THE LEGAL VALIDITY OF APPEARANCE BY TELEGRAPH

By NATIVIDAD DE CASTRO *

INTRODUCTION

"Law is a plant of slow *growth*", once said Lord Bryce, and this statement perhaps is well illustrated in the development of the law regarding appearances. For the telegraph though it has been in use for several decades, and the law regarding it in general, and in particular regarding commerce has found constant treatment in the courts of justice yet in the realm of procedure where its use also has been greatly extended in recent times, yet the law regarding it is still in its infancy, particularly with respect to the topic of this paper. In these days of rapidity of transmission of ideas, the utility of appearance by telegraph is not to be doubted. A lawyer for example is entrusted with a case in a far distant province. Obviously it would not be practical, would but involve loss of time and consequently greater expense to client who would have to pay for it, to require his attorney to travel hundreds of miles for a matter which could be disposed in two or three minutes in court. The telegraph which science has developed, and which the law takes judicial notice thus fills in that need of a means to transact judicial business, similar to the way which businessmen transact their affairs at least in matters which are not easily misunderstood. For few principles in the law as simpler than that of appearance: what is but the manifest or implied intention of a party to submit himself to the jurisdiction of the court. A telegram making known that intention could contain but few words.

The problem for us not having been settled squarely by any decided case in the Philippines, and our researches having failed to find decision on all fours, we shall discuss the topic from general principle, by analogies, by historical antecedents, and lastly by its practical use today. Consequently we shall divide the subject thus: (1) The Fundamental Principles of Appearance; (2) Historical Antecedents; (3) The question viewed in its Practical Aspect.

---

* LL.B., Member of the Philippine Bar.

I.

Definition.—In its *broadest* sense appearance has been defined as the coming into court of either of the parties to an action but in its most ordinary sense it is the act by which a person against whom suit has been commenced submits himself to the jurisdiction of the court. As the case of Brigg. v. Gilmer, 54 Ala., 425, 430 defines it, it is "A submission to the jurisdiction of the court, in obedience or in answer to process." It is the first act of the defendant in court. Groves v. Grant County Ct., 42 W. Va. 587, 26 SE 460.

Kinds.—Appearances may be general or special. An appearance is general when it is made without reserve, and is an absolute submission to the jurisdiction of the court, and is made for any purpose other than to question the jurisdiction thereof. Or as has been otherwise expressed it is any act by which the defendant recognizes the jurisdiction of the court. A general appearance may be made either expressly or by implication from defendant's acts in seeking, taking or agreeing to any step or proceeding beneficial to himself and detrimental to the plaintiff other than that of objecting or contesting merely the jurisdiction of the court. A special appearance is one that is made for certain purposes only, and does not extend to all the purposes of the suit; as to contest the jurisdiction or the sufficiency of the service. There are other classifications of appearances, but the foregoing are the ones pertinent to our discussion.

Manner.—As evident we are concerned with the appearance of the defendant. The plaintiff being the one who initiates the action there is of course no formalities required and such is the rule of the common law. But our rules of court, and they unless against some positive statute have the force of law (Inchausti v. De Leon, 24 Phil. 224) provide:

> "4. All appearances shall be made in writing, signed by the person appearing, and duly filed. A copy of the notice of appearance shall be served upon counsel for the plaintiff. The following form may be used:
>
> The United States of America,
> Philippine Islands.
>
> Court of First Instance of .....

John Doe, plaintiff,
.....
Attorney for .....
versus
Richard Roe, defendant,
.....
Attorney for .....

The clerk will enter my appearance for
.....

(Signed) .....
Address: .....

(Rules of Court of First Instance of the Philippine Islands)

Acts Constituting Appearance.—We do not pretend to enumerate every act constituting an appearance. Such a work would be impossible and of little value to our purpose. We shall rather enumerate some acts to serve as the foundation of the reasoning process by which we shall attempt to show that appearance by telegraph is valid and lawful.

