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## Civil Procedure

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instead from that order to the court of appeals on questions of law and fact. The court of appeals held that the order of the trial court directing the plaintiff to answer the questions in the course of the deposition was not a "final order," reviewable on appeal, the obvious remedy being an appeal from a contempt citation which would follow the plaintiff's refusal to conform with the order of the common pleas court.

In an opinion by the Court of Appeals of Cuyahoga County in the case of *Grosser v. Armet Alloys, Inc.*,<sup>10</sup> the Court again reviewed the rule upon abuse of discretion by a trial court in granting a motion for new trial, and held that error of law does not, per se, constitute an abuse of discretion, no evidence of prejudice appearing in the record.

CLARE D. RUSSELL

## CIVIL PROCEDURE

### *Real Party In Interest and Amendment of "Cause of Action"*

One of the most troublesome problems in the law of pleading and procedure is the basic one of "what constitutes a cause of action?" Where does it begin, where does it end, and what are its essential and minimal elements? Nowhere is this more difficult of solution than in the situation caused when a plaintiff seeks to amend his petition or to substitute parties after the running of the applicable statute of limitations.

Ohio courts have been extremely liberal in permitting amendments and substituting parties. In the past, the supreme court has held<sup>1</sup> that when a widow institutes an action as administratrix for damages for the wrongful death of her husband, under the mistaken belief that she has been appointed and qualified as such administratrix, and after the running of the statute of limitations on the action discovers her want of qualification, she may com-

<sup>10</sup> 113 N.E.2d 391 (Ohio App. 1953).

<sup>11</sup> An excellent article entitled "How to Get into the Supreme Court," by Judge Kingsley A. Taft, was published in December, 1953, in Volume 26, No. 47, of THE OHIO BAR.

A new article on appellate review, which indicates outstanding research and which contains a discussion of the procedural statutes recently amended, appears in Volumes 2, 3, and 4 of OHIO JURISPRUDENCE (2d ed.), just released.

Judge Roscoe G. Hornbeck and Harold F. Adams, of the Columbus Bar, have also recently published a compact and informative book called "Appellate Practice in Ohio." (Columbus, Ohio, The John Adams Publishing Co., 1953, pp. 155, \$4.50.) The book outlines steps taken in perfecting appeals from the various courts, both in civil and criminal cases, discusses such matters as the elements of a final order and what constitutes a chancery case, and includes a number of citations which should prove helpful to the practitioner. This work, however, is limited to appeals from courts and does not cover appeals from commissions and administrative agencies.

plete her qualification and amend her petition. The amended petition will relate back to the date of her original petition, and the action will be deemed to have been commenced within the time limited by statute.

In *Kyes v. Pa. R.R.*,<sup>2</sup> the supreme court was faced with a situation in which the action for wrongful death had been brought within the time limited by the statute by an ancillary administrator, appointed by the probate court of an Ohio county, of the estate of a non-resident. When the capacity of the ancillary administrator was challenged, his appointment was vacated by the probate court, and the decedent's mother was appointed administratrix in Pennsylvania — after the running of the statute. The trial court in which the wrongful death action was pending allowed her to be substituted as the party plaintiff.

The supreme court denied the defendant's contention that the two cases ought to be distinguished on the grounds that in the later case there had been no honest intent and mistake, or that there was a substitution of an entirely different person acting in a different capacity, under authority of a different sovereignty, and that there was knowledge of the lack of capacity.

No supreme court opinion has ever yet overruled the case of *Wedner v. Rankin*,<sup>3</sup> in which it was held that a plaintiff acting wholly without authority as executor or administrator could cure such a defect in capacity by a subsequent appointment.<sup>4</sup>

The court in the *Keyes* case relied upon the unchanged character of the cause of action in wrongful death, the nominal character of the statutory plaintiff's interest and the requirement<sup>5</sup> of liberal construction of the remedial part of the Code.<sup>6</sup>

### *Accrual of Cause of Action: Principal v. Agent*

A situation is frequently presented in which, although a breach of duty has occurred, the person to whom the duty is owed either is honestly ignorant of it or has no reasonable means of determining at the time of breach the total extent of his damages. While prospective or future damages in personal injury actions are, theoretically, capable of definite ascertainment, there are numerous other situations which pose greater difficul-

<sup>1</sup> *Douglas v. Daniels Brothers Coal Co.*, 135 Ohio St. 641, 22 N.E.2d 195 (1939).

