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Civil Procedure

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Four other cases¹² reported during 1954 which also warrant consideration in this article are discussed in the article on Criminal Law and Procedure in this survey.

CLARE D. RUSSELL

CIVIL PROCEDURE

Commencement of Action to Acquire Jurisdiction in Divorce

The concept of the commencement of an action has always been at least two-fold in Ohio. If counsel is considering it from the standpoint of tolling the applicable statute of limitations he knows that he must file his petition and perfect service thereon within sixty days after the running of the statute.¹ If, however, he is not concerned with the statute of limitations, but only with having a firm basis for supporting an attachment or injunction, he need only have filed his petition and caused summons to issue thereon.² A failure to serve the summons does not invalidate the attachment made after summons was issued.³

The Ohio Supreme Court clearly established a third (and apparently highly important) category in *Gebelo v. Gebelo*.⁴ The husband lived in Ashtabula County, and his wife lived in Cuyahoga County. The husband commenced an action in divorce in Ashtabula County, this probably being the only proper venue for *his* action,⁵ on October 30, 1951. Several obviously good faith efforts on his part to serve wife in Cuyahoga County proved unsuccessful. The wife apparently learned of the pendency of her husband's action, for she went into Ashtabula County and obtained leave to plead on December 11, 1951.⁶ She did not follow this action with any further appearance or pleading. The husband then commenced service by publication on January 2, 1952, but before the six weeks of publication could be completed, the wife filed a divorce petition against her husband in Cuyahoga County on January 18, 1952, and obtained service on him in Ashtabula County on January 23, 1952. The question therefore became one whether the Ashtabula County or Cuyahoga County court of common pleas, courts of concurrent and coexistent jurisdiction, had jurisdiction.

The supreme court held, Judge Hart vigorously and cogently dissenting, that the Cuyahoga County court had first obtained jurisdiction, to the ex-

¹² *State v. Robinson*, 161 Ohio St. 213, 118 N.E.2d 517 (1954); *Village of Avon v. Popa*, 96 Ohio App. 147, 121 N.E.2d 254 (1954); *Ex parte Karnes*, 67 Ohio L. Abs. 455, 121 N.E.2d 159 (Ohio App. 1954); *State v. Sellers*, 66 Ohio L. Abs. 535, 118 N.E.2d 193 (Ohio App. 1954).

clusion of the Ashtabula County court. Commencement of publication, it said, was not completion of service, nor did the wife's leave to plead confer jurisdiction on the Ashtabula court. Since the Cuyahoga court first *completed* service, it obtained jurisdiction.

The dissenting opinion conceded that at the time the wife commenced her action in Cuyahoga County the court had not yet acquired that degree of jurisdiction which would have enabled it to render a final judgment or decree. But, as it carefully pointed out, even in statute of limitation situations, service commenced prior to the running of the statute but completed after the running is held to date back to the time when it was instituted, and in Ohio this is specifically provided by statute⁷ in instances of service by publication. Likewise, while the majority opinion in effect holds that divorce is not a civil action when it holds that a divorce action is not commenced merely by filing a petition and causing summons to issue thereon,⁸ the provisions of Chapter 3 (Divorce and Alimony), Division VII, Title IV, Part Third of the Ohio General Code contained no express statutory provision with respect to the commencement of a divorce or alimony action, thus, in effect, relegating a litigant to the Code of Civil Procedure.⁹

On the other hand, it was provided under the Ohio General Code¹⁰ and is provided under the Ohio Revised Code¹¹ that publication in divorce cases is to be as in ordinary civil actions. Furthermore, as the dissent points out, had the husband in his lawsuit obtained an attachment on any of his wife's property orders of an in rem nature could have been made by the husband's court immediately upon the filing of the petition and issuance of summons, and before any service was completed.¹² This writer is tempted

¹ OHIO REV. CODE § 2305.17.

² OHIO REV. CODE §§ 2703.01, 2703.02, 2715.01.

