1957

Civil Procedure

Samuel Sonenfield

It was conceded by the parties that during a fourth period of time as Assistant Director of the Department of Liquor Control respondent was not actively engaged in the practice of law.

The court distinguished its holding in 1955 that a referee of the Cleveland Municipal Court had not been actively engaged in the practice of law on the ground that "since a Judge of the Cleveland Municipal Court in the performance of his judicial duties can not, by statutory definition, be considered as practicing law, then neither can services, as a referee, in assisting a judge in the performance of judicial duties be considered the practice of law."[23]

SAMUEL SONENFIELD

CIVIL PROCEDURE

Prohibition — Capacity to Bring Action — Availability of Another Remedy

Last year's Survey[1] considered the unsuccessful effort of a plaintiff as a taxpayer to enjoin the Ohio State Racing Commission from expending funds or issuing permits for the conducting of horse racing in Ohio.[2] In that case it was held that in the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds, unless he has some special interest therein by reason of which his own property rights are placed in jeopardy. Since petitioner had not alleged that respondent was expending funds collected from taxpayers generally, and did not claim to be among those special taxpayers from whom Commission revenues were collected, and could point to no special authorization by statute to him to bring the action, he could not succeed.

The same petitioner (and others) then brought an original action for a writ of prohibition in the Supreme Court[3] against the Commission to prohibit it from authorizing, permitting or issuing any permits for conducting horse racing for a stake, purse or award, with pari-mutuel or certificate type of wagering, within the state. The principal basis of their contention was the constitutional prohibition[4] against lotteries of any kind, and the alleged invalidity on that account of the statutory authority of respondent Commission.[5]

The Supreme Court sustained respondent's demurrer to the petition, and two judges dissented.

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[23] State *ex rel.* Flynn v. Board of Elections, 164 Ohio St. 193, 201, 129 N.E.2d 623, 628 (1955); 1955 Survey, 7 WEST. RES. L. REV. 231 (1956)

Conceding, apparently *arguendo* the quasi-judicial character of respondent[6] the court held, without specifying its reasons in any detail other than to refer to the opinion in the 1954 injunction case, that petitioner was not entitled to the extraordinary remedy of prohibition because he had an adequate remedy at law by way of an injunction.

The key seems to lie in the fact that the principal petitioner might have succeeded in the original injunction action had he alleged some "special interest" in the thing sought to be enjoined. Judge Taft asks, without attempting to answer his own question, whether petitioner could have held his position in court with an allegation that he was a "citizen." He believes that a majority of the court would have refused petitioner an injunction even if he had so characterized himself. He recognizes petitioner's dilemma, but can get only one other judge to recognize it, or, perhaps, to be willing to do anything about it.

It seems to this writer that a valid and important legal question is presented. There is serious doubt, in view of the constitutional prohibition, of the validity of the legislation creating the Racing Commission, and of the pari-mutuel system.[7] It ought to be resolved, whatever the motives of this petitioner may be in seeking its resolution. It is safe to hazard a guess that if he or someone else[8] alleges that he is a patron of the tote-machines, and therefore does have an interest in the expenditure by the Commission of revenues received therefrom, he will be told that he has unclean hands and to go sit down in the back of the court room. In his petition for a writ of prohibition he was careful to join as co-relators the wife and children of a man who, it was alleged, had lost money by wagering at one of the race tracks for which a permit had been given by the respondent Commission. Of course, if relator lost because of the existence of an adequate remedy, then they, too, had an adequate remedy in injunction. They could perhaps succeed on the ground of reasonable apprehension of injury to their rights by alleging that if

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[1] 1955 Survey, 7 WEST. RES. L. REV. 237 (1956).

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

[3] State *ex rel.* Masterson v. Ohio State Racing Comm'n, 164 Ohio St. 312, 130 N.E. 2d 829 (1955).

[4] OHIO CONST. art. XV, § 6.

[5] OHIO REV. CODE §§ 3769.01 *et seq.*

[6] See the remarks of Judge Taft, dissenting, at 164 Ohio St. 312, 317, 130 N.E.2d 829, 832 (1955).

[7] This is no moral judgment — only a legal one!

[8] Quaere: is petitioner now precluded by *res judicata* from filing another injunction action in common pleas in which he sues as a citizen or as an "interested" taxpayer? He *could* have made those allegations in his first injunction petition.

permits are granted the husband will put some more of the family's sustenance on some horse and lose it.

Perhaps the next Survey will have Chapter 3 of this Ohio Judicial Derby.

Counterclaims — Certification by Municipal Court to Common Pleas Court

At early common law counterclaims were not permitted,[9] but this rule has been changed, and all systems of code pleading make substantial provision for them in the interest of avoiding unnecessary litigation.[10]

A correlative problem occasioned by the recognition of counterclaims is that which occurs when the plaintiff's claim is below the minimum jurisdictional amount of a court of limited pecuniary jurisdiction, but the defendant's claim, while the proper subject of a counterclaim, exceeds that amount.

