Case Notes

Civil Procedure—THE TRIAL COURT HAVING SUSTAINED THE DEFENDANT'S SPECIAL APPEARANCE CHALLENGING THE JURISDICTION OF THE COURT, THE PLAINTIFF COULD NOT FILE, IN THE SAME CASE, AN AMENDED AND SUBSTITUTED PETITION WITH NEW NOTICE.—*White v. Wilkes* (Iowa 1969).

On December 11, 1968, plaintiff filed a petition alleging that defendant, Robert J. Wilkes, owed him $707. On December 20, 1968, defendant filed a special appearance under Iowa Rule of Civil Procedure 66 challenging the jurisdiction of the court. He contended that his name was Robert F. Wilkes and not the Robert J. Wilkes named in the petition. This special appearance was sustained on January 10, 1969. No further action was taken until February 24, 1969, when the plaintiff filed a new petition and notice identifying the defendant as Robert F. Wilkes. Defendant again appeared specially challenging the jurisdiction on the ground that plaintiff had failed to file his pleadings within seven days of the ruling on the first special appearance and it had thus become a final adjudication. This special appearance was sustained on the grounds alleged by the defendant and the plaintiff appealed the rulings in both of these special appearances. *Held*, plaintiff's inaction following the sustaining of defendant's first special appearance constituted a waiver of appellate review,[1] and by filing an amended and substituted petition plaintiff made a futile attempt to revive a dead action. *White v. Wilkes*, 173 N.W.2d 98 (Iowa 1969).

The action of both the trial court and the appellate court with respect to the defendant's first special appearance finds ample support in Iowa law in *Shields v. Heinold*.[2] In that case it was held that an incorrect middle initial was sufficient to deprive the court of jurisdiction.[3] Similarly, it is obvious that the plaintiff, in not filing a petition to vacate the judgment[4] or filing an appeal[5] within 30 days following the first special appearance, had in effect waived any appellate review of the court's determination.[6] However, with regard to the second special appearance filed by the defendant, both the decision of the trial court and that of the Iowa supreme court seem to misconstrue the applicable law. In support of its sustaining this second appearance, the trial court relies on the plaintiff's failure to comply with Rule 86:

> If a party is required or permitted to plead further by an order or ruling, the clerk shall forthwith mail or deliver notice of such order or ruling to the attorneys of record. . . . Unless otherwise provided

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1 IOWA R. CIV. P. 331, 335, 336.
2 253 Iowa 898, 114 N.W.2d 302 (1962). *See also* Annot., 6 A.L.R.3d 1174 (1962).
3 *Id.* at 902, 114 N.W.2d at 304.
4 IOWA R. CIV. P. 252.
5 IOWA R. CIV. P. 331.
6 IOWA R. CIV. P. 335.

> by order or ruling, such party shall file such pleading within seven days after such mailing and delivery; and if such party fails to do so within such time, he thereby elects to stand on the record theretofore made. . . .[7]

In reviewing the cases which have been decided on the basis of this rule, it appears that they are chiefly concerned with plaintiff's amendment, or election to stand following the sustaining of a motion to strike,[8] a motion for more specific statement,[9] or a motion to dismiss[10] his petition and that this rule has never been applied to plaintiff's option following a special appearance by the defendant. On the other hand, the Iowa supreme court relies heavily on the case of *Oldis v. John Deere Waterloo Tractor Works*[11] for the proposition that upon plaintiff's failure to appeal from the first special appearance the cause as to these parties was terminated.[12] The Iowa court also places great emphasis on the fact that plaintiff filed, not an amendment, but an amended and substituted petition. An amended and substituted petition ordinarily supersedes the original petition and "[u]nless placed in evidence the original pleading is no longer in the case . . . and any ruling of the court with relation to the sufficiency of the original pleading, is not properly in the record."[13] However, the original pleading may remain part of the record to show when the action was commenced.[14] Under the Iowa Rules of Civil Procedure, an action is commenced when service of process of an original notice is accomplished.[15] Therefore, in order for an action to commence, a valid original notice must be served on the appropriate defendant.[16] In order to insure the adequacy of the notice, the requirements[17] for a valid original notice must be satisfied and failure to comply with these requirements is fatal to the commencing of the action.[18] It would seem highly unlikely that the "cause as to the parties was terminated" even before it was commenced.