In the case of Thorhill v. Hargreaves, 107 NW 846, the Plaintiff filed a petition against the defendants in the county court (a term case), stating a cause of action on a past-due note. A paper signed by the defendants, duly entitled and filed in the cause, contained a waiver of service of process and a confession of the debt, and authorized the court to enter judgment against them thereon. *Neither the defendants, nor any attorney acting for them, were* ever actually in the presence of the court in the cause. HELD, that such paper, when filed, constituted a personal appearance on the part of the defendants, within the meaning of the law, and that the defendants thereby submitted themselves to the jurisdiction of the court.

Again in the case of Salina Nat. Bank v. Prescott et al., 57 Pac. 121, the president of the defendant company, Lone Star Plaster Company, made a voluntary appearance by filing with the clerk of the court a writing which was as follows: "The issuance and service of a summons in the above entitled action is hereby waived, and the said defendant the Lone Star Plaster Company, hereby enters its voluntary appearance in said action. The Lone Star Plaster Company, by J. F. Merrill, President." HELD, That a voluntary appearance is made by the defendant signing a paper, entitled in the cause, waiving service of sum-

mons and entering an appearance in the action, whether the same is filed with the petition or afterwards, in term time or vacation."

Many more cases could be cited, but the foregoing we deem sufficient to show as was said by case of Stephens v. Riggling, 86 SE 683, 685; "Any action by the defendant, amounting to a manifestation of an intent to be in court, is a voluntary appearance, and may be by formal writing, or by informal parol action, the act of 'appearance' being a coming into court the first act of a defendant in court, or a submission to the jurisdiction of the court in whatever form manifested.

Application of Principles to our Problem.—By telegraph we can fully manifest our intention to submit ourself to the jurisdiction of the court. There is no reason why it should not be given the same effect as one made regularly. It is written when it is filed for a telegram is typewritten before delivered. A notice could be sent to plaintiffs attorney by sending a similar telegram to him. The form too could be followed. On principle therefor, there is no objection why appearance by telegraph should not be allowed in our courts.

II.

HISTORICAL ANTECEDENTS

Value and utility of the Historical Method.—In this chapter we propose to show that historically there can be no legal objection to the use of the telegraph in entering appearances. On the value of this mode of proceeding Mr. Justice Holmes of the United States Supreme Court said:

> "It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. The study pursued for such ends becomes science in the strictest sense. Who would fail to be interested in the transition through the priest's test of truth, the miracle of the ordeal, and the soldier's, the battle of the duel, to the democratic verdict of the jury! Perhaps I might add, in view of the great increase of jury-waived cases, a late transition yet—to the commercial and rational test of the judg-

> ment of a man trained to decide. * * * History is the means by which we measure the power which the past has had to govern the present, in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old." (Harvard Law Review, Vol. XII, pp. 444, 445, 452.)

Appearance according to the early doctrines.—In ancient times where the form was valued more than the substance, where the quality of formalism characterized every legal act, and where unpractical requirements were strictly adhered to, appearance meant actual coming into court, actual physical presence. It was so used both in the two great systems of law: the Roman and the Anglo-Saxon. It was indicated by the familiar word "comes" "and the said C.D. comes and defends". The fulfillment of the requirement was just as in the law of to-day, necessary to give the court jurisdiction over the parties.

Generally, a time was fixed within which the defendant must enter his appearance; formerly in England, and elsewhere the *quarto die post*, which literally means the fourth day after. This day which is found by counting four days after the return of the writ is called appearance day, and if the person summoned appears on that day it is sufficient. The preceding three days were given as an indulgence. This practice was generally followed not only in England but in many states of the Union. In England, however, it has been changed by statute. 15 & 16 Vic. c. 76. The adoption of the codes has also changed the practice in most of the states of the Union. Pennsylvania is the only one which to this date retains the ancient procedure.

If the defendant failed to appear within the period aforementioned, the prescribed remedy of ancient procedure was "distress infinite" when the injuries were committed without force and by capias or attachment, when the injuries were committed against the peace, that is, were technical trespasses. But until there was an appearance, the courts were powerless to do anything, could go no further than apply the foregoing process to secure appearance.

Thus then was the antiquated and rigid procedure which has now given way in this practical modern world.

