University of Miami Law Review

Volume 15 | Number 3 Article 5

5-1-1961

Waiver By General Appearance: Impact of the Federal and Florida Rules

Robert Staal

COMMENTS

WAIVER BY GENERAL APPEARANCE: IMPACT OF THE FEDERAL AND FLORIDA RULES

I. INTRODUCTION

Probably no technicality in the law has caused more apprehension among attorneys than waiver by general appearance of defenses directed to lack of jurisdiction over the person. Traditionally, a party could come into court for the sole purpose of registering his jurisdictional objection, and if he were overruled, safely withdraw.[1] But he had to dance the rope of division between special and general appearances. Should he act in a manner inconsistent with his limited status, as by moving to the merits or invoking the court's jurisdiction in his own behalf, he was said to have considered himself in court for all purposes, and a waiver by general appearance ensued.[2]

Federal Rule 12, especially subsection (b),[3] and several state rules modeled after it,[4] including Florida's Rule 1.11(b),[5] are widely said to have abolished the distinction between special and general appearances,[6] so that a party is free to join any kind of participation on the merits with his defenses going to personal jurisdiction, subject to the qualification of the rules themselves[7] that the objections be timely. The often quoted words of Maris, J., in the leading case of *Orange Theatre Corp. v. Rayherstz Amuse-*

---

1. See generally, 6 C.J.S. *Appearances* § 1 (1937).
2. *Id.* § 9.
3. The relevant sentence is as follows: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." FED. R. CIV. P. 12(b).
4. According to Annot., 62 A.L.R.2d. 937, 940-41 (1958), citing Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958), the following jurisdictions are reported to have adopted rules of practice substantially similar to the Federal Rules: Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Utah and Wyoming. Although Florida was not listed, it too has similar rules; in addition, West Virginia is believed to have similar rules.
5. The relevant sentence of Rule 1.11(b), FLA. R. CIV. P., is exactly identical to the corresponding sentence in Federal Rule 12(b). See note 3 *supra*.
6. Investors Royalty Co. v. Market Trend Survey, 206 F.2d 871 (10th Cir.), *cert. denied*, 346 U.S. 909 (1953); Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871 (3d Cir.), *cert. denied*, 322 U.S. 740 (1944); Fauchier v. McNeil Constr. Co., 84 F. Supp. 574 (D. Nev. 1949); D. W. Onan & Sons v. Superior Court, 65 Ariz. 255, 179 P.2d 243 (1947); Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956); Greenberg v. Greenberg, 101 So.2d 608 (Fla. App. 1958); Weant's Adm'r v. Ellis, 287 S.W.2d 446 (Ky. 1955).
7. Rule 12(g) states that "a party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he

ment Corp.,[8] suggest that the problem simply vanished after the Federal Rules were enacted:

> It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse which he possessed before he came in.[9]

There is a good deal of evidence, however, in the federal cases since 1938, and in the Florida cases since 1954, that today's attorney is not nearly so free of the ancient abracadabra of the law as Judge Maris supposed. In the first place, there is doubt as to the scope of the new rule. The cases indicate that a party still may not be safe in joining certain kinds of participation on the merits with objections to personal jurisdiction. Secondly, even in areas where the new rule is established as changing the old practice, many cases have applied the latter as if the former did not exist. And finally, many of the courts which at least show an awareness of the change unhappily persist in the old vocabulary of "special and general appearances."

The burden of this comment is to ascertain the impact of the Federal Rule, and its Florida analogue, on the doctrine of appearances, both in theory and practice, with an eye to whether today's practitioner can safely disregard traditional precautions.

II. THE FORMER PRACTICE

At common law, it was not enough to label one's appearance "special"; the courts were more interested in whether one's actions, in fact, crossed from the land of abatement to the land of bar.[10] Since the special appearance was for a particular purpose while the general was without reserve, the former might be converted into the latter if the defendant took some step

---

shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule."

Subdivision (h) adds: "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings, or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

8. 139 F.2d 871 (3d Cir.), *cert. denied*, 322 U.S. 740 (1944).

9. *Id.* at 874.

10. 3 CYCLOPEDIA OF FEDERAL PROCEDURE 335 (3d ed. 1952).