³ Rorick v. Devon Syndicate, Ltd., 307 U.S. 299, 306, 59 Sup. Ct. 877, 881 (1939); *Ex parte* Cattell, 146 Ohio St. 112, 64 N.E.2d 416 (1945).

⁴ 160 Ohio St. 243, 116 N.E.2d 7 (1953); for another case in which the same issue arose but did not require adjudication, see *Baxter v. Baxter*, 115 N.E.2d 857 (Ohio App. 1950).

⁵ OHIO REV. CODE § 3105.03.

⁶ Why she did so is not stated, since there is no rule day in a divorce action. OHIO REV. CODE § 3105.09. As the court pointed out in the majority opinion, her action made no difference insofar as the Common Pleas Court of Ashtabula County was concerned, since in a divorce action in Ohio there must be service of summons on the defendant. See *Tucker v. Tucker*, 143 Ohio St. 658, 56 N.E.2d 202 (1944).

⁷ OHIO REV. CODE § 2305.17.

⁸ OHIO REV. CODE § 2703.01.

⁹ Nor do the equivalent provisions of the Ohio Revised Code Sections 3105.05, 3105.06.

¹⁰ OHIO GEN. CODE § 8003-7.

¹¹ See note 9, *supra*.

¹² Citing *Benner v. Benner*, 63 Ohio St. 220, 58 N.E. 569 (1900) and *Pennington*

to ask how the Ohio Supreme Court would have solved the dilemma if such attachment had been secured by the husband on his wife's property before she obtained service on him in her action.

Commencement of Action to Toll Statute of Limitations

In last year's summary of developments in the field of Civil Procedure,¹³ mention was made of the decision of the Cuyahoga County court of appeals in the case of *Kossuth v. Bear*.¹⁴ During 1954 the case was carried to the supreme court and decided by it, with a different result from that reached in the lower appellate court.

Plaintiff was injured as a result of defendant's negligence in an automobile accident in Lorain County in May of 1948, at which time defendant lived in Lorain County. Defendant moved to Cuyahoga County in August or September of 1949. For some unexplained reason plaintiff had filed an action against defendant in Cuyahoga County in April of 1949, giving defendant's address as "Cleveland, Ohio." No service was ever made on defendant in this action within the time provided by the applicable statute of limitations.¹⁵ An amended petition was filed months after the statute ran, alleging absence from the state and concealment of himself by the defendant, by this time a resident of California, and service was obtained upon the Secretary of State under the provisions of the non-resident motorists statute.¹⁶

Likewise, the plaintiff filed a similar action in Lorain County on the day before the running of the applicable statute of limitations.¹⁷ Service was attempted but was never made in this action, and the action was "dismissed without prejudice" by the court after the statute of limitations had run.

The Cuyahoga County case was tried on the basis of the service of the amended petition on the Secretary of State, and judgment went for plaintiff. Defendant appealed. The court of appeals ruled¹⁸ favorably for defendant on his contentions that his temporary absences from the State of Ohio during the running of the statute had not served to toll it and that on the

v. Fourth National Bank of Cincinnati, 11 Ohio N.P. (N.S.) 620, *aff'd*, 92 Ohio St. 517, 112 N.E. 1085 (1915).

¹³ See 5 WEST. RES. L. REV. 247 (1954).

¹⁴ 161 Ohio St. 378, 119 N.E.2d 285 (1954).

¹⁵ OHIO REV. CODE § 2305.10.

¹⁶ OHIO REV. CODE § 2703.20.

¹⁷ Of course, by this time the defendant was living in Cuyahoga County, although under the applicable venue provisions service could have issued to and been made in Cuyahoga out of Lorain. See OHIO REV. CODE §§ 4515.01 and 2703.04.

¹⁸ 96 Ohio App. 219, 114 N.E.2d 80 (1953).

evidence presented he could not have been held to have been concealing himself. But on defendant's contention that the failure of plaintiff to obtain service on defendant in the Cuyahoga County action until after the the statute of limitations had fully run was a bar to the filing and prosecution of the amended petition, the court of appeals ruled against defendant. In other words, the appellate court held that plaintiff *had* commenced an action within the statute of limitations and had failed "otherwise than upon the merits."

