IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. 21399

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DON MCCLAY
AND MOUNTAIN TOP REALTY INC.,
Plaintiffs Below, Appellees

v.

MID-ATLANTIC COUNTRY MAGAZINE,
Defendant Below, Appellant

_____

Appeal from the Circuit Court of Tucker County
Honorable Andrew N. Frye, Jr., Judge
Civil Action No. 90-C-126

REVERSED

_____

Submitted: May 11, 1993
Filed: July 15, 1993

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

_____

NO. 21498

_____

RITE AID OF WEST VIRGINIA, INC.,
Plaintiff Below, Appellant,

v.

THE CITY OF CHARLESTON, A MUNICIPAL CORPORATION;
THE CITY OF ST. ALBANS, A MUNICIPAL CORPORATION;
AND THE WEST VIRGINIA MUNICIPAL LEAGUE, INC.,
A WEST VIRGINIA CORPORATION,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Honorable Herman G. Canady, Jr., Judge
Civil Action No. 91-C-2916

REVERSED

Submitted: May 11, 1993
Filed: _____

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JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS BY THE COURT

"'When provision of municipal ordinance is inconsistent or in conflict with statute enacted by legislature, statute prevails and municipal ordinance is of no force or effect.' Syllabus Point 1, Vector Co. v. Board of Zoning Appeals, 155 W.Va. 362, 184 S.E.2d 301 (1971)." Syl. pt. 1, Davidson v. Shoney's Big Boy Restaurant, 181 W.Va. 65, 380 S.E.2d 232 (1989).

Neely, J.:

Rite Aid of West Virginia, Inc. appeals an order of the Circuit Court of Kanawha County allowing the Cities of Charleston and St. Albans to impose a license fee on Rite Aid as a condition upon Rite Aid's sale of liquor. W. Va. Code 60-4-18 [1935] specifically prohibits cities from imposing a fee or a special tax as a condition upon the exercise of a state-issued liquor license. Therefore, we reverse.

The parties have stipulated the following facts:

Pursuant to W. Va. Code 60-3A-1 [1990], et seq., Rite Aid was granted retail liquor licenses by the State of West Virginia to sell liquor in the Cities of Charleston and St. Albans and in other cities. W. Va. Code 60-3A-12 [1990] requires a retail liquor outlet to pay the State of West Virginia an annual license fee upon each license.

For purposes of this appeal, the cities of Ansted, Clarksburg, Madison, Montgomery, St. Mary's, Mannington, Gilbert, Nutter Fork, Northfork and Kingwood, West Virginia, all municipalities within which appellant was granted retail liquor licenses by the State of West Virginia, entered into agreements empowering the WVML to represent their interests and binding themselves to the decision of this Court.

After Rite Aid acquired retail liquor licenses, the cities adopted ordinances imposing a municipal license fee on retail outlets selling liquor. Under the ordinances, Rite Aid must pay a municipal retail license fee to the municipality in which it is located before the issuance of a municipal retail license by appellees. If we accept the cities' position, it would be unlawful to sell liquor at retail.

W. Va. Code 60-4-18 [1935] provides:

> A municipal corporation shall not impose a fee or a special tax as a condition upon the exercise of a license issued under the provisions of this Chapter.

Chapter 60 of the West Virginia Code is the "Liquor Control Act" enacted by the West Virginia Legislature in 1935. Section 18 of Article IV (quoted above) has not been amended since. In 1990 the West Virginia Legislature passed the "State Retail Liquor License Act" under which private applicants replaced the State as sellers of liquor at retail.

We address in turn the five points raised by the appellees:

First, appellees maintain that W. Va. Code 8-13-4 [1969] allows them to impose an additional tax on any license issued by the state. However, the same statute expressly withdraws that power if prohibited in a state statute. W. Va. Code 8-13-4 [1990] provides:

> Whenever anything, for which a state license is required, is to be done within the corporate limits of any municipality, the governing body thereof shall have plenary power and authority, unless prohibited by general law, to require a municipal license therefor and for the use of the municipality to impose a reasonable tax thereon which may not exceed the amount of the state license tax. Upon proper application for such municipal license and payment of the prescribed reasonable tax by any person who has a valid and subsisting state license, such municipal license shall be issued.

