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Civil Procedure

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petents. A system of limited licenses given by the bar under supervision of the courts could insure that only qualified non-lawyer specialists would be permitted to exercise limited lawyer-type functions in a particular field. Such a system would have a two-fold advantage. It would remove any doubt in the public mind as to which specialists are qualified to give advice on matters having a heavy legal content. It would also protect the individual specialist from the uncertain prospect of court action.

While neither the *McCaban* nor the *Battelle* case raises the prospect of an immediate attack on professional non-lawyer specialists, such as certified public accountants in the tax field, for the unauthorized practice of law, an ounce of intelligent prevention would certainly be worth more than the proverbial pound of cure.

SEYMOUR J. SCHAFER

CIVIL PROCEDURE

LIMITATION OF ACTIONS

Probably one of the least to be expected and certainly one of the least to be desired effects of the progress of medicine and surgery in the past fifty years is the increase in actions for malpractice. A public which has come to expect science and medicine to find a cure for everything is increasingly willing to blame the individual practitioner for something when the cure is not forthcoming. The increase in actions for malpractice has already caused nationwide comment.

Malpractice has always been a disfavored action¹ and it carries with it the short statute of limitations which usually attaches to such actions.² Efforts to escape the stringency of this short limitation usually fail.³

In *Corpman v. Boyer*⁴ the husband of the victim of the alleged malpractice by the defendant-surgeon brought an action for damages for medical expenses, loss of consortium and loss of services of his wife. It was filed almost three years after the date upon which any action could have accrued, and the sole question for the supreme court was whether the one-year⁵ or the four-year catch-all tort section applied.⁶

The supreme court held that the action was not one for malpractice.

1. Note, 9 WEST. RES. L. REV. 86 (1957).

2. OHIO REV. CODE § 2305.11.

3. See *Swankowski v. Diethelm*, 129 N.E.2d 182 (Ohio Ct. App. 1953).

4. 171 Ohio St. 233, 169 N.E.2d 14 (1960). See also discussion in *Torts* section, p. 566 *infra*.

5. OHIO REV. CODE § 2305.11.

6. OHIO REV. CODE § 2305.09(D).

The four judges in the majority relied heavily upon *Kraut v. Cleveland Railway*⁷ in which the husband's action (*not* in malpractice) for loss of services and medical expenses arising out of injuries to his wife had been held to be governed by the four-year statute rather than by the two-year statute⁸ governing "bodily injuries." In neither *Kraut* nor *Corpman* was the action one for "bodily injury" or for "malpractice." It was apparently "an injury to the rights of the plaintiff not arising on contract nor [otherwise] enumerated."

There is a vigorous and cogent dissent by Judges Zimmerman, Taft and Herbert, who point out that if plaintiff is going to succeed, he is going to have to prove an act of malpractice against the defendant doctor. This being so, he is by the decision of the majority being given three more years than his wife to sue for what is essentially the same wrongful act, even though an admittedly different legal right has been invaded.

In reaching their decision the majority also relied upon a case decided earlier in the period covered by this survey, while the dissenters were able to their satisfaction to distinguish it. In *Klema v. Saint Elizabeth's Hospital*⁹ the court had decided that where the alleged negligent act of a hospital results in death, the two-year wrongful death limitation,¹⁰ rather than the limitation of the malpractice statute applicable to the decedent, had he lived, applies. The basis of the unanimous court's action in *Klema* was the decision that the wrongful death gave rise to a new and entirely separate cause of action in the personal representative of decedent; for the majority in *Corpman* the same can be said of the husband's action for loss of his wife's services and consortium. For the dissent in *Corpman*, malpractice is not, as is wrongful death, separate from the results to the husband of the victim of that act.

Further Cases On Limitations

*Palmieri v. Abart*¹¹ involved the problem of the "borrowing statute,"¹² by which it is provided that if the laws of the jurisdiction wherein a cause of action arose provide a shorter statute of limitations than does Ohio, the foreign statute shall control when the action is brought in this state. The question for decision was when the foreign statute began to run.

7. 132 Ohio St. 125, 5 N.E.2d 324 (1936). See also discussion in *Torts* section, p. 566 *infra*.

