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J. Patrick Browne

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BEING AND NOTHINGNESS: COMMENCEMENT AND THE APPLICATION OF OHIO CIVIL RULES 3(A) AND 4(E)*

J. PATRICK BROWNE**

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** Professor of Law, Cleveland State University, Cleveland-Marshall College of Law; B.S., John Carroll University; M.S.L.S., Case Western Reserve University; J.D., University of Detroit.

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I. THE CONCEPT OF COMMENCEMENT

THIS Article is appropriately titled "Being and Nothingness" since the metaphysical notion of existence is the key to understanding the concept of commencement. Very simply put, no judgment, not even a judgment of dismissal, can have any validity unless the civil action in which it is entered has come into existence as a civil action.¹ As a general

¹ *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954), exemplifies this proposition. The plaintiff attempted to commence an action in Lorain County, but the action failed of commencement because the defendant was never served with a summons. When it became apparent to the trial court that the defendant had not been served, it entered an order stating that the action was "dismissed without prejudice at plaintiff's cost." *Id.* at 380, 119 N.E.2d at 286. Within a year from that dismissal, the plaintiff attempted to commence an action in Cuyahoga County, under the provisions of OHIO REV. CODE ANN. § 2305.19 (Page 1981), the "savings statute," which, in substance, provides that a new action on the same claim may be brought within one year when a previous action "fails otherwise than on the merits." In the second action, the defendant moved to quash the service and to dismiss the action because it was not brought within the two year statute of limitations. The trial court overruled the motions and after a trial on the merits, entered judgment for the plaintiff. The court of appeals affirmed, but the supreme court reversed, holding that since the first action never came into existence, there was no action that could be "dismissed," and that as a consequence, the first action did not "fail otherwise than on the merits" because there was no action in existence that could "fail." As the supreme court stated:

As to the petition which was filed in Lorain county on May 29, 1950 (one day before the expiration of two years from the date of the accident), there was no service of summons. Therefore, it cannot be said that an action was ever deemed

rule, a civil action comes into existence at the moment of commencement, and it ceases to exist as an action when the court journalizes a final judgment that adjudicates the rights of all of the parties and determines all of the claims involved in the action.² With the court's journalization, the judgment comes into existence and takes the place of the civil action, which ceases to exist. To put it in other words, the action merges with the judgment, and the action no longer has any separate existence of its own. Thus, a civil action either has being as such, or it is a nothingness, and as a nothingness, it cannot support any judgment or order; anything done in a civil action that fails of commencement is void and a nullity.³

Because the action comes into existence with commencement, it is important to define that precise moment in time when the action is deemed to have commenced. That is the task of Civil Rule 3(A),⁴ which states: "A

to be commenced in Lorain county. In other words, notwithstanding the filing of the petition and the issuance of summons, no case ever matured in Lorain county to the point where the court had any jurisdiction over the defendant or had any power to make any order based upon the allegations of the petition so filed. There was no pending case to be "dismissed." Although on the Lorain county court docket there appears the words, "dismissed without prejudice," what the court did was merely to strike the petition from the files. It is common knowledge that after service of summons and even after the filing of an answer a case may be "dismissed" for want of prosecution. Such would be a genuine dismissal because such case would be pending and the court would have jurisdiction over it. It seems axiomatic that a nonexistent case can not be dismissed. In the present instance, for lack of service, no case came into existence in Lorain county. Therefore, as to the petition filed in Lorain county we hold that the plaintiff did not fail "otherwise than upon the merits." The plaintiff simply never had a pending case in Lorain county.

161 Ohio St. at 383-84, 119 N.E.2d at 288.

² Although a civil action normally "dies" with the entry of a final judgment, it may be "resurrected" by a timely motion for judgment notwithstanding the verdict, a motion for a new trial, a motion for relief from judgment, or a timely appeal. If any of these motions are granted by the trial court, or if a reviewing court reverses the trial court's judgment in whole or in part, the civil action is revived to the extent necessary to comply with the order granting the motion, or to the extent necessary to comply with the reviewing court's mandate on remand to the trial court.

³ While this statement is true with respect to any order or judgment affecting the merits of the civil action, it may not be entirely true with respect to any order or judgment not going to the merits. Because the Ohio system has linked the concept of commencement with the acquisition of jurisdiction over the person of the defendant, there exists an anomalous quasi-action known as an "action attempted to be commenced." See *infra* text accompanying notes 216-19. Orders or judgments not affecting the merits entered in an "action attempted to be commenced" are neither void nor a nullity. Thus, for example, an "action attempted to be commenced" may be dismissed for lack of jurisdiction over the person, or for lack of subject matter jurisdiction. See, e.g., OHIO REV. CODE ANN. 2305.19 (Page 1981), which speaks of an action "attempted to be commenced" failing "otherwise than upon the merits." For a more complete discussion of an "action attempted to be commenced," see section IV of this Article.

⁴ OHIO R. CIV. P. 3(A). Specific Ohio Civil Rules are hereinafter generally referred to as "Civil Rule" or "Rule."

civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." Unfortunately, for reasons that are more historical than rational, this formula links the relatively simple concept of commencement (the filing of the complaint with the court) to the acquisition of jurisdiction over the person of the defendant; this linkage has produced a number of unnecessary complications.⁶ These complications will be discussed in some detail in subsequent sections of this Article, but it must be emphasized here that the approach to these problems, and the correct solution to them, cannot be fully understood unless one first grasps the basic concept that a civil action, as such, must have a real, albeit incorporeal, existence. Being or nothingness, to be or not to be, that is the principal question with which we must deal when we consider the concept of commencement.

II. COMMENCEMENT AND THE STATUTE OF LIMITATIONS

In pertinent part, section 2305.03 of the Ohio Revised Code provides: "A civil action . . . can be commenced only within the period prescribed in sections 2305.03 to 2305.22, inclusive, of the Revised Code. When interposed by proper plea by a party to an action mentioned in such sections, lapse of time shall be a bar thereto."⁶ This language has produced some confusion, suggesting as it does, that an action cannot be commenced beyond the statutory period of limitations. That suggestion, however, is incorrect. While the concept of commencement and the concept of the statute of limitations bar are intimately connected, they are two separate and distinct concepts, and to properly understand the application of each, the distinction between the two concepts must constantly be kept in mind.

As far as commencement is concerned, an action is commenced whenever the requirements of Rule 3(A) are met; this is true even if the applicable statutory period of limitations has expired before the complaint is filed with the court. Suppose, for example, that an automobile collision resulting in personal injury and property damage occurs on August 1, 1984. Putting aside all questions of tolling, etc., the statutory period of limitations applicable to an action for that personal injury and property damage will expire on August 1, 1986.⁷ Suppose further that the injured party files his complaint for personal injury and property damage on August 6, 1986, and valid service is obtained on September 28, 1986. In such

⁶ For a survey of the historical development of Civil Rule 3(A) and a discussion of the problems it has produced, see Scigliano, *Failure of Commencement, The Forgotten Defense—A Comment on Ohio Civil Rule 3(A)*, 16 AKRON L. REV. 265 (1982). See also Browne, *Some Problems with Proposed Civil Rule 4(E)*, 55 CLEV. B.J. 164 (1984).

⁷ OHIO REV. CODE ANN. § 2305.03 (Page 1981).

⁸ See OHIO REV. CODE ANN. § 2305.10 (Page 1981), which provides that "[a]n action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

a case, since service was obtained within one year following the filing of the complaint, the date of service relates back to the date on which the complaint was filed,⁸ and the action is deemed commenced as of August 6, 1986. However, even though it was commenced, recovery on the claim will be barred by the running of the applicable statute of limitations (assuming that the defense is properly asserted) because it was not commenced on or before August 1, 1986.⁹ The running of the statute of limitations had no effect on the commencement of the action, but did affect recovery on the claim. In fact, the date of commencement is immaterial for commencement purposes and becomes material only when the defense of the bar of the statute of limitations is properly pleaded. Accordingly, when section 2305.03 states that a civil action can be commenced only within the statutory period of limitations, it means that in order to avoid the bar of the statute of limitations the action *must* be commenced before the statutory period expires. It does not mean that an action *cannot* be commenced after the expiration of the statutory period of limitations. Indeed, in the above example, if the defendant had not properly pleaded the statute of limitations defense, the action not only would have been commenced on August 6, 1986, but recovery on the claim would not be barred by the running of the statute.¹⁰

Note, too, that because commencement and limitations are separate and distinct concepts, the running of the statute of limitations has no effect on the year in which to acquire jurisdiction over the person of the defendant. Suppose, in the example above, that the complaint was filed on July 31, 1986, and service was obtained on the defendant on September 28, 1986, more than two years after the collision occurred. The action is still deemed to have commenced as of July 31, 1986—within the two year statutory period—even though jurisdiction over the person of the defendant was acquired after the statute of limitations had expired. The one year in Rule 3(A) during which jurisdiction may be obtained over the person of the defendant is completely independent of and not affected by the two year statute of limitations applicable to this particular case.¹¹

While the expiration of the statutory period of limitations does not reduce the Rule's one year period in which to obtain jurisdiction over the

⁸ See *St. Thomas Hosp. v. Beal*, 2 Ohio App. 3d 132, 132, 440 N.E.2d 1240, 1241 (9th Dist. 1981)(Summit County): "If service is obtained within one year of filing, that case is commenced on the date of filing for purposes of the statute of limitations."

⁹ *Collins v. State*, No. 82AP-370 (Ohio 10th Dist. Ct. App. Jan. 6, 1983)(Franklin County); *Williams v. Jerry L. Kaltenbach Enters., Inc.*, 2 Ohio App. 3d 113, 440 N.E.2d 1219 (1st Dist. 1981)(Hamilton County).

¹⁰ OHIO REV. CODE ANN. § 2305.03 (Page 1981), provides that the statute of limitations is a defense to an action only when lapse of time is "interposed by proper plea by a party to an action."

¹¹ *Fieno v. Beaton*, 68 Ohio App. 2d 13, 426 N.E.2d 203 (1st Dist. 1980)(Hamilton County).

person of the defendant, neither does the nonexpiration of the statute of limitations expand that period beyond one year from the filing of the complaint. Again, suppose an automobile collision on August 1, 1984. This time, the complaint is filed on September 1, 1984, but service on the defendant is not obtained until October 5, 1985, more than one year after the complaint was filed, but well within the two year period of limitations. In this case, because service was not obtained within one year following the filing of the complaint, the date of service does not relate back to the date on which the complaint was filed.¹² The action fails of commencement because the requirements of Civil Rule 3(A) were not met,¹³ even though the statute of limitations had not yet expired on the date of service. In situations such as this, proper procedure requires the filing of a new complaint, not an amended complaint, before the statute of limitations expires and a new service on the defendant. If the new service is obtained within a year following the filing of the new complaint, the action will be commenced as of the date the new complaint was filed.¹⁴

To summarize, all that is required for commencement purposes is the filing of a complaint with the court and the acquisition of jurisdiction over the person of the defendant within one year thereafter. For purposes of the statute of limitations, the complaint must be filed with the court *before the applicable statute of limitations expires*, and jurisdiction over the person of the defendant must be acquired within one year from the filing of the complaint.