Appearance at Present—Physical Presence.—As aforesaid physical presence was necessary to give the court jurisdiction, hence the reason why it was greatly insisted on. Today in real actions presence of anyone is not essential, to confer upon the court jurisdiction over the property and hence over its owner. In personal actions, neither is presence necessary, for if the defendant does not appear or answers he will be adjuged in default, plaintiff will be allowed to prove his case, and the corresponding judgment entered in due course. (Sec. 128, Code of Civil Procedure of the Philippines). Even the summons which is served on defendant contains the following warning: "If you fail to appear within the time aforesaid the plaintiff will take judgment against you by default and demand from said court the relief applied for in said complaint". (Sec. 392 par. 3; Sec. 784 No. 40, Code of Civil Procedure). Thus the reason for physical presence no longer holds true, and this view is sustained by the authorities. As was said in the case of Stephens v. Riggling, mentioned, supra, "*Any action* by the defendant amounting to a manifestation of an intent to be in court, is a voluntary appearance and may be by formal writing or by informal parol action..." Or as was said in the case of Barbour v. Newkirk, 83 Ky., 529, 532: "A party enters his appearance if he does any act from which it may be presumed that he acknowledged the jurisdiction of the court". That physical presence is not necessary was again decided in the following emphatic language in the case of Thornhill v. Hargreaves, 76 Nebraska 582: "The act or proceeding by which a defendant places himself before the court and submits to its jurisdiction *does not necessarily involve the actual, physical presence either of the party or his attorney before the court.*" Hence the proposition that in the law of to-day actual physical presence is not necessary cannot be doubted. It is sustained both by reason, by legal history, and the weight of authority.

Appearance by Telegraph is but an application of the principle that in appearance actual physical presence is not necessary.

We shall now examine the situation of a party defendant who is for example in the city of Baguio, and who appears thru his attorney who files in the City of Manila the corresponding appearance provided by statute. Theoretically he is in court, actually he is in Baguio. The attorney is merely his agent.

This is an instance of a valid appearance without actual physical presence sanctioned by law. Examine now the strikingly similar situation of the same defendant should he instead wire his appearance to the Clerk of Court. This he can do for a party can conduct his own litigation and does not necessarily have to employ the services of an attorney. (Sec. 34 C.C.P.) He is in Baguio, actually, but could we say that he is in Manila, theoretically? Both reason and argument from authority seem to point to an affirmative answer. Appearance coming from the latin words *"ad"* and *"parere"*, to and "become visible", apparently means presence, "to become visible". In the first case, when defendant thru his attorney filed the appearance, he certainly was not "visible". In the second case when defendant wired his appearance neither was he visible. If in the first case the law allows the procedure mentioned, there is no reason why the second mode should also not be sanctioned. To rule otherwise would be to make a distinction without a difference. If an attorney's services is not necessary as a party may conduct his own litigation, his elimination and the substitution in his place of the telegraph office can not affect the validity of the appearance. The elimination of an accident cannot affect the essential.

III.

THE QUESTION VIEWED IN ITS PRACTICAL ASPECT

The aim of the law is to make its rules reflect life. In a single short paradoxical sentence Dean Pound of Harvard Law School expressed the modern philosophy of law. He said: "Law must be stable and yet it cannot stand still". Stability is required for otherwise the parties would never be sure of its rights were the law as changeable as a weathercock. To this desire can be explained in a great measure the conservatism of judges. But this conservatism, this desire for safety should not cause judges to close their eyes to the progress of science, of the arts, and the ever-changing life surrounding them. Hence again the truth of the second part of Dean Pound's statement: "yet it cannot stand still". The law must march with and cannot ignore the changes which the lapse of time inevitably brings.

The telegraph a Part of Modern Life.—In the olden days when the telegraph was scarcely dreamed of, when its very pro-

posal would bring a knowing smile of incredulity, courts of course did not have to wrestle with the problem now confronting us. But to-day, the telegram forms part of our every-day life, has by constant use been interwoven into its very texture. Commerce without it would be delayed; governments paralyzed, and even the conduct of war itself hampered. The law more conservative than any other institution at last now is feeling its influence, acknowledging the advantages to be derived from its annihilation of time and space. Petitions for postponement now are even sent thru telegraph. Urgent judicial information is sent thru the same means. The use of the telegram is illustrated in the case of People v. Ildefonso Servillon et al. Criminal case No. 1626 of the Court of First Instance of Antique. In two days three telegrams were sent between the attorney of the defendant Mr. Diokno, then in Manila, to Judge Garduño, in Antique requesting information vital to the defense.