"consistent with the hypothesis that the court ha[d] jurisdiction of the cause and the person."[11]

Examples of actions which worked this conversion were: objecting to lack of jurisdiction over the subject-matter,[12] answering to the merits,[13] asking for a change of venue,[14] arguing a motion to quash on grounds going to the merits,[15] moving to dismiss on the merits,[16] seeking extension of time in which to plead,[17] and challenging the court's jurisdiction over the defendants.[18]

The technical transformation from special appearance to general has been variously described as a "curing" of defects,[19] as a "waiver" of irregularities,[20] or merely that the alleged insufficiency of process need no longer be determined.[21] Whatever the rationalization, this much was certain: the courts were quick to brand as a waiver any act suggesting that the defendant considered his case in court for purposes other than objecting to personal jurisdiction. Why the law favored this forfeiture while abhorring most others was well stated by the Florida Supreme Court:

> The doctrine of waiver of defects in process and in service of process is salutary, and the rule ought to be rigidly applied in every case where the acts of the party can be fairly construed into a waiver . . . . which tends to discourage as dilatory the filing of such appearances.[22]

The defendant's special appearance status could be waived by any of the actions described above which were done before the jurisdictional objection was decided. This could occur through a joinder of such participation on the merits with the jurisdictional objection,[23] or through a separate assertion of the defense to the merits while the jurisdictional

---

11. 6 C.J.S. *Appearances* § 1 at 9 (1937).
12. Hireen v. Interstate Transit Lines, 52 F.2d 182 (N.D. Cal. 1931); McComb v. United States Housing Corp., 264 Fed. 589 (D. Del. 1920); Butters v. Gowen, 138 Fla. 250, 189 So. 278 (1939).
13. Dickey v. Turner, 49 F.2d 998 (6th Cir. 1931).
14. Benedica v. Seiberling, 17 F.2d 841 (N.D. Ohio 1927); Butters v. Gowen, 138 Fla. 250, 189 So. 278 (1939); Dudley v. White, 44 Fla. 264, 31 So. 830 (1902).
15. Caspar v. Bonbright, 94 Fla. 1237, 115 So. 540 (1928); First Nat'l Bank v. Board of Pub. Instruction, 93 Fla. 182, 111 So. 521 (1927).
16. Collins v. Finley, 65 F.2d 625 (9th Cir. 1933); Woodside v. United States, 60 F.2d 823 (4th Cir. 1932); Cobb v. State *ex rel.* Hornickel, 134 Fla. 315, 187 So. 151 (1939); Gulf View Apartments v. City of Venice, 108 Fla. 41, 145 So. 842 (1933).
17. Feldman Inv. Co. v. Connecticut General Life Ins. Co., 78 F.2d 838 (10th Cir. 1935); Ruckstell Sales & Mfg. Co. v. Starr Transmission Corp., 13 F.2d 478 (S.D. Cal. 1926).
18. City of Coral Gables v. Certain Lands Upon Which Taxes Are Delinquent, 110 Fla. 189, 149 So. 36 (1933).
19. Bartley v. Bingham, 34 Fla. 19, 15 So. 592 (1894).
20. Florida Ry. v. Gensler, 14 Fla. 122 (1872); Mercer v. Booby, 6 Fla. 723 (1856).
21. Ivey v. Hunter, 126 Fla. 227, 170 So. 734 (1936).
22. Rorick v. Stilwell, 101 Fla. 4, 15-16, 133 So. 609, 615 (1931).
23. See generally, 6 C.J.S. *Appearances* § 12 (1937).

objection was pending,[24] or before it was made.[25] Obviously, the use of successive motions to present defenses in abatement first, then defenses in bar, was offensive to courts with crowded dockets.

Waiver might also result if the defendant proceeded to trial on the merits after his jurisdictional defense was overruled. Here, however, instead of the jurisdictional defect being "cured" before it was even passed on by the trial court, the litigant was said to have waived his right to appeal any error the trial court may have committed in ruling on the jurisdictional point.[26] In respect to this aspect of the appearances problem, the decisions have always been, and still are, in conflict.[27] This problem, too, represents the only significant split in the former practices of the federal and Florida courts, before the adoption of their respective Rules of Civil Procedure. While the majority of federal courts have always preserved the right of the defendant to appeal,[28] the Florida courts have uniformly found a waiver by general appearance.[29]