8. OHIO REV. CODE § 2305.10.

9. 170 Ohio St. 519, 166 N.E.2d 765 (1960). See also discussion in *Torts* section, p. 566 *infra*.

10. OHIO REV. CODE § 2125.02.

11. 111 Ohio App. 195, 167 N.E.2d 353 (1960). See also discussion in *Conflict of Laws* section, p. 467 *infra*.

12. OHIO REV. CODE § 2305.20.

Plaintiff was injured by defendant in an automobile accident in West Virginia on February 2, 1958. On October 4, 1958, defendant moved from West Virginia to Ohio. The West Virginia statute of limitations on plaintiff's action ran out on February 2, 1959. Plaintiff commenced an action against defendant, now an Ohio resident, on March 6, 1959. This was within the Ohio statute.¹³

It was conceded that defendant's move from West Virginia to Ohio was in good faith, but that even if it had not been so motivated, the decision must be the same, since borrowing statutes "have been universally construed not to include the borrowing of any of the tolling provisions."¹⁴ The court held that the West Virginia statute of limitations applied, that the statute commenced to run when the cause of action accrued there and that the action was barred in Ohio.

The decision also involved the companion case brought by the husband of the injured woman, against the same defendant, for loss of his wife's services, just as in *Corpman*, previously discussed. But since West Virginia's statute of limitations for bringing actions for loss of services was, at the time of the accident, also one year, the decision was the same as to the husband's cause of action. The Ohio statute borrowed the West Virginia statute as to both, and both were therefore barred.

Failure Otherwise Than On the Merits

Relief from the stringent consequences of the running of the statute of limitations may be obtained in several ways. Of course, the best way is for the plaintiff to commence his action before the statute has run. Occasionally he does so, only to find that for some reason he has miscalculated in his action. Ohio has a statutory provision, section 2305.19, which affords to a plaintiff an extra year if, having commenced or attempted to commence his action within the period provided for it, he fails "otherwise than upon the merits." The question then becomes what is a failure "otherwise than upon the merits"?

In *Cero Realty Corporation v. American Manufacturers Mutual Insurance Company*¹⁵ plaintiff had brought an action against four insurance companies upon policies issued to it by them. It did so within the time provided by the applicable statute of limitations. To this petition and to an amended petition specific demurrers for misjoinder of parties defendant were sustained by the trial court. The amended petition was dismissed by plaintiff without prejudice. Within one year from the date of dismissal of the amended petition the plaintiff filed four separate peti-

13. OHIO REV. CODE § 2305.10.

14. *Palmieri v. Ahart*, 111 Ohio App. 195, 198, 167 N.E.2d 353, 355 (1960).

15. 171 Ohio St. 82, 167 N.E.2d 774 (1960).

tions, one against each insurer, to which each defendant interposed by specific demurrer the objection of the statute of limitations.

The plaintiff claimed the benefit of the saving statute. The issue was whether a voluntary dismissal without prejudice by the plaintiff, without having reached the merits, is a failure otherwise than upon the merits.

The key in Ohio has long been language in *Siegfried v. New York, Lake Erie & Western Railroad*,¹⁶ in which it is said: "A dismissal by the plaintiff involves no action of the court. It is a voluntary withdrawal of his case, and is not a failure in the action."¹⁷ It has been followed or cited with approval by several subsequent decisions of the supreme court.¹⁸

A more recent trend, however, has been to give section 2305.19 a liberal construction in order to accomplish its remedial purpose. In pursuance of this end, the supreme court was able to distinguish *Siegfried* and *Buehrer v. Provident Mutual Life Insurance Company*,¹⁹ on the basis that in neither of them was the dismissal by the plaintiff attributable to any adverse decision by the court; on the contrary, the plaintiff had voluntarily dismissed his action. But, it is submitted, the real key to the supreme court's reasoning lies in its quotation from an annotation²⁰ in which the distinction between voluntary and involuntary nonsuits is said to be not well made: "such a construction of the statute is too narrow, and voluntary as well as involuntary nonsuits are within its beneficent operation."²¹

In all probability *Siegfried* has been overruled, insofar as it attempts to distinguish between voluntary and involuntary nonsuits. Future distinctions will probably turn upon whether the merits have been reached.