<sup>2</sup> 158 Ohio St. 362, 109 N.E.2d 503 (1952).

<sup>3</sup> 26 Ohio St. 522 (1875).

<sup>4</sup> See *Douglas v. Daniels*, 62 Ohio App. 22 N.E.2d 1003 (1938)

<sup>5</sup> OHIO REV. CODE § 1.11 (OHIO GEN. CODE § 10214)

<sup>6</sup> The case is interesting also from the standpoint of the court's decision that the trial court's delay of four years and three months in ruling on defendant's motion for a new trial did not deprive the court of jurisdiction. See OHIO REV. CODE § 2701.02 (OHIO GEN. CODE § 1685).

ties. In *Archer v. Huntington Nat. Bank*,<sup>7</sup> plaintiffs employed the defendant bank as agent to sell certain securities owned by the plaintiffs and apply the proceeds toward liquidation of a loan to the plaintiffs. The bank sold most of the securities so entrusted, but allegedly neglected to sell or to attempt to sell a certain large block of securities on March 4, 1937, and did not do so until November 6, 1950, on a low market. The difference in the sale price on the respective dates cost the plaintiff-borrower over \$22,000.00. The defendant bank demurred *generally*, which demurrer the court sustained on the ground that the right of action accrued on March 4, 1937, and that since more than four years had elapsed before action brought, it was barred by the statute of limitations<sup>8</sup> applicable to tort actions.<sup>9</sup>

The court of appeals, distinguishing *State ex rel Lien v. House*,<sup>10</sup> held that the transaction in the case before it was not an express trust, that the cause of action accrued and the statute of limitations began to run when the alleged negligent act was committed, and that the " damage is not the cause of action."<sup>11</sup>

There is not much doubt that there is case authority in support of the court's conclusion on the issue of when the cause of action accrues.<sup>12</sup> However, the conclusion is utterly unrealistic. No amount of violations of a duty owed to another will give rise to a cause of action until the obligee of the duty has suffered injury or damage. Until the injury has been suffered, how can the damages, in fairness even to the violator of the duty, be computed? Nor ought we need to wait until the legislature acts to change the statutes, as has often been suggested. Some day a courageous court is going to adopt a realistic view of the problem and correct the law on it.

### Service of Process: Non-resident Motorists

Ever since the right of a state was established<sup>13</sup> to require of a non-resident motorist that he submit to service of process in actions brought in the state into which he drives, arising out of his being there, a constant expansion of the concept of amenability to process has been the rule. In *Paduchik v. Mikoff*,<sup>14</sup> the Supreme Court of Ohio logically extended the

<sup>7</sup> 92 Ohio App. 229, 109 N.E.2d 677 (1952)

<sup>8</sup> OHIO REV. CODE § 2305.09 (OHIO GEN. CODE § 11224)

<sup>9</sup> How this result could possibly have been reached under any proper application of the code rules on demurrers defies understanding. See OHIO REV. CODE §§ 2309.08, 2309.09 (OHIO GEN. CODE §§ 11309, 11310)

<sup>10</sup> 144 Ohio St. 238, 58 N.E.2d 675 (1944).

<sup>11</sup> *Archer v. Huntington Nat. Bank*, 92 Ohio App. 229, 232, 109 N.E.2d 677, 678 (1952).

<sup>12</sup> *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583 (1882); *Kerns v. Schoonmaker*, 4 Ohio 331 (1831).

<sup>13</sup> *Hess v. Pawloski*, 274 U.S. 352, 47 Sup. Ct. 632 (1927).

