Case Western Reserve Law Review

Volume 7 | Issue 3 Article 10

1956

Civil Procedure

Samuel Sonenfield

The probate court, on motion to vacate P's. final account as administrator, opened up the account, ordered P. to repay to the estate for distribution the statutory commission he had received as administrator and summarily found him guilty of contempt of court for his fraud upon it in representing adverse interests without informing the court that he was doing so.

The court of appeals sustained the order requiring P. to repay his administrator's fees to the estate, but reversed as to the contempt finding. While recognizing that it has repeatedly been decided that an attorney-administrator may be allowed additional compensation for extraordinary services performed as the lawyer for the estate, it pointed out that P. had not made any application on such a basis. It held that, as a sworn officer of the court, P. had a duty, and as administrator he had a duty to the court which appointed him, to make a full and complete disclosure to the court of his dual representation and of his arrangement to get a substantial fee from the sole heir, and that failing to do so he was not entitled to his administrator's commission. While the court did not say so, this same rule would appear also to apply to a lay administrator who failed to make a disclosure to the court of similar dealings with claimants against the estate.

The appellate court found, however, that there was no basis for a summary finding of guilt of contempt. There was here, said the court, no disrespect to the court, no hindrance to the administration of its affairs, no perjury, no "obstruction to the court in the performance of its duty." While these acts, and non-disclosures, might be found to be constructive contempt, in order to punish for them the court must follow the procedures established by statute, such as a specific charge in writing of the acts for which the contemner is brought into court, followed by a written answer by the offender, and sworn, competent testimony of witnesses in open court.

SAMUEL SONENFIELD

CIVIL PROCEDURE

Limitation of Actions — Written Memorandum Does Not Convert Oral Contract Into One in Writing

A corporate securities dealer entered into an oral contract with an individual, whereby the latter was employed as the corporation's sales manager. Among the provisions of this agreement were those whereby the

sales manager was to receive as compensation for his services 40% of the net profits realized by his employer from its operations. If any loss resulted he was to assume and pay 40% of such losses. Subsequent to the termination of the relationship between the parties, the sales manager wrote and signed a statement concerning several unsettled matters between them as of the date of termination. It clearly reflected the 40%-60% ratio of the oral agreement.

A net loss resulted to the corporation at the close of the relationship, forty per cent of which amounted to some $12,000.00 More than 10 years after the termination of the contractual relationship and the subsequent memorandum signed by the sales manager, the company filed suit for this amount. It pleaded the oral contract, alleged that "the terms of this oral contract are evidenced by a memorandum in writing dated May 11, 1937," which memorandum it attached to its petition and marked as an exhibit.

The Ohio Supreme Court,[1] reversing the court of appeals and affirming the judgment of the common pleas court in granting defendant's motion for judgment on the pleadings and opening statement, held that *as pleaded* by plaintiff, the action was one upon a contract not in writing[2] rather than one upon a contract or promise in writing.[3] Therefore it must be brought within six years after the cause of action accrued. While Ohio Revised Code section 2305.08[4] permits an extension of time for suit, commencing with a payment, acknowledgment or promise, the action still must be brought "within the time herein limited." That is to say, a written acknowledgment of an oral contract does not necessarily convert the contract into "a . . . contract or promise in writing. . . . " and clearly does not unless it is sued upon and proved as such. Why plaintiff did not attempt to do this is not clear. Under the circumstances he had nothing to lose by attempting it. Of course, the court had no reason to speculate upon what might have been the result had he done so. So it is settled that mere attachment of a written memorandum to a petition does not constitute a pleading of a written contract.