Since 1951 the Municipal Court Act[11] has made specific provision for the certification by the municipal court of the entire controversy to the common pleas court.[12] An unusual exception came to light in *Mann v. Sexton.*[13] Plaintiff sued in the Municipal Court of Dayton for forcible entry and detainer with a second cause of action for a judgment for rent due. Defendant answered and filed a counterclaim for reformation of his lease, with a second cause of action for money damages in which the amount prayed for exceeded the $2,000.00 jurisdictional limit of the court. The municipal court certified the entire matter to the common pleas court, which promptly on motion, remanded the entire proceedings back to municipal court for the reason that the common pleas court does not have jurisdiction of forcible entry cases.[14]

Joinder of Parties United in Interest

Questions of proper joinder of parties are not commonly raised today, as contrasted with their incidence at common law and in the early days of the codes, but a rather unusual one did arise in the period covered by this Survey.[15] The situation was brought about by a lease executed by

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[9] CLARK, CODE PLEADING 633, 634 (2d ed. 1947)

[10] CLARK, *op cit. supra* note 9, at 635-638.

[11] OHIO REV. CODE c. 1901.

[12] OHIO REV. CODE § 1901.22 (E) Note, however, that the rule appears to be different with respect to counterclaims filed in the Cleveland Municipal Court. See OHIO REV. CODE § 1901.18 (I) (1)

[13] 99 Ohio App. 47, 130 N.E.2d 866 (1955)

[14] Clarkson Coal Mining Co. v. United Mine Workers of America, 23 F.2d 208, 210 (1927).

[15] Cleveland Trust Company v. Hart, 100 Ohio App. 66, 131 N.E.2d 841 (1955).

five tenants in common, three of whom owned undivided one-fourth interests and two of whom owned undivided one-eighth interests in the leased real estate, to one of their members and a third person. Action was brought by lessors for unpaid rent under the lease. Two of the five lessors, one of whom was also one of the lessees, refused to join as plaintiffs and were made parties defendant.[16]

The defendants contended that the one tenant who occupied the position of both a lessor and lessee, who refused to join as a plaintiff, and who consequently was made a defendant, could not possibly be "united in interest with those who seek a judgment against her."

The Court of Appeals of Summit County properly and promptly gave short shrift to this scholastic argument, pointing out that this particular reluctant party had acquired two separate and distinct statuses by virtue of her positions in the contract, and that while in that of lessee her interests might have been in opposition to those as lessor, she was certainly united in interest with her fellow-lessors in the fulfillment of the contract, regardless of the identity of the lessees. Therefore the joinder statute was properly invoked.

Disqualification of Common Pleas Judges for Bias — Mandamus Held Not to Enforce

The Supreme Court had before it in 1956[17] a question decided in a per curiam opinion in 1922[18] — whether upon the filing of an affidavit of bias, prejudice or other cause for disqualification of a common pleas judge, by a party to an action pending before him, his removal by the Chief Justice is mandatory or whether the fact of such disqualification is to be inquired into by the Chief Justice.

The Supreme Court reaffirmed its earlier ruling that the filing of the affidavit does not bring about automatic removal, but that the Chief Justice has the duty of passing upon the fact of such disqualification, which determination will not be overruled by his fellow members except for abuse by him of his discretion. Judges Taft and Stewart dissented, arguing cogently that the disqualification is or ought to be mandatory.

Difficulty arises because of an apparent conflict between two pro-

[16] OHIO REV. CODE § 2307.20: "Parties who are united in interest must be joined as plaintiffs or defendants. If the consent of one who should be joined as plaintiff cannot be obtained and that fact is stated in the petition, he may be made a defendant."

[17] State *ex rel.* Pratt v. Weygandt, Chief Justice, 164 Ohio St. 463, 132 N.E.2d 191 (1956).

[18] State *ex rel.* Chute v. Marshall, 105 Ohio St. 320, 137 N.E. 870 (1922)

[19] "When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against,

visions of the Revised Code. Section 2701.03[19] enacted in 1913 pursuant to constitutional authority[20] might appear to be in conflict with section 141.08,[21] enacted in 1917 The majority held that although sections 2701.03 and 141.08 were enacted at different times they are *in pari materia,* and must be read and construed together; the Chief Justice has in fact for over 40 years been hearing and passing upon such affidavits of bias and prejudice; to construe the language of section 2701.03 as requiring automatic disqualification of a judge upon the mere filing of an affidavit would raise a serious question of constitutionality, in view of the injunction of Article IV, section 3 that the Chief Justice *shall pass upon* the disqualification; and the desirability of an interpretation which would permit disqualification of a judge upon the mere filing of an affidavit of prejudice, no matter how groundless, is doubtful.

Limitation of Actions — Credit on Note Does Not Toll Statute on Mortgage

Defendant bought real estate from plaintiffs in 1923 and gave to plaintiffs a purchase-money mortgage securing a note for the balance of the purchase price. The note was due in 1926 and was not paid. The last credit thereon was on August 6, 1932.