[Emphasis added]. If the words "... unless prohibited by general law..." of W. Va. Code 8-13-4 [1969] are to have any meaning, then the specific prohibitions set forth in W. Va. Code 60-4-18 [1935] must be recognized. Because W. Va. Code 60-4-18 [1935] specifically

exempts municipalities from imposing a tax or fee as a condition upon the exercise of a state-granted retail liquor license, the municipality is without authority to do the same.

Second, appellees contend that W. Va. Code 60-4-18 [1935] was repealed by implication when the Legislature substantially amended the "Liquor Control Act" in 1990. Despite the wide-scale changes to the Act, the Legislature left W. Va. Code 60-4-18 [1935] wholly intact. In the absence of the Legislature's affirmative showing of its intention to repeal a statute, the only permissible justification for a repeal by implication is that earlier and the latter statutes are irreconcilable. Tasker v. Ginsberg, 538 F. Supp. 321, 325 (N.D. W. Va. 1982). There is no state statute in conflict with W. Va. Code 60-4-18 [1935].

Third, appellees maintain that because the W. Va. Code 60-4-18 [1935] does not conflict with the municipal ordinances at issue, the ordinances are valid. Obviously, the ordinances are wholly inconsistent with W. Va. Code, 60-4-18 [1935]: the municipal ordinances impose a tax; the statute expressly exempts imposition of such a tax. As we said in Davidson v. Shoney's Big Boy Restaurant, 181 W. Va. 65, 68, 380 S.E.2d 232, 235 (1989), whenever a provision of a municipal ordinance conflicts with a state statute, the statute

prevails and the municipal ordinance is of no force or effect. The municipal ordinances at issue are thus invalid.

Fourth, appellees construe the words "shall not" in W. Va. Code, 60-4-18 [1935] as a discretionary directive which gives cities the right to impose a tax on liquor licensees. It is well-established, however, that the word "shall" in the absence of language in the statute which show a contrary intent on the part of the Legislature should be afforded a mandatory connotation. Johnson v. Commissioner, Department of Motor Vehicles, 178 W. Va. 675, 677, 363 S.E.2d 752, 754 (1983). Moreover, when the language of a statute is clear and unambiguous, the courts will apply, not construe such language. State ex rel. Dewey Portland Cement Company v. O'Brien, 142 W. Va. 451, 465, 96 S.E.2d 171, 179 (1956). The language of W. Va. Code 60-4-18 [1935] could be no more clear or less unambiguous and leaves little room for anything but the most farfetched efforts at interpretation.

Finally, appellees argue that the express provision of the State Retail Liquor License Act to "[p]reserve and continue the tax base of counties and municipalities derived from the retail sale of liquor" gives them a pre-existing right to impose taxes upon holders of retail liquor licenses. W. Va. Code 60-3A-2(b)(3)

[1990]. However, despite the prohibition against municipal taxation of retail liquor licensees in W. Va. Code 60-4-18 [1935], the Legislature safeguarded the cities' recognized need for money by imposing a five percent sales tax upon all purchases of liquor from retail licensees under W. Va. Code 60-3A-21 [1990]. In short, that municipalities may not impose additional fees on retail liquor licensees does not preclude their collection of much-needed money in the form of a hefty municipal sales tax. This indeed adds further weight to our conclusion that it was no oversight that W. Va. Code 60-4-18 [1935] was left on the books because the Legislature made express provision for a municipal honeypot in the new statutory scheme.

For the foregoing reasons, we reverse the finding of the Circuit Court, enter a declaratory judgment in favor of the appellant, and hold the municipal ordinances at issue to be invalid.

Reversed.

Daniel T. Booth, Esq.

Martin & Seibert, L.C.

Martinsburg, West Virginia

Attorneys for the Appellant

No Appearance for the Appellees

The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction." Syllabus Point 3, State ex rel. Smith v. Bosworth, 145 W. Va. 753, 117 S.E.2d 610 (1960).