Injunction — Capacity to Sue

Plaintiff brought an action in common pleas court as a taxpayer to enjoin and restrain the Ohio State Racing Commission from expending

[1] First National Securities Corp. v. Hott, 162 Ohio St. 258, 122 N.E.2d 777 (1954).
[2] OHIO REV. CODE § 2305.07.
[3] OHIO REV. CODE § 2305.06.
[4] "If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

funds of the state of Ohio or issuing permits for the conducting of horse racing. The gist of his complaint was that the relevant section of the applicable statute[5] forbade the expenditure by the Commission of funds in excess of the revenues which it collects from a special class of taxpayers, and that no part of the funds expended by the Commission could come from funds collected from taxpayers generally. Petitioner made no claim that he was authorized by statute to bring the action, nor did he claim to be among those special taxpayers from whom Commission revenues are collected.

The trial court sustained a demurrer on the ground that relator lacked legal capacity to sue[6] and the Ohio Supreme Court affirmed.[7] Citing the text of legal encyclopedias, it based its decision upon the ground that while equity will at the instance of a taxpayer restrain the illegal expenditure of public money, it will do so only if petitioner brings himself within the class from whom the moneys sought to be expended were collected. The court held that taxpayer petitioner had not met this requirement.

Assuming that petitioner did not allege that the Commission was expending moneys received from general taxes, the result appears to be correct. Of course, if he alleged the threatened expenditure of general fund moneys, he would have a capacity to sue and the result reached by the court would be dubious.

Mandamus — Issuance of Writ by Supreme Court Still Discretionary

In last year's survey we had occasion to report a decision of the Ohio Supreme Court in which,[8] as we and others interpreted their opinion,[9] the court refused to grant a petition for a writ of mandamus, filed originally in that court, solely for the reason that the relator's purpose in seeking it was primarily the enforcement and protection of purely private rights, and that he might better have sought such relief at the level of one of the lower courts. Criticism of the result was based upon the admonition of the Ohio constitutional provision that " . . . no law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court"[10] in such actions, and that the court in

---

[5] OHIO REV. CODE § 3769.10.

[6] State *ex rel.* Masterson v. Ohio State Racing Commission, 115 N.E.2d 474 (Ohio App. 1952).

[7] State *ex rel.* Masterson v. Ohio State Racing Commission, 162 Ohio St. 366, 123 N.E.2d 1 (1954).

[8] State *ex rel.* Allied Wheel Products, Inc. v. Industrial Commission, 161 Ohio St. 555, 120 N.E.2d 421 (1954).

[9] 6 WEST. RES. L. REV. 222, 25 CLEVE. BAR ASS'N. J. 187 (1955).

[10] ART. IV, Sec. 2.

adopting such a basis for its decision was in effect violating the admonition of the fundamental law.

The court was again faced with the problem of *State ex rel, Libbey-Owens-Ford Glass Co. v. Industrial Commission of Ohio.*[11] After an application for death benefits had been denied by respondent's Toledo Board of Claims, a denial by the Commission of an application for review of the original decision and a denial of claimant's motion to rehear, respondent Commission granted a review of the claim by a Medical Board of Review. Relator, a contributor to the Occupational Disease Fund, brought an action in mandamus.

The Supreme Court, two judges dissenting and another concurring with the majority in a separate opinion, refused the writ. The bases of the opinion of the majority were that relator had no authority under the applicable statutes to intervene in a proceeding before the Commission in a claim against the Occupational Disease Fund except to file with the Commission an application for reconsideration, review or modification, that the relief sought by relator was really in the nature of an action for mandatory injunction, in which the Supreme Court has no original jurisdiction, and that the action of the commission in this case was not "arbitrary, unreasonable or unlawful and did not constitute a gross abuse of discretion."

These are certainly valid grounds for refusal of the writ. Presumably the matter is now res judicata insofar as relator's going into a lower court and seeking the same relief is concerned. The question which is not settled in this writer's mind is whether last year's case is distinguished or overruled, or whether the court has now removed those cases involving purely private rights from the entire field of mandamus.