III. FEDERAL RULE 12

The relevant part of subsection (b) states that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Under the old practice, as mentioned above, the *sequence* in which a jurisdictional defense and a defense to the merits were presented determined whether or not the former would be waived. Asserting the defense to the merits first or asserting it after the jurisdictional defense but before the latter was disposed of by the court was fatal, as was a joinder of the two. In short, the defendant could do nothing but await a ruling on his jurisdictional defense. If the ruling were adverse, he could then withdraw or present his defenses to the merits, as he chose. Subsection (b) obviates this delay by making the sequence of presentation unimportant.[30]

Subsections (g) and (h), however, substitute waiver by nonjoinder for waiver by joinder.[31] If a party fails to consolidate in his first motion all defenses then available to him, those omitted are waived under subsection

---

24. *Ibid.*
25. *Ibid.*
26. Largay Enterprises, Inc. v. Berman, 61 So.2d 366 (Fla. 1952); Ortell v. Ortell, 91 Fla. 50, 107 So. 442 (1925); Henry v. Spitler, 67 Fla. 146, 64 So. 745 (1914); Stephens v. Bradley, 24 Fla. 201, 3 So. 415 (1888); Florida Ry. v. Gensler, 14 Fla. 122 (1872). The prevailing federal practice was contra. See Harkness v. Hyde, 98 U.S. 478 (1878). See also Sunderland, *Preserving a Special Appearance*, 9 MICH. L. REV. 396, 405 (1911).
27. See Annot., 62 A.L.R.2d 937 (1958) and Sunderland, *Preserving a Special Appearance*, 9 MICH. L. REV. 396 (1911).
28. See note 26 *supra*.
29. *Ibid.*
30. "The theory of the Rule [12(b)] is that the quick presentation of defenses and objections should be encouraged and that successive motions which prolong such presentation should be carefully limited." 2 MOORE, FEDERAL PRACTICE § 12.12, at 2260 (2d ed. 1960).
31. See note 7 *supra*.

(g); likewise, if a party fails to present all his defenses either by motion, or by answer or reply if he has made no motions, those omitted are waived under subsection (h), with certain exceptions.[32] At first blush, it appears that the rules have merely replaced one entrapment with another, but the waiver under the rules is said to result, not from a general appearance with all its proverbial tricks and snares, *but simply because the defense is untimely.*[33]

A. *Conceptual Difficulties*

What impact has Rule 12 had on the doctrine of appearances? First, certain theoretical difficulties should be noted. The language of the relevant sentence[34] is narrow indeed, and a rather liberal disposition is required to see these few words as authority for the proposition that all distinctions between special and general appearances have vanished. "Defenses or objections" will not be waived by joinder with other "defenses or objections." But suppose a "defense or objection" directed to lack of jurisdiction over the person is joined with *a request for affirmative relief*, such as a counterclaim. A counterclaim, even when compulsory, *is not technically a "defense or objection."* Although at least one critic has derided such a literal interpretation as inconsonant with the spirit of Rule 12,[35] the issue seems unsettled.[36]

Next, suppose that a party goes to trial after his jurisdictional defense has been overruled. What bearing does Rule 12 have on whether his part in the proceedings constitutes a general appearance waiving his right to appeal the overruled jurisdictional objection? None at all, says Professor Moore:

> Under the former [federal] practice, both at law and in equity, a party could, by proper procedure, raise the [jurisdictional] defenses, and losing thereon proceed to litigate on the merits, and losing on

---

32. *Ibid.*

33. "If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of paragraph (h) of Civil Procedure Rule 12 to be treated as waived, *not because of the defendant's voluntary appearance, but because of his failure to assert the defense within the time prescribed by the rules.*" (Emphasis added.) Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir.), *cert. denied*, 322 U.S. 740 (1944).

34. See note 3 *supra.*

35. "It has been said that the new Rules do not expressly abolish the special appearance. So it might be argued that although a party does not waive the lack of personal jurisdiction by joining his objection with 'other defenses or objections,' he might waive it by taking some other step which indicates that he regards himself 'in court,' such as filing an affidavit of prejudice against the judge, or obtaining an extension of time to plead. But such an idea would be clearly out of line with the theory of Rule 12." 3 FED. RULES SERV. 669 (1940).