On the other hand, this saving statute cannot be used unless an action has been "commenced" within the full meaning of that term. To determine this, reference must be had to the section of the Code which provides that an action is commenced as to each defendant at the date of the summons which is served on him.²²

If a defendant is a minor certain other requirements exist, to wit:

16. 50 Ohio St. 294, 34 N.E. 331 (1893).

17. *Id.* at 297, 34 N.E. at 332.

18. *Moherman v. Nickels*, 140 Ohio St. 450, 457, 45 N.E.2d 405, 409 (1942); *Buehrer v. Provident Mut. Life Ins. Co.*, 123 Ohio St. 264, 272, 175 N.E. 25, 28 (1931); *Welsh v. Pennsylvania Co.*, 53 Ohio St. 670, 44 N.E. 1150 (1895).

19. 123 Ohio St. 264, 175 N.E. 25 (1931).

20. 86 A.L.R. 1048 (1948).

21. *Id.* at 1051; *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 86, 167 N.E.2d 774, 777 (1960).

22. OHIO REV. CODE § 2305.17.

service on him *and* his father, guardian or other person named in the statute.²³

In *Jubasz v. Corson*²⁴ plaintiff sued a minor and his father as joint defendants in a tort action. Plaintiff did not know of the one defendant's minority and did not serve the father as such. Defendants filed a joint answer but did not raise the issue of minority or want of proper service. Subsequent to the running of the statute of limitations plaintiff learned of the true state of affairs, filed an amended petition and obtained proper service on the defendant minor. Defendant minor filed a motion to dismiss.

The supreme court ruled that plaintiff had not even "commenced" the action against the infant defendant, since there was no valid or effective summons made on him within the two-year period. Therefore there was no "failure" of any action which had been commenced. The same result was reached in the case of *Webb v. Chandler* by a court of appeals.²⁵

THE LURE OF LABELS

Three reported decisions appeared during the period covered by this survey which illustrate, to this writer at least, the attraction which easy labels have for lawyers and the dangers which may lurk in their use.

*Morgenstern v. Austin*²⁶ involved an action wherein plaintiff owned a brick warehouse. Defendant owned the contiguous property, upon which were located a dwelling house and shed. Plaintiff alleged that defendant had constructed the shed in violation of the ordinances of the City of Cleveland and in such close proximity to plaintiff's building that children could, and did, crawl from defendant's shed to plaintiff's building, causing damage to it.

Plaintiff conceived the theory of her case against defendant to lie in the area of attractive nuisance, and used both that phrase and other words appropriate thereto in her petition. So far as appears from the *per curiam* opinion, plaintiff proved substantially the facts she alleged in her petition. Defendant's motion for judgment at the end of all the evidence was overruled by the trial court and judgment was entered for plaintiff.

The supreme court reversed and entered final judgment for defendant. The course of reasoning whereby it did so is what is of importance to pleaders.

First of all, said the court, the doctrine of attractive nuisance has

23. OHIO REV. CODE § 2703.13.

24. 171 Ohio St. 218, 168 N.E.2d 491 (1960).

25. 110 Ohio App. 193, 168 N.E.2d 906 (1959).

26. 170 Ohio St. 113, 162 N.E.2d 849 (1959). See also discussion in *Torts* section, p. 571 *infra*.

been repudiated in Ohio.²⁷ Therefore plaintiff cannot recover on that theory, since there is no such "cause of action."

Well and good. But is there *any* theory — *any* cause of action?

It is not the purpose of this article to discuss the whole field of tort law in Ohio. But it seems to this writer that the essence of tort liability is that all torts are made up of a duty owed by defendant to plaintiff, a breach thereof by defendant, proximate causal connection, and damages resulting therefrom. The general test of whether there is a cause of action seems to lie in whether the courts will recognize that to the plaintiff, in all his circumstances as he sets them forth, there is owed a duty by defendant. The specific test should come in the determination of whether this defendant by his particular action or inaction has failed to perform that duty. If the court can answer "yes" to both questions, there must be an actionable situation. The plaintiff may fail of proof upon trial, or the defendant may confess and avoid in one or more ways, but at least, there *is* a cause of action in the abstract.

