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# The Range of Process in Ohio

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# *The Range of Process in Ohio*

An Ohio plaintiff who seeks personal judgments against several defendants properly joinable in one action is allowed to determine all liabilities in one action by that policy of the law which seeks to prevent a multiplicity of suits.[1] In an in personam action the law of Ohio also favors the defendant's right to be sued at a place which is convenient to him.[2] This note is primarily concerned with situations wherein it is impossible for the courts to encourage both policies. Such a situation arises when properly joined defendants in an in personam action would, if sued individually, be properly sued in separate counties. When a defendant counterclaims under the Ohio statute[3] against a plaintiff or against another defendant who, if sued individually or separately, would be entitled to be sued in a different county a similar problem is presented.

The Ohio legislature attempted to resolve the problems presented above in Ohio Revised Code Section 2703.04 as follows:

> When the action is rightly brought in any county according to sections 2703.32 to 2703.40, inclusive, of the Revised Code, a summons may be issued to any other county against one or more of the defendants at the plaintiff's request.

## I. Validity of Service Dependent Upon Proper Venue

With respect to the general scope of this topic, the ancillary question of whether the defendant has merely a personal privilege to request that his claim be tried in the proper county, or an absolute right to demand trial there is worthy of special consideration. This question is answered when we determine whether process served on a defendant by a court in the wrong county confers jurisdiction upon it to render a personal judgment against him.[4] Assuming that a particular Ohio common pleas court has jurisdiction

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[1] Meyer v. Cincinnati Street Ry., 157 Ohio St. 38, 104 N.E.2d 173 (1952)

[2] "All actions, other than those mentioned in sections 2307.32 to 2307.38, inclusive, of the Revised Code, must be bought in the county in which a defendant resides or may be summoned. " Ohio Rev. Code § 2307.39. The Ohio Constitution provides that the jurisdiction of the common pleas courts is to be determined by statute. Ohio Const. Art. IV Sec. 4. By the exercise of this power, the legislature may regulate and control the place of trial for civil actions, subject to the limitations imposed by the Ohio and United States Constitutions. Inter-Ins. Exchange of Chicago Motor Club v. Wagstaff, 144 Ohio St. 457, 59 N.E.2d 373 (1945); Allen v. Smith, 84 Ohio St. 283, 95 N.E. 829 (1911) "It is well settled that, in the absence of express constitutional provisions to the contrary, the legislature may regulate, and control the venue in civil actions, subject alone to the limitation that reasonable opportunity must be given for the prosecution and defense thereof." State v. First State Bank, 52 N.D. 231, 249, 202 N.W 391, 398 (1925).

For an example of the Federal Constitution s "commerce clause" being used as a method of controlling the place of trial in civil actions, see 17 Minn. L. Rev. 392.

[3] Ohio Rev. Code § 2309.16.

[4] State *ex rel.* Yett v. Peters, 185 Ore., 350, 203 P.2d 299 (1949); Mutzig v. Hope, 176 Ore. 368, 158 P.2d 110 (1945).

over the subject matter in a particular case,[5] the requisites of a personal judgment may be met either by valid service on the defendant,[6] or by his voluntary appearance.[7] A summons is valid if the defendant must come into court and assert his objection to trial in the wrong county, and if this is the case, the defendant has a mere privilege to be tried in the proper county.[8] It follows that such a summons would be valid if an Ohio common pleas court is a court of statewide jurisdiction for all purposes.[9]

The Ohio courts have indicated that an Ohio common pleas court is not a court of statewide jurisdiction for the purpose of summoning a defendant from another county when the action is brought in the wrong county. Thus, an Ohio appellate court held on a motion to quash service of summons and to vacate an in personam default judgment that the court never acquired jurisdiction of the person of the defendant where the venue was improper and the defendant never made a voluntary appearance, even though personal service was made on the defendant in another county. The service on the defendant was of no more effect than if it had been made on a resident and citizen of another state.[10] The Ohio Supreme Court has not ruled on the extent to which the validity of service is dependent on proper venue; it has, however, indicated that if the place of trial is improper, personal service on a non-resident defendant will be invalid.[11] The question is open in Ohio but it is likely that the Ohio Supreme Court will hold that a defendant has an absolute right to be sued in the proper county.

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[5] "The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace. " OHIO REV. CODE § 2305.01.

[6] OHIO REV. CODE § 2703.08.