36. *Compare* Kincade v. Jeffery-De Witt Insulator Corp., 242 F.2d 328 (5th Cir. 1957) and Marshall v. Bacon, 97 So.2d 252 (Fla. 1957), finding a waiver resulting from the request for affirmative relief, *with* Investors Royalty Co. v. Market Trend Survey, Inc., 206 F.2d 108 (10th Cir.), *cert. denied*, 346 U.S. 909 (1953) and Keil Lock Co. v. Earle Hardware Mfg. Co., 16 F.R.D. 388 (S.D.N.Y. 1954), finding no waiver. The latter view seems to be the majority in the federal courts.

> the merits appeal, and attack the judgment, both on the merits and on such [jurisdictional] grounds as he had urged . . . *Rule 12(b) does not change that rule. All it does is prescribe how various defenses shall be presented.* (Emphasis added.)[37]

Yet, several federal cases have viewed Rule 12(b) as the basis for this pre-existing federal practice.[38] What is more amazing, the Florida Supreme Court has held that the adoption of a rule based on Rule 12(b) resulted merely in the substitution of this federal practice for the old Florida practice, which was to find a waiver of the right to appeal.[39] In short, the Florida court changed the state practice on the basis of a rule which obviously, because it applied in terms to the presentation of pleadings and motions alone, was irrelevant as to the consequences of going to trial after the overruling of a jurisdictional defense. To make matters worse, the court appeared to imply that what the rule never purported to do was all that it did do.[40]

At any rate, in jurisdictions where, unlike the pre-existing federal practice, going to trial did result in a waiver of the right to appeal, the adoption of a rule based on Federal Rule 12(b) can hardly be said to have abolished the distinction between special and general appearances. Except for the erroneous interpretation by the supreme court, this would have been the case in Florida today.

Next, suppose that in an action to attach his property, an unserved defendant personally appears to defend on the merits. Here is another appearance problem beyond the pale of Rule 12(b), which will not prevent a waiver by general appearance. In *Grant v. Kellogg*,[41] the defendant was not allowed to enter the jurisdiction to defend, on the merits, an attachment of its bank account without submitting to full in personam jurisdiction. "No provision of the Federal Rules," said the court, "specifically permits a special appearance by a defendant to contest the merits of a plaintiff's claim. There is nothing in Rule 12, Federal Rules of Civil Procedure, to that effect."[42] While this statement is inaccurate as a generalization, it is true as applied to an attempted special appearance for the purpose of defending on the merits an in rem attachment. The reason is clear from Professor Moore's language, cited by the court:

---

37. 2 MOORE, FEDERAL PRACTICE § 12.12 at 2261 (2d ed. 1960) (Emphasis added.)

38. See cases cited in Annot., 62 A.L.R.2d 937 at 940 (1958), especially Vilter Mfg. Co. v. Rolaff, 110 F.2d 491 (8th Cir. 1940).

39. Eli Lilly & Co. v. Shields, 83 So.2d 271 (Fla. 1955).

40. See the puzzled comment in Annot., 62 A.L.R.2d 937 at 941 (1958): "In at least one case, the Florida court has apparently taken the view that the adoption of a rule based on Federal Rule 12(b) *merely* involves the adoption of the pre-existing Federal Rule that the jurisdictional objection properly *made on special appearance* is not waived by subsequently going to trial on the merits." (Emphasis added.)

41. 3 F.R.D. 229 (S.D.N.Y. 1943).

42. *Id.* at 232.

> [A]ny litigation on the merits necessarily involves more than the mere right to hold or maintain a lien on the property proceeded against; *it comprehends also the merits of the underlying personal claim between the parties, which, if unfounded, will cause the action to fail.* It seems then that the defendant, being willing to come in and litigate this claim in part so as to protect any interest in the property, should have to let such a defense on the merits determine the entire personal rights as between the parties. (Emphasis added.)[43]

Once again the lie is given to that glib phrase, "the distinction between special and general appearances has been abolished."[44]

B. *The Federal Decisions*

Aside from these theoretical difficulties, which lie in shadows around Rule 12(b), the practitioner also has to cope with the frequent oblivion the district courts have shown to the *established* changes under the new rule. Witness a cluster of "early" cases which ignored the modern practice. In one, a general appearance was found when the defendant joined a motion to dismiss to the merits with motions to the jurisdiction.[45] In another, the defendant asserted his jurisdictional defenses in the answer.[46] Still another court, when the government of Peru entered a special appearance to question jurisdiction on the basis of immunity as a sovereign, found the defense waived by a general appearance in that the defendant took "the testimony of the master for use on the trial of the cause on the merits."[47] In a fourth "early" case, the defendant waived his jurisdictional defense when he joined an objection to jurisdiction over his person with an objection to jurisdiction over the subject-matter.[48] The court cited the Encyclopedia of Pleading and Practice with approval:

> An appearance to deny the jurisdiction of the court over the subject-matter is, according to the weight of authority, a general appearance.[49]

This was indeed the weight of authority — before the Federal Rules of Civil Procedure which had been promulgated three years previously.