Judge Taft, in his concurring opinion, argued that the writ ought to be refused for the reason that there are *two* remedies in mandamus in Ohio: the original common law one, original jurisdiction in which is conferred upon the Ohio Supreme Court by the 1851 Constitution, Article IV, section 2; and the code remedy of mandamus devised by the legislature,[12] original jurisdiction in which is and can be conferred only on common pleas court. Since this latter is an adequate remedy at law (i.e., under the code), and since it has always been the prerogative of the courts to refuse the common law variety of mandamus when there exists an adequate remedy at law, it is proper for the Supreme Court to deny to exercise its kind of mandamus jurisdiction.

If this rationale is ever adopted by a majority of the Supreme Court, then the Supreme Court need never grant any of the extraordinary remedies,

[11] 162 Ohio St. 302, 123 N.E.2d 23 (1954).

[12] OHIO REV. CODE §§ 2731.01 et seq.

and the last sentence of Article IV, section 2, of the 1912 Constitution might as well be repealed by the people as well as by the Supreme Court.

Chief Justice Weygandt and Judge Stewart, in a dissenting opinion, appeared to feel that the rationale of Judge Taft's concurring opinion was embodied in the majority opinion and pointed out that nowhere except in the minds of their five brethren could they find such a distinction between the two varieties of mandamus. With this the writer agrees and awaits further development and consequent enlightenment.

Jurisdiction of the Subject Matter to Award Alimony After Foreign Divorce

Jurisdiction in divorce and allied marital situations present difficult problems in our federal system. Since *Williams v. North Carolina*[13, 14] it has been fairly well established that domicile of at least one of the parties within the state purporting to act upon the status is a constitutional prerequisite to the valid exercise of jurisdiction by courts. It has likewise been decided that even if such jurisdiction exists in the courts of state B, so that they may grant to a husband domiciled within its boundaries a divorce from his wife still domiciled in state A, even though she is served only by constructive service, they may not cut off the wife's rights against her husband to alimony and support which have been fixed by a court of state A in a prior action by her against him in State A, in which he was personally served.[15]

This, then, is the concept of divisible divorce. The converse of the situation just outlined is presented when the divorce is granted to a domiciliary husband from a non-domiciliary wife, served only constructively, followed by an action by her against him in her state, and in which she obtains personal service on him in her state. A further variation on the theme is the problem caused when the prior divorce decree in husband's state purports to cut off wife's right to alimony and support from him. The Ohio Supreme Court faced it in *Armstrong v. Armstrong*.[16] It reached what must be a logical and proper result, and one which it is hoped that the United States Supreme Court will reach when the problem, as it is bound to, comes before that Court.

---

[13] 317 U.S. 287 (1942).

[14] 325 U.S. 226 (1945). Of course, if the defendant spouse answers, or even is personally served in the forum in which the action is brought, and foregoes his right to question the bona fides of the plaintiff's domicile, he may later be estopped to do so collaterally. Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1949). The same may be true of those in privity with him. Johnson v. Muelberger, 340 U.S. 581 (1951).

[15] Estin v. Estin, 334 U.S. 541 (1948); May v. Anderson, 345 U.S. 528 (1953).

[16] 162 Ohio St. 406, 123 N.E.2d 267 (1954).

The Ohio court unanimously held that since alimony is an *in personam* obligation (except, of course, insofar as the foreign court may have had before it any real property belonging to the plaintiff in the divorce action) and cannot be fixed upon or cut off from a person not before it by appearance or lawful personal service. No full faith and credit is due the decree of a state purporting so to act in the absence of such personal jurisdiction.