The dissent to this decision[19] points to a statute, on the books since 1843, which the majority seems to have overlooked: "If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall,

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[7] IOWA R. CIV. P. 86.

[8] *See, e.g.*, Forte v. Schlick, 248 Iowa 1327, 85 N.W.2d 549 (1957); Goldstein v. Brandmeyer, 243 Iowa 679, 53 N.W.2d 268 (1952).

[9] *See, e.g.*, Windus v. Great Plains Gas, 254 Iowa 114, 116 N.W.2d 410 (1962); Morf v. Washburn, 250 Iowa 759, 94 N.W.2d 756 (1959).

[10] *See, e.g.*, Liken v. Shaffer, 64 F. Supp. 432 (N.D. Iowa 1946); Nesper Sign & Neon Co. v. Nugent, 168 N.W.2d 805 (Iowa 1969).

[11] 259 Iowa 1111, 147 N.W.2d 200 (1966).

[12] *Id.* at 1117, 147 N.W.2d at 203.

[13] *See generally*, 71 C.J.S. *Pleading* § 321a (1951).

[14] *See generally*, 71 C.J.S. *Pleading* § 321c (1951).

[15] IOWA R. CIV. P. 48.

[16] Mazzoli v. City of Des Moines, 245 Iowa 571, 63 N.W.2d 218 (1954).

[17] IOWA R. CIV. P. 50.

[18] White v. O'Neill, 164 N.W.2d 79 (Iowa 1969); Shields v. Heinold, 253 Iowa 898, 114 N.W.2d 302 (1962).

[19] By reference to the dissent in *Boomhower v. Cerro Gordo County Board of Supervisors*, 173 N.W.2d 95, 97-98 (Iowa 1969).

for the purposes herein contemplated, be held a continuation of the first."[20] This statute is not unique to Iowa, and a recent United States Supreme Court decision[21] cites similar *saving statutes* found in thirty-one states.[22] In order for Iowa's saving statute[23] to apply, the case must be one which has not been adjudicated on the merits.[24] This requirement was certainly met in the instant case following the defendant's first special appearance. The Iowa rule holds that a special appearance serves only to raise questions of jurisdiction.[25] This may be jurisdiction over the person, over the subject matter, or to challenge the sufficiency of the original notice.[26] Therefore, in a special appearance, the merits of the controversy cannot be determined;[27] in fact, no pleading to the merits is allowed under a special appearance.[28]

The dissent, however, seems to overlook the primary requirement for the applicability of the saving statute: the plaintiff must fail *after the commencement of the action*—after the requirements of Rule 48[29] and Rule 50[30] have been satisfied. In the instant case, it is difficult to see how the court could have deemed the action commenced in light of the decisions in several Iowa cases.[31] However, the court seems to have determined that the action was, indeed, commenced with the filing of the erroneous original notice. This being the case, it appears that the court is willing to interpret Rule 48[32] as stating: "The action is commenced when the petition is filed"—rather than when process is served upon the defendant. While agreeing with the dissent that "[t]he litigant should have

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[20] CODE OF IOWA § 614.10 (1971). The original form of this statute is found in IOWA REV. STAT. (Terr.) Ch. 94, § 9 (1843).

[21] Burnett v. New York Cen. R.R., 380 U.S. 424, 432 (1964).