Even if these "early" cases could be written off to experience, there are many more in the last decade which raise doubt whether Rule 12(b) can be taken at even its face value. In *Hadden v. Rumsey Products*,[50] a 1951 case, the plaintiff filed an exemplified copy of the journal entry of a confessed

---

43. *Ibid.* Professor Moore seems to think that this problem differs in kind from the waiver problems dealt with in Rule 12(b). See 2 MOORE, FEDERAL PRACTICE § 12.12 at 2264 (2d ed. 1960).
44. See note 6 *supra.*
45. Smith v. Belmore, 1 F.R.D. 633 (E.D. Wash. 1941).
46. Ball v. Paramount Pictures, 57 F. Supp. 505 (W.D. Pa. 1944).
47. The Ucayli, 47 F. Supp. 203 (E.D. La. 1942).
48. Hale v. Campbell, 40 F. Supp. 584 (N.D. Iowa 1941).
49. *Id.* at 587.
50. 96 F. Supp. 988 (W.D.N.Y. 1951).

judgment he had secured. Four days later, the defendant had issued a rule to show cause which was never served. On the return day, the plaintiff appeared "specially," but the court found he had made a general appearance waiving defective process by filing the journal entry of the judgment. "The rule is," said the court, "that a general appearance is entered whenever the party invokes the judgment of the court in any way on any question other than the court's jurisdiction without being compelled to do so by previous rulings of the court sustaining the jurisdiction."[51]

In a 1953 case,[52] the defendant, who had not been served, signed an answer. It was held that the plea to the merits was a general appearance conferring jurisdiction though none otherwise existed. As authority, the court cited cases decided before the Federal Rules were promulgated.[53] In 1955, the District Court of Massachusetts said that although the defendants were not served, the authorized action of their counsel in stipulating for an extension of time in which to plead was a general appearance.[54]

When the defendant took depositions and maintained "the entire conduct of the proceedings," a 1956 case[55] held that the objection to improper venue was waived, even though it had been timely raised. The court found that the defendant's participation on the merits was an acknowledgment that the forum was a convenient one in which to litigate the issues.

In a 1957 condemnation suit,[56] the defendant answered but alleged that several relatives also owned interests in the land; these parties later authorized the defendant to appear for them, but they were never served. It was held that lack of service was waived by a general appearance which occurred when the authorizations were filed in court. Ignoring the Federal Rules, the court based its decision partially on its own local practice rules — which contained a provision on appearances exactly contrary to

---

51. *Id.* at 991.

52. Drinkwater v. Drinkwater, 111 F. Supp. 559 (D. Colo. 1953).

53. *Id.* at 561.

54. Emerson v. National Cylinder Gas Co., 131 F. Supp. 299 (D. Mass. 1955). In a peculiar interpretation of Rule 12, this court seemed to hold that although action inconsistent with a special appearance status created a general appearance, the jurisdictional objection was not waived providing it was timely presented, to wit, within the time allowed for answering the complaint. When defendant failed to answer, his jurisdictional objection was waived by general appearance. See page 301: "Under Rule 12 a general appearance will not prevent a subsequent contest of the court's jurisdiction over the person. However, that contest must be timely. When [defendant] failed to answer or otherwise plead [within the time allowed], *the general appearance stood, and it was properly defaulted.*" (Emphasis added.) See also Preferred Risk Mut. Ins. Co. v. House, 14 F.R.D. 39 (W.D. Mo. 1953).