<sup>14</sup> 158 Ohio St. 533, 110 N.E.2d 562 (1953)

scope of the statute<sup>15</sup> which constitutes the secretary of state the agent to receive service of process in Ohio on the non-resident motorist to a situation in which the accident took place not on a public highway, but on private property. The plaintiff was injured by an automobile in the driveway of a farm building where the defendant was working. The court held that the statute was not, as are those of some other states, restricted in its terms to accidents occurring on the highways, and that there was no legislative or constitutional reason so to restrict it. The result is entirely logical and is in line with a growing number of decisions which base amenability to process not on consent which the state has a right to refuse, but upon the doing of an act within the jurisdiction.<sup>16</sup>

### *Joinder of Actions for Pain and Suffering and Wrongful Death*

In many instances of wrongful death, the victim incurs more or less pain and suffering prior to death. It is well established that the tortfeasor may be held liable in damages for both aspects of his tort, and while the proceeds of each recovery often ultimately reach the same heirs of the decedent, they do so by entirely different channels, since the pain and suffering recovery accrues to the estate and the wrongful death recovery to the widow, children, heirs, and next of kin having a pecuniary interest in the life of the decedent. Traditionally most lawyers have joined the two causes of action in one petition to avoid a multiplicity of suits and to have the rights of all parties fully determined in one action. The supreme court put an end to this practice in *Fielder v. Ohio Edison Co.*<sup>17</sup> Its reasoning was that both causes of action do not affect all the parties to the action as required by Ohio Revised Code Section 2309.06 (Ohio General Code Section 11307)

### *Declaratory Judgments: Jurisdiction of Courts*

Since its enactment,<sup>18</sup> there has been a slowly but steadily growing use of the Declaratory Judgments Act.<sup>19</sup> In *Zanesville v. Zanesville Canal & Mfg. Co.*,<sup>20</sup> the supreme court reversed a common pleas decision which had

<sup>15</sup> OHIO REV. CODE § 2703.20 (OHIO GEN. CODE § 6308-1).

<sup>16</sup> See *Sugg v. Hendrix*, 142 F.2d 740 (5th Cir. 1944)

<sup>17</sup> 158 Ohio St. 375, 109 N.E.2d 855 (1952), 5 WEST. RES. L. REV. 109 (1953). Of course, it being a misjoinder of causes of action, defendant could waive the defect. For an interesting situation arising out of such a waiver, See *LoPresti v. Community Traction Co.*, 160 Ohio St. 480 (1954).

<sup>18</sup> 115 Ohio Laws 495 (1933).

<sup>19</sup> OHIO REV. CODE §§ 2721.02 thru 2721.15 (OHIO GEN. CODE §§ 12102-1 thru 12102-16).

<sup>20</sup> 159 Ohio St. 203, 111 N.E.2d 922 (1953).

been affirmed by the court of appeals, in favor of the plaintiff, the City of Zanesville. The action had been brought to determine the right of the plaintiff to put certain real property in its possession and "appropriated" (actually, "dedicated") in 1802 to one public use, to a new and different use. At the time of the original dedication the laws of the Northwest Territory vested the fee of lands dedicated by town plats to public use in the county. The plaintiff joined as defendants just about every possible defendant except the county.

The supreme court, following numerous precedents in other states, held that the Declaratory Judgments Act is applicable only where there is a present, actual controversy, and only where justiciable issues were presented *and all interested persons are made parties to the proceeding*. The repeal of the former dedication act in 1831,<sup>21</sup> of course, did not divest Muskingum County of the fee. A vitally interested party was not brought before the court, which is in declaratory judgment actions a jurisdictional fact, going to the court's jurisdiction over the subject matter.