III. THE ELEMENTS OF COMMENCEMENT

Both Civil Rule 3(A) and section 2305.17 of the Ohio Revised Code de-

¹² *St. Thomas Hosp. v. Beal*, 2 Ohio App. 3d 132, 440 N.E.2d 1240 (9th Dist. 1981)(Summit County); *Conway v. Smith*, 66 Ohio App. 2d 65, 419 N.E.2d 1117 (8th Dist. 1979)(Cuyahoga County).

¹³ *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984); *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), *rev'd on other grounds*, *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983); *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977); *Saunders v. Choi*, No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984); *Pistner v. Baxter*, 2 Ohio App. 3d 69, 440 N.E.2d 812 (10th Dist. 1981)(Franklin County); *Conway v. Smith*, 66 Ohio App. 2d 65, 419 N.E.2d 1117 (8th Dist. 1979)(Cuyahoga County); *Dirker v. Seven Up Bottling Co.*, No. 9223 (Ohio 9th Dist. Ct. App. Aug. 1, 1979)(Summit County).

Not all courts, however, have recognized the distinction between the one year period for obtaining jurisdiction over the defendant and the statutory period of limitations. Thus, in *St. Thomas Hosp. v. Beal*, the Court of Appeals for Summit County held that an action was commenced *as of the date of service on the defendant* when service occurred more than one year after the complaint was filed but prior to the expiration of the statute of limitations. 2 Ohio App. 3d at 132, 440 N.E.2d at 1241. This conclusion is not warranted by anything said in Rule 3(A), its statutory predecessor OHIO REV. CODE ANN. § 2305.17 (Page 1981), or prior judicial decisions, and it is of doubtful validity.

¹⁴ *Lombardo v. Calabrese*, No. 44520 (Ohio 8th Dist. Ct. App. Nov. 4, 1982)(Cuyahoga County).

fine "commencement," and it has been said that the Rule must be read *in pari materia* with the statute.¹⁵ Therefore, any discussion of the elements of commencement requires a comparison between the two:

Civil Rule 3(A):

A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing.¹⁶

Section 2305.17:

An action is commenced [for statute of limitations purposes] by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.¹⁷

While it has been said that "[Civil Rule] 3(A) is substantially the same as R.C. 2305.17,"¹⁸ there are obvious differences between them. Despite these differences, section 1 of amended House Bill No. 1201, which indicates the statutory sections superseded by the Ohio Rules of Civil Procedure, does not expressly repeal the statute. Furthermore, section 3 of that Act provides: "The failure to repeal or amend any other section establishes no evidence concerning its conflict with [the civil] rules."¹⁹ Thus, the question becomes: To what extent are the disparate elements of section 2305.17 in full force and effect, and to what extent have they been impliedly repealed by the provisions of Civil Rule 3(A)?²⁰ The following subsections will attempt to answer this question.²¹

¹⁵ *St. Thomas Hosp. v. Beal*, 2 Ohio App. 3d 132, 440 N.E.2d 1240 (9th Dist. 1981)(Summit County).

¹⁶ OHIO R. CIV. P. 3(A).

¹⁷ OHIO REV. CODE ANN. § 2305.17 (Page 1981).

¹⁸ *Conway v. Smith*, 66 Ohio App. 2d 65, 67 n.4, 419 N.E.2d 1117, 1119 n.4 (8th Dist. 1979)(Cuyahoga County).

¹⁹ See Act of June 17, 1970, § 3, 1970 Ohio Laws 3021.

²⁰ The Ohio Constitution provides, in pertinent part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." OHIO CONST. art. IV, § 5. Accordingly, a procedural statute in effect on July 1, 1970 when the Ohio Rules of Civil Procedure became effective is impliedly repealed to the extent that its provisions conflict with the provisions of a Civil Rule. Since Civil Rule 3(A) defines commencement, it may be assumed that the definition of commencement is procedural rather than substantive. Therefore, § 2305.17 is a procedural statute rather than one which establishes a substantive right, and it is subject to the implied repeal provisions of article IV, § 5(B).

²¹ Most of the decisions that have discussed both the statute and the Rule tend to ignore the differences between them, and thus they avoid the question. See *Gentile v. Carr*, 4 Ohio App. 3d 55, 464 N.E.2d 477 (7th Dist. 1981)(Jefferson County); *Scott v. Orlando*, 2 Ohio App. 3d 333, 442 N.E.2d 96 (6th Dist. 1981)(Lucas County); *St. Thomas Hosp. v. Beal*, 2 Ohio App. 3d 132, 440 N.E.2d 1240 (9th Dist. 1981)(Summit County). In *Conway v. Smith*, 66 Ohio App. 2d 65, 419 N.E.2d 1117 (8th Dist. 1979)(Cuyahoga County), the question did

A. Filing a Complaint with the Court

1. A Civil Action

While Civil Rule 3(A) states that it is applicable to "civil actions," section 2305.17 speaks only of "actions." This difference does not indicate a distinction; in civil litigation, all "actions"²² are "civil actions."²³ However, since Rule 3(A) is automatically applicable to all civil actions through the provisions of Civil Rule 1(A), the reference to a "civil action" in Rule 3(A) is redundant, unless its inclusion was meant as a signal that Rule 3(A) was not to be applied to special proceedings.²⁴ If that was the intention of the supreme court when it drafted Rule 3(A), it has not always been followed. There is a body of authority, both direct and by way of dictum, that Civil Rule 3(A) is applicable to those special proceedings that are adversary in nature and which require the service of a summons,²⁵ but is not applicable to those special proceedings that do not re-

arise, but the court was able to avoid dealing with it because the plaintiff had complied with the requirements of the statute, and all parties to the appeal based their arguments on the language of Civil Rule 3(A) alone. *Id.* at 67 n.4, 419 N.E.2d at 1119 n.4. Accordingly, there is no clear-cut decision on the continuing force and effect of the statutory provisions relating to commencement.

The Advisory Committee Staff Note to Civil Rule 3(A) affords very little guidance on this point. In pertinent part, it states: "Unlike § 2305.17, R.C., Rule 3(A) does not require a praecipe or an affidavit for service by publication as a requirement for commencing a civil action." OHIO R. CIV. P. 3(A) advisory committee note (1970). This suggests that the praecipe and affidavit requirements of the statute are no longer of any force or effect, but it very carefully avoids any express statement to that effect.

²² OHIO REV. CODE ANN. § 2307.01 (Page 1981), defines an action as "an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense."

²³ OHIO R. CIV. P. 2 states: "There shall be only one form of action, and it shall be known as a civil action."

²⁴ In pertinent part, OHIO R. CIV. P. 1(C) states:

These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure . . . (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

The general rule to be drawn from this language is that the Civil Rules do not provide the procedure to be followed in special statutory proceedings. Rule 3(A)'s reference to a "civil action" could be read to mean that Civil Rule 3(A) falls within this general rule and not within Rule 1(C)'s exceptions.

²⁵ See *Proctor v. Giles*, 12 Ohio Op. 3d 74, (1st Dist. Ct. App. 1979)(Hamilton County), *rev'd on other grounds*, 61 Ohio St. 2d 211, 400 N.E.2d 393 (1980); *Lysaght v. Dollison*, 61 Ohio App. 2d 59, 399 N.E.2d 121 (1st Dist. 1978)(Hamilton County); *Carter v. Johnson*, 55 Ohio App. 2d 157, 380 N.E.2d 758 (8th Dist. 1978)(Cuyahoga County); *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975)(Hamilton County). See also *Beverly v. Beverly*, 33 Ohio App. 2d 199, 215, 293 N.E.2d 562, 572 (6th Dist. 1973)(Erie

quire the service of a summons.²⁶ The language of Civil Rule 1(C) can sustain this result.²⁷

2. Filing

Again, on the matter of filing, there is a difference between the Rule and the statute, but this time, it may be a difference with a distinction. Civil Rule 3(A) requires the complaint to be filed "with the court," while section 2305.17 requires the complaint to be filed "in the office of the clerk of the . . . court."²⁸ Civil Rule 5(E) defines "filing." It first states that "pleadings and other papers . . . shall" be filed "with the clerk of the court." To this extent, Civil Rules 3(A) and 5(E) are in complete harmony with section 2305.17. However, the second clause of Rule 5(E) permits filing of "the papers" with the judge provided that he has given his permission. "The papers" mentioned in this clause can be read in two ways. If it is contrasted with the phrase "pleadings and other papers," as used in the first clause, it can be read restrictively, so that it precludes the filing of "pleadings" with the judge. On the other hand, if the phrase, "the papers," is not contrasted with "pleadings and other papers," it can be read expansively to include all pleadings, motions, and other papers.²⁹ If the restrictive reading is adopted, the Rule and the statute remain in harmony; if the expansive reading is adopted, then there exists a conflict between Civil Rule 3(A) and section 2305.17, since Rule 3(A), when read in conjunction with Rule 5(E), would permit the filing of the complaint with the judge rather than only with the clerk. Neither the Rules Advisory Committee Staff Note to Rule 5(E)³⁰ nor any reported decision resolves this problem. Nevertheless, Rule 3(A)'s broad reference to filing with the court, rather than the statute's narrow reference to filing in the office of the clerk, suggests that Rule 3(A)'s concept of "filing" encompasses both clauses of Civil Rule 5(E). That being so, the second clause of Rule 5(E) must be read expansively; thus, there is a conflict between Civil Rule 3(A) and section 2305.17. Under the principle of primacy,³¹ that con-

County)(Brown, J., concurring)(application of Rule 15(C) in an action testing the validity of a will); *Gibbs v. Lemley*, 33 Ohio App. 2d 220, 222, 293 N.E.2d 324, 325 (4th Dist. 1972)(Lawrence County)(Stephenson, J., dissenting)(Rules 4 and 10 applied to will contest proceeding).

²⁶ *State ex rel. Civil Rights Comm'n v. Gunn*, 45 Ohio St. 2d 262, 344 N.E.2d 327 (1976).

²⁷ See *supra* note 24. Depending on the language of the statute authorizing a special proceeding requiring service of a summons, Civil Rule 3(A) is applicable because it is not, by its nature, clearly inapplicable (the first exception in Rule 1(C)) or because the statute makes reference to the procedure used in civil actions (the second exception in Rule 1(C)).

²⁸ OHIO REV. CODE ANN. § 2305.17 (Page 1981).

²⁹ See the discussion in Scigliano, *supra* note 5, at 271.

³⁰ The Staff Note simply states: "Rule 5(E) defines the act of filing pleadings and other papers." This does suggest, however, that despite the difference in language, both clauses of Civil Rule 5(E) deal with the filing of pleadings as well as other papers.

³¹ See Browne, *Civil Rule 1 and the Principle of Primacy—A Guide to the Resolution of*

flict must be resolved in favor of the Rule, it must be concluded that the statutory restriction of filing in the office of the clerk has been impliedly repealed.³²

In any event, the complaint is not filed within the meaning of either the Rule or the statute unless and until it comes into the actual possession, custody, and control of the clerk or the judge; merely mailing the complaint to the court for filing is not sufficient.³³ Furthermore, this actual possession, custody, and control must also be a *knowing* possession, custody, and control; the clerk or the judge must be aware of the document's presence and must assume responsibility for it.³⁴ As a general rule, the clerk's filing stamp on the complaint³⁵ or the judge's notation on it³⁶ is the best evidence that it has been filed; in some cases, however, a docket entry reflecting its filing will suffice.³⁷

3. A Complaint

On this matter, the difference between the Rule and the statute is purely one of terminology; the Rule's "complaint" replaces the statute's "petition." The question that remains, however, is what is a complaint for commencement purposes? It has been held that a document that does not meet the formal and substantive requirements of the Civil Rules cannot be deemed an answer.³⁸ Logically, this same rationale should apply to all

Conflicts Between Statutes and the Civil Rules, 5 OHIO N.U.L. REV. 363 (1978).