[7] OHIO REV. CODE § 2703.09.

[8] Commercial Cas. Ins. Co. v. Consolidated S. Co., 278 U.S. 177 (1929); State *ex rel.* Yett v. Peters, 185 Ore. 350, 203 P.2d 299 (1949); Mutzig v. Hope, 176 Ore. 368, 158 P.2d 110 (1945).

[9] See 20 MINN. L. REV. 617, 622.

[10] Snyder v. Clough, 71 Ohio App. 440, 50 N.E.2d 384 (1942). Kendall v. United States, 12 Pet. 524 (U.S. 1838) (process cannot reach a party beyond the territorial jurisdiction of the court); Cross v. Armstrong, 44 Ohio St. 613, 10 N.E. 160 (1887).

[11] A motion to set aside a default judgment on the grounds that the court had no jurisdiction over the defendant, because the place of trial had been determined by the residence of an alleged joint defendant who had been dismissed from the action came before the Ohio Supreme Court in *Maloney v. Callahan,* 127 Ohio St. 387, 188 N.E. 656 (1933). Denying the motion on other grounds the court stated: "If it were apparent from the records that there was no joint liability on the part of Isaacs, the resident defendant, and his dismissal was for that reason, we would be required to hold that the trial court was without jurisdiction to render valid judgment against Maloney, the non-resident defendant." Another Ohio Supreme Court dictum declares: "Neither a railroad company, nor other corporation, nor even a natural person, is bound to appear in an action in obedience to a summons served out of the

## II. IN PERSONAM ACTIONS

Where a personal judgment is sought against a non-resident of the county in which an action is brought, an Ohio common pleas court can acquire jurisdiction over the person of a defendant or defendants in another county within the state. A condition precedent to the proper service of summons on the non-resident defendant is that the action be "rightly brought" in that county.[12] The Ohio courts have consistently held that the correct interpretation of "rightly brought" is "successfully prosecuted against the resident defendant" where the place of trial is determined by the residence of one of the defendants.[13] Th effects of this position produce a procedural maze which offers many pitfalls for the unwary.

Since a defendant will be properly before the court if he voluntarily appears in the action against him, a non-resident defendant must, if he appears in the action, make his objection to the improper place of trial and resulting improper service of summons at his earliest opportunity.[14] A general ap-

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prescribed county." Railroad Co. v. Morey, 47 Ohio St. 207, 210, 24 N.E. 269 (1890).

[12] OHIO REV. CODE § 2703.04. Bennett v. Sinclair Refining Co., 144 Ohio St. 139, 57 N.E.2d 776 (1945) (when a tort action is properly commenced in any county a summons may be issued to any other county against one or more defendants); Inter-Ins. Exchange of Chicago Motor Club v. Wagstaff, 144 Ohio St. 457, 59 N.E.2d 373 (1945); Gorey v. Black, 100 Ohio St. 73, 125 N.E. 126 (1919) (a voluntary appearance by one of the defendants who are subsequently joined is sufficient to establish the venue in the county of suit); Thomson v. Massie, 41 Ohio St. 307 (1884) (even though at the time of the commencement of the action no judgment could be rendered by reason of pending bankruptcy against the defendant whose residence established the venue, properly joined defendants may be served in another county).

[13] Glass v. Tolley Transfer Co., 112 N.E.2d 818 (Ohio App. 1952); Stark County Agricultural Soc y v. Brenner, 122 Ohio St. 560, 172 N.E.2d 659 (1930); Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N.E. 565 (1927); Allen v. Miller, 11 Ohio St. 374 (1860); Dunn v. Hazlett, 4 Ohio St. 435 (1854). *Cf.* Adams v. Trepanier Lumber Co., 117 Ohio St. 298, 302, 158 N.E. 541, 542 (1927); Drea v. Carrington, 32 Ohio St. 595, 602 (1877); Hoffman v. Johnson, 86 Ohio App. 19, 28, 36 N.E.2d 184, 189 (1941); State *ex rel.* McGann v. Evatt, Tax Comm'r, 63 Ohio App. 564, 567, 27 N.E.2d 490, 491 (1940); Uthoff v. DuBrie, 62 Ohio App. 285, 287, 23 N.E.2d 854, 855 (1939) But see Maloney v. Callahan, 127 Ohio St. 387, 393, 188 N.E. 656, 658 (1933) (dismissal of one defendant held not to require the trial court to dismiss the action as against alleged joint defendant who was a non-resident of the county of suit where the place of trial had been determined by the residence of the alleged joint defendant who had been dismissed). See also 12 NEB. L. BULL. 341 (1933-34) (the identical rule seems to prevail in Nebraska).