Plaintiffs instituted an action in ejectment against defendant on August 3, 1953. This was more than 15 years after the last payment on the note,[22] but just short of the running of the 21-year statute on recovery of title to or possession of real property.[23]

The plaintiff contended that the credit of August 6, 1932 on the note

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a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, setting forth the fact of such interest, bias, prejudice or disqualification, the clerk of the court of common pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the chief justice of the supreme court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. The judge so assigned shall try such matter or cause. "

[20] OHIO CONST. art IV, § 3: "Any judge of the court of common pleas may temporarily preside and hold court in any county; and until the general assembly shall make adequate provision therefor, the chief justice of the supreme court of the state shall pass upon the disqualification or disability of any judge of the court of common pleas, and he may assign any judge to any county to hold court therein."

[21] "The chief justice of the supreme court shall receive his actual and necessary expenses incurred while performing his duties under the law and the constitution in determining the disqualification or disability of any judge of the court of common pleas or of the court of appeals. "

[22] OHIO REV. CODE § 2305.06.

[23] OHIO REV. CODE § 2305.04.

had the effect of tolling the statute on recovery of possession of realty. The Supreme Court pointed out[24] that the only exceptions to the statute of limitation on this action are minority, unsoundness of mind and imprisonment; that none of them applied here; that the provisions of Revised Code section 2305.08[25] will toll the statute on the money obligation but not on the real property right, and that it does not by implication toll the running of any other statute. Even if it did toll the running of the statute on the real property right, it would toll it only to the extent of 15 years, which would have required plaintiff to have sued in 1947

Limitation of Actions — General Appearance and Failure to Raise Defense After Bar

In *Russell v. Drake*[26] the Supreme Court had before it the question whether a defendant, improperly served with summons while a minor, could, after reaching majority during the pendency of the action, cure such a defect in service by voluntarily entering his general appearance and pleading to the merits. The court unanimously held that he could.

Within the period provided by the applicable statute of limitations, plaintiff commenced an action to recover damages for personal injury from defendant, a minor. Summons was served upon him at his usual place of residence. The fact of his minority was apparently unknown to the plaintiff, and no service was attempted or made upon his guardian, father or other proper person.[27]

During his minority, and after this defective service upon him, defendant obtained two leaves to plead and then filed a general denial.

Subsequent to attaining his majority he filed a motion for a continuance of the case for 30 days. Thereafter and for the first time, he attempted by a special appearance to obtain a dismissal of the action on the ground of want of jurisdiction of the court over his person, because of the defective service of summons, *and* because the cause of action had been barred by the statute of limitations. It should be noted that the request for and grant of the 30-day continuance took place three days after the running of the statute.

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[24] Eastwood v. Capel, 164 Ohio St. 506, 132 N.E.2d 202 (1956). This case is also discussed in the MORTGAGES section, *infra.*

[25] "If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, (author's note: *15* years) after such payment, asknowledgment or promise."

[26] 164 Ohio St. 520, 132 N.E.2d 467 (1956)

[27] OHIO REV. CODE § 2703.13.

The Supreme Court held that his motion for a continuance after attaining his majority constituted a general appearance, since it was an act other than an objection to the court's jurisdiction over his person. This cured the defective service of process at a time when he was capable of waiving his rights.

The court then decided that his motion to dismiss, even if treated as a special demurrer, was not sufficient to raise the bar of the statute, since the defect complained of did not appear on the face of the petition.[28] Defendant never amended his answer to set up the bar as a special, affirmative defense, but went to trial on his general denial. He therefore waived it.

The following three rules may be deduced from the case:

1. A minor may, after attaining his majority, by a general appearance waive a defective service of process made upon him during minority.
2. The running of the statute of limitations against the obligation of the minor may be waived by him after his majority is reached, by his failure to raise it in the two methods provided.
3. The courts will not treat filing dates or docket entries as defects appearing on the face of pleadings so as to permit the special demurrer of limitation of actions to be raised with respect to them.

Limitation of Actions — Commencement Of Action and Service on a Minor

If the statute of limitations is correctly raised, it will avail a minor defendant. In *Lehman v. Horning*[29] the Court of Appeals for Crawford County held that when the minor defendant in an action for personal injuries was neither named correctly in the petition filed against him, nor served with a summons on an amended petition, for more than two years from the date of the alleged action, no suit had been commenced or attempted to be commenced against him within the time provided by the statute.[30]

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[28] There is a good question whether court will take judicial notice of the filing date and other docket entries as to time, which do not, strictly appear on the face of pleadings, so as to make this special demurrer available. See 36 YALE L. J. 914, 918-21 (1927); but see an inferential notation by the court of the filing date stamp in *Ulmer v. Honeywell*, 113 N.E.2d 143 (Ohio App. 1952).

[29] 100 Ohio App. 19, 135 N.E.2d 475 (1955)

[30] OHIO REV. CODE § 2305.10.