2. "A foreign corporation not authorized to do business in this state is amenable to service of process and subject to the jurisdiction of the courts of this state if such process is served upon and accepted by the state auditor only in the three instances described in the third paragraph of Code, 1931, 31-1-71, as amended, namely, (a) if such corporation makes a contract to be performed in whole or in part, by any party thereto, in this State; (b) if such corporation commits a tort in whole or in part in this State; or, (c) if such corporation manufactures, sells, or supplies any product which causes injury to a person or property within this State." Syllabus Point 2, Schweppes U.S.A. Limited v. Kiger, 158 W. Va. 794, 214 S.E.2d 867 (1975).

3. "A court which has jurisdiction of the subject matter in litigation exceeds its legitimate powers when it undertakes to hear and determine a proceeding without jurisdiction of the parties." Syllabus Point 4, State ex rel. Smith v. Bosworth, 145 W. Va. 753, 117 S.E.2d 610 (1960).

Per Curiam:

Mid-Atlantic Country Magazine, a Virginia corporation, appeals an order of the Circuit Court of Tucker County granting a default judgment against it in the amount of $66,500 to Don McClay and Mountain Top Realty, Inc., a domestic corporation. On appeal, Mid-Atlantic maintains that because of defective service of process the circuit court lacked personal jurisdiction over it. Because we agree that the circuit court lacked personal jurisdiction over Mid-Atlantic, we reverse the order of the circuit court.

On December 19, 1990, the appellees[1] instituted a civil action in the Circuit Court of Tucker County against Mid-Atlantic alleging that Mid-Atlantic had breached their contract when the appellees' realty advertisement did not appear in the magazine's issue featuring Canaan Valley and Tucker County, the areas served by the appellees, but did appear in a different issue that did not feature any areas served by the appellees. The complaint alleges that Mr. McClay paid $1,500 for the advertisement. The complaint, which also alleges that Daniel T. Booth, Esq. is Mid-Atlantic's

[1]Although we are using the spellings of parties' names found in the circuit court's order, various pleadings used the following names: Don Maclay and Mid Atlantic Country Magazine.

agent, was mailed to Mr. Booth, who according to the Certificate of Service is Mid-Atlantic's "named counsel of record."

Before the complaint was filed by letter dated November 6, 1990, Mr. Booth attempted to collect $1,619.50, which Mountain Top allegedly owed to Mid-Atlantic for the advertisement. In his letter, Mr. Booth said that his firm had "been retained by Mid-Atlantic Country to collect an account due and owing" by Mountain Top and that "[a]ll communications and correspondence relating to this account must be directed to this office." After Mr. Booth received the complaint, he filed a motion to dismiss pursuant to Rule 12(b) of the W. Va. RCP with his affidavit averring that he was not the agent of Mid-Atlantic to accept service of process in West Virginia.

On January 28, 1991, the appellees filed an amended complaint. A certified copy of the amended complaint was mailed to Mid-Atlantic's corporate address in Virginia and a copy was mailed to Mr. Booth. On February 22, 1991, Mid-Atlantic filed a motion to dismiss alleging that service by publication was insufficient to obtain an in personam judgment against Mid-Atlantic.

On August 1, 1991, the appellees filed a motion for default judgment and Mid-Atlantic objected asserting that the default judgment motion was improper before the resolution of its motions to dismiss. After a hearing, the circuit court granted the appellees judgment by default. After the circuit court refused to set aside the judgment, Mid-Atlantic appealed to this Court.

I

Although Mid-Atlantic raises several issues concerning the lower court's procedures, the central question concerns the circuit court's jurisdiction. In Syl. pt. 3, State ex rel. Smith v. Bosworth, 145 W. Va. 753, 117 S.E.2d 610 (1961), we stated our long recognized rule on jurisdiction:

> To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.

See Syl. pt. 1, Schweppes U.S.A. Limited v. Kiger, 158 W. Va. 794, 214 S.E.2d 867 (1975).