[14] Foster v. Borne, 63 Ohio St. 169, 58 N.E. 66 (1900); Long v. Newhouse, 57 Ohio St. 348, 49 N.E. 79 (1897); Mason v. Alexander, 44 Ohio St. 318, 7 N.E. 435 (1886); Handy v. Ins. Co., 37 Ohio St. 366 (1881); Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951); *accord,* Berger v. Nobel, 81 Ga. App. 759, 59 S.E.2d 761 (1950); Davis v. Waycross Coca Cola Bottling Co., 60 Ga. App. 390, 3 S.E.2d 863 (1939); King v. Ingels, 121 Kan. 790, 250 Pac. 306 (1926); *Cf.,* Evans v. Garrett, 72 Ga. App. 846, 35 S.E.2d 387 (1945) (non-resident defendants demurred to the petition but in the demurrer expressly reversed their right to insist on a plea to the jurisdiction over their persons, and it was held that they had not vol-

pearance before this objection at his earliest opportunity will preclude the non-resident defendant from urging it at a later time.[15]

If the petition shows on its face that the action is brought in the wrong county, the defendant must make his objection in the form of a motion to quash service.[16] Where the place of trial has been determined by the residence of one of the defendants, the petition may show that the defendants are improperly joined in the action, and thus the court should sustain such a motion.[17] If the court sustains the defendant's motion to quash, it is held to be a final order, and the plaintiff may appeal directly from this decision.[18] Some Ohio decisions do hold that the sustaining of a motion to quash is not a final order.[19] These cases, however, are limited to situations where the ruling on the motion does not dispose of the proceeding.[20] The right of the plaintiff to appeal from the order of a lower court sustaining a motion to quash by the defendant has not been questioned in Ohio where the ground for the motion is that the action has been brought in the wrong county.[21] The Ohio courts have been very liberal in allowing the defendant to include matters seemingly going to the merits of the plaintiff's claim in his motion to quash on this ground.[22] Even a general denial to an amended petition has

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untarily submitted their persons to the jurisdiction of the court). *Contra,* Baltimore & O. Ry. v. Hollenberger, 76 Ohio St. 177, 81 N.E. 184 (1907).

[15] See note 14 *supra.*

[16] Although there do not seem to be any direct holdings that a motion to quash is the proper method of objecting to improper venue, many Ohio cases inferentially sustain such a right. Loftus v. Pennsylvania Ry., 107 Ohio St. 352, 140 N.E. 94 (1923), *error dis'd* 266 U.S. 639, 45 Sup. Ct. 97 (1925).

[17] Canton Provisions Co. v. Gaudner, 130 Ohio St. 43, 196 N.E. 634 (1935); Smith v. Johnson, 57 Ohio St. 486, 49 N.E. 693 (1898); Mercer v. Ohio Fuel Gas Co., 50 Ohio L. Abs. 219, 79 N.E.2d 685 (Ohio App. 1947); Hoffman v. Johnston, 68 Ohio App. 19, 36 N.E.2d 184 (1941); State *ex. rel.* McGann v. Evatt, Tax Comm'r, 63 Ohio App. 564, 27 N.E.2d 490 (1940); Trotter v. Trotter, 55 Ohio App. 198, 9 N.E.2d 297 (1936); *accord* Jackson v. Norton, 75 Ga. App. 650, 44 S.E.2d 269 (1948); Schoonover v. Clark, 155 Kan. 835, 130 P.2d 619 (1942); *cf.* Drea v. Carrington, 32 Ohio St. 595, 602 (1877).

[18] See note 21 *infra.*

[19] See note 20 *infra.*

[20] State *ex rel.* McCale v. Industrial Comm'r, 132 Ohio St. 13, 4 N.E.2d 263 (1936); Schenck v. Union Service Co., 60 Ohio L. Abs. 201, 101 N.E.2d 12 (Ohio App. 1949) (quashing of service of summons because of irregularity of process as distinguished from attacking the jurisdiction of the court is not a final order); Doan v. Stout, 67 Ohio App. 359, 36 N.E.2d 827 (1941).