Limitation of Actions — False Arrest And False Imprisonment

The Court of Appeals for Franklin County held in an opinion appearing during the period covered by this Survey[31] that an action for "false arrest" is similar to one for "false imprisonment." Thus the one-year statute of limitations[32] applies to it, rather than the four-year statute[33] for an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, 2305.14 and 1307.08 of the Revised Code. The holding appears correct, for basically false arrest and false imprisonment as causes of action are indistinguishable except in the manner in which they arise.[34]

Executions — May Not be Levied Without Specific Money Judgment

The Supreme Court resolved a question in 1956 which had not previously got beyond lower court level. It held in *Roach v. Roach*[35] that a decree of a divorce court for installment payments for support is not *per se* a judgment upon which an execution may properly issue. The statute providing for the writ of execution must be strictly construed and followed.[36] Strict construction of it requires that such an order, including past due installments, must be reduced to a lump sum judgment, in order to have execution thereon. Judge Taft dissented, urging that the result reached was directly contrary to the Supreme Court's decision in *Piatt v Piatt*.[37]

Sufficient Pleading of "Facts" In A Petition for Divorce

Some lawyers, and particularly those of us who teach pleading and have an honest and chaste love for our mother tongue, are wont to

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[31] Alter v. Paul, 135 N.E.2d 73 (Ohio App. 1955)

[32] OHIO REV. CODE § 2305.11.

[33] OHIO REV. CODE § 2305.09.

[34] For a case involving proper pleading of a cause in false imprisonment (arrest) see *McCoy v. Baer*, 136 N.E.2d 66 (Ohio App. 1955), discussed in this Survey at page 263.

[35] 164 Ohio St. 587, 132 N.E.2d 742 (1956)

[36] OHIO REV. CODE § 2329.09: "The writ of execution against the property of the judgment debtor issuing from a court of record, shall command the officer to whom it is directed, to levy on the goods and chattels of the debtor. *The exact amount of the debt,* damages and costs, *for which the judgment is entered, shall be endorsed* on the execution." (Emphasis supplied).

[37] 9 Ohio 37 (1839).

mourn the death of pleading as a fine art. We would not go back to the common law days of special traverses and the like. But it seems to some of us that too few lawyers in drawing their pleadings today are mindful of the niceties of legal prose.[38] When he was on the common pleas bench in Madison County, Judge Bell showed himself to be a stickler for proper pleading, and did his best to put an end to the pernicious practice of plaintiffs' lawyers in characterizing a state of acts of negligence on the part of the defendant by the custom and expedient, unwarranted though it might have been, of repeating the facts already pleaded and then embroidering them by saying, "The defendant was negligent in the following respects and particulars. "[39]

Since his election to the Supreme Court, Judge Bell has apparently been doing some quiet evangelizing among brethren on that bench, and he is making converts. In *Dansby v. Dansby*[40] the plaintiff's petition for divorce, after alleging the facts of residence and marriage, purported to set out "two causes of action"[41] as follows:

> plaintiff states willful absence of the defendant for one year.
> For her second cause of action plantiff says that the defendant has been guilty of gross neglect of duty.

Defendant filed a motion to require plaintiff to make her petition definite and certain, which motion the trial court overruled. Defendant then demurred to the petition for the reason that it did not state facts sufficient to constitute a cause of action, which demurrer was also overruled.

On appeal the Supreme Court, with Judge Bell writing the unanimous opinion, conceded that this practice among attorneys of simply alleging the statutory grounds in the words of the statute has become prevalent. The court appeared willing to follow precedent at the court of appeals level to the effect that such a statement is good against general demurrer.[42] But it held that such allegations are not sufficient in the face of a motion to require definiteness and certainty.

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[38] For an example of the trap in which a lawyer found himself as a result of his use of the forbidden hybrid general-specific denial, see *Hermanses v. Standard Oil Co.*, 131 N.E.2d 233 (Ohio App. 1955)

[39] See Brown v. Pollard, 112 N.E.2d 692 (Ohio C. P. 1953). If the facts pleaded constitute or may constitute actionable negligence, the judge will so charge the jury. If they do not constitute negligence, then plaintiff's pleading that they do adds nothing to his case and can only prejudice the defendant's rights in the minds of the jury. The code requires the pleading of facts and *not* law. OHIO REV. CODE § 2309.04.

[40] 165 Ohio St. 112, 133 N.E.2d 358, 359 (1956).

[41] Actually these are grounds for divorce, *not* causes of action. See OHIO REV. CODE § 3105.10; Hanna v. Hanna, 114 N.E.2d 133 (Ohio App. 1952)

[42] Seibel v. Seibel, 30 Ohio App. 198, 164 N.E. 648 (1927); Kelley v. Kelley, 74

> A defendant in a divorce case, as in any other case, is entitled to know the facts upon which the action is based. Such an abbreviated and inartistic pleading as the mere statement of statutory grounds does not so advise him and constitutes an open invitation to him to demur or move to make definite and certain. And thus the door is opened to greater justification for the often made criticism of "too much delay in the law."[42a]

The court distinguished *Porter v. Lerch*[43] on the ground that the sufficiency of the evidence and not the pleadings was the issue before it in that case.

To Judge Bell we say, "Long Life!"

Sufficient Pleading in False Imprisonment Action

We do concede that it is sometimes difficult to draw the line between what is a statement of fact and a conclusion of law, and between an ultimate fact and a purely evidentiary one. In *McCoy v. Baer*[44] the Court of Appeals for Franklin County gives us a valuable opinion upon what allegations[45] in an action for false imprisonment are necessary to stand against a general demurrer, together with other authorities so holding.