The valid exercise of in personam jurisdiction by a circuit court over a nondomestic corporation depends upon "two elements,

amenability to jurisdiction and service of process." Terry v. Raymond International, Inc., 658 F.2d 398, 401 (5th Cir. 1981), cert. denied, 456 U. S. 928 (1982). In the present case, Mid-Atlantic maintains that the appellees' service of process was defective. Service of process is the "physical means by which jurisdiction is asserted." Terry id.

Rule 4(d) of W. Va. RCP states, in pertinent part:

> Personal or substituted service of process shall be made by delivering or mailing within the State a copy of the summons and of the complaint together, in the manner prescribed in this subdivision . . . . Personal or substituted service shall be made in the following manner:
>
> * * *
>
> (8) Foreign Corporations and Business Trusts Not Qualified to Do Business.--Upon a foreign corporation, including a business trust, which has not qualified to do business in the State, (A) by delivering a copy of the summons and of the complaint to any officer, director, trustee, or agent of such corporation; or (B) by delivering copies thereof to any agent or attorney in fact

> authorized by appointment or by statute to receive or accept service in its behalf.

W. Va. Code 56-3-14 [1931] states, in pertinent part, that service of process on a foreign corporation "not qualified to do such business under the laws of this State,. . . may be made by delivering, within the State, a copy of the process or notice to any officer, director or agent of such corporation acting or transacting business for it in this State."

First, the appellees attempted service of process by mailing the summons and complaint to Mr. Booth, a lawyer who wrote a collection letter for Mid-Atlantic. The appellees, based on the collection letter, allege that Mr. Booth is an agent or an attorney in fact for Mid-Atlantic. However, by an affidavit, Mr. Booth denies that he is authorized to act as Mid-Atlantic's general agent or general counsel, or to accept service of process for Mid-Atlantic. In Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 387, 32 S.E. 194, 195 (1898), we discussed a similar case in which the service of process alleged that the lawyer served was the insurance company's attorney in fact but the return did not state that this lawyer "was attorney appointed by the company to accept service of process." In Adkins, this Court, discussing the return of a service of process

that said the summons was served "by delivering a copy to Alf. Paul, attorney in fact and of record for said Globe Fire Insurance Company" said:

> Attorney in fact for what purpose? To make a deed, or sell property, or accept service of process? The return does not say. . . . The facts making the substitute a proper person for service under the law must appear. . . . This return says that Paul was attorney of record. This does not help. If attorney for any purpose, his power might be of record. We cannot assume therefrom that he was attorney to accept service.

Adkins, 45 W. Va. at 387, 32 S.E. at 195. See also Pueblo of Santa Rose v. Fall, 273 U.S. 315 (1927)(holding that no one has the right to appear as another's lawyer without the authority to do so); Stone v. Bank of Commerce, 174 U. S. 412, 421 (1899)("The authority of an attorney commences with his retainer. He cannot while acting generally as an attorney for an estate or a corporation accept service of process which commences the action without any authority so to do from his principal").

Based on the record in the present case, we find that the service of process on Mr. Booth was invalid under Rule 4(d)(8)(A) of the W. Va. RCP because Mr. Booth was not an agent for Mid-Atlantic and was not authorized to accept service of process.

II

The appellees also attempted service by mailing a copy of the amended complaint to Mid-Atlantic's corporate address in Virginia. Rule 4(d)(8)(B) allows service upon "any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf."[2] W. Va. Code 31-1-15 [1984], sometimes referred to as our long-arm statute, authorizes the Secretary of State to act as the attorney in fact for the acceptance of service of notice and process for all domestic corporations and for all foreign corporations authorized to do business in West Virginia. In addition, W. Va. Code 31-1-15 [1984] authorizes the Secretary of State to act as the attorney in fact to accept service of notice and process for foreign corporations that do business in West Virginia without having been authorized. W. Va. Code 31-1-15 [1984] states, in pertinent part:

> Any foreign corporation which shall conduct affairs or do or transact business in this State without having been authorized so to do pursuant to the provisions of this article shall be conclusively presumed to have appointed the secretary of state as its attorney-in-fact with authority to accept service of notice and process on behalf of such corporation and upon whom service of notice and process may be made in this State for and upon every such

[2]See supra part I for Rule 4(d)(8).

corporation in any action or proceeding described in the next following paragraph of this section. No act of such corporation appointing the secretary of state as such attorney-in-fact shall be necessary.