[21] Gorey v. Black, 100 Ohio St. 73, 125 N.E. 126 (1919); Allen v. Smith, 84 Ohio St. 283, 95 N.E. 829 (1911); Drea v. Carrington, 32 Ohio St. 595 (1877); Uthoff v. Dubrie, 62 Ohio App. 285, 23 N.E.2d 854 (1939); *cf.* Urschel v. Hannin, 25 Ohio App. 368, 371, 158 N.E. 550, 552 (1928) (dictum).

[22] Drea v. Carrington, 32 Ohio St. 595 (1877) (motion to quash supported by an answer alleging that these defendants were only secondarily liable and were therefore not properly before the court). *Contra,* King v. Ingels, 121 Kan. 790, 250 Pac. 306 (1926) (defendants filed a motion to quash and stated that the petition failed

been treated as a motion to quash when the plaintiff was allowed to amend so as to proceed against the non-resident defendant alone where the place of trial had been determined by the residence of a dismissed defendant.[23] The overruling of a motion to quash is not a final order and thus not appealable in Ohio.[24] An erroneous ruling on the non-resident defendant's motion to quash will not prejudice the non-resident defendant's position, for if he has made his objection at his earliest opportunity and properly preserved it throughout the proceeding he will be able to urge it again on appeal.[25]

Where the place of trial is determined by the residence of one of the defendants, a general denial may properly be used to put in issue the fact of improper service of process where the evidence in the case establishes the non-liability of the resident defendant, so that if judgment is rendered against the non-resident defendant alone, he may at that time make his objection to the improper service of process on the ground that the action was brought in the wrong county.[26] If, however, a judgment favorable to the non-resident defendant is rendered, it is not an erroneous judgment, and the defendant may rely on it if he is later sued on the same cause of action.[27] This follows logically from an early ruling of the Ohio Supreme Court that the plaintiff is entitled to a jury trial on the issues raised in his petition and in a motion to quash supported by an answer denying the allegations of the peition which tended to establish the proper service of summons on the non-resident defendants.[28] If the plaintiff has a right to have these issues tried by a jury, then the only way in which a defendant can be protected in his right to be sued in the proper county is to allow him to assert his objection when the improper venue becomes apparent.

The plaintiff, always has the right to submit the issues to the jury so that if the facts essential to the proper venue in that county, and thus essential to the proper service of summons on the non-resident defendant, are found adverse to the plaintiff, the jury should go no further but should render its verdict on that issue alone.[29] Such a decision would not be res judicata on the issue of the non-resident's liability on the merits.[30] In reality, it seems

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to state a cause of action against the resident defendants; the court held that by this act they had generally appeared)

[23] Dunn v. Hazlett, 4 Ohio St. 435 (1854).

[24] 2 OHIO JUR. 2d 610.

[25] Fostoria v. Fox, 60 Ohio St. 340, 54 N.E. 370 (1899).

[26] Glass v. Transfer Co., 159 Ohio St. 505, 112 N.E.2d 823 (1953); Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N.E. 565 (1927); Dunn v. Hazlett, 4 Ohio St. 435 (1854).

[27] Fostoria v. Fox, 60 Ohio St. 340, 54 N.E. 370 (1899).

[28] Drea v. Carrington, 32 Ohio St. 595 (1877).

[29] Bucurenciu v. Ramba, 117 Ohio St. 546, 552, 159 N.E. 565, 567 (1927).

[30] See 23 OHIO JUR. 1003.

the courts are indulging in a fiction to preserve the right of a defendant to be sued in the proper county. For, in contemplation of the settled rules of law, a judgment rendered where there is neither service of process, nor a voluntary general appearance is void, and cannot be enforced by the plaintiff,[31] or pleaded as res judicata by a defendant.[32] Therefore, since a special appearance in these cases is impossible until the non-liability of the resident defendant has been established by the judgment of the court, the Ohio courts have allowed a special appearance at this stage, even though the non-resident defendant previously had merely inferentially contested the place of trial.[33]

In Ohio, even though the non-resident defendant has filed a motion for a new trial after the rendition of a judgment for the resident defendant, and before he has specifically raised the issue of improper venue by an objection to the jurisdiction of the court over his person, he may still prevail on this issue.[34] The result seems questionable because a motion for a new trial does invoke a ruling of the court on the merits of the case, and constitutes a general appearance which should preclude the non-resident defendant from thereafter resisting the exercise of jurisdiction over his person.[35]