The Law of the Case — The Ghost Walks

The trial of a lawsuit and its appeal to a higher court present many traps for the unwary. Among them is the ancient, hoary-headed doctrine of "The Law of the Case." It has numerous manifestations and rests basically upon principles of res judicata applied internally to a particular case. That is to say, that whereas the principle of res judicata is more commonly applied to a fresh attempt to try a cause of action which was one adjudicated and not appealed from, so that the second attempt may be said to be a collateral attack, it occasionally arises in the retrial of a case after reversal on appeal, or even, more rarely, in the later stages of an original trial. An example of its application is an instance in which two errors prejudicial to the rights of a party to a lawsuit occur at a first trial, but only one is made the subject of objection. On appeal the judgment of the trial court is reversed for the error to which exception is saved. At the second trial objection is made at the point of repetition of the other error, which passed unnoticed the first time. A strict application of the rule of law of the case would preclude the sustaining of the objection at the second trial, since, by failure to object at the first trial, or failure to pursue on appeal an exception duly noted, the injured party has made an erroneous act or ruling "the law of the case" for that action between those parties, forevermore.[17]

The doctrine has proponents and critics. On the one hand, in its favor, is the argument that a party ought to speak up or forever after hold his peace. On the other hand, an arbitrary application of res judicata ought not to be a basis for perpetuating obvious and serious error when there is a reasonable opportunity for its correction without overturning any final judgment. There is probably nothing inherently "right" or "wrong" about the rule. The only need is for consistency, although admittedly, the courts have never been entirely consistent in applying it, even in those jurisdictions which do admit its existence.[18]

The curious thing about its latest appearance in Ohio was its resuscitation as an applicable doctrine in an Ohio case[19] during the period covered

[17] Gohman v. City of St. Bernard, 111 Ohio St. 726, 146 N.E. 291 (1924).

[18] *Ibid.*

[19] Charles A. Burton, Inc. v. Durkee, 162 Ohio St. 433, 123 N.E.2d 432 (1954).

by the survey. Its last previous application by the Supreme Court had been in *Gohman v. City of St. Bernard.*[20] Later, in *New York Life Insurance Co. v. Hosbrook*[21] the Supreme Court flatly overruled the first three syllabi of the *Gohman* case. In the latest case, without so much as mentioning either of the two most recent cases, the court flatly and unequivocally laid down the rule that "where a second action or a retrial of an action is predicated on the same cause of action and is between the same parties as the first action of first trial of an action, a final judgment of an appellate court in the former action or first trial of an action is conclusive in the second action or second trial of an action as to every issue which was or might have been presented and determined in the first instance." The principal Ohio Supreme Court case cited in support of the doctrine was *Pollock v. Cohen*[22] which appeared to have been overruled by the decision in *Hosbrook.*

We are therefore again left in doubt as to what is the rule in Ohio.

Service of Process on Defendant Use of Prohibition to Correct Erroneous Ruling on Motion to Quash

Ohio, in accord with most states, permits a defendant to make a special appearance to contest a court's jurisdiction over his person. The recognized method is, of course, the motion to quash the service of summons and to set aside the sheriff's return. Furthermore, Ohio permits a party whose motion is overruled to save his exception, answer over to the merits, and make the alleged erroneous ruling on the motion one of his grounds of appeal in the event of an unsuccessful defense on the merits. In other words, he does not waive his objection to the court's taking jurisdiction over his person by answering over.

This is not universally the rule. Some states, while allowing the motion to quash, do not permit a defendant who loses on this issue to answer over and preserve that particular exception. But some which observe this rule then permit the bringing of a petition for a writ of prohibition in a higher court to prevent further action at the trial level. The theory seems to be that since the defendant may not preserve his exception, he has no adequate remedy at law, and therefore the extraordinary remedy will lie.

In *State ex rel, Rhodes, Auditor v. Solether, Judge,*[23] the Supreme Court held that since defendants who objected to the trial court's assumption of jurisdiction over their persons on the ground of improper venue of the

[20] 111 Ohio St. 726, 146 N.E. 291 (1924).
[21] 130 Ohio St. 101, 196 N.E. 888 (1935).
[22] 32 Ohio St. 514 (1877).
[23] 162 Ohio St. 559, 124 N.E.2d 411 (1955).

action, so that they were improperly summoned from another county, could save an exception to the action of the trial court in overruling their motion to quash, and safely proceed to trial on the merits without prejudice to their right to pursue this objection on appeal, they had an adequate remedy at law and could not seek a writ of prohibition against the trial court. An adequate remedy at law is always a defense to a petition for a writ of prohibition, which is never a substitute for an appeal. Basically, prohibition lies only to prevent an erroneous exercise of jurisdiction over subject matter, and never to prevent its exercise over the person.