### ***Jurisdiction of Common Pleas Courts: Replevin Against Personal Representative***

In last year's survey,<sup>22</sup> criticism was leveled at a decision<sup>23</sup> of the court of appeals which held that the courts of common pleas had no jurisdiction of an action in replevin against the administratrix of a decedent's estate to recover certain personal property which the decedent held at the time of his death as bailee for the plaintiff, and that sole jurisdiction of the action rested in the probate court which was administering the decedent's estate. In commenting upon the court's decision, we pointed out that *Lingler v. Wesco*,<sup>24</sup> upon which the court of appeals relied for its result, could readily be distinguished.

The supreme court, in *Service Transport Co. v. Matyas*,<sup>25</sup> reversed the court of appeals, distinguishing *Lingler v. Wesco* on another theory. It is submitted that whatever may be the shortest path to the result reached, the supreme court's conclusion that courts of common pleas *do* have jurisdiction in such cases is a proper one. The same result was later reached by the Court of Appeals in Cuyahoga County in *Carter v. Birnbaum*.<sup>26</sup>

### ***Limitation of Actions: Set-off and Counterclaim: Cross Demands Deemed Compensated***

In *Summers v. Connelly*<sup>27</sup> the supreme court was faced with the troublesome problem which arises when a plaintiff's claim is met by a cross-demand

<sup>21</sup> 29 Ohio Laws 350; OHIO REV. CODE § 711.11 (OHIO GEN. CODE § 3589).

<sup>22</sup> 4 WEST RES. L. REV. 205 (1953).

from the defendant, one of which is barred by a statute of limitations. In this case, a husband died intestate, seized of real estate he had previously inherited from his deceased wife. Neither left any children, both had other heirs, and the "half-and-half" statute<sup>28</sup> was invoked, one-half of husband's interest in the realty which he had inherited from his wife passing to the wife's heirs. Two of the wife's heirs were indebted to the husband at the time of his death on a promissory note which had become barred by the statute of limitations. The administrator claimed that any amount due from the husband's estate to the wife's heirs should have set off against it the amount due from those heirs to the deceased husband, even though had the estate sued on the note the claim would have been barred.

The supreme court declared that the statute of limitations is one of repose and not a mere presumption, and that the rule that statutes of limitations are not applicable to defenses has no application to cases of set-off or counterclaim, but is confined to strict defenses. The court refused to permit the administrator to set-off against the share passing to the indebted heirs the amount of their indebtedness so barred.

#### *Limitations of Actions: Foreign Corporations: Attachments*

Plaintiff, in her quest of beauty, purchased from an Ohio drug store a chemical compound used in making home-permanent hair waves, which was manufactured by a foreign corporation. Plaintiff was injured in her use of it and sued the drug store.<sup>29</sup> The foreign corporation was not authorized to do business in Ohio and apparently had no agents or assets within the state. More than two years later, and after the running of the statute of limitations on her cause of action, plaintiff learned of credits due to the foreign corporation from retailers in Ohio, and filed an amended petition, naming the foreign manufacturer as a new party defendant and garnisheeing its debtors located here. Service of summons was then had upon the foreign defendant by publication.

The question raised by the foreign corporation's special appearance and motion to quash was whether the "saving clause"<sup>30</sup> in the portion of the code dealing with limitation of actions prevented the running of the two-year

<sup>28</sup> *Service Transport Co. v. Matyas*, 63 Ohio L. Abs. 236, 108 N.E.2d 854 (App. 1952).

<sup>29</sup> 79 Ohio St. 225, 86 N.E. 1004 (1908).

<sup>30</sup> 159 Ohio St. 300, 112 N.E.2d 20 (1953).

<sup>31</sup> 113 N.E.2d 102 (Ohio App. 1953).

<sup>32</sup> 159 Ohio St. 396, 112 N.E.2d 391 (1953), 5 WEST. RES. L. REV. 209 (1954).

<sup>33</sup> OHIO REV. CODE § 2105.10 (OHIO GEN. CODE § 10503-5).

<sup>34</sup> *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 112 N.E.2d 542 (1953).

<sup>35</sup> "When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the commencement of

statute<sup>31</sup> of limitations on plaintiff's injury so as to allow plaintiff to proceed against the foreign manufacturer.