The effect of the dismissal of the defendant upon whose residence the place of trial has been determined concerning the position thereafter of the non-resident defendant in the action is not entirely clear in Ohio. In *Stark County Agricultural Soc'y v. Brenner*,[36] the court concluded:

> It is unimportant to determine whether or not there was a joint enterprise, and therefore a joint liability between the veterans [the resident defendant] and De Michele [the non-resident defendant], because the veterans were voluntarily dismissed from the case, with prejudice, and are therefore definitely discharged from liability for the injury. [37]
>
> The Veterans of Foreign Wars having been volunarily dismissed from the case, and it having been found by this court that there is no liability on the part of the Agricultural Society, it follows that there can be no such joint liability as would justify the maintenance of an action against De Michele in this county other than that of his residence. [38]

[31] Hayes v. Kentucky Joint Stock Land Bank of Lexington, 125 Ohio St. 359, 181 N.E. 542 (1932).

[32] Oil Well Supply Co. v. Koen, 64 Ohio St. 422, 60 N.E. 603 (1901).

[33] The Ohio courts have taken the position that when the non-resident defendant answers with a general denial, he puts in issue the fact of whether service was properly made on him. Glass v. Transfer Co., 159 Ohio St. 505, 112 N.E.2d 823 (1953); Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N.E. 565 (1927); Dunn v. Hazlett, 4 Ohio St. 435 (1854).

[34] Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N.E. 565 (1927).

[35] In *Berger v. Nobel*, 81 Ga. App. 759, 59 S.E.2d 761 (1950) it was held that by a motion for a new trial defendant admits the jurisdiction of the court over his person.

[36] 122 Ohio St. 560, 172 N.E. 659 (1930).

[37] *Id.* at 566, 172 N.E. at 661.

[38] *Id.* at 573, 172 N.E. at 663.

Three years later the Ohio Supreme Court, without citing the *Stark* case, upheld a default judgment against a non-resident defendant, stating:

> However the bare fact that Isaacs [the resident defendant] was dismissed from the action does not of itself justify us in saying that the trial court thereby lost jurisdiction over the non-resident defendant; the records failing to show that Isaacs could not have been legally included in the judgments. In other words the fact of his dismissal standing alone does not establish his non-liability. [39]

Thus, the court in the *Stark* case takes the position that either the dismissal of the defendant upon whose residence the place of trial has been determined will always result in the dismissal of the non-resident defendant upon proper motion, or that an affirmative showing of the liability of this resident defendant is a requisite for dismissal of the non-resident defendant. Whereas, the court in the *Maloney* case asserts unequivocally that the record must affirmatively show the non-liability of the resident defendant before the impropriety of the place of trial as to the non-resident defendant will be established.

Authority from other states on the effect of the dismissal of the defendant upon whose residence the place of trial has been determined on the position thereafter of the non-resident defendant is conflicting.[40] In Ohio, the requirement of an affirmative showing of liability would be more consistent with the policy of the decisions requiring successful prosecution of the proceeding against the resident defendant.[41]

If the non-liability of the resident defendant is established for the first time on appeal, Ohio takes the position that this is enough to preclude consideration of the question of the liability of the non-resident defendant in that proceeding.[42] The only conclusion consistent with the Ohio position

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[39] Maloney v. Callahan, 127 Ohio St. 387, 393, 188 N.E. 656, 658 (1933).

[40] In the following cases the dismissal of the resident defendant resulted in dismissal of the non-resident defendant upon proper motion. Volok v. McCarter Truck Line, 156 Kan. 128, 131 P.2d 713 (1942); Meyers v. Kansas, O. & G. Ry., 200 Okla. 676, 199 P.2d 600 (1948); Delaney v. Atterbury, 189 Okla. 361, 116 P.2d 968 (1941); Pine v. Superior Court of Seminole Cty., Okla., 39 P.2d 530 (1934). In the following cases the dismissal of the resident defendant did not result in dismissal of the non-resident defendant even though he properly objected to the place of trial. Pike County Coal Co. v. Farrabee, 79 Ind. App. 210, 137 N.E. 680 (1923); Henderson v. Nat. Mut. Cas. Co., 168 Kan. 674, 215 P.2d 225 (1950).

