This being the only allegation of error, the judgment must be

AFFIRMED.

CREIGHTON *v.* KERR.

A withdrawal, "without prejudice to the plaintiff," of a general appearance entered by an attorney, for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood. Hence where there has been error in the beginning of an action, as *ex. gr.*, one of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, and so cures the defect, the advantage thus given to the plaintiff is not taken away by a withdrawal declared to be "without prejudice" to him. And the court states that it does not intend to intimate that the result would have been different had the appearance been withdrawn unconditionally.

ERROR to the Supreme Court of the Territory of Colorado; the case being thus:

The statutes of Colorado relating to attachments enact:

"SECTION 54. Whenever a plaintiff in any civil action pending in any court of record in this Territory shall file in the office of the clerk of the court wherein such cause is pending, an affidavit showing that the defendant resides out of this Territory, it shall be the duty of the clerk to cause a notice to be published in some newspaper, published in the county in which such cause is pending, for four successive weeks prior to the next term of the court, which notice shall set forth and state the title of the court in which such action is pending, the nature of the action, and, if such action shall be brought to recover money, the amount claimed by the plaintiff, the names of the parties, and the time when, and the place where, the next term of court in which such action is pending will be held, and that if the defendants shall fail to appear at the term of court, and plead or demur, judgment shall be entered by default.

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v. Hayward, 20 Howard, 208; MacDonogh *v.* Millaudon, 3 Id. 693; Field *v.* Gibbs, 1 Peters's Circuit Court, 155; Com. & R. Bk. *v.* Slocomb, 14 Peters, 60; Eldred *v.* Bank, 17 Wallace, 551.

"SECTION 55. It shall be the duty of the plaintiff, in all cases in which such notice shall be published, in addition to such publication, . . . if upon diligent inquiry the place where the defendant may then be found can be ascertained, to send to such defendant, and to each of them, by mail, a true copy of such notice, properly addressed to such defendant, at the post-office nearest to the place where such defendant may be found, at least thirty days prior to the term of court mentioned in such notice."

This statute being in force, Kerr and another, in May, 1870, sued Creighton in the District Court for Arapahoe County, in Colorado Territory, in attachment. They filed an affidavit, alleging Creighton's non-residence, and that he owed them $5563.

The sheriff returned that he had attached certain shares in the Colorado National Bank, belonging to Creighton, who was not found.

The plaintiffs then filed their declaration, claiming $8000.

No notice of these proceedings was published as required by the statutes.

Subsequently an entry was made in the court as follows:

"Now come the said plaintiffs, by Alfred Sayre, Esq., their attorney, and the said defendant, by Messrs. Charles and Elbert, his attorneys, also comes, and thereupon, on motion of said plaintiff's attorney, the said defendant was ruled to plead ten days from this date."

On the 19th of October the following:

"And now on this day come Messrs. Charles and Elbert and withdraw their appearance as attorneys for the said defendant, *without prejudice* to the plaintiff."

On the 27th of October a judgment was entered, reciting the appearance, its withdrawal "by leave of the court and without prejudice to said plaintiffs;" and the defendant's failure to plead according to the rule. Damages were assessed by a jury at $12,244. A *remittitur* was entered for $4244, and judgment taken for $8000. The Supreme Court affirmed this judgment, and the defendant brought the case here.

Mr. J. M. Woolworth, for the plaintiff in error:

I. If we lay out of view the appearance which Charles and Elbert entered for Creighton, it is obvious that this judgment cannot be sustained for a moment, because—

1. No notice of the proceedings was published, nor mailed to the defendant, both of which things the statute render necessary. If neglected, a judgment may not be collaterally avoided, but on error it must be reversed.

2. The writ of attachment by which the suit was brought is for only $5563, and the affidavit on which the writ is issued alleged only that sum to be due. It was not competent for the court to render a judgment for more than was specified in the writ.

II. The fact that Mr. Creighton appeared generally in the action, does not affect the case.

Had the withdrawal of the appearance been general, and unqualified by the words "without prejudice to the plaintiff," the case would have stood as if no appearance had been entered.* The words "without prejudice," do not retain to the plaintiff the advantage of the appearance. To give to them that effect would make of no effect the withdrawal. The utmost meaning that can be attributed to them is, that the progress of the cause, and all rights of the plaintiff not resting on the appearance, should remain unaffected by the withdrawal.

Mr. R. T. Merrick, contra.

Mr. Justice HUNT delivered the opinion of the court.

In the view we take of this case it is not necessary to examine the alleged irregularities in the conduct of the suit or the alleged defects in its commencement. Without intending, in fact, to decide those points, it may be assumed, as is argued by the plaintiff in error, that there was not that notice of the proceedings required by the laws of Colorado.

* Michew *v.* McCoy, 3 Watts & Sergeant, 501; Lodge *v.* State Bank, 6 Blackford, 557; Dana *v.* Adams, 13 Illinois, 691.

It may be assumed also that in making a claim of damages for $5563 only in the writ of attachment, and in making a claim for $8000 in the declaration, an error was committed. It is insisted that in consequence of this claim in the writ the party would have been justified in assuming that no judgment for a larger amount would be taken against him; and that great injustice might have been done to him. We do not find that the respectable counsel claims that any injustice has actually been done.

But we are of the opinion that there has been no opportunity for the commission of injustice. We find the facts in this respect to be as follows:

After the execution of the writ of attachment the plaintiff filed his declaration claiming damages to the amount of $8000, giving the items of the claim. After this time, viz., on the 12th day of October, the defendant appeared in the suit by his counsel, Messrs. Charles and Elbert. The appearance was general, and, "thereupon," as the record says, on motion of the plaintiff's attorney, the defendant was ruled to plead in ten days.