55. Fairhope Fabrics, Inc. v. Mohawk Carpet Mills, Inc., 140 F. Supp. 313 (D. Mass, 1956).

56. United States v. Hoerner, 157 F. Supp. 563 (D. Mont. 1957).

Rule 12(b)[57] — and partially on federal decisions made prior to the Federal Rules. "In this case there can be little question that the parties who signed the authorizations recognized the case as in court and that a judgment or award was to be made therein. Their taking or agreeing to this step in the action is consistent with no other purpose or intent than to make a general appearance."[58]

Besides the cases yielding a result contrary to Rule 12(b), the decisions in which the court seemingly would have found a waiver, had the defendant's conduct amounted to a general appearance, are legion.[59] As recently as 1959, a district court[60] cited with approval an encyclopedia passage long in error as applied in the federal courts after the new rule:

> An appearance originally special is waived or converted into a general appearance if the appearing party, before the special appearance has been ruled on, does some act which amounts to a general appearance.[61]

The court went on to say that *although it found no fault* with the general rule, there was in the instant case no intent to appear generally since "any action taken by respondents as to the merits came as a result of the Court's insistence, prompted by the insistence of proctors for libellant. . . ."[62]

In *Andrews v. Andrews & Andrews, Inc.*, [63] the court found that merely because a layman, who was inexperienced in court proceedings, and who was present in court as a creditor, answered questions in an informal way, a general appearance had not occurred. The trouble with this and similar decisions is that although the result is often consonant with the modern practice, there is implicit in the rationale a warning that had the participation constituted a "general appearance," waiver would have followed.

Last and doubtless also least, semantic error has prospered the confusion. A striking example is found in *P. Beirsdorf & Co. v. Duke*

---

57. *Id. at* 567: "Rule 22 of the Rules of Practice of the United States District Court for the District of Montana provides: 'Special Appearance—Any party may, without leave of court, appear specially in any action at law or suit in equity, for any purpose for which leave to appear could be granted by the Court, by stating . . . that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the Court, he will appear generally . . . If such statements be not made as above provided, the appearance shall be deemed and treated as a general appearance.'"

58. United States v. Hoerner, 157 F. Supp. 563, 567-68 (D. Mont. 1957).

59. Schuckman v. Rubenstein, 164 F.2d 952 (6th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); Solis for Use and Benefit of Lucio v. Bailey, 139 F. Supp. 842 (S.D. Tex. 1956); Proctor v. Sagamore Big Game Club, 128 F. Supp. 885 (W.D. Pa. 1955); Preferred Risk Mut. Ins. Co. v. House, 14 F.R.D. 39 (W.D. Mo. 1953); Maloney v. Iowa-Illinois Gas & Elec. Co., 88 F. Supp. 686 (S.D. Iowa 1950); Puett Elec. Starting Gate Corp. v. Thistle Down Co., 2 F.R.D. 550 (N.D. Ohio 1943).

60. Nolan v. Jensen, 171 F. Supp. 351 (E.D. Va. 1959).

61. *Id.* at 358.

62. *Ibid.*

63. 42 F. Supp. 5 (E.D.N.Y. 1941).

Laboratories.[64] Although service on the defendant was defective, he moved to dismiss on four grounds, *none of them directed to lack of jurisdiction over the person*. The court correctly found that under Federal Rule 12(g), the jurisdictional defense was waived because it was available, but not included when the first motion was made. But the court obviously did not understand that the basis of Rule 12(g) is waiver because the objection is *untimely*,[65] since it used this language: "*Defendant's motion was an appearance and constituted a waiver of defective service.*" (Emphasis added.)[66]

IV. THE FLORIDA ANALOGUE — RULE 1.11

The traditional practice in Florida, as stated heretofore, found waiver by general appearance whenever defendant acted in a manner inconsistent with his status as one in court to question jurisdiction over his person only.[67] Common Law Rule 13, effective in 1950,[68] provided that no defense, *except* those of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process, was to be waived by joinder to other defenses in a responsive pleading or motion.

In 1952, the part of Rule 13 relevant to this discussion was amended to its present form in the subsequent Florida Rules of Civil Procedure.[69] But the Committee Comment on this amendment evinced a significant hangover of the old practice:

> Although the present rule does not definitely say so, it is probable that if the movant serves any other pleading or motion to the merits when, or after, serving motions [to dismiss for lack of jurisdiction over the person, for insufficiency of process, and for insufficiency of service of process], though not physically 'joined' with such motions, the special motions will be automatically overruled, and the objections will be waived.[70]

The Florida Rules were promulgated June 1, 1954. Although the provision pertinent to the doctrine of appearances was identical with Amended Common Law Rule 13, it was now greeted with optimism as working a change:

> This simplification of procedure is a major step forward. It enables counsel to incorporate in one answer all his objections to the proceedings as well as his defenses to the merits and any counterclaims he may have without fear that he may thereby waive any valid objection. Thus the technical niceties of distinction

---

64. 10 F.R.D. 283 (E.D.N.Y. 1950).
65. See note 33 *supra*.
66. 10 F.R.D. 283, 286 (E.D.N.Y. 1950).
67. See Rorick v. Stilwell, 101 Fla. 4, 133 So. 699 (1931).
68. 30 FLA. STAT. ANN. 229 (1956).
69. *Id.* at 231.
70. *Id.* at 233.

between general and special appearances are abolished and no end is accomplished by retaining the terms.[71]

A. *Conceptual Difficulties*

After six years under the new rules, the optimism seems hardly justified. Beset with the same theoretical difficulties as the federal courts, the Florida judiciary has shown a disappointing tendency to restrict the operation of Rule 1.11(b) in one area, while taking a conceptually indefensible liberal position in another.

Although it was thought that the objection of lack of jurisdiction over the person would not be waived by joinder "even with the averment of counterclaims or crossclaims,"[72] the Florida Supreme Court, in *Marshall v. Bacon*,[73] expressed disapproval of so liberal a construction. Defendant, a resident of California, received only notice by mail of his wife's attempt to sequester his life insurance policies in payment of delinquent alimony; thereupon he "specially appeared" to question jurisdiction over his person, and also to ask for affirmative relief — that the policies be returned to him. The chancellor gave defendant the affirmative relief requested. On appeal, the court reversed, holding that no more process than notice was necessary in this type of supplementary proceeding, but went on "to sustain" its decision by pointing out that a general appearance had been made:

> On this aspect of the case there can, therefore, be no question as to the jurisdiction over him for the simple reason that he appeared generally and requested the relief which he received. By his brief he contends that this was merely a response to an inquiry by the chancellor. . . . Regardless of the motivating factor, *we are not inclined to disregard completely the proposition that when a party appears generally and seeks affirmative relief and such relief is granted, he will not be heard to question the jurisdiction of the court in which he appeared.* (Emphasis added.)[74]

Logical as such a result may seem, since the defendant is actually making use of the forum for his own ends while denying its power over him, it is against the weight of federal authority[75] and has been criticized as discordant with the spirit of the rule.[76]

On the other hand, in *Eli Lilly & Co. v. Shields*,[77] (discussed *supra*),[78] the Florida Supreme Court held that Rule 1.11(b), which refers in terms only to pleadings and motions,[79] signalled the adoption of that federal

71. See Author's Comment, 30 FLA. STAT. ANN. 241-42 (1956).
72. *Id.* at 242.
73. 97 So.2d 252 (Fla. 1957).
74. *Id.* at 255.
75. Consult note 36 *supra*.
76. See note 35 *supra*.
77. 83 So.2d 271 (Fla. 1955).
78. *Cf.* text accompanying notes 39 and 40 *supra*.
79. "No defense or objection is waived by being joined with one or more other defenses or objections *in a responsive pleading or motion*." (Emphasis added.)

practice, existing before the Federal Rules were promulgated, of permitting the defendant to appeal the ruling on his jurisdictional defense after he has gone to trial on the merits.[80] Since Florida practice had always found a waiver in this situation,[81] the change, though doubtless for the better, arose through misconception.

B. *The Rule in Practice*

There are cases in Florida, as in the federal courts, which either ignore the new rule, or seem confused as to its meaning. In *Dubinsky v. Ware*, a 1956 case,[82] plaintiff attached a truck of defendant's in a suit for freight charges. The defendant filed an answer admitting the amount of indebtedness, also filed a motion to dismiss, and posted a forthcoming bond. In holding that the admission of indebtedness and the posting of the bond constituted a general appearance waiving jurisdictional defenses, the Florida Supreme Court cited cases decided before the new rule was extant.