An identical result was reached in a similar case decided several months later, in which the Supreme Court relied entirely on its decision in the case just discussed.[24]

Service of Process on Non-Resident Motorists

An interesting situation in the field of service of process on the non-resident motorist who has operated his automobile in Ohio, been involved here in an accident and has returned to his home prior to the commencement of an action here for damages arising out of the accident was presented in *Fyffe v. Eddington*.[25]

Ohio has adopted code provisions[26] similar to those upheld as constitutional in the famous case of *Hess v. Pawloski*,[27] and they have frequently been interpreted by Ohio courts. The possible variations in the situations which arise are almost numberless. In the case at hand plaintiff was a resident of Columbus, defendant a resident of Denver, Colorado. They were involved in a collision in Franklin County.

Defendant returned to Colorado. Plaintiff commenced an action in Franklin County and served the Secretary of State on July 11. Service was then mailed to the defendant on July 15. It reached defendant's address in Colorado on July 18, but he had died on July 17. A motion to quash service of summons was granted.

The court held that while the statutes are undoubtedly constitutional, in that the probability that notice will reach the defendant supplies the due process of law, when it is shown that service did not and could not possibly be made on defendant, there was no compliance with the statutes. The statutes being in derogation of the common law, they must be strictly construed.

---

[24] State *ex rel.* City of Cleveland v. Parma Municipal Court, 163 Ohio St. 231, 126 N.E.2d 331 (1955).

[25] 97 Ohio App. 309, 125 N.E.2d 882 (1953).

[26] OHIO REV. CODE § 2703.20.

[27] 274 U.S. 352 (1927).

Jurisdiction of Municipal Courts

The enactment by the legislature in 1951 of a comprehensive Municipal Court Act, establishing and governing by one code all municipal courts in the state, except two, presented some new problems of interpretation, particularly with respect to the extent of their territorial jurisdiction. Four are specifically given county-wide jurisdiction in their respective counties, or, at least, an unqualified jurisdiction outside the boundaries of the corporations for which they are named.

The difficulty with respect to the others arose out of the fact that section 1901.19 of the Revised Code provides that:

> Subject to section 1901.17 of the Revised Code, [which deals with the pecuniary jurisdiction of all municipal courts] a municipal court shall have jurisdiction within the limits of the county or counties in which its territory is situated: . . .
>
> (E) In any civil action or proceeding of whatever nature or remedy wherein justices of the peace now have or may hereafter be given jurisdiction coextensive with the county; and *in all civil actions for the recovery of money only where the amount claimed by the plaintiff exceeds the exclusive jurisdiction of justices of the peace.* (emphasis supplied).

At first blush, the second part of subsection (E) of section 1901.19 would appear to grant to any municipal court in any county in which it is located a county-wide jurisdiction over a defendant if the amount sought against him in a civil action by the plaintiff exceeded $100.00 and was less than $2,000.00 (or, in the case of the Cleveland Municipal Court, $5,000.00), as justices have in certain types of civil actions.[28]

In the case[29] which specifically raised the question, plaintiff brought an action in contract, praying judgment for $300.29, in the Euclid Municipal Court, against a defendant resident in Cleveland. There was no codefendant who resided in Euclid. No subject matter of the action had arisen or was located there. There was nothing to which the jurisdiction of that court could be tied; it had to rest, if at all, upon the second portion of subdivision (E) of section 1901.19. At the trial defendant's motion to quash service of summons was overruled. The court of appeals reversed[30] and the Supreme Court sustained the court of appeals.