The defendant appealed further and finally prevailed. The supreme court¹⁹ pointed out that while Section 2305.19, Ohio Revised Code provides that

In an action commenced, or attempted to be commenced, if in due time . . . the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year. . . .

The words ". . . commenced, or attempted to be commenced. . ." must be read in connection with Section 2305.17, Ohio Revised Code.²⁰ This section clearly shows that "commenced" and "attempt to commence" are met only by the accomplishment of valid service either within the running of the statute or, at the latest, within sixty days after it has run. Since in this case no service was ever made until after the sixty-day period which may be tacked on to the end of a statute of limitations, no action was ever commenced or attempted to be commenced within the meaning of the saving statute. Thus did the supreme court settle at last a vexing question, often approached by it but never quite reached, since its previous decisions were always made without the necessity of ruling on the identical fact situation.²¹

Similarly, the court of appeals for Madison County held, in *Geyer v. New York Central R.R. Co.*,²² that when a petition is filed and a precipe issued within the statute of limitations, but summons is not issued until after the statute has run, the defendant may properly plead the bar of the statute. While questioning whether the onus of requiring the clerk of courts

¹⁹ See note 14, *supra*.

²⁰ "An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive, and section 1307.08 of the Revised Code, as to each defendant, at the date of the summons which is served on him or on a codefendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action is commenced at the date of the first publication, if it is regularly made.

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."

²¹ *Ross v. Willett*, 54 Ohio St. 150, 42 N.E. 697 (1896); *Baltimore & Ohio Railroad Co. v. Ambach*, 55 Ohio St. 553, 45 N.E. 719 (1896); *McLarren v. Myers*, 87 Ohio St. 88, 100 N.E. 121 (1912).

²² 95 Ohio App. 539, 121 N.E.2d 62 (1953).

to do his duty promptly ought to be placed upon the plaintiff, the court felt itself bound by prior adjudications to the same effect by the supreme court.²³ It likewise held, in what is admittedly obiter dictum, that the statutory provisions²⁴ for service of process upon a railroad company are exclusive, and that even assuming that defendant railroad's principal office was outside of the State of Ohio, the statute of limitations applicable to plaintiff's cause of action was not suspended by such "absence" from the state, since such a defendant *must* be served under the specific statutory provisions therefor.²⁵

Venue of Actions — Suit to Cancel Mechanics' Lien and to Quiet Title Against Same

In the case of *Gustafson v. Buckley*²⁶ the Ohio Supreme Court ruled that an action to cancel a mechanics' lien filed against realty, and to quiet the title to such property as against such lien is not an action for the recovery of real property or of an estate or interest therein, or for its partition, or for the foreclosure of a mortgage, or for the *enforcement* of a lien or other incumbrances or charge thereon. Therefore, in the face of objections to venue, such action cannot be brought in the county where the property lies under the provisions of Ohio Revised Code Section 2307.32, but must be brought where the lien claimant resides or may be found, under the provisions of Section 2307.39. This case is discussed more fully in a note in a prior issue of the Western Reserve Law Review.²⁷

Real Party in Interest Suit for Damages by Bailee of Automobile

At common law a bailee or other person having possession could sue for trespass or in trover for damages to or wrongful withholding of an article of personalty injured by a third person. The question was raised in *Petismeyer v. Omar Baking Co.*²⁸ whether, in the light of the statutory provision that

No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed

²³ See note 20, *supra*.

²⁴ OHIO REV. CODE § 2703.10.

²⁵ The court distinguished on their facts the cases of *Commonwealth Loan Co., Inc., v. Firestone*, 148 Ohio St. 133, 73 N.E.2d 501 (1947) and *Couts v. Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950). Compare also the discussion of a somewhat similar problem at 5 WEST. RES. L. REV. 243 (1954).