[41] The policy of these decisions in Ohio is expressed in *Allen v. Miller*, 11 Ohio St. 374, 379 (1860) as follows: "It seems to us that the words 'defendant' and 'defendants' as employed in those sections of the code to which reference has been made, in so far as they effect the question of jurisdiction, must be held to mean not nominal defendants merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought; and that to hold otherwise, would open wide a door to all sorts of colorable devices, to defeat the policy of the law in respect to jurisdiction — devices difficult to detect, but oppressive and wrongful in their practical operation."

[42] Stark County Agricultural Soc y v. Brenner, 122 Ohio St. 560, 172 N.E. 659

requiring successful prosecution against the defendant upon whose residence the place of trial has been determined before a personal judgment can be rendered against the non-resident defendant, would be a dismissal of the action against the non-resident defendant because he objected when his first opportunity presented itself on appeal.

The opportunity to take advantage of a finding of non-liability of the defendant upon whose residence the place of trial has been determined by a proper objection may be lost by the non-resident defendant before the chance presents itself. Motions in the nature of demurrers to the court's jurisdiction over the subject matter,[43] or motions requiring the plaintiff separately to state and number his causes of action, and to strike certain matter from the petition,[44] or joint answers which purport to limit the appearance to questions of jurisdiction, but which also contest the validity of the joinder,[45] have all been held by Ohio courts to preclude an objection to the improper place of trial by the non-resident defendant based on the non-liability of the resident defendant. But, even an answer denying the merits of the plaintiff's claim, which also asserts the fact of the non-residence of the defendant will not preclude that defendant's later motion for dismissal on the basis of the improper place of trial when it appears that the resident defendant is a mere nominal defendant.[46]

An appeal on questions of law and fact, as distinguished from an appeal on questions of law,[47] will also defeat the right of the non-resident defendant to rely on the finding of non-liability of the resident defendant.[48] This is a result of the nature of an appeal on questions of law and fact in Ohio. The appellate court considers the entire record *de novo,* and as such, the taking of the appeal on questions of law and fact or causing notice of such an appeal to be entered on the record is a general appearance.[49] On the other hand, an appeal on questions of law to a higher court, objecting to a judgment of the lower court on the issue of jurisdiction of the person is not a general appearance because an appeal on questions of law is a new proceeding.[50]

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(1930); Smith v. Johnson, 57 Ohio St. 486, 49 N.E. 693 (1898); *accord,* Adams v. Trepanier Lumber Co., 117 Ohio St. 298, 158 N.E. 541 (1927); Fostoria v. Fox, 60 Ohio St. 340, 54 N.E. 370 (1899).

[43] Handy v. Ins. Co., 37 Ohio St. 366 (1881).

[44] Long v. Newhouse, 57 Ohio St. 348, 49 N.E. 79 (1897).

[45] Davis v. Moraine Center, Inc., 8 Ohio L. Abs. 575 (Ohio App. 1930).

[46] Allen v. Miller, 11 Ohio St. 374 (1860).

[47] OHIO REV. CODE § 2505.01.

[48] Foster v. Borne, 63 Ohio St. 169, 58 N.E. 66 (1900); Mason v. Alexander, 44 Ohio St. 318, 7 N.E. 435 (1886); Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951).

[49] See note 48 *supra.*

[50] See note 48 *supra.*

## III. COUNTERCLAIMS

Ohio Revised Code Section 2309.16 provides for counterclaims by one or more defendants against one or more plaintiffs or one or more defendants in certain instances. Depending on the circumstances of the particular case, a new party either "may"[51] or "shall"[52] be made by summons to answer the counterclaim. Two Ohio appellate courts have reached contrary results on the question whether summons may issue on counterclaims against a new party and a personal judgment rendered if that new party is a resident of another county and properly objects to the place of trial. One appellate court upheld the validity of a summons issued to another county upon a counterclaim[53] while the other held that this was not the bringing of an action within the terms of Ohio's non-resident service statute[54] so as to authorize the service of summons on an additional party in another county.[55]

The Ohio Supreme Court has not as yet ruled on the propriety of the issuance of a summons to another county on a counterclaim. However, in *Gorey v. Black*,[56] the Ohio Supreme Court held that even though the statute providing for the place of trial for actions arising out of automobile collisions did not specifically provide for service of summons on non-residents of the county in which suit was brought, the general non-resident service statute[57] was sufficient authority for the service of summons on a non-resident of the county of the forum since the action was "rightly brought" in that county.

Authority in other states seems to support the validity of a summons issued to another county within the state on a counterclaim where the counterclaim provisions are similar to those of Ohio and no constitutional limitations intervene.[58]

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[51] OHIO REV. CODE § 2309.17.