We should, long since, have ceased to pin labels upon causes of action. The supreme court has recognized this before²⁸ and recognized it in its opinion when it said:

Plaintiff contends, however, that she proved a cause of action in trespass by defendant, and that under our liberal rules of pleading she can plead under one theory and recover under another, if her proof so warrants. While it is true that Ohio does not adhere to the strict rules of pleading required at common law, and that if sufficient facts are proved a plaintiff may recover even though he has mistakenly chosen the wrong theory for his action, he must still allege sufficient facts to establish *some* cause of action.²⁹ (Emphasis added.)

The court then went on to say that plaintiff's reliance, on appeal, on a theory of trespass, was equally fruitless, since her petition negated any trespass or encroachment by defendant. All this is true, and perhaps the court was in the position of trying to field weak grounders hit to it by the plaintiff. At the common law, if plaintiff had had to choose a form of action, her facts would almost indubitably have called for trespass on the case. To this writer, if there was any duty owed by defendant to plaintiff, it lay in an obligation upon the former to foresee that his violation of the ordinances of the City of Cleveland could very likely present a situation which would appeal to the neighborhood's junior Tarzans, and that their emulative exploits would sooner or later place them on plaintiff's skylights, to plaintiff's ultimate damage.

The court devoted a good portion of its opinion to an explanation

27. *Id.* at 115, 162 N.E.2d at 851, citing *Wheeling & L. E. Ry. v. Harvey*, 77 Ohio St. 235, 83 N.E. 66 (1907).

28. *Bacceliari v. Heath*, 158 Ohio St. 481, 110 N.E.2d 130 (1953).

29. *Morgenstern v. Austin*, 170 Ohio St. 113, 115, 162 N.E.2d 849, 851 (1959).

to plaintiff that she should have asked leave under section 2309.58 of the Revised Code to amend her pleading to conform to the evidence. She did not do so, and since this right to amend is, like God, helpful to those who help themselves, it availed her nothing here.

This writer in all due respect suggests that the court is in danger of falling into its own trap. If the facts do not amount to a trespass, as the word is used in its common-law sense, then a request to amend to call her action one in trespass could not and should not save her case for her. She should have amended her "label" to "trespass on the case," or, better yet, some modern phraseology which would have expressed what it was that defendant did or did not do, or what it was that he knew or should in the exercise of due care have known would happen to plaintiff's building if he erected his shed where and in the manner in which he did.

In summary, then, the labels seem unimportant, as do the "theories." If plaintiff's petition was defective because it lacked allegations of facts sufficient to show a duty and a breach thereof, or if plaintiff's evidence fell short of proving such necessary items, then the court is correct in holding for defendant. If on the other hand, the allegations are sufficient, and they were proved, or were proved without timely objection by defendant even though not set forth in the pleadings, then the court seems to have erred. What is in this writer's opinion not important is the label which *anyone* puts on them.

The case of *New York Central Railroad v. Linamen*,³⁰ which appears in the same volume of reports, sets forth more clearly what this writer is trying to say. Plaintiff had been compelled to pay to one of its employees a substantial sum of money as a result of injury sustained by him while in the course of his employment. The injury had occurred because defendant had caused a board to extend from premises upon which he was working, out over plaintiff's track. The "trespass" was not authorized by plaintiff and it had clearly been the cause of the injury to plaintiff's employee.

The plaintiff in its petition had characterized the defendant's act as a "trespass" and, when at the conclusion of plaintiff's presentation of its case the defendant moved for a directed verdict, on the ground that the injury was consequential and not direct, the trial court had granted the motion.

Here was common-law formalism with a vengeance, and the court of appeals recognized it as such. Of course, the defendant's act was not a "trespass" and, when at the conclusion of plaintiff's presentation of its case, the injury in this instance was consequential rather than direct.

30. 162 N.E.2d 900 (Ohio Ct. App. 1959), *reversed on other grounds*, 171 Ohio St. 87, 167 N.E.2d 778 (1960).

At common law the form of action would have had to be case. The act is probably best described as an "encroachment."

In its opinion the court put the whole problem succinctly as follows:

Now, if the plaintiff sets forth the facts of his case and upon those facts is entitled to a recovery, it matters not whether the wrong be considered a trespass or an act of negligence. . . .