²⁶ 161 Ohio St. 160, 118 N.E.2d 403 (1954).

²⁷ 6 WEST. RES. L. REV. 89 (1954).

²⁸ 95 Ohio App. 37, 117 N.E.2d 184 (1952).

of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate issued. . . ,²⁹

a wife may prosecute an action for damages to an automobile to which her husband has such certificate but which was driven by her at the time the damage was incurred. The court of appeals for Franklin County decided that the statute does not abrogate the common law right of a bailee to maintain such an action. It distinguished *Mielke v. Leeberson*,³⁰ on the ground that in an action for damages to the automobile no question of title in the strict sense of the word was involved, since the plaintiff was not contesting with the defendant over the ownership of the chattel, nor did the matter at issue concern the sale, disposal, mortgage or encumbrance of the vehicle. The court pointed out that the Code provision could hardly be extended to prevent a garage owner or mechanic from asserting a lien or claim upon an automobile which he had stored or repaired, although he would necessarily not require its owner to give him a certificate of title before doing so, and followed a recent decision of the Summit County court of appeals in a case which allowed the establishment of a purchase money resulting trust on a motor vehicle without the showing of the required certificate.³¹

Original Jurisdiction of the Supreme Court in Mandamus

The Ohio Constitution³² confers upon the Supreme Court original jurisdiction in (among other extraordinary remedies) mandamus, and provides that "No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court." Of course, a concurrent jurisdiction exists in courts of appeals³³ and common pleas.³⁴

There can be little doubt that parties litigant have taken great and perhaps undue advantage of this grant of jurisdiction, in resorting in the first instance to the highest court in cases which could probably be just as well settled at a lower level, and further, in treating as actions in mandamus many cases which are really nothing more than proper subjects for mandatory injunction in equity,³⁵ but which, of course, would not as injunction

²⁹ OHIO REV. CODE § 4505.04.

³⁰ 150 Ohio St. 528, 83 N.E.2d 209 (1948); 4 WEST. RES. L. REV. 251 (1953).

³¹ *Douglas v. Hubbard*, 91 Ohio App. 200, 107 N.E.2d 884 (1951).

³² OHIO CONST. Art. IV, Sec. 2.

³³ OHIO CONST. Art. IV, Sec. 6.

³⁴ OHIO CONST. Art. IV, Sec. 3; OHIO REV. CODE § 2731.02.

³⁵ Except for the fact that they are brought against a public official to enforce the performance of a non-discretionary duty imposed by law.

suits receive as of right the trial preference to which the extraordinary remedies are entitled.³⁶

The supreme court, in *State ex rel. Allied Wheel Products, Inc., v. Industrial Commission*³⁷ took a deep breath and laid down the rule that it would simply decline to grant the writ, in the exercise of its discretion, when the purpose of the relator is primarily the enforcement or protection of purely private rights. This will, the court feels, avoid both a clogging of its docket and prevent the gaining of a preferential position thereon; it will not prejudice applicants for the writ, since the court, in declining to issue writs in such instances, refuses to pass on the merits of the case, and thus no *res judicata* problem will present itself. The relator will simply be remitted to a lower court.

The decision has aroused strong criticism,³⁸ particularly for its reliance upon an Illinois case³⁹ which is based upon a constitutional provision *not* containing the prohibition against any limitation upon invoking the jurisdiction. This writer is of the opinion that a statutory redefinition of the scope of the writ of mandamus might be both appropriate and also a solution to the inconsistency between the constitutional provisions and the supreme court's position.

Jurisdiction of Courts — Service by Publication to Impose Constructive Trust on Shares of A Domestic Corporation

In *Silberman v. Silberman*⁴⁰ the court of appeals for Cuyahoga County had before it a question of first instance in Ohio, whether jurisdiction could be acquired by Ohio courts to impose a constructive trust upon shares of stock, not themselves before the court, by service by publication upon their non-resident owners.