[52] OHIO REV. CODE § 2309.18.

[53] Aldrich v. Friedman, 18 Ohio App. 302 (1923).

[54] OHIO REV. CODE § 2703.04.

[55] Borling v. Huber, 31 Ohio L. Abs. 273 (Ohio App. 1939).

[56] 100 Ohio St. 73, 125 N.E. 126 (1919).

[57] See note 54 *supra*.

[58] For the right of a tortfeasor in a jurisdiction which has adopted the Uniform Contribution Among Tortfeasors Act to seek contribution against a joint tortfeasor in an action pending in a county which would not be the proper venue of an independent action against such tortfeasor, see Lacewell v. Griffin, 214 Ark. 909, 219 S.W.2d 227 (1949). This case holds that an action between the tortfeasors is a third party action growing out of the first action, which had been properly brought in that county; and the third party action necessarily continued in the same venue as that of the original action. Hence, by analogy, a counterclaim should be considered to be a third party action growing out of the first action, thus justifying issuance of summons against a new party beyond the territorial limits of the county of the forum.

## IV THE GOOD FAITH RULE

In Ohio, the good faith of the plaintiff in joining several defendants in one action is another factor in the plaintiff's favor on the issue whether the action was "rightly brought" in that county so as to authorize the issuance of summons to another county against a non-resident defendant when the evidence in the proceeding establishes the non-liability of the defendant whose residence determined the place of trial.[59] However, several jurisdictions have interpreted "rightly brought" to mean "brought in good faith against the resident defendant" where the place of trial is determined by the residence of one of the defendants.[60] The result of this position is that even though the evidence does establish the non-liability of the defendant upon whose residence the place of trial was determined, the place of trial as to the non-resident defendant in that action will not be improper if the plaintiff joined the several defendants and chose the place of trial in good faith.

Some of the cases purporting to follow this "good faith rule" are of questionable authority. In several the court would have been justified in holding that the non-resident defendant appeared generally, thus obviating the necessity for consideration of the issue of improper venue.[61] In one,[62] the plaintiff dismissed her action against the resident defendant, apparently because of a settlement and proceeded against the non-resident defendant. The opinion, although apparently basing its conclusion on the issue of good faith commencement is also consistent with the result found in cases requiring some affirmative showing of non-liability on the part of the resident defendant before the dismissal will enable the non-resident defendant to

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[59] Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951).

[60] Pike County Coal Co. v. Farrabee, 79 Ind. App. 210, 137 N.E. 680 (1923); Henderson v. Nat. Mut. Cas. Co., 168 Kan. 674, 215 P.2d 225 (1950); Volock v. McCarter Truck Line, 156 Kan. 128, 131 P.2d 713 (1942); Schoonover v. Clark, 155 Kan. 835, 130 P.2d 619 (1942); Verdigris River and Drainage Dist. No. 1 v. City of Coffeyville, 149 Kan. 191, 86 P.2d 592 (1939); King v. Ingels, 121 Kan. 790, 250 Pac. 306 (1926); Van Buren v. Pratt, 123 Kan. 581, 256 Pac. 1006 (1923); Farmers Grain & Supply Co. v. Atchison, T. & S. F. Ry., 120 Kan. 21, 245 Pac. 734 (1926); Hawkins v. Brown, 78 Kan. 284, 97 Pac. 479 (1908); *Cf.* Moore v. Gore, 191 Tenn. 14, 21, 231 S.W.2d 361, 364 (1950); Achy v. Holland, 76 Tenn. 510, 512 (1881).

[61] Farmers Grain & Supply Co. v. Atchison, T. & S. F. Ry., 120 Kan. 21, 245 Pac. 734 (1926) (an answer pleading to the merits of the action before its motion to the improper place of trial was filed); Van Buren v. Pratt, 123 Kan. 581, 256 Pac. 1006 (1923) (the non-resident defendant filed a demurrer on the ground that the court had no jurisdiction over the subject matter before the motion to quash was acted upon by the court); Hawkins v. Brown, 78 Kan. 284, 97 Pac. 479 (1908) (included a motion in the nature of a demurrer to the jurisdiction of the court over the subject matter in a motion to quash on the basis of improper venue).

[62] Pike County Coal Co. v. Farrabee, 79 Ind. App. 210, 137 N.E. 680 (1923).