³² See *supra* note 20.

³³ *Bohacek v. Administrator*, No. 45090 (Ohio 8th Dist. Ct. App. Feb. 17, 1983)(Cuyahoga County); *Douthitt v. Garrison*, 3 Ohio App. 3d 254, 444 N.E.2d 1068 (9th Dist. 1981)(Summit County); *Fazio v. Board of Review*, No. 42989 (Ohio 8th Dist. Ct. App. May 21, 1981)(Cuyahoga County); *Oravec v. Board of Review*, No. 42836 (Ohio 8th Dist. Ct. App. May 14, 1981)(Cuyahoga County); *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st Dist. 1942)(Hamilton County).

³⁴ *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st Dist. 1942)(Hamilton County).

³⁵ *Westmoreland v. Valley Homes Corp.*, 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975); *John H. Kappus Co. v. Markoff*, No. 44163 (Ohio 8th Dist. Ct. App. July 15, 1982)(Cuyahoga County); *Sieenthal v. Summers*, 56 Ohio App. 2d 168, 381 N.E.2d 1344 (10th Dist. 1978)(Franklin County); *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975)(Hamilton County); *Seaway Taverns, Inc. v. Board of Liquor Control*, 163 N.E.2d 186 (Ohio 10th Dist. Ct. App. 1959)(Franklin County); *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st Dist. 1942)(Hamilton County).

³⁶ When papers are filed with the judge, he must "note thereon the filing date and forthwith transmit them to the office of the clerk." OHIO R. Civ. P. 5(E). If the papers are not transmitted to the clerk's office and accepted for filing by the clerk, they are not deemed filed even if the judge has accepted them for filing. *Jeewek v. Jeewek*, No. 43018 (Ohio 8th Dist. Ct. App. May 21, 1981)(Cuyahoga County).

³⁷ *Westmoreland v. Valley Homes Corp.*, 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975); *King v. Paylor*, 69 Ohio App. 193, 43 N.E.2d 313 (1st Dist. 1942)(Hamilton County).

³⁸ *Daley & Co. v. Capizzi*, No. 46967 (Ohio 8th Dist. Ct. App. Feb. 9, 1984)(Cuyahoga County); *Wood County Furniture v. Baughman*, No. WD-83-17 (Ohio 6th Dist. Ct. App. Aug. 5, 1983)(Wood County); *Spratt v. Frederickson*, No. 38579 (Ohio 8th Dist. Ct. App. Apr. 26, 1979)(Cuyahoga County).

pleadings, including a complaint. However, as one commentator notes, this standard is too harsh for commencement purposes; a document should be sufficient as a "complaint" if it contains three elements: the statement of the claim or an attempted statement of the claim, the demand for judgment, and an appropriate signature.³⁹ This will be sufficient to commence the action, since any other defects in the document can be readily cured by amendment.

The Ohio Rule makes commencement dependent upon the acquisition of jurisdiction over the person of the defendant, and as a consequence, an action must be commenced as to each defendant involved in the action.⁴⁰ Therefore, the term "complaint" as used in Rule 3(A) must be understood in its generic sense; that is, it includes not only a complaint against a defendant, but also a third party complaint. Likewise, in appropriate cases, the term will include a counterclaim or cross-claim. No doubt this generic use can lead to some interesting commencement problems.

Take, for example, the case of the new party defendant brought into the suit after the filing of the original complaint. If this new party defendant is an *additional* party defendant, then the "complaint" for Rule 3(A) purposes will be the amended complaint which first names him as a party defendant.⁴¹ However, it is now well settled that leave of court under the provisions of Rule 21 is required before such an amended complaint can be filed.⁴² Accordingly, if the amended complaint is filed without leave of court and if the absence of leave is raised by a motion to strike⁴³ or otherwise, the amended complaint will be deemed a nullity and

³⁹ Scigliano, *supra* note 5, at 273-75.

⁴⁰ See, for example, *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977), in which the supreme court held that the action was commenced against the defendant who was served within a year following the filing of the complaint, but not against the defendant who was not served within that year. *Id.* at 64-65, 362 N.E.2d at 643. As a consequence, a subsequent action against the second defendant was barred by the statute of limitations. *Lash v. Astley*, No. 79AP-477 (Ohio 10th Dist. Ct. App. Jan. 22, 1980)(Franklin County).

However, the rule that the action must be commenced separately as to each defendant apparently does not apply if an unserved defendant is merely a nominal defendant. *Heuser v. Crum*, 31 Ohio St. 2d 90, 285 N.E.2d 340 (1972).

⁴¹ *Collins v. State*, No. 82AP-370 (Ohio 10th Dist. Ct. App. Jan. 6, 1983)(Franklin County).

⁴² *Zinner v. Romberg*, No. 46494 (Ohio 8th Dist. Ct. App. Oct. 27, 1983)(Cuyahoga County); *Gates Towing v. Branch Motor Express*, 1 Ohio App. 3d 149, 440 N.E.2d 61 (10th Dist. 1981)(Franklin County); *Bell v. Coen*, 48 Ohio App. 2d 325, 357 N.E.2d 392 (9th Dist. 1975)(Summit County); *Vickers, Procedural Defenses Available to the New-Party Defendant: The Necessity of Obtaining Leave to Amend and Relation Back*, 17 AKRON L. REV. 9, 23 (1983).

⁴³ *Zinner v. Romberg*, No. 46494 (Ohio 8th Dist. Ct. App. Oct. 27, 1983)(Cuyahoga County). If the defendant does not challenge the plaintiff's failure to obtain leave before filing the amended complaint, the plaintiff's failure is waived, and the filing of the amended complaint will commence the action, all other things being equal. *Lombardo v. Calabrese*, No. 44520 (Ohio 8th Dist. Ct. App. Nov. 4, 1982)(Cuyahoga County).

not part of the pleadings at all.⁴⁴ In such a case, the action against the new party defendant will fail of commencement for want of a "complaint."⁴⁵ Conversely, if the amended complaint is filed with leave of court, and jurisdiction is acquired over the person of the defendant within one year thereafter, the action against the new party defendant will be deemed commenced as of the date the amended complaint was filed.⁴⁶ The same basic rules apply when a new party defendant is brought in as a *substitute* defendant under the provisions of Civil Rule 15(C), except that the date of commencement will differ. In the case of substitution under Rule 15(C), the amended complaint is deemed to relate back to the original complaint, so that the date of commencement vis-a-vis the new party substitute defendant will be the date the original complaint was filed with the court.⁴⁷

Many of the same problems attend the amendment bringing in a new party plaintiff. First, there is the need for leave to do so under Civil Rule 21.⁴⁸ Next, one must inquire as to the new party plaintiff's relationship to the original claim. If the new party plaintiff is a real party in interest with respect to the original claim, then the amended complaint bringing in the new party relates back to the original complaint, and the action of the new party plaintiff is deemed commenced by and at the time of the filing of the original complaint.⁴⁹ However, if the new party is not a real party in interest with respect to the original claim, then his claim is separate and distinct from the original claim and, for all practical purposes, a separate action which must be commenced in its own right. Obviously, the "complaint" which commences this action will be the amended complaint naming the new party plaintiff.⁵⁰

As a general rule, counterclaims and cross-claims present no commencement problems, since the action was commenced by the filing of the plaintiff's complaint, and the court has jurisdiction over all of the

⁴⁴ *Maryhew v. Yova*, 11 Ohio St. 3d 154, 159, 464 N.E.2d 538, 543 (1984)(C. Brown, J., dissenting); *Miller v. Lint*, 62 Ohio St. 2d 209, 404 N.E.2d 752 (1980); *Westmoreland v. Valley Homes Corp.*, 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975).

⁴⁵ *Zinner v. Romberg*, No. 46494, slip op. at 9-11 (Ohio 8th Dist. Ct. App. Oct. 27, 1983)(Cuyahoga County).

⁴⁶ *Collins v. State*, No. 82AP-370, slip op. at 6 (Ohio 10th Dist. Ct. App. Jan. 6, 1983)(Franklin County).

⁴⁷ *Jack Davis Painting Co. v. Eller Enters., Inc.*, 8 Ohio App. 3d 211, 456 N.E.2d 1274 (10th Dist. 1982)(Franklin County).

⁴⁸ See *supra* note 42 and accompanying text.

⁴⁹ See the last sentence of OHIO R. Civ. P. 17(A) which states: "Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

⁵⁰ Whether a new service of process is required on this additional claim is not entirely clear. It has been held that no new service is necessary if an action has already been commenced against the defendant, and the claim of the new party plaintiff arises out of the conduct, transaction, or occurrence set forth in the original complaint. *Smith v. Red & Yellow Cab Co.*, No. L-81-178 (Ohio 6th Dist. Ct. App. Dec. 24, 1981)(Lucas County).

parties involved. However, a commencement situation does arise when the pleader attempts to bring in a new party defendant in response to the counterclaim or cross-claim under the provisions of Civil Rule 13(H). In such case, the "complaint" which commences the action against the new party defendant is the answer which contains the counterclaim or cross-claim. Whether leave of court under the provisions of Civil Rule 21 is required in such cases is an open question in Ohio, but since Civil Rule 13(H) is more specific than Civil Rule 21 and does not require leave of court, leave should not be necessary. However, leave of court under the provisions of Civil Rule 15(A) and/or 13(F) may be required to add the counterclaim or cross-claim if the counterclaim or cross-claim was not included in the original answer. Normally such leave is not required if the pleader can amend the answer as a matter of course under the provisions of Rule 15(A);⁵¹ otherwise, the omitted counterclaim or cross-claim can only be added with leave of court or the written consent of the adverse party.⁵² Of course, if the omitted counterclaim is a compulsory counterclaim, and it is too late to amend as a matter of course, leave of court to add the compulsory counterclaim by way of an amendment to the answer is always required.⁵³ Likewise, leave of court is always required if an after-acquired counterclaim is to be added by way of a supplement to the answer.⁵⁴ Thus, the counterclaim or cross-claim against a new party defendant will fail of commencement as to that new party defendant if leave of court is required and not obtained before the filing of the amendment or supplement to the answer.⁵⁵

Unlike the counterclaim and cross-claim, which are asserted in a responsive pleading,⁵⁶ the third party claim must be asserted in its own

⁵¹ *National City Bank v. Fleming*, 2 Ohio App. 3d 50, 440 N.E.2d 590 (8th Dist. 1981)(Cuyahoga County); Browne, *Compulsory Counterclaims and the Problem of Subject Matter Jurisdiction*, 56 OHIO ST. B.A. REP. 688, 690 (1983).

⁵² OHIO R. CIV. P. 15(A). *Cf. Hoover v. Sumlin*, 12 Ohio St. 3d 1, 5, 465 N.E.2d 377, 381 (1984)(leave to amend answer to raise affirmative defense should be "freely given" under Rule 15(A)).

