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Civil Procedure--Statute of Limitations--Commencement of Action

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mere anachronisms resulting from legislative inactivity.[29] Judge Clark concurs: "no clear and precise state policy would be frustrated by permitting suit in the federal forum."[30]

The majority in the principal case disagrees. In the absence of an overriding federal interest intimated by Congress, "state policy is involved in one case [barring a plaintiff foreign corporation by a door-closing statute] as much as in the other [not allowing a suit against a defendant foreign corporation]. . . ."[31] This absence of explicit congressional regulation, either by statute or delegated rule, was fastened on by the majority as determinative of the issue.[32] The court conceded that Congress, or its delegate, could authorize nation-wide service of process, but the fact that it had not done so was thought to be sufficiently demonstrable of a lack of intent to override state policy and apply the federal standard. Thus, until an affirmative act is forthcoming the federal court is bound by state law.[33]

In any question involving federalism and judicial responsibility to two sovereigns, no solution is entirely satisfactory. The present issue is no exception. Those favoring the abolition, or at least a narrowing, of diversity jurisdiction incline toward the state test of "doing business." Those looking upon state courts with distrust, favor the federal standard. As a result, controversy will reign over this issue until the Supreme Court passes on the question, Congress enacts a statute, or the problem becomes moot due to increasing liberalization by the states in allowing recourse to their courts.

ROLF H. SCHEIDEL

CIVIL PROCEDURE — STATUTE OF LIMITATIONS — COMMENCEMENT OF ACTION

Robinson v. Commercial Motor Freight, Inc.,
174 Ohio St. 498, 190 N.E.2d 441 (1963).

In *Robinson v. Commercial Motor Freight, Inc.*,[1] the plaintiff filed his personal injury petition and a praecipe for service of summons with the clerk of courts of Hancock County on the terminal date of the two-year statute of limitations.[2] The clerk failed to issue summons to the sheriff until two days after the running of the statute of limitations. The

29. 74 HARV. L. REV. 1662 (1961).

30. Arrowsmith v. United Press Int'l, 320 F.2d 219, 241 (2d Cir. 1963).

31. *Id.* at 227.

32. 28 U.S.C. § 1391(c) (1958), providing that a corporation may be sued in any district in which it is doing business, applies only to venue.

33. *E.g.*, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958) (anti-trust).

defendant then demurred to the petition on the ground that the action was not brought within the time limited for the commencement of such actions under Ohio Revised Code section 2305.10. At the hearing on the demurrer, the court sustained defendant's oral motion to dismiss. The Hancock County Court of Appeals affirmed this judgment, and the motion to certify to the supreme court was granted.

The question presented for determination was: whether *filing* the petition and praecipe or *issuance* of summons by the clerk constituted a "commencement" of the action which would stop the running of the statute of limitations. The Ohio Supreme Court held that *filing* the petition and praecipe constituted "commencement of the action" within the meaning of sections 2305.03 to 2305.22, inclusive, of the Ohio Revised Code.[3]

In Ohio, a cause of action avoids the bar of the statute of limitations as soon as suit is "commenced."[4] Prior to the present case, it was well established that to bring a case within the saving's provision of section 2305.17, a summons had to be issued before the expiration of the statute of limitations.[5] Hence, if the statute of limitations had run between the time the petition had been filed with the clerk of courts and the time summons had been issued to the sheriff for service upon the defendant, the cause of action was barred.[6]

In the *Robinson* case, however, the Ohio Supreme Court departed from the established law. The court found that the rule pronounced in

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1. 174 Ohio St. 498, 190 N.E.2d 441 (1963).

2. The pertinent provisions of OHIO REV. CODE § 2305.10 require that "an action for bodily injury . . . shall be brought within two years after the cause thereof arose."

3. In reaching its conclusion, the court found that: (1) "Section 2703.01, Revised Code, requires two affirmative acts on the part of the plaintiff: [a.] The filing of a petition, and [b.] the doing of an act 'causing a summons to be issued thereon.' [2.] The act 'causing a summons to be issued' is the filing of a praecipe with the clerk as provided in Section 2703.02, Revised Code, requiring the giving of certain information and 'demanding that a summons issue.' [3.] The filing of the praecipe *causes the issuance of summons* referred to in Section 2703.01, Revised Code." Robinson v. Commercial Motor Freight, Inc., 174 Ohio St. 498, 503, 190 N.E.2d 441, 444 (1963). *But see id.* at 505, 190 N.E.2d at 445 (Zimmerman, J., dissenting): "If the General Assembly was dissatisfied with the interpretation and application given by this court to the statutes involved, it has had ample time and opportunity to remedy the situation."