[22] ALASKA STAT. § 09.10.240 (1962); ARK. STAT. § 37-222 (1962); CONN. GEN. STAT. § 52-592 (1958); DEL. CODE ANN. Tit. 10, § 8117 (1953); GA. CODE ANN. § 3-808 (1962); ILL. ANN. STAT. ch. 83, § 24a (Smith-Hurd 1966); IND. ANN. STAT. § 2-608 (Burns 1933); CODE OF IOWA § 614.10 (1971); KAN. CODE CIV. PROC. ANN. § 60-518 (1963); KY. REV. STAT. § 413.270 (1963); LA. CIVIL CODE Art. 3555, R.S. 9:5801 (Slovenko 1961); ME. REV. STAT. Tit. 14, § 855 (1965); MASS. GEN. LAWS ANN. ch. 260, § 32 (1959); MICH. STAT. ANN. § 27A.5856 (1962); MISS. CODE § 744 (1957); MONT. REV. CODES § 93-2708 (1964); N.H. REV. STAT. ANN. § 508:10 (1968); N.M. STAT. § 23-1-14 (1954); N.Y. CIV. PRAC. LAW & RULES § 205 (McKinney 1963); N.C. STAT. § 1-25 (1963)—Repealed Session Laws 1967 § 954(4); OHIO REV. CODE ANN. § 2305.19 (Page 1954); OKLA. STAT. ANN. Tit. 12, § 100 (1960); ORE. REV. STAT. § 12.220 (1969); R. I. GEN. LAWS § 9-1-22 (1969); TENN. CODE ANN. § 28-106 (1955); TEX. CIV. STAT. ANN. Tit. 91, Art. 5539a (Vernon 1958); UTAH CODE ANN. § 78-12-40 (1953); VT. STAT. ANN. Tit. 12, § 558 (1959); VA. CODE § 8-34 (1957); W. VA. CODE § 5410 (1961); WYO. STAT. § 1-26 (1959).

[23] CODE OF IOWA § 614.10 (1971).

[24] Phoenix Insurance Company of Hartford v. Fuller, 216 Iowa 1201, 250 N.W. 499 (1933); Cooley v. Maine, 183 Iowa 560, 165 N.W. 1015 (1918).

[25] IOWA R. CIV. P. 66.

[26] Monroe Township School Dist. v. Board of Educ., 250 Iowa 1324, 98 N.W.2d 888 (1959).

[27] Iowa Electric Co. v. State Bd. of Control, 221 Iowa 1050, 1059, 266 N.W. 543, 547 (1936).

[28] Anderson v. Moon, 225 Iowa 70, 75-76, 279 N.W. 396, 399 (1938).

[29] IOWA R. CIV. P. 48.

[30] IOWA R. CIV. P. 50.

[31] White v. O'Neill, 164 N.W.2d 79 (Iowa 1969); Shields v. Heinold, 253 Iowa 898, 114 N.W.2d 302 (1962); Mazzoli v. City of Des Moines, 245 Iowa 571, 63 N.W.2d 218 (1954).

[32] IOWA R. CIV. P. 48.

his day in court and not be eliminated on procedural issues,"[33] and that "[the court] should do [its] part by construing the statute liberally to effectuate its purpose and assist the parties in obtaining justice,"[34] it must be realized that a too-liberal construction may serve to defeat the legislative intent inherent in the statute.

A better way to approach the instant case would have been to hold that the action was commenced with the service of the second original notice on the *correct* defendant. After commencing the action but before a judgment on the merits, if the plaintiff still failed due to an insufficient petition,[35] for example, the saving statute[36] would give the plaintiff six months to correct his procedural flaw before his action would be "dead." Thus, the plaintiff would be given his day in court where the merits of the controversy could be judicially decided.

MARK C. SMITH

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[33] Boomhower v. Cerro Gordo Bd. of Supervisors, 173 N.W.2d 95, 98 (Iowa 1969) (dissenting opinion).
[34] *Id.* citing CODE OF IOWA § 4.2 (1966).
[35] IOWA R. CIV. P. 70.
[36] CODE OF IOWA § 614.10 (1971).