The Law of the Case

The ghost of "The Law of the Case," which was the subject of comment in the 1955 Survey, was seen again in 1956.[46] It was only a brief glimpse, but enough to convince observers that like Denmark's King, it is "doomed for a certain term to walk the night."[47]

Validity of Judicial Sales — Failure to Comply With Notice to Defendant — Rights of Owner Of Property Sold

When a defendant cannot be served within the bounds of a court's jurisdiction, the law provides the remedy of attachment whereby the

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Ohio App. 225, 57 N.E.2d 791 (1944); Ridgeway v. Ridgeway, 118 N.E.2d 845 (Ohio App. 1954) It should *not* be sufficient. A conclusion of law is *not* a statement of facts.

[42a] Dansby v. Dansby, 165 Ohio St. 112, 114, 133 N.E.2d 358, 360 (1956).

[43] 129 Ohio St. 47, 193 N.E. 766 (1934).

[44] 136 N.E.2d 66 (Ohio App. 1955).

[45] "Plaintiff says that defendant did unlawfully order and procure the arrest of plaintiff by the police of Columbus, Ohio, without warrant of law or any lawful process of any court or tribunal, forcibly and against the will of plaintiff and without reasonable or probable cause, in the presence of divers and sundry good people; that plaintiff was confined in the city prison deprived of her liberty for about two hours before being exonerated from said false charges."

[46] Gottfried v. Yocum, 133 N.E.2d 389, 391 (Ohio App. 1953); See 1955 Survey, 7 WEST. RES. L. REV. 241 (1956).

[47] "Hamlet" I. v. 10.

plaintiff may reach the defendant's property which is found therein, in order that it may in part at least satisfy the plaintiff's personal claims against the defendant.[48] The action is, of course, not changed in its inherent nature by reason of the resort to defendant's property as a means of making up for the inability to reach his person; the action remains one *in personam* in its nature, but a quasi-in-rem jurisdiction over his property is asserted by the court.

One of the problems which arises is that of the nature of the title which a purchaser obtains at sheriff's sale of the goods attached and sold to satisfy the plaintiff's judgment. It seems fairly well settled that he gets no more than the judgment-defendant had to give, as distinguished from the case in which plaintiff's action is one purely *in rem*.[49] As far as the defendant is concerned, however, Ohio statutes attempt to cut off any of his rights once the property comes into the hands, through judicial sale, of a purchaser in good faith.[50]

Not every judicial sale, however regular on its face, will afford this protection to a purchaser against recovery of the property by its former owner when he learns of what has happened in his absence. In *Lenz v. Frank*,[51] involving a foreclosure for delinquent real estate taxes, the sheriff purported to have served the property owner at her usual place of residence, although in fact she had become ill and at the time of attempted residence service was actually living elsewhere. Despite several subsequent transfers of the real estate to other good faith purchasers, and substantial improvements in the property by them, the court permitted the foreclosed owner in an independent, collateral attack[52] on the foreclosure decree to recover the property upon tender of the delinquent taxes, court costs, value of the subsequent improvements and interest. It distinguished *Moor v. Parsons* on the basis that in that case the defendant who had lost his property was seeking to recover it under the provisions of the statutes providing for relief after judgment,[53] and could not get around section 11633, Ohio General Code,[54] whereas Mrs. Lenz had never been before

[48] OHIO REV. CODE §§ 2715.01-2715.56.

[49] Woodruff v. Taylor, 20 Vt. 65 (1847)

[50] OHIO REV. CODE § 2325.03; Moor v. Parsons, 98 Ohio St. 233, 120 N.E. 305 (1918)

[51] 152 Ohio St. 153, 87 N.E.2d 578 (1949)

[52] The Supreme Court erroneously called it a direct attack, on the ground that it was based upon a complete lack of jurisdiction of the original trial court over the person of the defendant, due to the fact that the place where service was left was not her usual place of residence. But see BLACK'S LAW DICTIONARY 327 (4th ed. 1951). It would seem that a direct attack can only be one made in the original case by appeal, error, certiorari or other attempt to set aside the court's judgment or decree.

[53] OHIO REV. CODE §§ 2325.01-2325.22.

[54] Now OHIO REV. CODE § 2325.03.

the court due to want of jurisdiction over her person[55] and was, in effect, not seeking relief under the statutory procedure. In neither case did the sheriff's return or its equivalent, indicate that the defendant was not before the court.

With this lengthy but necessary preliminary explanation, we come to the 1956 case.[56] Plaintiff filed against nonresident defendants an action for declaratory judgment terminating a lease and to recover advance rent paid under the lease. Plaintiff filed an affidavit for service by publication in proper form, but no marked copy thereof was ever mailed to the defendants at the address set forth in the affidavit, nor was any entry that such had been done, as is required by statute,[57] ever filed on the appearance docket. Defendants did not appear and a default judgment was entered against them. Subsequently the lots attached by plaintiff were sold at sheriff's sale *to plaintiff.* It later sold them to a third person, the appellee in the case before the Supreme Court.