It is our conclusion that the petition stated sufficient facts which were supported by the evidence to establish a prima facie case. It alleged and offered proof [sic] that the defendant contractor got over the plaintiff's property line and erected a batter board; that he had no right to do so, and that the batter board caused the plaintiff the consequential damages, which are the subject of any action which had been commenced.³¹

In *Rogers v. Barbera*³² the plaintiff complained against the defendant for having accused the plaintiff of an armed robbery on premises occupied by defendant and having caused plaintiff to be imprisoned in the county jail for more than two months, until released when the grand jury failed to indict plaintiff.

The gist of plaintiff's petition is set forth in the court's opinion and is too long to repeat here. From reading it, it is difficult to tell whether the drafter felt that he had a cause of action in false arrest or malicious prosecution, although the facts available to him *should* have told him that if he had anything at all it must be the latter.

The trial court upon motion, correctly took from the jury's consideration any theory of false arrest (or imprisonment; they are the same thing, to all intents and purposes³³) but allowed the case to go to the jury on a question of malicious prosecution. The jury found for plaintiff.

The court of appeals reversed and remanded for a new trial. The supreme court reversed and entered final judgment for defendant on the ground that the record as a matter of law showed no lack of probable cause for the acts of defendant.

For the pleader the case is significant in two respects: (1) in its reaffirmance of the substantive and pleading identity of the actions of false arrest and false imprisonment, and (2) its recognition that it is not labels, but facts, which are important in pleading and in substance.³⁴

SERVICE OF PROCESS

Mention was made before in this section³⁵ of the annual survey of the necessity for the institution of proper service of process in order to ac-

31. *Id.* at 902.

32. 170 Ohio St. 241, 164 N.E.2d 162 (1960).

33. See Sonenfield, *Civil Procedure, Survey of Ohio Law — 1956*, 8 WEST RES. L. REV. 254, 263 (1957).

34. For those who are interested in the finer points of "form" in pleading, there is recommended a delightful article, McCaskill, *The Modern Philosophy of Pleading*, 38 A.B.A.J. 123 (1952).

35. Notes 21 & 22 *supra*, and accompanying text.

comply with a tolling of the statute of limitations. Several other decisions were published during the period covered by this survey which dealt with service of process.

In 1953³⁶ the legislature amended section 2109.03 of the Revised Code, adding to the previously existing requirement that a fiduciary of an estate shall file in the probate court the name of the attorney, if any, who will represent him in matters relating to his trust, the provision that if the fiduciary is absent from the state, such attorney shall be the agent of the fiduciary upon whom summonses, citations and notices may be served.

In *Meisner v. Flemion*³⁷ the question for decision was whether such a designated attorney could also be served with process in an action brought in the common pleas court. Defendant contended that the statute's applicability was limited to matters or actions in the probate court. The court of appeals refused to so limit the scope of the amendment and allowed service on the attorney in an action commenced in common pleas.

In *Kaczenski v. Kaczenski*³⁸ an attempt was made to use the same statute. The fiduciary was a non-resident of Ohio and had appointed a resident attorney. The plaintiff presented a claim to the fiduciary; it was rejected and he sued upon it in the common pleas court, resorting to service on the local attorney. The caption of his petition showed the defendant fiduciary's address to be outside of Ohio, but in the body of the petition there was no allegation as to the absence of the fiduciary.

The Court of Appeals for Trumbull County ruled that service on the attorney was ineffective, for the reason that "the special statute providing for service upon the agent of the fiduciary requires the one seeking the service of summons affirmatively to allege in the body of the petition that the fiduciary is absent from the state."³⁹

Judge Donahue dissented. He could find nothing in the statute which explicitly or impliedly required such a spelling out of the plaintiff's problem. Neither can this reviewer. It is not required when a plaintiff is using the analogous Code section 2703.20, which provides for service on non-resident motorists.⁴⁰

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36. 119 Ohio Laws 394, 398 (1953).

37. 109 Ohio App. 117, 164 N.E.2d 183 (1958). See also discussion in *Wills and Decedents' Estates* section, p. 585 *infra*.

38. 169 N.E.2d 36 (Ohio Ct. App. 1959).

39. *Id.* at 37.

40. *Blackwell v. Columbus & So. Ohio Elec. Co.*, 113 N.E.2d 676 (Ohio Ct. App. 1951).