The court construed the word "person" in the saving clause to apply to corporations, as artificial persons, and ruled that the suspension provisions of such statutes are operative without regard to the character of the action as being one in personam, quasi-in-rem or in rem.<sup>32</sup> The court left unanswered the question whether the statute begins to run at the time when property of the foreign corporation first comes into the state subsequent to the accrual of the cause of action, observing that "the record does not contain evidence that either merchandise or accounts belonging to this defendant did exist in Ohio prior to the institution of the attachment proceedings herein involved."<sup>33</sup> Quære: what would the result be if the foreign corporation could show that it had had merchandise or accounts belonging to it in Ohio at all times subsequent to the accrual of the cause of action?

#### *Statute of Limitations: Saving Clause: Temporary Absence of Defendant From the State*

The Ohio "saving clause"<sup>34</sup> also provides that if a person, after the cause of action accrues, departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

In *Kossouth v Bear*<sup>35</sup> the Court of Appeals of Cuyahoga County had occasion, for the first time in this state except for a one-line dictum in an earlier supreme court case,<sup>36</sup> to apply this portion of the statute, dealing with departure of defendant after the accrual of the cause of action. The defendant by his alleged negligence caused bodily injury to plaintiff on May 30, 1948. Thereafter there occurred a comedy of errors in plaintiff's efforts to obtain service upon defendant, the details of which are not relevant to the solution of the court's problem, for it found as a fact that the defendant continued from the date of the accident to live openly and without

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the action shall not begin to run until he comes into this state or while he is so absconded or concealed." (Emphasis supplied) OHIO REV. CODE § 2305.15 (OHIO GEN. CODE § 11228)

<sup>31</sup> OHIO REV. CODE § 2305.10 (OHIO GEN. CODE § 11224-1)

<sup>32</sup> This was probably *dictum*, since the court correctly held that the action to be one strictly in personam, and at least one case, *Crandall v. Irwin*, 139 Ohio St. 253, 39 N.E.2d 608 (1942), has held that the saving clause does not apply in an action to foreclose a mechanic's lien.

<sup>33</sup> *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 474; 112 N.E.2d 542, 547 (1953)

<sup>34</sup> OHIO REV. CODE § 2305.15 (OHIO GEN. CODE § 11228)

<sup>35</sup> 114 N.E.2d 80 (Ohio App. 1953).

<sup>36</sup> *Title Guaranty & Surety Co. v. McAllister*, 130 Ohio St. 537, 546, 200 N.E. 831, 835 (1936).



conscious effort to conceal his whereabouts in and about Cleveland until he left to live in California in August or September of 1950. . . . The applicable statute of limitations<sup>37</sup> therefore ran out on May 30, 1950, unless certain temporary absences of defendant from Ohio on pleasure trips between May 30, 1948, and May 30, 1950, were sufficient to toll its running. Defendant was served through the Secretary of State<sup>38</sup> some time after November 1, 1950.

The court seems to have assumed for the purposes of argument that defendant's temporary absences from the state between May 30, 1948, and May 30, 1950, might have totalled up enough time in fact to toll the statute, if they had that legal effect. It ruled, however, that as a matter of law they did not have such a legal effect. Distinguishing a case in which the defendant had been and to all intents and purposes had remained absent from the state from the time of or prior to the accrual of the cause of action,<sup>39</sup> and cases in which a defendant departed from the state permanently after the cause accrued but before the statute had fully run,<sup>40</sup> the court likened the situation to that in *Stanley v. Stanley*,<sup>41</sup> in which temporary visits to the state by a non-resident were held not to commence the running of the statute. Temporary absences from the state by a resident do not toll the running of the statute.

### *Jurisdiction to Award Non-resident Husband's Insurance Policy to Wife in Divorce Action*

A difficult question of the jurisdiction of a trial court in an uncontested divorce action was presented to the Court of Appeals of Cuyahoga County in *Whitelaw v. Whitelaw*,<sup>42</sup> and it was decided by a divided court; it is this writer's opinion that the dissenting judge was correct in his view of the case.