4. OHIO REV. CODE § 2305.03 states: "A civil action, unless a different limitation is prescribed by statute, can be commenced only within the period prescribed in sections 2305.03 to 2305.22, inclusive, of the Revised Code. When interposed by proper plea by a party to an action mentioned in such sections, lapse of time shall be a bar thereto."

The saving's statute provides: "An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive . . . as to each defendant, at the date of the summons which is served on him. . . . Within the meaning of such sections, an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days." OHIO REV. CODE § 2305.17.

5. Zakrzewski v. Lenczycki, 129 Ohio St. 462, 195 N.E. 867 (1935); McLarren v. Myers, 87 Ohio St. 88, 100 N.E. 121 (1912); Feigi v. Lopartkovich, 38 Ohio App. 338, 176 N.E. 670 (1930).

6. See Baltimore & O.R.R. v. Ambach, 55 Ohio St. 553, 45 N.E. 719 (1896).

Baltimore & O.R.R. v. Ambach[7] was harsh and unreasonable. In overruling the *Ambach* case, the court demonstrated the potential injustice of the old rule.

> A clerk may be forgetful or careless and as a result fail to issue summons until too late. In these days of congested population, a clerk has many deputies. The clerk's office in a populous county has a huge number of filings to make, records to maintain, and other paperwork. A deputy may for one reason or another fail to cause the issuance of summons and thereby preclude a plaintiff from having his day in court. A clerk or a deputy may have a personal feeling against some attorney, and a rule such as that in the *Ambach* case might well afford an opportunity to vent such feeling.[8]

The instant decision seems to have the support of the majority of jurisdictions outside of Ohio. However, there is considerable variation among the states as to what shall be deemed "commencement" of an action. Furthermore, it is not uncommon for different rules to apply in the same jurisdiction for different causes of action.[9] Nevertheless, most of the state statutes defining commencement of action may be classified into three general categories. Under the first view, which finds favor in a majority of states, an action is commenced by filing a petition or its equivalent with the court.[10] The second view provides that an action is not commenced until summons is issued.[11] The third view requires that service of process be made upon the defendant to interrupt the running of the statute of limitations.[12]

Regardless of when the action is deemed to be "commenced," the majority of states require an intent to commence the action or to make prompt service upon the defendant in order to toll the statute. For example, if an attorney files his petition and praecipe for service of sum-

7. *Ibid.*

8. Robinson v. Commercial Motor Freight, Inc., 174 Ohio St. 498, 502, 190 N.E.2d 441, 443 (1963). To further demonstrate the injustices of the former rule, the court cited McLarren v. Myers, 87 Ohio St. 88, 100 N.E. 121 (1912). The salient facts there were as follows: Plaintiff's attorney filed petition and praecipe for issuance of summons twelve days before the statute of limitations was to have expired. On two occasions before the statute had run, the attorney orally urged the clerk to issue summons, but to no avail. When the statute expired before the clerk issued summons, the action was dismissed by the court, and judgment was affirmed by the supreme court.

9. See Annot., 27 A.L.R.2d 236, 245 (1953).

10. Horn v. Pope, 205 Ala. 127, 87 So. 161 (1920); Gideon v. St. Charles, 16 Ariz. 435, 146 Pac. 925 (1915); Kingsley v. Clark, 57 Colo. 352, 141 Pac. 464 (1914); McFarland v. McFarland, 151 Ga. 9, 105 S.E. 596 (1921); Massman v. Duffy, 330 Ill. App. 76, 69 N.E.2d 707 (1946); Haupt v. Burton, 21 Mont. 572, 55 Pac. 110 (1898); Tribby v. Wokee, 74 Tex. 142, 11 S.W. 1089 (1889); Luke v. Bennion, 36 Utah 61, 106 Pac. 712 (1908). See also Annot., 27 A.L.R.2d 236, 245-58 (1953).