In 1960, the Third District Court of Appeal, in two cases decided only months apart, seemed to ignore the rule in the first, but applied it squarely in the second. In the first,[83] the defendant-wife in a divorce action moved to dismiss for lack of jurisdiction over her person and for insufficiency of process. Because she argued matters going to the merits in support of her motion, the chancellor found a general appearance. On appeal, the court properly reversed and cited several federal cases which reiterate the proposition that Rule 12(b) destroys the distinction between general and special appearances.[84] But in the very next paragraph the court, *obiter*, seemed to ignore the authority it had just cited:

> *With no grounds in the defendant's motion other than those relating to jurisdiction*, the fact that counsel for defendant in presenting the motion argued something which bears on the merits, as a reason supporting a ground going to the jurisdiction, *did not destroy the nature of the motion as being one which only challenged jurisdiction.* Therefore, the jurisdiction over the defendant is limited to that which was acquired by the substituted service.[85]

In short, the court is saying that argument to the merits in support of a motion to jurisdiction will not be deemed a general appearance so long as

---

80. "This rule [1.11(b)] is patterned after Rule 12(b) of hte Federal Rules of Civil Procedure, 28 U.S.C.A. Under the federal practice a defendant who raises questions of jurisdiction of its person is not prejudiced by participating in the trial and defending the matter on the merits and may obtain a review. . . . *The import of our rules is to a like effect.* To dispel any further doubt in the matter, we specifically hold . . . that a defendant who has properly raised such a question is not prejudiced by participation in the trial and defending the matter on the merits and may have the correctness of such ruling reviewed upon appeal after adverse final judgment in the cause should one so be rendered." 83 So.2d 271, 272 (Fla. 1955) (Emphasis added.)

81. Eli Lilly & Co. v. Shields, 83 So.2d 271, 272 (Fla. 1955).

82. 87 So.2d 815 (Fla. 1956).

83. Camp v. Camp, 120 So.2d 813 (Fla. App. 1960).

84. *Id.* at 815.

85. *Ibid.*

the motion remains one limited to challenging jurisdiction, but a motion which on its face presents a defense to the merits as well as a jurisdictional defense will be a general appearance.

This dictum notwithstanding, however, the Third District Court a few months later took a firm stand on the rule by holding that the trial court had erroneously found a general appearance from the defendant's joinder of motions to strike and dismiss on the merits with a motion to quash service.[86]

V. Conclusion

In Illinois, where, as in Florida, a rule modeled on Federal Rule 12 was adopted,[87] a writer mockingly chided attorneys for continuing to be haunted by the "ghost" of the special appearance.[88] This spook, he said, was long since laid to rest.

One wonders whether this spook ever had more than one foot in the grave. What does the ponderous statement, "the distinction between special and general appearances has been abolished," really mean? Does it mean that, aside from the waivers imposed by the new rules when objections are untimely, counsel with jurisdictional defenses can take any action whatsoever on the merits without fear of waiver?

Theoretically, at least, the following conclusions seem sound in jurisdictions where the new rule obtains:[89] (1) it is no longer necessary to denominate a motion to jurisdiction as made by "special appearance"; (2) "defenses and objections" to the merits, properly so called, may be safely joined with defenses and objections to the jurisdiction, either in a motion or in the answer; (3) "defenses and objections" to the merits, properly so called, may be interposed separately by motion or answer, either before the jurisdictional defense is raised, or after it is raised but before it is ruled on (providing, of course, that they were not available for consolidation in the prior motion to jurisdiction); (4) in the majority of federal courts, and in Florida since 1955, a litigant may go to trial after his motion to jurisdiction has been overruled without losing his right to appeal the jurisdictional point; (5) it is unsettled, especially in Florida, whether a defendant who joins participation on the merits other than a "defense" or "objection" (particularly a request for affirmative relief) with a jurisdictional defense, is safe from waiver by general appearance, and (6) although there is some conflict, it is probable that a defendant may not enter to defend an in rem attachment of his property on the merits without submitting to full in personam jurisdiction.

---

86. Huffman v. Heagy, 122 So.2d 335 (Fla. App. 1960).
87. Ill. Sup. Ct. R. 8(2).
88. Bebb, *The Special Appearance Ghost*, 8 John Marshall L.Q. 56, 58 (1942).
89. See note 4 *supra*.

Therefore it is clear, even on a conceptual basis, that Rule 12(b), and its Florida counterpart, have not totally eradicated the ancient abracadabra of the law of appearances.

In practice, caution is dictated even with reference to established changes by the substantial number of cases evincing ignorance of the rule or confusion about its meaning. To some extent attorneys themselves can be blamed for continuing to use successive motions to preserve a "special appearance" status, since they are failing in their duty to instruct the court. But under the existing state of affairs the price of being "an officer of the court" in the fullest sense of the phrase is high indeed.

ROBERT STAAL