The court correctly held that the defendants could appeal, as a final order, the common pleas court's refusal to vacate and set aside the sale of the real estate holding, in effect, that the judgment of the trial court in the first case was *void ab initio,* and not merely voidable, for want of jurisdiction over the *defendants and their property.*

Of course, the decision is only on the appealability of the trial court's judgment in the petition to vacate. But its applicability to the substantive law of jurisdictional requirements cannot be escaped. To the writer it seems to have this result: sections 2325.01 *et seq.* of the Revised Code are coming to be held to apply to and provide for the vacation and modification of judgments which are voidable only, and not to those which are void *ab initio.* Defects in service of process may well render them void *ab initio,* in which case resort to the statutory provisions for relief after judgment is not necessary. A mere motion to quash may suffice. No time limit is *per se* involved, and an innocent purchaser is not protected, even by the record upon which he must almost of necessity rely.[58]

Who May Attack a Judgment Collaterally

In *Plater v. Jefferson*[59] plaintiff, already divorced from defendant,

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[55] Nobody said anything about the fact that a personal judgment may not be rendered in Ohio for delinquent real estate taxes. See 1943 Ops. Att'y Gen. (Ohio) 89.

[56] Lincoln Tavern, Inc. v. Snader, 165 Ohio St. 61, 133 N.E.2d 606 (1956).

[57] OHIO REV. CODE § 2703.16.

[58] In *Lincoln Tavern v. Snader,* the purchaser from the judgment creditor could have by careful checking observed the defect in service as shown by the appearance docket entry. In *Lenz v. Frank* and *Moor v. Parsons* he could not. They were determinable only from evidence dehors *any* court record. See Judge Taft's dissents in *Lenz* and *Lincoln Tavern.*

[59] 136 N.E.2d 111 (Ohio App. 1956).

prayed that a divorce decree obtained by defendant from her previous husband be vacated, and that defendant be restrained from enforcing an alimony order which she had obtained against plaintiff in her divorce action against him. The gist of plaintiff's complaint was that his erstwhile spouse had, while living in a meretricious relationship with him, filed divorce proceedings against her first husband, as part of a fraudulent scheme on her part to be free of husband number one, so as to be able to claim a common law marriage with plaintiff, to sue plaintiff for divorce and alimony and to procure a large alimony award, in all of which defendant apparently succeeded all too well to suit plaintiff.

The Cuyahoga County Court of Appeals correctly held that the judgments complained of were regular on their face, were each entered by a court having jurisdiction of the subject matter of the action and of the parties, were unmodified and unreversed, and not open to attack collaterally. Quoting Freeman on Judgments,[60] the court held that only those strangers who, if the judgments were given full effect, would be prejudiced in regard to some *pre-existing right,* may thus impeach it. Plaintiff had in his petition no allegations which averred prejudice to any rights which he had prior to his wife's divorce from her first husband.[61]

Some Further Problems in Jurisdiction

Settled during 1956,[62] insofar as Ohio is concerned,[63] was the question whether a divorce court of this state which has jurisdiction of the person of the defendant in an original divorce action, wherein the support of minor children is involved, retains jurisdiction over such defendant after a divorce decree and an order for the support of minor children are entered, so as to permit further orders for support to be made against such defendant, even though he has since become a nonresident of the state. In this case a copy of a motion made after term, seeking an order to increase child support, and a notice of the time of hearing of such motion were mailed to the nonresident defendant at his address in another state and were received by him in ample time to be present at the hearing.

Basing its holding on the premises that a court in which a decree of divorce is rendered has continuing jurisdiction even without expressly

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[60] § 319 (5th ed. 1925)

[61] Except, perhaps, not to have married her, and *they* can hardly be said to be prejudiced by enforcement of that judgment.

[62] Van Divort v. Van Divort, 165 Ohio St. 141, 134 N.E.2d 715 (1956), *affirming,* 137 N.E.2d 684 (Ohio App. 1955) The decision is also considered in the DOMESTIC RELATIONS section, *infra.*

[63] Cumulative motions table in 134 N.E.2d indicates rehearing denied.

reserving it, over matters relating to the custody, care and support of minor children of the parties,[64] and that an application to change or modify alimony or support money is but incidental to the original suit and not the institution of a new or original action, the party under a support order is subject to the continuing jurisdiction of the trial court in that regard, "without reference to the place of his residence or further steps to acquire jurisdiction of his person."

If this is true (and it seems that it should be even under our system of separate state jurisdictions) the only remaining question would be that of the due process of the notice.[65] In this instance no express statutory provisions are found, but the Court of Common Pleas of Franklin County had adopted a rule of court "providing for the service of writs or process by mail pursuant to, in accordance with and to the extent permitted by section 11297-1, General Code."[66] The court held that compliance with it and receipt by the husband of actual notice was sufficient.

The same court on the same day also held[67] that a nonresident unmarried mother could maintain bastardy proceedings for the support of her child against a resident putative father, notwithstanding the fact that the child was begotten and born in another state, and that neither child nor mother had ever resided in Ohio. The action is essentially a civil action for a tort of a transitory nature. The statutes giving the right in Ohio to bring the action[68] do not limit that right to a woman resident within the state. The better view is that such proceedings are transitory in their nature. To hold otherwise might make Ohio a refuge for fathers of bastard children.