. . .

For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this State, (b) if such corporation commits a tort in whole or in part in this State, or (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this State notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this State at the time of said injury. The making of such contract, the committing of such tort or the manufacture or sale, offer of sale or supply

> of such defective product as hereinabove described shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of state pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract, tort, or manufacture or sale, offer or supply of such defective product shall be of the same legal force and validity as process duly served on such corporation in this State.

See also, W. Va. Code 56-3-33 [1984] (a second long-arm statute permitting the exercise of personal jurisdiction on a nonresident defendant in particular circumstances and authorizing service of the summons and complaint through the Secretary of State, who in the prescribed circumstances becomes a non-resident's attorney-in-fact).

In Schweppes U. S. A. Limited, we discussed W. Va. Code 31-1-15 [1984] and noted that "the legislature in its endeavor to lessen the burden of a resident injured in this state by an act of a foreign corporation provided a method of obtaining personal service

on such corporation, making it amenable to the jurisdiction of our courts so that in an action instituted against it an in personam judgment could be rendered." Schweppes U. S. A. Limited, 158 W. Va. at 797-98, 214 S.E.2d at 869-70.

W. Va. Code 31-1-15 [1984] does not grant the Secretary of State unlimited authority to accept service for every foreign corporation not authorized to do business in this State. Rather, this code provision makes service through the office of the Secretary of State on an unauthorized foreign corporation permissible in the following three circumstances: (1) if a corporation "makes a contract to be performed, in whole or in part, by any party thereto, in this State;" (2) if a corporation "commits a tort in whole or in part in this State;" and (3) if a corporation "manufactures, sells, offers for sale or supplies any product in a defective condition" which cause injury to any person or property "within this State." W. Va. Code 31-1-15 [1984]. See also W. Va. Code 56-3-33(a) [1984] for a listing of the acts that are "deemed equivalent to an appointment . . . of the secretary of state" as a nonresident's attorney.

In Syl. pt. 1, Hodge v. Sands Mfg. Co., 151 W. Va. 133, 150 S.E.2d 793 (1966), we recognized that "the maintenance of an action in the forum . . . [should] not offend traditional notions

of fair play and substantial justice." See also Hill by Hill v. Showa Denko, K.K., 188 W. Va. 654, 425 S.E.2d 609 (1992) cert. denied, ___ U.S. ___, 113 S.Ct. 2338, ___ L.Ed. 2d ___ (1993); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (requiring a "substantial connection" created by a defendant's conduct with the forum to establish minimum contacts); Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 117 (1987)(personal jurisdiction "premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause").

In the present case, the complaint alleges that a Virginia corporation contracted with a West Virginia corporation in West Virginia to publish an advertisement in their magazine. In its brief, Mid-Atlantic concedes that because its actions established minimum contacts with West Virginia, service through the Secretary of State would be proper. However, the appellees did not seek service through the Secretary of State but rather directly mailed the amended complaint to Mid-Atlantic's Virginia address.[3]

[3]When the Secretary of State receives a process or notice for an unauthorized foreign corporation, the Secretary files one copy in his office and "transmit[s] one copy of such process or notice by registered or certified mail, return receipt requested, to such corporation at the address of its principal office. . . ." W. Va. Code 31-1-15 [1984]. The code further provides when such service

W. Va. Code 56-3-14 [1931] states, in pertinent part:

> If such corporation has not qualified to do such business under the laws of this State, service may be made by delivering, within the State, a copy of the process or notice to any officer, director or agent of such corporation acting or transacting business for it in this State.
>
> If there be no statutory attorney in fact, officer, director or agent found in this State upon whom service may be had as aforesaid, then on affidavit of that fact an order of publication may be awarded as provided by sections twenty-three and twenty-four [§§ 56-3-23 and 56-3-24] of this article.

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is sufficient. See also W. Va. Code 56-3-33(c) [1984].