⁵³ OHIO R. CIV. P. 13(F). *See National City Bank v. Fleming*, 2 Ohio App. 3d 50, 54, 440 N.E.2d 590, 596 (8th Dist. 1981)(Cuyahoga County); *Rosenberg v. Gattarello*, 49 Ohio App. 2d 87, 92, 359 N.E.2d 467, 470 (8th Dist. 1976)(Cuyahoga County).

⁵⁴ *See* OHIO R. CIV. P. 13(E), 15(E).

⁵⁵ Under the appropriate circumstances, leave of court may be implied. Thus, if the trial court refuses to grant a motion to strike an omitted counterclaim filed without leave of court, the denial of the motion to strike implies the grant of leave to file the omitted counterclaim. *See National City Bank v. Fleming*, 2 Ohio App. 3d 50, 54, 440 N.E.2d 590, 596 (8th Dist. 1981)(Cuyahoga County). Whether this concept of implied rulings on motions is consistent with the requirements of Civil Rule 58 governing entry of judgment is a matter that has yet to be decided.

⁵⁶ *See* OHIO R. CIV. P. 12(A)(2), 13(A), 13(G). *See also Behrle v. Beam*, 6 Ohio St. 3d 41, 45 n.1, 451 N.E.2d 237, 240 n.1 (1983)(compulsory counterclaim, even in amount over monetary jurisdiction of a municipal court, must be pleaded in a responsive pleading to that court); Browne, *supra* note 51, at 701-02 (same).

separate pleading—the third party complaint.⁵⁷ Therefore, the third party complaint is the “complaint” needed to commence a third party action. Once again, however, there may be leave of court problems that affect the commencement of the third party action. The third party complaint may be filed as a matter of right if it is filed with the court within fourteen days after the service of the original responsive pleading, but thereafter, it may be filed only with leave of court.⁵⁸ If such leave of court is not obtained and the absence of leave is challenged, the third party complaint is illegally on file, is not a part of the pleadings, and is a nullity.⁵⁹ In such a case, of course, the third party action would not be commenced since there is no “complaint” on file with the court.⁶⁰ However, the failure to challenge the absence of leave waives that defect and results in the commencement of the third party action.⁶¹

Suppose that after a complaint has been filed and the jurisdiction acquired over the person of the defendant, the complaint is stricken from the files either because of a violation of Civil Rule 11,⁶² or because the plaintiff has failed to comply with Civil Rule 12(E),⁶³ and leave to file a new or amended complaint is not granted. What effect does this have on commencement? Clearly Civil Rule 3(A) contemplates that the complaint will remain on file as a pleading until the entry of final judgment. Therefore, it is logical to conclude that if the complaint is stricken from the files and not replaced by a new or amended complaint, the action fails of commencement for want of a complaint. However, there does not seem to be any reported decision on this point, and the question remains open. On the other hand, if the original complaint is stricken from the files, but with leave to file an amended complaint, the amended complaint will most likely relate back to the filing of the original complaint.⁶⁴ The action will be deemed commenced as of the date the original complaint was filed, and the striking of the original complaint will have no effect on

⁵⁷ See OHIO R. CIV. P. 7(A), 14(A).

⁵⁸ OHIO R. CIV. P. 14(A).

⁵⁹ See *supra* note 44 and accompanying text.

⁶⁰ See *Lombardo v. Calabrese*, No. 44520 (Ohio 8th Dist. Ct. App. Nov. 4, 1982)(Cuyahoga County).

⁶¹ See *id.* slip op. at 13-14.

⁶² In pertinent part, OHIO R. CIV. P. 11 states: “If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.” If it is the complaint that is so stricken, no further proceedings in the action are required, and it is logical to conclude that the action is at an end.

⁶³ OHIO R. CIV. P. 12(E) provides:

If the motion [for a definite statement] is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such other order as it deems just.

⁶⁴ See OHIO R. CIV. P. 15(C).

commencement.

4. The Court

Civil Rule 3(A) is satisfied when the complaint is filed with "the court," but section 2305.17 requires the complaint to be filed with the "proper court." Thus, the essential inquiry concerns the meaning of the word "proper," and whether it is still a requisite to commencement. At the minimum, the term "proper court" could mean either a court that is proper as to venue or a court with subject matter jurisdiction of the action, or both.

It is not likely, however, that "proper" refers to venue, at least not in the context of the Civil Rules. Under the provisions of Rule 3(C)(1), the remedy for improper venue is the transfer of the action to a proper venue. Since a nonexistent action cannot be transferred, Civil Rule 3(C)(1) assumes that commencement, and the presence or absence of venue, cannot be a factor in commencement. The same would be true even in those rare cases in which an action can be dismissed for faulty venue under the provisions of Civil Rule 3(D). As pointed out in *Kossuth v. Bear*,⁶⁵ only an action that has been commenced can be dismissed; a nonexistent action cannot be dismissed.⁶⁶ Thus, once again, venue is not a factor; by speaking of dismissal Civil Rule 3(D) assumes prior commencement.

If "proper court" means a court with subject matter jurisdiction, it should be noted at the outset that commencement is not affected by the filing of the complaint with the wrong division of the court if some other division of the same court has subject matter jurisdiction; in this case, the remedy is to transfer internally the action to the proper division.⁶⁷ But is "proper" even related to subject matter jurisdiction? In *Moyer v. Moyer*,⁶⁸ the Court of Appeals for Cuyahoga County impliedly so held, but on a motion for reconsideration, the opinion was withdrawn⁶⁹ as con-

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

⁶⁶ See *supra* note 1.

⁶⁷ See *Mid-Ohio Chem. Liquid Fertilizers, Inc. v. Lowe*, No. 80-CA-15 (Ohio 12th Dist. Ct. App. Oct. 28, 1981)(Fayette County); *Siebeuthal v. Summers*, 56 Ohio App. 2d 168, 381 N.E.2d 1344 (10th Dist. 1978)(Franklin County); *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975)(Hamilton County).

⁶⁸ No. 36991 (Ohio 8th Dist. Ct. App. July 6, 1978)(Cuyahoga County). The *Moyer* court stated:

We conclude that the institution of proper proceedings is synonymous with commencement of an action under Civ. R. 3(A) in a court with subject matter jurisdiction. Civ. R. 3(A) provides: "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." The date of the filing of the complaint in a court of subject matter jurisdiction marks the institution of proper proceedings if service is obtained within one year.

Id. slip op. at 6.

⁶⁹ Journal Entry, *Moyer v. Moyer*, No. 36991 (Ohio 8th Dist. Ct. App. Oct. 12, 1978)(Cuyahoga County).

flicting with the Ohio Supreme Court's decision in *State ex rel. Balson v. Harnishfeger*.⁷⁰ In the pre-Rule decision, *Hoehn v. Empire Steel Co.*,⁷¹ the supreme court likewise so held in interpreting a statute analogous to section 2305.17;⁷² but upon analysis, it appears that the supreme court confused venue with subject matter jurisdiction. In any event, *Hoehn* was expressly overruled in *Wasyk v. Trent*,⁷³ in which the supreme court clearly held that an action will be commenced even if the complaint is filed in a court that lacks subject matter jurisdiction over the action because to hold otherwise would deprive the plaintiff of the remedial protection of section 2305.19, the "savings statute."⁷⁴ Thus, it appears that subject matter jurisdiction is not a prerequisite to commencement, and the term "proper" has no particular meaning. Accordingly, an action may be commenced if the complaint is filed in any court. In any Ohio court, that is, for the supreme court has said:

It is apparent that the word "court," as used in [Civil Rule] 3(A) refers to an Ohio court, since Rule 1(A) provides that the Ohio Rules of Civil Procedure be limited to "courts of this state." Accordingly, the phrase "commenced or attempted to be commenced" contained in R.C. 2305.19 must be limited to actions before the courts of this state, absent an express provision to the contrary.⁷⁵

This raises the interesting problem of whether a federal court located in Ohio is a "court of this state" for commencement purposes. In *Wasyk*

⁷⁰ 55 Ohio St. 2d 38, 377 N.E.2d 750 (1978).

⁷¹ 172 Ohio St. 285, 175 N.E.2d 172 (1961).

⁷² *Id.* at 286-87, 175 N.E.2d at 173. The analogous statute in *Hoehn* was § 2703.01, which was repealed effective July 1, 1971, as being in conflict with Civil Rule 3(A). Act of June 17, 1970, § 1, 1970 Ohio Laws 3017. Before its repeal, the statute read: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon." OHIO REV. CODE ANN. § 2703.01 (Page 1964)(repealed 1971).

⁷³ 174 Ohio St. 525, 191 N.E.2d 58 (1963).

⁷⁴ *Id.* at 527-29, 191 N.E.2d at 60-61. The court noted:

Defendant contends that because of the lack of jurisdiction of the federal court, the proceedings in that court were a nullity. Defendant makes this argument even though he filed a motion to dismiss on the basis of lack of jurisdiction of the federal court. Such motion required a hearing in that court, and it was not possible to know until that hearing that a jurisdictional requirement was lacking. Obviously, then, the federal court, although it lacked jurisdiction to determine the merits of the cause, was possessed of jurisdiction to the extent that it could determine the question of diversity of citizenship.

It is, therefore, clear that the action was commenced, but likewise it is clear that it was commenced in a court which had no jurisdiction of the subject matter of the action.

Id. at 527, 191 N.E.2d at 60.

⁷⁵ *Howard v. Allen*, 30 Ohio St. 2d 130, 135, 283 N.E.2d 167, 170 (1972).

v. Trent,⁷⁶ the supreme court held that sections 2305.17 and 2305.19 applied to an action brought in the District Court for the Southern District of Ohio, but the above-quoted language in a later decision casts doubt on this holding. Perhaps the answer depends upon whether the federal action is based on diversity of citizenship or whether it involves a federal question. If it involves a federal question, the court will apply Rule 3 of the Federal Rules of Civil Procedure.⁷⁷ If the action is a diversity action, the federal court will apply Ohio Rule 3(A), since there is a difference between the federal and state rules, and that difference could be outcome-determinative.⁷⁸ Thus, to the extent that the federal court would apply Ohio law, it may be considered a "court of this state."

5. The Praeipe Demanding that Summons Issue

Section 2305.17 requires the filing of a praecipe demanding that summons issue; Civil Rule 3(A) does not. Is the conflict between the two such that the statutory provision must be deemed impliedly repealed? Since both the Rule and the statute address the same general subject, although not the same precise point, it can be argued that the statutory requirement for a praecipe is not in conflict with the Rule but is, rather, a valid supplement to the Rule which must be observed.⁷⁹ However, the 1970 Rules Advisory Committee Staff Note to Civil Rule 3(A) implies that the praecipe portion of section 2305.17 has been impliedly repealed by the enactment of Rule 3(A),⁸⁰ and the only case authority on point reached the positive conclusion that the praecipe requirement has been repealed.⁸¹ Although it was expressed in dicta, that conclusion seems sound, and unless the supreme court states otherwise, a plaintiff may dispense with the filing of a praecipe demanding that summons issue.

6. The Affidavit for Service by Publication

The statute requires the filing of an affidavit for service by publication, and the Rule does not. Here, however, the difference is without importance. Obviously, the statutory language applies only to those cases in

⁷⁶ 174 Ohio St. 525, 191 N.E.2d 58 (1963).

⁷⁷ FED R. CIV. P. 3 provides: "A civil action is commenced by filing a complaint with the court."

⁷⁸ See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (in a diversity action in federal court, state statute providing that an action was not deemed commenced until service of summons on defendant, rather than Federal Rule 3, applied to determine when an action commenced for state statute of limitation purposes).