Within the ten days, in which an order to plead had been entered, upon, or upon the faith of, or in consequence of their appearance, the attorneys came into court and withdrew their appearance as attorneys for the defendant, without "prejudice to the plaintiff." Leave to withdraw was granted upon this condition. Assuming the rule to plead to have been effectual, as it manifestly would have been had there been no withdrawal, and assuming that a failure to comply therewith placed the defendant in default, and entitled the plaintiff to a judgment by *nil dicit*, as would manifestly have been the case had there been no withdrawal, the plaintiff and the court held the action to be undefended, and a judgment was entered for the plaintiff, with damages to be assessed by a jury to be impanelled. The jury received evidence upon this subject, and under instructions from the court rendered a verdict for $12,244. The evidence is not returned in the record, as there was no occasion that it should be, and there is no presumption of law, or

reason in fact, to suppose that the verdict was for a larger sum than was justly due to the plaintiff. For all in excess of $8000 a remission was made, and judgment was entered for that sum.

The leave to withdraw the appearance of the defendant's attorneys was given upon the condition that it should be "without prejudice to the plaintiff." This meant that the position of the plaintiff was not to be unfavorably affected by the act of withdrawal. All his rights were to remain as they then stood.

A general appearance waives all question of the service of process. It is equivalent to a personal service. The question of jurisdiction only is saved.* If there was error in the commencement of this action by reason of a defective notice or otherwise, it was cured by the appearance.

This advantage, among others, was not to be impaired by the withdrawal of the appearance.

A personal appearance by the defendant, through his attorneys, converted into a personal suit that which was before a proceeding *in rem*. This result had been worked when the appearance was entered, and stood in full effect when the withdrawal was made. Any judgment that he could then obtain against the defendant was binding upon the defendant, indisputable and valid against him and his property wherever he or it could be found. To reconstruct this judgment and by means of a withdrawal of the appearance make it a judgment to be enforced upon certain shares of bank stock only, and liable to be re-examined as to that upon the personal application of the defendant, would produce an extremely unfavorable effect upon the plaintiff's position. It would be a "prejudice" to him, and hence it cannot be permitted.

A rule to plead had been served upon the attorneys. This remained in force. At the expiration of the time to plead the action was undefended, and a right to an interlocutory judgment at once arose. To take away this right would be

* United States v. Yates, 6 Howard, 605.

an injury to the plaintiff. Hence under the condition of no prejudice it remained good to him.

The appearance of the defendant may remain, although the attorneys, by whom it was entered, have withdrawn. Its effect cannot be annulled by such withdrawal. The appearance gives rights and benefits in the conduct of a suit, to destroy which by a withdrawal would work great injustice to the other party. Such was the case of *Eldred* v. *Bank*,* where the defendant withdrew his plea, claiming that the withdrawal left the case as though it had never been filed, and that, never having been served with process, he was not liable to a personal judgment. The court say: "We do not agree to this proposition. The filing of the plea was both an appearance and a defence. The withdrawal of the plea could not have the effect of withdrawing the appearance of the defendant, and requiring the plaintiff to take steps to bring him again within the jurisdiction of the court. . . . He was not by the withdrawal of the plea out of court."

None of the cases cited contain anything in hostility to these views. As confirming them see *Lawrence* v. *Yeatman*,† *Rowley* v. *Berrian*,‡ *Thompson* v. *Turner*.§

Second. We do not intend by the argument thus advanced to intimate that the result would have been different had the appearance been withdrawn unconditionally, as was the case in *Eldred* v. *Bank*.

The authorities upon this subject of a voluntary appearance are cited in the case of *Habich* v. *Folger*, recently decided in this court,‖ and it is not necessary to do more than to refer to them as there collected.

In the present case there was not a simple withdrawal, but it was allowed upon the condition that it should be without prejudice to the position of the plaintiff. We decide the case upon the facts as they are presented, and

* 17 Wallace, 551. † 2 Scammon, 17. ‡ 12 Illinois, 198.
§ 22 Id. 389; see also the present case reported in 1 Colorado, 509.
‖ The last preceding case.

nothing would be gained by attempting to go beyond them.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY did not sit during the argument, and took no part in this decision.

McQUIDDY *v.* WARE.

1. A man who has neglected his private affairs and gone away from his home and State, for the purpose of devoting his time to the cause of rebellion against the government, cannot come into equity to complain that his creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice, and on a supposition wrongly made by them that he had no home in the State, or none that they knew of.
2. Especially is this true when there is no allegation of want of actual knowledge of what they were doing.
3. And still more especially true is it in Missouri, where the statutes of the State allow a bill of review of decrees or judgments obtained on constructive notice at any time within three years after they are obtained, and the complainant has let more than six years pass without an effort to have them so reviewed.
4. Allegations of general ignorance of things a knowledge of which is easily ascertainable, is insufficient to set into action the remedies of equity.

APPEAL from the Circuit Court for the Eastern District of Missouri; the case being thus:

At the beginning of the late rebellion, which broke out in 1861, McQuiddy, a resident of Nodaway County, Missouri, and owning a farm there, voluntarily entered the service of the Confederate States under General Sterling Price, and followed the fortunes of that officer and his army when they left Missouri. At this time there were two mortgages on different parts of his farm, or instruments of writing which the holders of them asserted to be mortgages. These were due, and the holders *in May, 1862, and November, 1863*, procured a decree of foreclosure of them. This proceeding