Plaintiff wife sued defendant husband for divorce. The husband was not found within the jurisdiction, and constructive service was had upon him. The plaintiff had in her possession two insurance policies issued to the husband on his life by an insurance company. She filed a *supplemental* petition stating this fact and the fact that she had been and was continuing to pay the premiums thereon; made the insurance company a party defendant; and in addition to her prayer for divorce asked that the court award to her all right, title and interest in and to said contracts of insurance be-

<sup>37</sup> OHIO REV. CODE § 2305.10 (OHIO GEN. CODE § 11224-1).

<sup>38</sup> OHIO REV. CODE § 2703.20 (OHIO GEN. CODE § 6308-1).

<sup>39</sup> *Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E.2d 680 (1950).

<sup>40</sup> *Couts v. Rose*, 152 Ohio St. 485, 90 N.E.2d 139 (1950); *Commonwealth Loan Co. v. Firestone*, 148 Ohio St. 133, 73 N.E.2d 501 (1947).

<sup>41</sup> 47 Ohio St. 225, 24 N.E. 493 (1890).

<sup>42</sup> 65 Ohio L. Abs. 11, 113 N.E.2d 105 (App. 1952).

longing to her husband. The insurance company defended on the ground that the court had no jurisdiction to award to plaintiff the relief prayed for by her with respect to the insurance policies, in the absence of any personal jurisdiction over the husband.

The common pleas court found that it did have jurisdiction to award the husband's interest in the policies to the plaintiff wife. Upon appeal by the insurance company the court of appeals, one judge vigorously dissenting, reversed and entered final judgment for the insurance company. The majority of the court of appeals distinguished *Benner v. Benner*<sup>43</sup> and *Reed v. Reed*,<sup>44</sup> in which "real or personal" property was before the court, on the basis that the policies were only evidence of the term of the contract, a mere contract right, not a symbol of property, and because the policies each contained a provision that only the insured was entitled to obtain any cash surrender value or exercise any other right under the policy.

The dissenting opinion relied upon the case of *Cleveland & Buffalo Transit Co. v. Beeman*,<sup>45</sup> in which it was held in an almost identical fact situation that certificates of stock in a corporation might be allowed to the wife as alimony and an order made upon the corporation directing it to transfer the certificates of stock to her, and upon *Pennington v. Fourth Nat. Bank of Cincinnati*,<sup>46</sup> in which an absent husband's bank account was ordered paid to plaintiff wife.

It is true that there is a factual difference between real property and tangible personal property on the one hand and intangible personality on the other. But it seems to this writer that there is no material legal difference between certificates of stock in a corporation and a policy of insurance, and that if anything, a cash surrender value of an insurance policy is both in fact and in the eyes of the law more tangible and susceptible of judicial administration than is the owner's "equity" in a stock certificate. While the problem is certainly not without difficulty, it is the opinion of this writer that the dissent has the better argument in this difficult but highly important case.

### *Service of Process: Defendant Exempt While Attending Criminal Case in Response to Warrant for Arrest*

The Court of Appeals of Cuyahoga County had occasion to pass upon the unusual problem, in *In re Lorok*,<sup>47</sup> of the exemption of an accused in a criminal proceeding from service of civil process. It has long been estab-

<sup>43</sup> 63 Ohio St. 220, 58 N.E. 569 (1900).

<sup>44</sup> 121 Ohio St. 188, 167 N.E. 684 (1929).

<sup>45</sup> 16 Ohio C.C. (N.S.) 112, *aff'd*, 81 Ohio St. 509, 91 N.E. 1126 (1909).

<sup>46</sup> 92 Ohio St. 517, 112 N.E. 1085, *aff'd*, 243 U.S. 269, 37 Sup. Ct. 282 (1917).

<sup>47</sup> 93 Ohio App. 251, 114 N.E.2d 65 (1952).