⁷⁹ See *Browne*, *supra* note 31, at 393-94.

⁸⁰ See *supra* note 21.

⁸¹ *Yancey v. Pyles*, 44 Ohio App. 2d 410, 413-14, 339 N.E.2d 835, 837 (1st Dist. 1975) (Hamilton County). But see *Conway v. Smith*, 66 Ohio App. 2d 65, 67 n.4, 419 N.E.2d 1117, 1119 n.4 (8th Dist. 1979) (Cuyahoga County) (implying that filing of a praecipe was still required after Rule 3(A) became effective).

which service is sought to be made by publication. In such cases under the Rules, Civil Rule 4.4(A) requires the same affidavit. Therefore, while this aspect of the statute may not be in harmony with Rule 3(A), it is in complete harmony with the Rules as a whole when Rules 3(A) and 4.4(A) are read together.

B. Acquisition of Jurisdiction Within a Year

The Rule states that the action will be commenced "if service is obtained within one year from filing"⁸² of the complaint while the statute states "if service is obtained within one year."⁸³ This slight difference in language is completely without significance, since it is apparent that the statute also means within one year from the filing of the complaint. It should be noted, however, that neither the Rule nor the statute completely means what it says; both talk of *service* as an essential element of commencement, but it is not; what both mean to say is that the action is commenced if *jurisdiction over the person of the defendant* is obtained within one year after the filing of the complaint.⁸⁴ Service, of course, is the normal manner in which such jurisdiction is acquired, and both the Rule and the statute speak to the norm rather than to the exceptions. For commencement purposes, it is immaterial how the court acquires *in personam* jurisdiction; what is material is that jurisdiction be acquired within a year following the filing of the complaint.⁸⁵

1. Effective Service

While the Rule and the statute speak only of "service," the courts have made it clear that "service" means "effective service"; that is, the sufficient service of a sufficient summons.⁸⁶ If the defendant has not been

⁸² OHIO R. CIV. P. 3(A).

⁸³ OHIO REV. CODE ANN. § 2305.17 (Page 1981).

⁸⁴ See Scigliano, *supra* note 5, at 275.

⁸⁵ *Id.* As to the various methods of acquiring jurisdiction, see *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984), where it is said:

It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court. The latter may more accurately be referred to as a waiver of certain affirmative defenses, including jurisdiction over the person under the Rules of Civil Procedure.

Id. at 156, 464 N.E.2d at 540 (footnote omitted).

⁸⁶ The supreme court in *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977), stated: "Effective service of summons on the defendant is a necessary prerequisite to the commencement of a civil action. Civ. R. 3(A)." To the same effect, see *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 222 (1966); *Hoehn v. Empire Steel Co.*, 172 Ohio St. 285, 175 N.E.2d 172 (1961), *rev'd on other grounds*, *Wasyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58 (1963);

served at all, and he does not otherwise submit his person to the jurisdiction of the court, the action fails of commencement.⁸⁷

"Sufficient service" means service made in accordance with the provisions of Civil Rules 4 through 4.6. As a general rule, any method of service will be sufficient service for commencement purposes if it is made in accordance with the provisions of those Rules. In some cases, however, either a Rule or a statute will restrict the method of service that may be used in a given case or situation. Civil Rule 15(D), for example, permits only personal service to be made on a "John Doe" defendant.⁸⁸ Thus, if a "John Doe" defendant is served by any other method of service, the service is insufficient, even though it is made in meticulous compliance with the Rule governing it, and the action against "John Doe" will fail of commencement.⁸⁹ While the focus of inquiry in "sufficient service" situations will generally be on compliance with the Rules governing service, compliance is not necessarily the primary consideration. The plaintiff must select a method of service that is reasonably calculated, under all the circumstances, to give the defendant actual notice of the suit.⁹⁰ If the plaintiff deliberately chooses a method of service that is not likely to give that actual notice, then the service is insufficient, even though there has been religious compliance with the Rule governing that method of service.⁹¹

Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (10th Dist. 1971)(Franklin County), *aff'd*, 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972); Nationwide Mut. Ins. Co. v. Pitstick, 7 Ohio Misc. 2d 53 (C.P. Hamilton County 1983).

⁸⁷ See Maryhew v. Yova, 11 Ohio St. 3d 154, 159, 464 N.E.2d 538, 543 (1984); Kossuth v. Bear, 161 Ohio St. 378, 384, 119 N.E.2d 285, 288 (1954).

⁸⁸ When the defendant's name is unknown, OHIO R. CIV. P. 15(D) provides: "The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

⁸⁹ E.g., Uihlein v. Gladioux, 74 Ohio St. 232, 78 N.E. 363 (1906); Collins v. State, No. 82AP-370 (Ohio 10th Dist. Ct. App. Jan. 6, 1983)(Franklin County); Lombardo v. Calabrese, No. 44520 (Ohio 8th Dist. Ct. App. Nov. 4, 1982)(Cuyahoga County); Vocke v. City of Dayton, 36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973)(Montgomery County); Tylee & O'Rourke, *Procedures for Filing of Actions Against Name-Unknown Defendants Under Ohio Civil Rule 15(D)*, 58 LAW & FACT 3 (Apr. 1984).

For a similar situation involving OHIO REV. CODE ANN. § 2111.04(B)(1)(Page 1976), serving notice in guardianship proceedings, see *In re Corless*, 2 Ohio App. 3d 92, 440 N.E.2d 1203 (12th Dist. 1981)(Butler County).

⁹⁰ E.g., Akron-Canton Regional Airport Auth. v. Swinehart, 62 Ohio St. 2d 403, 406 N.E.2d 811 (1980).

⁹¹ See Elliott v. Elliott, No. L-82-231 (Ohio 6th Dist. Ct. App. Dec. 10, 1982)(Lucas County); Ditwiler v. Hamilton, No. 81AP-267 (Ohio 10th Dist. Ct. App. July 30, 1981)(Franklin County); Goodwin v. Goodwin, No. CA 4954 (Ohio 5th Dist. Ct. App. Mar. 30, 1979)(Stark County). But see Kienzle v. Kienzle, No. 45035 (Ohio 8th Dist. Ct. App. Feb. 10, 1983)(Cuyahoga County), and J.R. Prods. v. Young, 3 Ohio App. 3d 407, 445 N.E.2d 740 (10th Dist. 1982)(Franklin County), in which the courts found the service to be valid because the defendants did receive actual notice of the proceedings even though the plaintiff in *Young* had the summons sent to an address which he knew was not the defendant's

Generally, a "sufficient summons" is a summons that contains all of the information required by Civil Rule 4(B), or a publication that contains all of the information required by Civil Rule 4.4(A). However, the failure to include all of the requisite information in the summons or publication will not render them "insufficient" if the defendant has not been prejudiced by the omission;⁹² in this case, the omitted information may be supplied by amendment.⁹³ But again, note must be taken of special requirements imposed by Rule or statute. For example, Rule 15(D) requires the summons in "John Doe" cases to contain the words "name unknown."⁹⁴ If this phrase is not included in the summons, the summons is insufficient, and the court will not acquire jurisdiction over the person of the defendant through the service of that summons.⁹⁵ As a general rule, then, if the filing of the complaint is not followed by the sufficient service of a sufficient summons, the action will fail of commencement.⁹⁶

2. The Defendant's Appearance in the Action

While the sufficient service of a sufficient summons is the normative method of commencing a civil action, it is not the exclusive method; an action may also be commenced if the defendant confers jurisdiction over his person by entering an appearance in the action.⁹⁷ However, not every appearance in the action by the defendant will result in the court's acquisition of jurisdiction over his person; to accomplish this end, the appearance must expressly or impliedly submit the defendant's person to the court's jurisdiction.⁹⁸ This type of appearance can be found in the written

address and the plaintiff in *Kienzle* intercepted the summons in an effort to conceal the fact of suit from the defendant.

The same result—invalid service and failure of commencement—may obtain even if the plaintiff quite innocently selects a method of service not reasonably calculated to give actual notice under all of the circumstances. See *Black v. Barany*, No. 44413 (Ohio 8th Dist. Ct. App. Sept. 30, 1983)(Cuyahoga County); *Rinehart v. Taylor*, No. 82AP-80 (Ohio 10th Dist. Ct. App. June 29, 1982)(Franklin County); *Grant v. Ivy*, 69 Ohio App. 2d 40, 429 N.E.2d 1188 (10th Dist. 1980)(Franklin County).

⁹² *Baldine v. Klee*, 14 Ohio App. 2d 181, 237 N.E.2d 905 (7th Dist. 1968)(Trumbull County).

⁹³ OHIO R. CIV. P. 4.6(B).

⁹⁴ See *supra* note 88.

⁹⁵ *Byers Enters. v. Factory Prods.*, No. 80AP-190 (Ohio 10th Dist. Ct. App. Aug. 14, 1980)(Franklin County); *Sidenstricker v. Weir*, No. 78AP-160 (Ohio 10th Dist. Ct. App. Aug. 17, 1978)(Franklin County); *Browne, Ohio Civil Rule 8(C) and Related Rules: Some Notes on the Pleading of Affirmative Defenses*, 27 CLEV. ST. L. REV. 329, 373 (1978); *Tylee & O'Rourke*, *supra* note 89, at 3.

⁹⁶ See cases cited *supra* note 86.

⁹⁷ *E.g.*, *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984); *Scigliano*, *supra* note 5, at 275.

⁹⁸ *Scigliano*, *supra* note 5, at 275. See also *Browne, The Leave to Plead as a Waiver of the Jurisdictional Defenses*, 32 CLEV. ST. L. REV. 431 (1984)(discussing when and how a defendant's appearance waives jurisdictional defects under the Ohio Rules).

waiver of service under the provisions of Civil Rule 4(D),⁹⁹ the written waiver of service in a promissory note,¹⁰⁰ an express contractual provision acknowledging that a particular court may exercise jurisdiction over the defendant's person,¹⁰¹ the settlement of a contested suit,¹⁰² the failure to assert in a timely fashion the jurisdictional defenses by motion or answer,¹⁰³ and perhaps, by the pleading of a counterclaim or cross-claim.¹⁰⁴ An appearance by the defendant cannot be found if it does not unequivocally submit the defendant's person to the court's jurisdiction, such as an appearance for the purpose of obtaining an extension of time in which to move or plead.¹⁰⁵

3. Within a Year

In order to commence an action, the effective service or the appearance must occur within the year immediately following the filing of the complaint.¹⁰⁶ A "year" is twelve consecutive months and not 365 days;¹⁰⁷ thus, if the complaint had been filed on March 1, 1983, the year would end on March 1, 1984, and not on February 29, 1984, even though 1984 is a "leap year."¹⁰⁸ If a day can be gained because of a "leap year," so it can be lost; if the complaint were filed on February 29, 1984, the year would end on February 28, 1985.¹⁰⁹ Since service of process is the usual method of acquiring in personam jurisdiction and since service can take place at any time of the day, the last day of the year extends to midnight of that day and is not terminated at the anniversary hour of the filing of the com-

⁹⁹ *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984).

¹⁰⁰ *First Nat'l Bank of Dayton v. One Green St., Inc.*, No. 7293 (Ohio 2d Dist. Ct. App. Nov. 25, 1981)(Montgomery County).