The first telegram reads as follows:

"Manila, Octubre 3, 1928.

Hon. JUEZ GARDUÑO,
San José, Antique.

Por favor ruégole me informe motivos porque inspectores Patnongon continuan detenidos habiendo según me telegrafían ofrecido fianza bastante. Contestación pagada.

DIOKNO."

Judge Garduño answered as follows:

"San José, Antique, Oct. 4, 1928.

Abogado RAMON DIOKNO,
Manila.

Re tel No es cierto.

GARDUÑO."

On October 4, 1928 Attorney Diokno sent again the following telegram:

"Manila, Octubre 4, 1928.

Hon. JUEZ GARDUÑO
San José, Antique.

Personal. Ruégole encarecidamente me telegrafie si tendría inconveniente que asuntos electorales allí, incluyendo criminales Patnongon, San José, se vieran por un Juez Auxiliar, y caso afirmativo como casi creo haberle en-

tendido, si querría pedirlo Departamento o autorizarme solicitarlo, para permitirle limpiar desembarazadamente dentro período ordinario calendario regular Juzgado. Contestación pagada.

DIOKNO."

(From the Informe de los Acusados p. 3 & 4)

Imagine the difficulties, the time lost, (ships go to Antique but once a week) and the consequent failure of justice, had the use of telegrams been banned by the Courts.

The Law should recognize Appearance by Telegram.—The major premise being that the law should adopt itself to the realities of life, and the minor premise being that the telegram is a part of the realities of our every-day life, the logical consequence follows that the law should recognize the use of the telegram. And one of the uses to which it is susceptible is the entering of appearances by telegram.

Exceptions to said Rule.—A Spanish maxim says that the exception confirms the rule, and this is no better illustrated than in this case. Should we recognize the validity of appearance by telegram, and there is no valid reason why we should not, yet because of certain statutory provisions we must limit its application in criminal cases. Sec. 16 of General Order No. 58, or as more generally called, our Code of Criminal Procedure, mandatorily provides that in cases of felony (delito) the defendant must appear personally for arraignment. If the charge is for a misdemeanor he may appear personally or by counsel. In the last case there is no reason why he should not be allowed to enter his appearance by telegram.

Argument by Analogy.—Just as the law allows service of subpoenas by telegram, it should likewise reciprocally allow appearance by telegram.

In the case of Egan v. Finney, 72 p. 133; 42 Oregon 499 the court held that provided the provisions of law were followed subpoena could be served by telegram. If one can be called into court by telegram why can one not enter his appearance by telegram? Reciprocity is the law of life and that rule is recognized in the law in hundreds of provisions. There is no reason why it should not also be applied in upholding the validity of appearance by telegram.

RESUMÉ

1.—Logically considered, as the fundamental laws regarding appearance only require any act which shows defendant's intention to submit the jurisdiction of the court which requirement can be met fully by the telegram, it follows that its use in entering appearances is lawful and valid.

2.—Historically considered, as the requirement of actual, physical presence of ancient procedure was only necessary to give jurisdiction to the court, which necessity no longer holds true in view of the statutory enactments permitting judgments by default in case of non-appearance, which proposition is supported not only by reason, legal history and the authority of adjuged cases, and as appearance by telegram is but a further application of said proposition permitting appearance without actual physical presence, it follows that appearance by telegraph is also valid and legal.

3.—Practically and sociologically considered, as the purpose of the law is to adopt its rules to the realities of life, and as the telegraph forms part of those realities of every-day life, it follows that the law should recognize its use, and one of the uses to which it is susceptible is that of entering appearances. Likewise as the law permits subpoenas by telegram reciprocally it should allow appearance by telegram.