To do so the Supreme Court was required to read into subsection (E), after the words " . . . for the recovery of money only where. . . . " the words, " . . . the territorial jurisdiction of the court is county-wide. . . . " While this might appear to be an unwarranted act of judicial legislation, it is justifiable. First of all, a prior section (1901.02) of the Municipal

[28] OHIO REV. CODE § 1909.02.

[29] Gibson v. Summers Construction Co., 163 Ohio St. 220, 126 N.E.2d 326 (1955).

[30] Gibson v. Summers Construction Co., 96 Ohio App. 307, 119 N.E.2d 637 (1954).

Court Act specifically confers a general county-wide territorial jurisdiction upon four named municipal courts, none of which is Euclid's. Nothing in any of the subsections of section 1901.19 *clearly* does so, so the inference is that it is not to be read as is section 1901.02. Second, the act creates six municipal courts within Cuyhoga County. To read subsection (E) of 1901.19 as written, and to apply it without the limitation supplied by the appellate courts, would result in an almost intolerable overlapping within that county of territorial jurisdiction of those courts and of the common pleas court. While it is undoubtedly competent for the legislature to create such a situation, it is not to be presumed that it intended to do so, in the absence of a clearer indication than is discovered.

The decision seems a sound and correct one. If it is not in accord with the intent of the legislature, that body need only clarify the relevant subsection at a future session so as to indicate such a county-wide jurisdiction by unequivocal words.

Limitation of Actions
Recovery of Gambling Losses

Gambling is legally unprofitable in Ohio. In addition to having to pay federal income tax on one's winnings, a loser may bring suit against the winner within six months after, say, an unsuccessful effort to fill an inside straight. After that period of time any person may sue to recover such losses. The question has always been, how long the third person may wait before bringing such an action.

The Franklin County Court of Appeals decided in *Johnson v. Beatty*[31] that the action, at least when brought by a person other than the loser, is one to collect a penalty or forfeiture, rather than one on an implied contract, and must be brought within one year after the cause of action accrues, rather than within six years. The court relied upon the old case of *Cooper v. Rowley*,[32] decided under a similar statute. A wife who waited until 21 months after her husband's gambling losses to defendant had ceased was barred by this one-year statute of limitations.

Jurisdiction of Courts to Appoint Receiver for Business in Another County

In *Industrial Credit Co. v. Ken Ray Corp.*,[33] the plaintiff, a judgment creditor of defendant, sought and obtained the appointment of a receiver for defendant's tavern, on the grounds that defendant's assets were being

[31] 126 N.E.2d 816 (Ohio App. 1954).
[32] 29 Ohio St. 547 (1876).
[33] 127 N.E.2d 33 (Ohio App. 1955).

dissipated and the security of plaintiff's mortgage and judgment claim endangered. Plaintiff and defendant were both residents of Cuyahoga County, in whose common pleas court the case was filed and the motion granted, and both were personally before the court. The entire physical and intangible assets of the tavern were in Erie County. It was objected that because of the absence of the assets from Cuyahoga County jurisdiction of that court to act upon them was wanting.

The court properly held that because the parties were before the court, and it had jurisdiction of the subject matter of the action, the physical location of the assets of the receivership outside the court's geographical boundaries did not deprive it of the right to appoint a receiver.

Amendment — Power of Trial Court to Substitute Parties

Codes of pleading and practice usually contain a provision giving trial courts liberal powers of amendment of pleadings, process and proceedings in the furtherance of justice. Ohio's is typical. Most such statutes are liberally construed in most instances. But a lawyer is not therefore free to disregard fundamental facts and rules of pleading or procedure, on the theory that he can always amend. The Supreme Court in 1955 drew an uncertain line upon amendments.[34]

In November of 1952 defendant Martin, a minor, drove his tractor into an automobile driven by plaintiff Oetzel, causing injuries to Oetzel's person, and damage to his clothing and the automobile. Oetzel was president of the N. Laundry Company, a corporation. An action was filed against Martin by Oetzel, asking for $5,000 damages for all of said injuries. Then it was discovered that the title to the automobile was in the corporation. It obtained leave and was substituted for Oetzel as the sole party plaintiff. Of course, as such an entity, it could have no interest in Oetzel's clothing or the injuries to his person. It filed an amended petition seeking $2,000 damages for the automobile.