¹⁰¹ *Alpha Indus. v. Tube Mach. Corp.*, 6 Ohio App. 3d 58, 453 N.E.2d 1114 (6th Dist. 1982)(Lucas County).

¹⁰² *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App. 3d 236, 456 N.E.2d 1309 (10th Dist. 1982)(Franklin County).

¹⁰³ *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984); *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St. 2d 403, 406 N.E.2d 811 (1980); *Security Ins. Co. v. Transit Auth.*, 4 Ohio App. 3d 24, 446 N.E.2d 220 (8th Dist. 1982)(Cuyahoga County); *Franklin v. Franklin*, 5 Ohio App. 3d 74, 449 N.E.2d 457 (7th Dist. 1981)(Mahoning County); *Hamilton v. East Ohio Gas Co.*, 47 Ohio App. 2d 55, 351 N.E.2d 775 (9th Dist. 1973)(Summit County); *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982).

¹⁰⁴ *Kovacik v. Kovacik*, No. 46117 (Ohio 8th Dist. Ct. App. Oct. 13, 1983)(Cuyahoga County); *Annot.* 17 A.L.R. FED. 388 (1973).

¹⁰⁵ *Maryhew*, 11 Ohio St. 3d at 157-58, 464 N.E.2d at 541-42; *Browne*, *supra* note 98.

¹⁰⁶ *See cases cited supra* note 13.

¹⁰⁷ *See Buckeye Union Ins. Co. v. Lowe*, No. 81AP-437 (Ohio 10th Dist. Ct. App. Oct. 20, 1981)(Franklin County); *Schon v. National Tea Co.*, 19 Ohio App. 2d 222, 250 N.E.2d 890 (7th Dist. 1969)(Mahoning County); OHIO REV. CODE ANN. § 1.44(B) (Page 1984).

¹⁰⁸ OHIO REV. CODE ANN. § 1.45 (Page 1984).

¹⁰⁹ *Id.*

plaint.¹¹⁰ Thus, if the complaint was filed at 10 a.m. on March 1, 1983, the year in which to acquire jurisdiction would expire at midnight on March 1, 1984.

Again, since service can take place at any time, there is no logical reason why the provisions of Civ. Rule 6(A) should apply to Rule 3(A)'s "year";¹¹¹ but Rule 6(A) probably does apply, since it speaks in broad general terms.¹¹² Therefore, if the last day of the year falls on a Saturday, Sunday, or legal holiday, the "year" does not end until midnight of the next day which is not a Saturday, Sunday, or legal holiday.¹¹³ However, since service does not require access to the court, the last sentence of Civil Rule 6(A)¹¹⁴ does not apply and does not serve to extend automatically the year in which to acquire jurisdiction over the defendant.

Can Civil Rule 3(A)'s "year" be extended under the provisions of Civil Rule 6(B)? Rule 6(B) has two major parts; the first is a broad grant of discretionary power which allows the trial judge to extend the "specified time" in which "an act is required" to be done "by these rules," and the second is a recitation of the Civil Rules to which this grant of power does not apply.¹¹⁵ Since Civil Rule 3(A) is not one of the Rules enumerated in the second part, it is fair to conclude that it falls within the first part, and

¹¹⁰ See *State ex rel. Jones v. Board*, 93 Ohio St. 14, 112 N.E. 136 (1915); *Schon v. National Tea Co.*, 19 Ohio App. 2d 222, 250 N.E.2d 890 (7th Dist. 1969)(Mahoning County).

¹¹¹ In pertinent part, OHIO R. Civ. P. 6(A) provides: "The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday." Scigliano, *supra* note 5, at 277-78, points out that the grace period provided by Rule 6(A) because the clerk's office is closed is unnecessary in service of process which can be effected at anytime.

¹¹² OHIO R. Civ. P. 6(A) begins: "In computing any period of time prescribed or allowed by these rules"

¹¹³ *Cf. Rahm v. Hemsoth*, 53 Ohio App. 2d 147, 372 N.E.2d 358 (6th Dist. 1976)(Lucas County)(when period in which plaintiff could bring cause of action ended on a Saturday, the period is extended to next full work day).

¹¹⁴ The last sentence of OHIO R. Civ. P. 6(A) reads:

When a public office in which an act, required by law, rule, or order of court, is to be performed is closed to the public for the entire day which constitutes the last day for doing such an act, or before its usual closing time on such day, then such act may be performed on the next succeeding day which is not a Saturday, a Sunday, or a legal holiday.

¹¹⁵ OHIO R. Civ. P. 6(B) provides:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them.

the court may, in its discretion, extend the period for acquiring jurisdiction over the defendant beyond the one year stated in Rule 3(A). By its terms, however, Civil Rule 6(B) does not apply to an act required by statute to be done within a specified time. Therefore, Rule 6(B), which seems to permit an extension under Rule 3(A), would not permit the extension of the one year time period found in section 2305.17, and we are again faced with the question whether the Rule or the statute prevails. When Rule 3(A) is read in the context of Rule 6(B), Rule 3(A)'s reference to service within a year following the filing of the complaint becomes permissive/general. Section 2305.17, on the other hand, remains mandatory/exclusive, since there is no statutory provision or Rules' provision authorizing an extension of the one year period for service which it prescribes. Although there is very little authority on point, it would appear that a mandatory/exclusive statutory provision will prevail over a permissive/general Rules' provision.¹¹⁶ Therefore, until the supreme court holds otherwise, it is more prudent to assume that the one year period for acquiring jurisdiction over the defendant cannot be extended.

Whatever its merits in the abstract, this conclusion is consistent with the principle underlying both section 2305.17 and Civil Rule 3(A). "The service within one year requirement is retained from [section] 2305.17, R.C., as amended in 1965, and is based on the philosophy that dockets should be cleared if, within the reasonable time of one year, service has not been obtained."¹¹⁷ Extending the time for obtaining jurisdiction would not achieve this goal of clearing the docket.

Can Civil Rule 3(A)'s "year" be reduced? Prior to the enactment of Civil Rule 4(E), it was well settled that it could not be; the plaintiff had an absolute right to a full year in which to acquire jurisdiction over the person of the defendant.¹¹⁸ Civil Rule 4(E) now provides:

¹¹⁶ Cf. *City of Akron v. Gay*, 47 Ohio St. 2d 164, 351 N.E.2d 475 (1976)(court characterized statutory requirement in an appropriation proceeding that owner file an answer by a particular date as "jurisdictional" and therefore unmodified by the Rules of Civil Procedure). See also *Browne*, *supra* note 31, at 395-96.

The problem was discussed in *Conway v. Smith*, 66 Ohio App. 2d 65, 67 nn.3-4, 419 N.E.2d 1117, 1119 nn.3-4 (8th Dist. 1979)(Cuyahoga County), but was not resolved, because appellants did not separately argue the overruling of their motion to extend the year in which to obtain service.

¹¹⁷ OHIO R. CIV. P. 3(A) advisory committee note (1970). See also *Maryhew v. Yova*, 11 Ohio St. 3d 154, 157, 464 N.E.2d 538, 541 (1984)(referring to the "clearing the docket" rationale for the one year service requirement without attribution to the staff note).

¹¹⁸ See *Twardowski v. Cooper*, No. 8105 (Ohio 2d Dist. Ct. App. May 2, 1983)(Montgomery County); *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975)(Hamilton County); *Hayden v. Ours*, 44 Ohio Misc. 62 (C.P. Paulding County 1975).

However, if it became apparent that the court could never acquire jurisdiction over the person of the defendant, the complaint could be stricken from the files for failure of commencement before the year expired. *Lozier v. Thorne*, No. 5-78-34 (Ohio 3d Dist. Ct. App. May 25, 1979)(Hancock County).

If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This division shall not apply to out-of-state service pursuant to Rule 4.3 or to service in a foreign country pursuant to Rule 4.5.

This new subdivision of Rule 4 has many problems,¹¹⁹ not the least of which is the meaning of the phrase "[i]f a service of summons and complaint is not made upon a defendant within six months." This could be read in either of two ways: 1) the plaintiff has not made any attempt to serve the defendant within the first six months following the filing of the complaint, or 2) there has been no effective service on the defendant within six months after the filing of the complaint. In all probability, the first reading is the intended reading since the Rule appears designed to dispose of those cases in which the plaintiff files the complaint to stop the running of the statute of limitations, and then requests the clerk to withhold the issuance of the summons until the happening of some future event.¹²⁰ Thus, Rule 4(E) could be used to reduce the year in which to obtain jurisdiction if the defendant was not served with a summons and complaint within six months, but it would not apply if ineffective attempts at service were made. Of course, since the principle underlying Rule 4(E) is failure to prosecute, the Rule contemplates prompt and continuous efforts at obtaining effective service; if the plaintiff's first attempt at service fails, and he thereafter makes no further attempt within the six month period, he has failed to prosecute his action, and Rule 4(E) should apply.

Rule 4(E) will not reduce the year if the plaintiff can show good cause why he has not obtained service on the defendant; but what is "good

¹¹⁹ See Browne, *supra* note 5.

¹²⁰ See, e.g., *Twardowski v. Cooper*, No. 8105 (Ohio 2d Dist. Ct. App. May 2, 1983)(Montgomery County)(plaintiff's counsel failed to perfect service upon defendants although six months had passed since filing of complaint); *Scott v. Orlando*, 2 Ohio App. 3d 333, 442 N.E.2d 96 (6th Dist. 1981)(Lucas County)(service was delayed at request of plaintiff's counsel concerned with other ongoing litigation).

Filing the complaint and then requesting the clerk to withhold issuance of the summons is a favorite tactic in "John Doe" situations, since the plaintiff frequently has no idea who "John Doe" is and needs time to discover who he is, or whether or not he in fact exists. See, e.g., *Vocke v. City of Dayton*, 36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973)(Montgomery County). This is a clear abuse of Civil Rule 15(D). See *Collins v. State*, No. 82AP-370 (Ohio 10th Dist. Ct. App. Jan. 6, 1983)(Franklin County); *Jack Davis Painting Co. v. Eller Enters., Inc.*, 8 Ohio App. 3d 211, 456 N.E.2d 1274 (10th Dist. 1982)(Franklin County). Civil Rule 4(E) may serve to end this form of abuse.

cause"? If the plaintiff could not reasonably be expected to know that he had not obtained service on the defendant, Rule 4(E) should not apply. Suppose, for example, that the plaintiff is suing both John and Jane Smith. Through inadvertence, the clerk's office issues two summons for John Smith and none for Jane. Both are sent by certified mail to the Smith residence, and Jane Smith receives both. From the record, it would appear that both John and Jane Smith had been served, but in fact, Jane had not been served at all. This type of all-but-impossible-to-detect error should constitute sufficient good cause to allow the plaintiff a full year in which to obtain service on Jane Smith. On the other hand, not every error by the clerk's office will amount to good cause, since the plaintiff has the burden of ascertaining that effective service has been made;¹²¹ thus, the test for good cause in conjunction with clerical error is whether the plaintiff could reasonably be expected to discover the lack of service. It is hardly likely that the courts will find good cause if the plaintiff deliberately asks that service be withheld because he does not know who the defendant is¹²² or because he does not want the defendant to know that he has been sued.¹²³

Is the "year" in which to obtain jurisdiction tolled by the provisions of section 2305.15 of the Ohio Revised Code?¹²⁴ Although this question had been discussed,¹²⁵ it has only recently been answered clearly.¹²⁶ In princi-

¹²¹ OHIO R. CIV. P. 4.6(E).