The facts are not made entirely clear by the opinion, but it appears that, having in his possession \$45,000 belonging jointly to himself, his brother and sisters, plaintiff made an agreement with them whereby said funds were deposited with a third party for the purpose of purchasing two separate parcels of realty (the situs of which is not set forth in the opinion). The third party caused two corporations to be formed (apparently in the State of Ohio; both corporations had statutory agents in Ohio who were personally served in the action brought by plaintiff) which received by

³⁶ OHIO REV. CODE § 2503.37.

³⁷ 161 Ohio St. 555, 120 N.E.2d 421 (1954).

³⁸ See 25 CLEVE. BAR ASS'N J. 187 (1955).

³⁹ *People ex rel. Kocourek v. City of Chicago*, 193 Ill. 507, 62 N.E.179 (1901).

⁴⁰ 121 N.E.2d 838 (Ohio App. 1954).

deed conveyances of the parcels of realty for the benefit of plaintiff and his brother and sisters. All of the shares of the stock in said corporations were, in violation of the agreement, issued to the brother and sisters of plaintiff, and, apparently, were at the time of action in their hands outside the State of Ohio.

Plaintiff sought a decree to impress a constructive trust in his favor upon a proportionate number of shares of stock in the corporations. He obtained personal service within the state of Ohio upon the corporations and some of the individual defendants. As to two non-resident individual defendants he properly secured service by publication, but without any attachment of any property in Ohio belonging to them. Plaintiff relied upon that provision of the Code⁴¹ permitting service by publication in an action relating to real or personal property in this state, when a non-resident defendant or a foreign corporation has or claims a lien thereon or some interest therein, or when it is sought to exclude him in whole or in part from an interest therein. The foreign defendants appeared specially and moved to quash; the trial court granted the motions, but the court of appeals reversed.

The question was one whether, for the purposes of jurisdiction in a case of this type, the personalty (shares of stock) was in Ohio, where the corporation was before the court, or elsewhere at the residence of the shareholders. Relying on an often cited United States Supreme Court case⁴² and a similar though not identical federal jurisdictional statute,⁴³ the court of appeals held that the stock was actually personal property in Ohio, the "habitation or domicile of the company . . . [which is the creature of] . . . the state that created it," and that the certificates of stock in the hands of the absent defendants "were only evidence of the ownership of the shares."

This case should also be compared with that of *Whitelaw v. Whitelaw*,⁴⁴ discussed in last year's survey,⁴⁵ which involved the jurisdiction of an Ohio court to adjudicate with respect to an insurance policy, the physical indicia of which were before the court, the defendant insured being absent and served only by publication.

Trial by Jury in Declaratory Judgment Action in Probate Court

A decedent's estate was under administration in probate court. After the executor had been appointed and qualified, plaintiff, one of several

⁴¹ OHIO REV. CODE § 2703.14 (1).

⁴² *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 Sup. Ct. 559 (1900).

⁴³ Now 28 U.S.C. § 1655.

⁴⁴ 65 Ohio L. Abs. 11, 113 N.E.2d 105 (Ohio App. 1952).

⁴⁵ 5 WEST. RES. L. REV. 245 (1954).

beneficiaries under decedent's will, filed an entirely separate and independent action in probate court, praying for a declaratory judgment with respect to her rights in certain items of personalty given to her by decedent a few days prior to his death. Her petition asserted no rights because of or arising under decedent's will. The defendants were the executor and decedent's next of kin and the other legatees under his will. Defendants demanded a jury trial. The probate court ruled that defendants were not entitled to such a trial, but was reversed by the appellate court. The supreme court affirmed the appellate court,⁴⁶ but qualified the position of both.