The Supreme Court held this to be an improper substitution, primarily because of the substantial change in the claim. It distinguished several earlier cases involving substitutions of parties plaintiff, in which the cause of action did remain the same or substantially the same after the substitution.

Joinder of Parties Defendant in Situations of Master and Servant Relationship

Ohio still adheres to the old rule that parties may not be joined as defendants when the sole basis of liability of one to the plaintiff rests upon

[34] Oetzel v. Martin, 163 Ohio St. 512, 127 N.E.2d 353 (1955).

his relationship to the other as master. That is to say, if A is liable to B for C's negligence solely because C is A's servant there may be no joinder in one action of A and C as parties defendant. The rule was reiterated in a 1955 case decided by the Supreme Court.[35]

It is not necessary to discuss the facts, as the case is treated elsewhere in this survey from the standpoint of the tort and agency problems involved. It is sufficient to say that it is in this writer's opinion antiquated, arbitrary, unrealistic and often unfair. It has been abandoned in most states[36] and should be in Ohio.

Service of Process
Sheriff's Return After Return Day

At common law the sheriff's return of process was usually jurisdictional, and it imported absolute verity. That is to say, its recital could not be contradicted, and no jurisdiction was obtained over the person of the defendant unless the sheriff's return showed service in the manner prescribed by statute. Even if the party had been served, an incorrect return gave the court no jurisdiction over him.

The rule has long since vanished in most states, including Ohio. A few problems are left, however, in interpretation of the statutes relating to the sheriff's return. It is prescribed that he shall make return of a summons by the second Monday after its date, with a few exceptions.[37] Pretty clearly he could not serve a summons after such day. But suppose that he serves it prior to that day but fails to return it in time — what result?

The situation arose in *Rhodes, Administrator v. Valley Greyhound Lines, Inc.*[38] The Court of Appeals for Ross County correctly held that the important question is not whether the return is defective, but rather, whether the defendant was in fact duly and legally served with process; that the service of the writ within its life is what gives jurisdiction over the defendant, and that a late return showing such good service is competent evidence thereof.

Action for Malpractice
Statute of Limitations

Actions for malpractice the law considers necessary evils. It recognizes that a right may arise, but for reasons of public policy puts upon them a short one-year statute of limitations in Ohio. Upon first consideration this would appear to be no particular handicap to the victim of the doctor's

---

[35] Shaver v. Shirks Motor Express Corp. 163 Ohio St. 484, 127 N.E.2d 355 (1955).
[36] CLARK, CODE PLEADING 385 (2d ed. 1947).
[37] OHIO REV. CODE § 2703.05.
[38] 128 N.E.2d 824 (Ohio App. 1954).

(or lawyer's) mistake, except for the fact that he may not learn of the presence of the medical sponge in his abdomen until more than a year after the doctor left there when hurriedly removing the patient's appendix. Unlike some "hidden" torts, the legislature has never provided any relief for this situation by permitting the statute to run from the time of discovery.[39]

It is the opinion of this writer that the question has never been fully settled in Ohio whether the statute begins to run at the time of, say, the operation, or whether its running may not be postponed to a later date if the physician continues to treat the patient after the act of malpractice for the same ailment.[40] There are certainly indications in some cases in Ohio that the statute may run from the cessation of the doctor-patient relationship, but not from any *later* time. Other cases, in which no continuing relationship was alleged or proved, hold that it runs from the date of the act of malpractice.