Similarly, the Court of Appeals of Clark County held that an action arising out of the collision of motor vehicles owned by plaintiff and defendants which occurred within the confines of Wright-Patterson Air Force Base, a federal military reservation, is transitory and may be brought wherever the alleged wrongdoer may be found and jurisdiction obtained.[69]

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[64] Corbett v. Corbett, 123 Ohio St. 76, 174 N.E. 10 (1930).

[65] See Walker v. City of Hutchison, 352 U.S. 112 (1956) and Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950)

[66] Now OHIO REV. CODE § 2703.23.

[67] Yuin v. Hilton, 165 Ohio St. 164, 134 N.E.2d 719 (1956) The case is also discussed in the DOMESTIC RELATIONS section, *infra.*

[68] OHIO REV. CODE §§ 3111.01 *et seq.*

[69] May v. Lyons and Sams, 135 N.E.2d 631 (Ohio App. 1954)

Service of Process — Demand in Garnishment

The Court of Appeals for Trumbull County held in *Strock v. Kojick*[70] that service of a written demand on a judgment debtor in proceedings to garnish earnings, by sending the same to him by ordinary mail was proper. It was received by the debtor in ample time and was proper in form. He contended that this did not comply with the requirements of the statute.[71] The court held that since the United States mail is the agent of the sender this constituted a delivery to the debtor, or a deposit of it at his residence, when he concedes that he did get it.

Procedure in Divorce Cases — Trial Judge Must Hear Entire Case

It has long been held in Ohio[72] that because of the statutory requirement that *the court*[73] of common pleas shall hear any of the causes for divorce charged in the petition, the judge may not refer the issues of fact and law to a referee for findings and decision. In *Perry v Perry*[74] the Court of Appeals for Pickaway County reversed and remanded a case in which Judge Radcliff[75] of Pickaway County heard the plaintiff and several of her witnesses, then stated to counsel that he would be unable to hear the remaining witnesses for a period of about one month. Plaintiff insisted that the hearing be postponed until His Honor could finish the case. Defendant insisted that it be finished at an earlier date. His Honor obliged the wrong party, which resulted in the assignment of a common pleas judge for a neighboring county, who heard the rest of the case. A transcript of the testimony of the witnesses heard by the second judge was made and read by Judge Radcliff and he made the decision and signed the decree.

The court of appeals held, and it must be conceded to be correct, that the second judge had acted only as a referee, that the judge who granted the decree had not personally heard the defendant and many of the witnesses, and that even the consent of the defendant to the procedure could not cure the error.

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[70] 136 N.E.2d 145 (Ohio App. 1955)

[71] OHIO REV. CODE § 1911.40: "Such demand shall be made by delivering such demand to the debtor personally, or by leaving such demand at, or by sending such demand by registered letter to the debtor's usual place of residence."

[72] State *ex rel.* Kleinman v. Cleveland, 118 Ohio St. 536, 161 N.E. 918 (1928)

[73] OHIO REV. CODE § 3105.10.

[74] 100 Ohio App. 15, 135 N.E.2d 427 (1955)

[75] The author of this survey article feels safe in mentioning names, since the author of the error is an old friend from Army days.

A Motion Is Not a Pleading

The Ohio Revised Code provides for only six pleadings.[76] While a court will sometimes construe what the pleader calls a motion as a demurrer if the intent to demur is obvious,[77] it should not recognize it as one of the three fact-stating pleadings. In *Poe v Poe*[78] defendant filed a motion to dismiss plaintiff's divorce petition on the ground that there had been condonation since the filing of plaintiff's petition. The court heard evidence on the motion, over plaintiff's objections, and dismissed plaintiff's petition.

The Court of Appeals for Auglaize County reversed and remanded. Condonation is an affirmative defense in a divorce action and must be affirmatively pleaded.[79] But a motion (in this case not even verified) is not a pleading and cannot ordinarily be used to dispose of the merits of a case.

Venue of Actions Against State Officials

Plaintiff as prosecuting attorney of Fulton County brought an action in its common pleas court against certain state officials, to wit, the Auditor, Treasurer and Director of Finance, alleging in substance numerous overcharges and collections by them and their official predecessors for many years for the support of inmates in state institutions for the feebleminded who had been committed from Fulton County. He also joined as defendants certain officials of Fulton County, to wit, the Treasurer, Auditor and Clerk of Common Pleas Court, on the basis that they would, if not restrained thereform, "issue warrants, pay and permit to be paid further and additional sums of money" from the county funds to the state without receiving credit from the state in the amount of the alleged overcharges.

Defendant state officials appeared specially and moved to quash service of summons upon them on the ground that the statutory venue[80] for such an action against them must be in Franklin County. Plaintiff contended that jurisdiction over the persons of defendant state officials

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[76] § 2309.02 (A) Petition (B) Demurrer thereto (C) Answer (D) Demurrer thereto (E) Reply (F) Demurrer thereto.

[77] For an example, see Plater v. Jefferson, 136 N.E. 2d 111 (Ohio App. 1956), discussed in this Survey at page 265.