¹²² See *supra* note 120 (withholding issuance of summons in "John Doe" suits).

¹²³ See *Scott v. Orlando*, 2 Ohio App. 3d 333, 442 N.E.2d 96 (6th Dist. 1981)(Lucas County).

¹²⁴ In pertinent part, OHIO REV. CODE ANN. § 2305.15 (Page 1981), provides:

When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action . . . does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

¹²⁵ In *Conway v. Smith*, 66 Ohio App. 2d 65, 419 N.E.2d 1117 (8th Dist. 1979)(Cuyahoga County), the Court of Appeals for Cuyahoga County held that § 2305.15 tolled the statute of limitations while the defendant was absent from the state, but implied that it would not toll the one year period in which to obtain jurisdiction over the person of the defendant. *Id.* at 68-70, 419 N.E.2d at 1119-21. In *Scott v. Orlando*, 2 Ohio App. 3d 333, 442 N.E.2d 96 (6th Dist. 1981)(Lucas County), the Court of Appeals for Lucas County suggested that § 2305.15 would toll the one year period in an appropriate case.

Appellants contend that the trial court erred in dismissing appellants' complaint in that the time limit for service prescribed by R.C. 2305.17 and Civ. R. 3(A) might have been extended by applying the savings clause, R.C. 2305.15 to those time limits. (Appellee had admitted to being absent from the state for approximately twenty-nine days.) We find this argument inapplicable given the facts of this case.

Id. at 334, 442 N.E.2d at 97.

¹²⁶ In the syllabus of *Saunders v. Choi*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984), the

ple, this question should be answered in the negative, since section 2305.15 by its express terms applies only to "the period of limitation for the commencement of the action" and the "period within which the action must be brought."¹²⁷ However, the year in which jurisdiction may be acquired is not part of this period; it is completely independent.¹²⁸ Therefore, by its own terms, section 2305.15 does not apply to either section 2305.17 or Civil Rule 3(A). Further, if section 2305.15 were to be applied to Rule 3(A), it would render the Rule meaningless in most cases in which service is attempted under the provisions of Civil Rules 4.3 or 4.5. Suppose, for example, that the plaintiff filed suit against a nonresident defendant who had never been physically present in Ohio, but who had contracted to supply goods in Ohio.¹²⁹ If section 2305.15 were applicable to either section 2305.17 or Civil Rule 3(A) under these circumstances, the year in which to obtain jurisdiction over the person of the nonresident defendant would not begin to run "until he comes into the state."¹³⁰ Since it is unlikely that the nonresident defendant would ever come into the state, it then would follow that the year in which to get jurisdiction never would begin to run. This would have the effect of completely nullifying section 2305.17 and Civil Rule 3(A) in cases such as this, and it can hardly be argued that such a result was contemplated by the supreme court when it enacted Civil Rule 3(A). The approach to this question adopted by the court in *Saunders v. Choi*,¹³¹ appears to be sound: if section 2305.15 has tolled the statute of limitations because of the defendant's absence from the state, but the plaintiff nevertheless brings suit, the statute of limitations remains tolled, and the plaintiff has only a year from the filing of the complaint in which to obtain jurisdiction over the

Ohio Supreme Court stated: "The tolling provisions of R.C. 2305.15 are expressly inapplicable to an action brought under R.C. 2305.19, and cannot be used to extend the one-year time limitation within which to commence an action under Civ. R. 3(A)." *Id.* at 247, 466 N.E.2d at 890 (syllabus).

¹²⁷ See *supra* note 124.

¹²⁸ Although § 2305.17 is part of the chapter of the Revised Code relating to limitation of actions, it is not a statute of limitation; its only purpose is to fix the date of the commencement of an action within the terms of those statutes. *Shaffer v. Shaffer*, 69 Ohio App. 447, 452, 42 N.E.2d 176, 178 (2d Dist. 1941) (Montgomery County). The same is true with respect to Civil Rule 3(A). It is not a statute of limitations, and it does not extend the applicable period of limitations by a year. *Samstag v. McDonough*, 75 Ohio Op. 2d 354, 355 (8th Dist. Ct. App. 1975) (Cuyahoga County). The dissent in *Saunders v. Choi*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984), completely misses this point, and thus reaches an unacceptable result. See *id.* at 251, 466 N.E.2d at 893 (C. Brown, J., dissenting).

¹²⁹ OHIO R. Civ. P. 4.3(A)(2) allows out-of-state service. For the converse of this situation, see *Kleinfeld v. Link*, 9 Ohio App. 3d 29, 457 N.E.2d 1187 (3d Dist. 1983) (Allen County) (plaintiff in an action in Alaska court had obtained in personam jurisdiction over the defendant, an Ohio resident, by use of a Alaska's "long arm" statute).

¹³⁰ See *supra* note 124 for the precise language of OHIO REV. CODE ANN. § 2305.15 (Page 1981).

¹³¹ 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984).

person of the defendant. If he does not obtain that jurisdiction within that year, the action fails of commencement.¹³²

Service by publication, as authorized by Civil Rule 4.4, can also present certain problems. Suppose that the first of the required publications is made within the year following the filing of the complaint, but the last is not made until after that year has expired. Has the action been commenced? In *Dolan v. Fulkert*,¹³³ the Court of Appeals for Lucas County held that it was, but in *Pistner v. Baxter*,¹³⁴ the Court of Appeals for Franklin County held that it was not, and the supreme court has yet to resolve this conflict between the decisions. Of the two approaches, that of *Pistner* is preferable, since it is based on a literal reading of the Civil Rules,¹³⁵ while the *Dolan* court tacitly admitted that it was taking liberties with the language of the Rules.¹³⁶ If the first publication is made after the year has expired, the action clearly fails of commencement under either the *Dolan* or *Pistner* approach.¹³⁷

¹³² *Id.* at 250, 466 N.E.2d at 892.

¹³³ 30 Ohio App. 2d 165, 168, 284 N.E.2d 179, 182 (6th Dist. 1972)(Lucas County).

¹³⁴ 2 Ohio App. 3d 69, 70, 440 N.E.2d 812, 813 (10th Dist. 1981)(Franklin County).

¹³⁵ *Id.* In fact, OHIO R. Civ. P. 4.4(A) expressly states that "[s]ervice shall be complete at the date of the last publication." OHIO R. Civ. P. 12(A)(1) provides: "[I]f service of notice has been made by publication, [the defendant] shall serve his answer within twenty-eight days after the completion of service by publication"; i.e., within twenty-eight days after the date of the last publication.

¹³⁶ The *Dolan* court said:

For more than one hundred years, under the statutory provision 2305.17 R.C., "the action is commenced at the date of the first publication, . . ." Even though this section was amended in 1965 and the specific words referred to were eliminated, it would appear that many competent practicing attorneys in the state of Ohio would probably believe that the date of first publication is the date on which service is considered to have been made. It is true that the new rules were adopted and were to be construed so that just results could be obtained by eliminating delay. However, they were not designed to entrap the unwary who had been "used to doing it this way," for the last 10, 25, or 50 years. With particular emphasis on the circumstances of this case and upon consideration of the relatively short time the civil rules have been in effect, it is decided that the directive of Rule 1(B), Construction, will not be violated by interpreting Rule 4.4(A) in such a way that the words "service shall be complete at the date of the last publication" shall not exclude the relating back of the last publication to the date of the first publication, if regularly made. In the absence of a clear mandatory requirement not to so relate the last publication back, we hold that the date of the first publication is the date service was obtained within Rule 3(A), even though not completed until the last publication under Rule 4.4(A).

30 Ohio App. 2d at 170-71, 248 N.E.2d at 183.

¹³⁷ See *Saunders v. Choi*, No. 45101 (Ohio 8th Dist Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984); *Conway v. Smith*, 66 Ohio App. 2d 65, 419 N.E.2d 1117 (8th Dist. 1979)(Cuyahoga County).

C. *The Existence of the Parties*

An action can only be commenced by a plaintiff that has real or legal existence, and an action can be commenced only against a defendant who has real or legal existence; thus, both the plaintiff and the defendant must have real or legal existence at the time the complaint is filed.¹³⁸ This rule remains completely valid despite some loose language in recent cases. What these recent cases have been discussing is not a change in the rule of existence, but how and under what circumstances the action by or against a nonexistent party can be deemed commenced against a substitute for that party.¹³⁹

1. The Existence of the Defendant

There are three fundamental rules that govern commencement:

1. If the action is brought against an individual in his individual capacity, he must be alive at the time the complaint is filed, and he must remain alive long enough for the court to acquire jurisdiction over his person, or the action will fail of commencement against him.¹⁴⁰

2. If the action is brought against an individual in his representative capacity, he must be alive and have the legal authority to act as a repre-

¹³⁸ See *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), *rev'd on other grounds*, *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983); *State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St. 2d 120, 296 N.E.2d 544 (1973); *Gentile v. Carr*, 4 Ohio App. 3d 55, 446 N.E.2d 477 (7th Dist. 1981)(Jefferson County); *Levering v. Riverside Methodist Hosp.*, 2 Ohio App. 3d 157, 441 N.E.2d 290 (10th Dist. 1981)(Franklin County); *Council of Whitehall v. Rogers*, 69 Ohio App. 2d 124, 432 N.E.2d 217 (10th Dist. 1980)(Franklin County); *Samstag v. McDonough*, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975)(Cuyahoga County); *Group of Tenants v. Mar-Len Realty, Inc.*, 40 Ohio App. 2d 449, 321 N.E.2d 241 (3d Dist. 1974)(Allen County); *Vocke v. City of Dayton*, 36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973)(Montgomery County); *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982).

Defendants, of course, must not only be in existence at the time the complaint is filed, but they must remain in existence long enough for the court to obtain jurisdiction over their person. If a defendant should cease to exist before service or the entry of a suitable appearance, no action can be commenced against the defendant.

¹³⁹ See, e.g., *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983)(substitution of administrator of deceased defendant's estate); *Gentile v. Carr*, 4 Ohio App. 3d 55, 446 N.E.2d 477 (7th Dist. 1981)(Jefferson County)(executrix of deceased defendant's estate substituted).