11. Sims v. Miller, 151 Ark. 377, 236 S.W. 828 (1922); Moore-Mansfield Constr. Co. v. Indianapolis, N.C. & T. Ry., 179 Ind. 356, 101 N.E. 296 (1913); Mertens v. McMahon, 115 S.W.2d 180 (Mo. Ct. App. 1938). See also Annot., 27 A.L.R.2d 236, 258-67 (1953).

12. Allen v. Turner, 152 Kan. 590, 106 P.2d 715 (1940); Agurs v. Putter, 19 La. App. 550, 137 So. 640 (1931). See also Annot., 27 A.L.R.2d 236, 299-304 (1953).

mons, but directs the clerk to delay issuance of summons until further orders, there has not been a "commencement" of the action within the meaning of the statute or rule.[13]

The Ohio statutes controlling the commencement of an action also require a bona fide intention to commence an action. The saving's provision of section 2305.17 provides that an attempt to commence an action shall be deemed to be equivalent to its commencement "when the party diligently endeavors to procure a service, if such attempt is followed by service within 60 days."[14] The *Robinson* case has not changed this requirement.[15] Although filing of the petition and praecipe is now sufficient to conditionally suspend the running of the statute of limitations, the plaintiff, nevertheless, must diligently endeavor to procure service upon the defendant.[16]

While the decision in the *Robinson* case is a departure from the established law of nearly 100 years,[17] it represents a trend in the state courts toward the more liberal view emphasized in the federal courts. The Federal Rules of Civil Procedure provide that "a civil action is com-

13. In McMullen Oil & Royalty Co. v. Lyssy, 353 S.W.2d 311 (Tex. Civ. App. 1962), the court held that filing the petition did not toll the statute since there was no bona fide intention that process be issued and served. See also Jordan v. Bosworth, 123 Ga. 879, 51 S.E. 755 (1905); Bell v. Quaker City Fire & Marine Ins. Co., 230 Ore. 615, 370 P.2d 219 (1962).

14. OHIO REV. CODE § 2305.17. The sixty day limitation begins to run from the attempt to make service, and not from the time when the court determines that the original service is defective. Baltimore & O.R.R. v. Collins, 11 Ohio C.C. Dec. 334, *aff'd without opinion*, 63 Ohio St. 577, 60 N.E. 1129 (1900). The legislative intent in enacting this provision was to prevent parties from prolonging the suspension of the statute of limitations by a mere attempt to sue without further endeavor to procure service upon the defendant. 34 OHIO JUR. 2D *Limitation of Actions* § 130 (1958).

15. *But see id.* at 505, 190 N.E.2d at 445 (dissenting opinion). Justice Zimmerman would have held that there cannot be a diligent endeavor to procure service when no summons has been issued to be served upon the defendant. "[P]roper diligence on the part of those seeking redress would have insured the issuance of the summonses and the placing of the same in the hands of the sheriff on the day the petitions were filed. . . ." See Bechthold v. Fisher, 12 Ohio C.C.R. 559 (Ct. App. 1896).

16. In the recent case of Byers v. Dobies, 93 Ohio L. Abs. 114 (Ct. App. 1963), the court applied the rule of the *Robinson* case in deciding a question involving an interpretation of OHIO REV. CODE § 2305.17. Specifically the question was: whether plaintiff had filed his petition within the time limit prescribed by the statute of limitations, although at no time before the expiration of the statute of limitations was there any attempt to obtain service upon the defendant *as a minor*. The court held first, citing the *Robinson* case, that the statute stopped running when plaintiff filed his petition. Second, the court found that, although at the time the petition and praecipe were filed, the plaintiff had not designated defendant as a minor and thus at no time before the expiration of the statute had there been an attempt to get service upon defendant *as a minor*, plaintiff had nevertheless complied with § 2305.17 by (a) amending his complaint; (b) causing alias summons to be issued upon defendant as a minor; and (c) obtaining proper service upon defendant all within the sixty day limitation prescribed by § 2305.17. "Section 2305.17, Revised Code, is a remedial statute. In its terms it provides a period within which by the exercise of due diligence a party who through mistake of his own or through circumstances over which he has no control would be denied his day in court is entitled to have such provision liberally construed in furtherance of its purpose." Byers v. Dobies, *supra* at 124.

17. See Robinson v. Orr, 16 Ohio St. 285 (1865).