Relying upon long established authority to the effect that the action for a declaratory judgment is a creature of statute, enacted since the adoption of the Ohio Constitution, and therefore not an action in which a trial by jury is a matter of absolute right, the supreme court held that (1) a declaratory judgment is a "civil action"; (2) factual issues in actions under the Declaratory Judgments Act⁴⁷ are to be tried and determined in the same manner as similar issues in other civil actions in the court in which the proceeding is pending;⁴⁸ (3) the determination of questions of fact in proceedings in probate court is to be made by the probate judge unless in his discretion he orders them to be tried by a jury or referred;⁴⁹ (4) the general provisions of the Code relating to trial in civil cases of issues of law on the one hand and of fact on the other hand⁵⁰ do not apply to trial in the probate court.

Therefore, said the supreme court, it was the function of the probate judge in his discretion to grant or refuse such a trial. Significantly, and explicitly, the supreme court did not decide whether the probate court had jurisdiction of the type of case posed by plaintiff's petition, saying that it was not challenged and not, therefore, before the reviewing court. This writer is moved to wonder, whether, since want of jurisdiction over the subject matter is never subject to waiver by the parties, it was not incumbent upon the supreme court to raise and settle this issue, *sua sponte*.

Wrongful Death Action All Beneficiaries Dead by Time of Trial

In *Danis, Adm'r v. New York Central R.R.*⁵¹ the Supreme Court had before it the question whether it should overrule a long established prin-

⁴⁶ *Renee v. Sanders*, 160 Ohio St. 279, 116 N.E.2d 420 (1953).

⁴⁷ OHIO REV. CODE §§ 2721.01 to 2721.15, incl.

⁴⁸ OHIO REV. CODE § 2721.10.

⁴⁹ OHIO REV. CODE § 2101.31.

⁵⁰ OHIO REV. CODE § 2311.04.

⁵¹ 160 Ohio St. 474, 117 N.E.2d 39 (1954).

ciple of law in Ohio;⁵² whether in an action for wrongful death, filed while persons who were eligible participants in a recovery under the act⁵³ were still living, but which came on for trial at a time when all such eligible participants had died, could continue to be prosecuted.

The court refused to overrule the established judicial precedent, saying that after forty-four years of acquiescence in it, such changes must come from the legislature.⁵⁴

Joinder of Parties and Service in Will Contests

Counsel filing actions to contest the admission to probate of a will in Ohio are faced with at least two technical obstacles. The statute of limitations is short—six months after admission of the will to probate,⁵⁵ and all devisees, legatees and heirs of the testator, "other interested persons" and the executor or administrator must be made parties.⁵⁶ The requirement as to parties is jurisdictional.⁵⁷

The court of appeals for Cuyahoga County had before it, in *Gravier v. Gluth*,⁵⁸ an example of the difficulties which the combination of the two requirements poses for counsel for contestants. Within the time prescribed by statute three heirs at law who chose to be contestants filed an action, naming as defendants and serving with process the executrix and the sole named legatee, and naming also as defendants, but issuing no process for, three other heirs at law. Months later, and long after the limitation had expired, the original plaintiffs obtained leave to amend the caption of their petition and did so by writing in ink into the caption thereof the names of the three originally named but unserved parties defendant as parties plaintiff, together with nine other (apparently newly discovered) heirs at law of the testator as parties plaintiff. No amendment was made of the body of the petition.

Upon proper motion by the defendants legatee and executrix the trial court dismissed the petition for want of jurisdiction. The court of appeals, one judge dissenting, affirmed.

The unhappy original plaintiffs argued that the provisions of the Code to the effect that

⁵² Doyle v. B. & O. R. Co., 81 Ohio St. 184, 90 N.E. 165 (1909).

⁵³ OHIO REV. CODE § 2125.02.

⁵⁴ See 5 WEST. RES. L. REV. 426 (1954) wherein the principal case is extensively discussed.

⁵⁵ OHIO REV. CODE §§ 2107.23, 2741.09.

⁵⁶ OHIO REV. CODE § 2741.02.

⁵⁷ Peters v. Moore, 154 Ohio St. 177, 93 N.E.2d 683 (1950).

⁵⁸ 119 N.E.2d 663 (Ohio App. 1954).