[78] 99 Ohio App. 542, 135 N.E. 2d 484 (1954)

[79] Winnard v. Winnard, 62 Ohio App. 351, 23 N.E. 2d 977 (1939).

[80] OHIO REV. CODE § 2307.35: "Actions for the following causes must be brought in the county where the cause of action or part thereof arose; "(B) Against a public officer, for an act done by him in virtue or under color of his office, or for neglect of his official duty. "

had been obtained by virtue of their being codefendants with the mentioned county officers properly summoned and served in Fulton County, by virtue of Revised Code section 2703.04.[81]

The Supreme Court upheld the action of the common pleas court in quashing service of summons. It held that the cause of action against the state officials arose in Franklin County, as that was the county where their official duties were carried on.

> The mere presentation of a statement of claim by a state officer to a public officer of a county for the payment of a claimed debt against the county under an appropriate statute does not constitute a breach of official duty giving rise to a cause of action against the officer within the county to which the demand is sent. We are not dealing with a situation where a state officer is bringing suit against a county or county officer to collect a claimed debt from the county.[82]

Therefore, reasoned the court, since the cause of action arose in Franklin County, it had to be brought there. Section 2703.04, providing for summons to issue to any other county against one or more defendants when an action is once rightly brought, could not apply. The requirements of section 2307.35 confer an absolute right on the state official, of which he may not be deprived.[83] Section 2307.35 is a special statute, applying to public officers and has application in this case, whereas section 2703.04 "is general in its scope and has no application where a defendant is a public officer and is sued as such."[84]

Judges Bell and Matthias dissented, holding that "the propriety of the joinder depends entirely on whether plaintiff can make a case against the local officials; if he cannot, then the case is properly dismissed as to the state officials."[85]

With them the author agrees and begs leave to make two more points: (1) if the wrongful collection by the state officials is the gist of the cause of action, then it would seem that the wrongful payment by the county officials was equally necessary to perfect such a cause, and *that* took place in Fulton County (certainly there are not *separate* causes of action for the *payment and collection*), and (2) section 2703.04, providing for summons issued to another county once action is rightly brought, provides that this may be done when it is rightly brought

[81] "When the action is rightly brought in any county, according to sections 2307.32 to 2307.40, inclusive, of the Revised Code, a summons may be issued to any other county against one or more of the defendants as the plaintiff's request."

[82] State *ex rel.* Barber v. Rhodes, 165 Ohio St. 414,421 136 N.E. 2d 60,65 (1956).

[83] The court intimated that he *could* waive it "without affecting the jurisdiction" (of the subject matter?) 165 Ohio St. 414, 419, 136 N.E.2d 60, 64 (1956).

[84] State *ex rel.* Barber v. Rhodes, 165 Ohio St. 414, 421, 136 N.E. 2d 60, 65 (1956).

[85] *Id.* at 422, 136 N.E.2d at 65.

according to sections 2307.32 to 2307.40, inclusive. Section 2307.35, on which the defendants and the majority of the court relied, falls somewhere in between 2307.32 and 2307.40, inclusive. To this writer the decision appears to be as far out of line as that in *Baltimore & Ohio R.R. v. Hollenberger.*[86] The result is to make this cause of action almost as "local" as were all causes at early common law, and to put an almost jurisdictional aspect on a venue matter.

Other Procedural Matters

In order that this portion of the Survey may not run to excessive lengths, the following brief resume of other noteworthy cases is given, in the hope that if any item catches the reader's eye and deals with a problem which he faces, he may find a helpful authority.

1. While a general demurrer searches the record, upon demurrer to an amended petition it does not search back to defects in the original petition, since that is deemed abandoned by the filing of the amended pleading.[87]

2. While a nonresident who is induced by fraud or artifice to come within the jurisdiction of the court is usually entitled to have service of process upon him in civil actions, made while he is still in the jurisdiction, set aside, not all inducements to enter are necessarily fraudulent. An interesting fact situation in which the motion of a defendant served under such circumstances was denied is found in *Guzzetta v. Guzzetta.*[88]

3. While there is no rule day in an action for divorce, the right of a defendant to file a cross-petition for divorce at trial is one which rests in the sound discretion of the court. It was held in *Sharkey v. Sharkey*[89] that the trial court did not abuse its discretion in refusing the defendant leave to do so.

4. A judgment for plaintiff in an action for personal injuries sustained by him could not be sustained when only eight of the nine jurors who signed the general verdict for him had also signed a special finding as to defendant's negligence, even though a total of eleven jurors had signed the special finding. At least nine of *the same* jurors who agreed to the requested finding of fact finding the defendant guilty of negligence, must agree to and sign the general verdict.[90]

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[86] 76 Ohio St. 179, 81 N.E. 184 (1907) See 11 OHIO ST. L. J. 291 (1950).

[87] Ross v. Cincinnati Transit Co., 136 N.E.2d 760 (Ohio App. 1956).

[88] 137 N.E.2d 419 (Ohio App. 1955).

[89] 137 N.E. 2d 575 (Ohio App. 1955).

[90] Plaster v. Akron Union Passenger Co., 137 N.E. 2d 624 (Ohio App. 1955).