At any rate, even when the action is pleaded as a breach of the actual or implied contract to use due care, Ohio has steadfastly held that the action, whether contractual or delictual in its nature, is one for malpractice, and the one-year limitation will apply. A few states have applied a contract statute when the case was thus pleaded.[41]

In *Swankowski v. Diethelm*[42] plaintiff's counsel pleaded the action as one in deceit — that defendant "knowingly, intentionally and fraudulently" failed to remove a needle and "knowingly permitted it to remain in the abdomen of plaintiff with intent to deceive plaintiff." He was no more successful than his predecessors who have sought to escape the burden of the one-year statute by pleading breach of contract. A demurrer was sustained by the trial court and its ruling affirmed by the Court of Appeals for Lucas County.

Apparently malpractice is malpractice, and that is what it will continue to be until the legislature does something about it, or relieves by permitting the statute to run beginning upon discovery. Judge Deeds wrote a cogent dissenting opinion which may help some bold spirit to try it again in a different appellate district, with the hope at least of getting the issue before the Supreme Court.

Service of Process — Hearing Use of Nunc Protunc Entries

A common method used by courts in correcting earlier errors or in

[39] Cf. OHIO REV. CODE § 2305.09.

[40] Cf. DeLong v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902); McArthur v. Bowers, 72 Ohio St. 656, 76 N.E. 1128 (1905); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238

[41] Frankel v. Wolper, 181 App. Div. 485, 169 N.Y. Supp. 15 (1918) dicta; Staley v. Jameson, 46 Ind. 159 (1874).

[42] 129 N.E.2d 182 (Ohio App. 1953).

making the record speak the truth is the *nunc pro tunc* entry. Such an entry or order is to be made only in furtherance of justice and will not ordinarily have an effect at an earlier time than that at which it is made, if such retroactivity would affect any substantial right of a party, such as to deny a right of review.[43] The Summit County Court of Appeals in 1954 had occasion to pass upon and uphold its use in validating service of process in an uncontested divorce action.[44]

Plaintiff wife sued her husband for alimony only. After personal service of summons upon him he filed a cross-petition for divorce. Husband then disappeared. Wife thereafter filed an amended petition for divorce and alimony. Now, in order that there may be effective service by publication in a divorce case there must be filed by the party seeking it two affidavits.[45] Wife had failed, at the time of the hearing in court on her amended petition, to file the second one. She did not do so until eight months later. Apparently all of her evidence had been given at the earlier hearing. At this second "hearing" at which the necessary affidavit was filed, the court entered a final decree of divorce, ordering it "to be an order *nunc pro tunc,* operative in all respects and binding as of" the date eight months before when evidence on the merits had been heard.

Three years later defendant husband sought to have the divorce decree vacated on the ground that the affidavit had not been filed at the time of the hearing. The question was thus presented whether "hearing" meant the taking of testimony and trial on the merits, or could also be construed to include such subsequent matters as deliberation by the judge, arguments or briefs by counsel and the preparation and filing of journal entries.

The court seemed to treat the filing of the affidavit as jurisdictional, but went on to decide that so long as it was filed prior to entry of the decree upon its journal, the jurisdictional requirement was met. Citing numerous authorities in other jurisdictions, the court gave the word a broad jurisprudential meaning.

Certainly no prejudice can be said to have resulted to the husband from it, since jurisdiction had already attached to permit the rendition of a personal judgment for alimony, and it can hardly be said that he was without fault insofar as wife's ability to make service on him in her divorce action was concerned.

Use of Mandamus to Compel Issuance of a Warrant for Violation of Law

Relator sought a warrant from the police judge of Cleveland Heights

[43] Belden v. Stott, 150 Ohio St. 393, 83 N.E.2d 58 (1948).

[44] Shuff v. Shuff, 129 N.E.2d 206 (Ohio App. 1954).

[45] OHIO REV. CODE §§ 2703.15, 3105.06.