In the present case, Mid-Atlantic acknowledges that under W. Va. Code 31-1-15 [1984] the Secretary of State is its statutory attorney in fact and therefore, under W. Va. Code 56-3-14 [1931] the appellees should have served the Secretary of State and not attempted service by publication. In addition, we note that the appellees did not comply with the requirements for service by publication set forth in W. Va. Code 56-3-23 [1923] and -24 [1967].[4]

In Syl. pt. 2, Schweppes U.S.A. Limited, we stated:

> A foreign corporation not authorized to do business in this state is amenable to service of process and subject to the jurisdiction of the courts of this state if such process is

[4]See Teachout v. Larry Sherman's Bakery, Inc., 158 W. Va. 1020, 216 S.E.2d 889 (1975) (attempted service on a nonresident defendant by publication and mailing copies of summon and complaint does not confer jurisdiction over the defendant's person); Central Operating Co. v. Utility Workers of America, AFL-CIO, 491 F.2d 245, 251 (4th Cir. 1974)("Service upon the state auditor [now Secretary of State] is the only authorized manner" for acquiring in personam jurisdiction over a foreign corporation not found in the State); Fabian v. Kennedy, 333 F. Supp. 1001, 1005 (N.D.W.Va. 1971) ("No statute or rule of the State of West Virginia, pursuant to Rule 4(e), Federal Rules of Civil Procedure, provides that in personam jurisdiction can be had over a non-resident served outside the state"); Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S.E. 387 (1910) (although service by publication cannot authorize the rendition of a personal judgment against a nonresident so served, such service authorizes a court to pronounce an in rem judgment); Birch v. Covert, 83 W. Va. 752, 99 S.E. 92 (1919)(a suit for specific performance against a nonresident vendor of land can be maintained on order of publication).

> served upon and accepted by the state auditor only in the three instances described in the third paragraph of Code, 1931, 31-1-71, as amended, namely, (a) if such corporation makes a contract to be performed in whole or in part, by any party thereto, in this State; (b) if such corporation commits a tort in whole or in part in this State; or, (c) if such corporation manufactures, sells, or supplies any product which causes injury to a person or property within this State.

See also Syl. pt. 3, Smith v. Smith, 140 W.Va. 298, 83 S.E.2d 923 (1954); S. R. v. City of Fairmont, 167 W. Va. 880, 884, n. 4, 280 S.E.2d 712, 715 n. 4 (noting that "Schweppes does not give effect to the first quoted paragraph of the statute nor to Syllabus Point 1 of Hodge v. Sands Manufacturing Company. . .").

In order to make a corporation amenable to the jurisdiction of our State's courts, service of process must be made in this State on (1) "any officer, director, trustee or agent" of the corporation (Rule 4(d)(8)(A)) or (2) "any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf" (Rule 4(d)(8)(B)). W. Va. Code §§ 31-1-15 [1984] and 56-3-33

[1984] appoint the Secretary of State as attorney in fact for all foreign corporations that have minimum contacts, as described in the code sections, with this State. If "no statutory attorney in fact, officer, director or agent [is] found in this State," then service of process may be made by publication (W. Va. Code 56-3-14 [1931]), but such service is insufficient for in personam jurisdiction. Strict compliance with the statutory provisions prescribing the service of process is required. "The general principle that where a particular method of serving process is prescribed by statute that method must be followed is especially exacting in reference to the service of process on a corporation defendant. A strict compliance with the statute is necessary to confer jurisdiction of the court over a corporation." Schweppes U.S.A. Limited, 158 W. Va. at 800, 214 S.E.2d at 871 (quoting 19 Am.Jur.2d, Corporations, Section 1462).

In Syllabus Point 4, State ex rel. Smith v. Bosworth, supra, we said:

> A court which has jurisdiction of the subject matter in litigation exceeds its legitimate powers when it undertakes to hear and determine a proceeding without jurisdiction of the parties.

Therefore, we find that because the circuit court did not have jurisdiction over the parties, the circuit court's order granting

default judgment is void. Because we reverse for lack of jurisdiction, our reversal is without prejudice to the appellees' right to seek further relief if valid service of process is effected.

For the above stated reasons, the judgment of the Circuit Court of Tucker County is reversed.

Reversed.