the modern practice innovations, it is believed, have tended to model the common law actions after chancery proceedings. But whatever the reason, the numerous differences seen among the various jurisdictions upon the need of summons anew in case of filing of amendments to complaints bear thoughtful consideration by all who deal with interests affected by judgments and decrees. To such the foregoing is respectfully submitted.

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pointed by an interlocutory order in a creditor's suit had closed out the estate and distributed the assets. Two years later he, as receiver, filed a cross-bill, asking for judgment against one of the distributees for the amount distributed to him, on the ground that the distributee had obtained his distribution by fraud. The court held that the cross-bill thus filed was not a true cross-bill, but was an original bill, so that process against the defendant was necessary to give the court jurisdiction. One judge in the Appellate Division of the New York Supreme Court dissented on the ground that the court was still in the process of administering the estate, and the defendant having notice of the cross-bill, the court had jurisdiction.

[54] Clark v. Zaleski, 253 Ill. 63, 97 N. E. 272 (1912).

[55] See note 6, *supra*.

[56] See note 32, *supra*.