¹⁴⁰ *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), *rev'd on other grounds*, *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983); *Hobbs v. Kurek*, No. 45432 (Ohio 8th Dist. Ct. App. Apr. 28, 1983)(Cuyahoga County); *Dewey v. Prater*, No. L-81-169 (Ohio 6th Dist. Ct. App. Dec. 8, 1981)(Lucas County); *Gentile v. Carr*, 4 Ohio App. 3d 55, 446 N.E.2d 477 (7th Dist. 1981)(Jefferson County); *Rahm v. Hemsoth*, No. L-79-006 (Ohio 6th Dist. Ct. App. Oct. 26, 1979)(Lucas County); *Little v. Little*, No. 6197 (Ohio 2d Dist. Ct. App. June 27, 1979)(Montgomery County); *Samstag v. McDonough*, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975)(Cuyahoga County); *Hayden v. Ours*, 44 Ohio Misc. 62 (C.P. Paulding County 1975).

sentative at the time the complaint is filed. He must remain alive and retain his legal authority to act as a representative long enough for the court to acquire jurisdiction over his person as a representative, or the action will fail of commencement against him as such representative.¹⁴¹

3. If the action is brought against an entity, that entity must have legal existence at the time the complaint is filed, and it must remain in legal existence long enough for the court to acquire jurisdiction over it, or the action will fail of commencement against it as an entity.¹⁴²

Note carefully, however, that these rules only require the conclusion that the action has not been *commenced* against the *named* defendant; they do not necessarily require the conclusion that the action *cannot* be commenced against someone other than the named defendant or that a new action cannot be commenced against someone other than the defendant named in the original action. Suppose, for example, that an individual defendant is dead at the time the complaint is filed. If the defendant's death is discovered before the statute of limitations has run on the claim, a new action can be commenced against the estate of the deceased defendant at any time before that statute expires.¹⁴³ Indeed, under these circumstances, the new action might be brought directly against the deceased defendant's liability insurance carrier.¹⁴⁴

This particular road to recovery is dependent upon the statute of limitations. Thus, it is essential that every plaintiff should be careful to avoid the problem identified by the Ohio Supreme Court in *Barnhart v. Schultz*.¹⁴⁵ The plaintiff should either discover the status of the defendant before filing the complaint, or he should file the complaint far enough in advance of the expiration of the statute of limitations to allow time to bring a second action against an appropriate defendant after discovery of the death or nonexistence of the original defendant.

There are times, of course, when circumstances make the early filing of the complaint impossible. If that is the case, and if the plaintiff suspects

¹⁴¹ See *Wrinkle v. Trabert*, 174 Ohio St. 233, 188 N.E.2d 587 (1963); *Little v. Little*, No. 6197 (Ohio 2d Dist. Ct. App. June 27, 1979)(Montgomery County); *Nissen v. Callahan*, No. 38132 (Ohio 8th Dist. Ct. App. Jan. 11, 1979)(Cuyahoga County).

¹⁴² See *Catchings v. Cleveland Pub. Schools*, No. 43730 (Ohio 8th Dist. Ct. App. Apr. 1, 1982)(Cuyahoga County); *Safeco Ins. Co. v. Colerain Township Trustees*, No. C-800050 (Ohio 1st Dist. Ct. App. Mar. 4, 1981)(Hamilton County).

¹⁴³ This conclusion is subject, of course, to the provisions of Chapter 2117 of the Ohio Revised Code. See, e.g., *In re Estate of George*, 24 Ohio St. 2d 18, 262 N.E.2d 872 (1970); *Meinberg v. Glaser*, 14 Ohio St. 2d 193, 237 N.E.2d 605 (1968); *Banas & Cornett, Legal Malpractice: New Rules in Ohio*, 57 OHIO ST. B.A. REP. 36, 38 (1984).

¹⁴⁴ See *Heuser v. Crum*, 31 Ohio St. 2d 90, 285 N.E.2d 340 (1972).

¹⁴⁵ 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978). As the supreme court put it: "[T]he plaintiffs have attempted timely filing but have failed either to discover that the original defendant has died or to insure themselves against such a discovery by filing their complaint sufficiently in advance of the statutory deadline." *Id.* at 62, 372 N.E.2d at 591-92.

the defendant may be dead but cannot determine whether that is so,¹⁴⁶ the plaintiff should join the defendant's liability insurance carrier as a party-defendant in the suit against the insured defendant. The claim against the insurance company would be stated hypothetically,¹⁴⁷ conditioned on the contingency that the defendant is deceased, and it would be made as an alternative to the claim against the defendant.¹⁴⁸ If it thereafter turns out that the defendant was deceased at the time that the complaint was filed, this method of pleading will commence an action against the defendant's liability insurance carrier which is deemed the real party in interest to the extent that the conditions of the last paragraph of section 2117.07 pertaining to presentation of claims against an estate are satisfied.¹⁴⁹ On the other hand, if the defendant is alive and if jurisdiction is obtained over his person, the claim against the insurance carrier will be dismissed for failure to state a claim upon which relief can be granted.¹⁵⁰ In either case, the plaintiff has commenced the action against a defendant who must then respond in damages if the plaintiff is successful in proving his case.

If the statute of limitations has run before the plaintiff discovers the death of the defendant, the plaintiff's position is difficult, but not impossible; much depends upon how much time there is left in the year following the filing of the complaint. If that year expires before corrective measures are taken, the action will not have been commenced against the named defendant who is dead, and the expiration of the statute of limitations will prevent its commencement against the decedent's estate or liability carrier.

If the plaintiff is lucky, at sometime during the year following the filing

¹⁴⁶ The local public library may be of assistance in ascertaining whether the defendant is alive or dead. Many libraries keep copies of the obituaries published in the local papers. A search of this reference file might reveal an obituary for the defendant, and the search itself would not take a great deal of time. Indeed, a well-staffed library will perform the search for you if you place a call to the reference department.

¹⁴⁷ See OHIO R. Civ. P. 8(E)(2).

¹⁴⁸ *Id.* For the allegations which are essential to such a claim against the liability insurance carrier, see the cases cited *supra* note 143.

¹⁴⁹ *Heuser v. Crum*, 31 Ohio St. 2d 90, 285 N.E.2d 340 (1972). As the court noted:

By operation of law, the decedent's liability insurer is now the sole entity that can be required to respond in possible damages to the [plaintiff's] allegations. As such, it is the only defendant below which has any interest in the outcome of this litigation. It arrives at this position by virtue of the contract it made with the decedent and the consideration which supports that contract. The presence of a legal representative of the estate under these facts has become perfunctory; a methodical posture which is maintained out of a desire to obviate any possibility that the existence of an insurer as a party defendant could influence the verdict of the jury.

Id. at 93-94, 285 N.E.2d at 342-43.

¹⁵⁰ *Chitlik v. Allstate Ins. Co.*, 34 Ohio App. 2d 193, 299 N.E.2d 295 (8th Dist. 1973)(Cuyahoga County).

of the complaint, the deceased defendant's personal representative will accept service of summons, voluntarily enter an appearance in the action, and request that he be substituted for the named defendant. In this case, the action will be deemed commenced against the estate of the deceased defendant, and the summons and complaint can be amended to reflect service on the personal representative and a claim against the estate of the deceased defendant.¹⁵¹ If the plaintiff is unlucky, the personal representative will make no response to the attempted service on the deceased defendant,¹⁵² or the estate will be closed and the personal representative discharged at the time service on the deceased defendant is attempted. Should this be the case, the plaintiff must discover the death of the defendant and must take corrective measures before the year for acquiring jurisdiction expires.

If the estate is still open at the time the plaintiff learns of the defendant's death, the plaintiff should move for leave immediately, under the provisions of Civil Rules 15(C) and 21, to amend the complaint and substitute the deceased's personal representative for the originally named defendant. As part of the motion for leave to amend, the plaintiff must demonstrate that the requirements of Civil Rule 15(C)(1) and 15(C)(2) have been met: 1) before the statute of limitations expired, the personal representative of the deceased had received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and 2) before the statute of limitations expired, the personal representative knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.¹⁵³ If the claim is covered by the deceased defendant's liability insurance, this notice and knowledge requirement can be satisfied by showing that the insurance carrier had timely notice of the claim prior to the expiration of the statute of limitations.¹⁵⁴

If the court is satisfied that the provisions of Rule 15(C) have been met, it should grant leave to amend. The plaintiff must then promptly file a copy of the amended complaint naming the personal representative as the defendant and serve the amended complaint and a summons on the personal representative within the year following the filing of the

¹⁵¹ *Gentile v. Carr*, 4 Ohio App. 3d 55, 446 N.E.2d 477 (7th Dist. 1981)(Jefferson County). Although *Gentile* does not mention amendment of the summons, OHIO R. CIV. P. 4.6(B) authorizes such an amendment, and it would seem appropriate to amend the summons to reflect service on the personal representative of the deceased defendant.

¹⁵² Since the deceased defendant obviously has not been served, he is not a "party" to the proceedings at this point, and OHIO R. CIV. P. 25 does not apply. Therefore, the personal representative need not serve and file the suggestion of death required by OHIO R. CIV. P. 25(E).

¹⁵³ *Baker v. McKnight*, 4 Ohio St. 3d 125, 128-29, 447 N.E.2d 104, 107 (1983).

¹⁵⁴ *Id.*

original complaint.¹⁵⁵ If effective service is made on the personal representative within that year, the amended complaint will relate back to the date on which the original complaint was filed, and the action against the personal representative will be deemed commenced as of that date.¹⁵⁶ However, if effective service on the personal representative is not obtained within a year following the filing of the original complaint, and if the personal representative makes no jurisdiction-granting appearance within that year, the action fails of commencement, and the original complaint should be stricken from the files.¹⁵⁷ Likewise, if the court is not satisfied that the provisions of Civil Rule 15(C) have been met, it should overrule the plaintiff's motion for leave to amend and strike the original complaint from the files, since the original action has not been commenced against anyone.¹⁵⁸

If the estate of the deceased defendant is closed at the time the defendant's death is discovered, or if there has been no administration of the estate, the plaintiff must first have the estate reopened or an administrator appointed¹⁵⁹ and must then move for leave to amend to follow the procedure outlined above. The difficulty here will be that of demonstrating compliance with the notice and knowledge requirements of Civil Rule 15(C)(1) and 15(C)(2). In the absence of an involved liability insurance carrier, that may well be impossible,¹⁶⁰ and if it does prove to be impossible, the amendment cannot be allowed, and the action will fail of

¹⁵⁵ *Id.* at 129, 447 N.E.2d at 108.

¹⁵⁶ *Id.* See Ohio R. Civ. P. 15(C). The amended complaint will relate back because the claim stated against the personal representative will have arisen "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [complaint]." *Id.* Thus, the date of commencement will be the date on which the original complaint was filed.

¹⁵⁷ *Baker*, 4 Ohio St. 3d at 129, 447 N.E.2d at 108; *Neville v. Restivo*, No. 3283 (Ohio 11th Dist. Ct. App. Mar. 30, 1984)(Trumbull County). Although a number of courts have said that the action should be "dismissed" under these circumstances, it is clear that the correct disposition of the action is to strike the complaint from the files for failure of commencement, since a nonexistent action cannot be dismissed. See *Kossuth v. Bear*, 161 Ohio St. 378, 383-84, 119 N.E.2d 285, 288 (1954); *Saunders v. Choi*, No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984).

¹⁵⁸ See *Baker*, 4 Ohio St. 3d at 129, 447 N.E.2d at 108. Civil Rule 3(A) does not extend by one year the time for giving the notice required by Rule 15(C)(1). See *Williams v. Jerry L. Kaltenbach Enters., Inc.*, 2 Ohio App. 3d 113, 114 n.1, 440 N.E.2d 1219, 1221 n.1 (1st Dist. 1981)(Hamilton County)(citing with approval *Kirtley v. Pennington*, No. C-780425 (Ohio 1st Dist. Ct. App. July 11, 1979)(Hamilton County)). For the proposition that a court may strike the original complaint from the files on its own initiative when the requirements of Rule 15(C) have not been met, see *Saunders v. Choi*, No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984), and *Nationwide Mut. Ins. Co. v. Pitstick*, 7 Ohio Misc. 2d 53 (C.P. Hamilton County 1983).

¹⁵⁹ See *Hobbs v. Kurek*, No 45432 (Ohio 8th Dist. Ct. App. Apr. 28, 1983)(Cuyahoga County); *Hayden v. Ours*, 44 Ohio Misc. 62 (C.P. Paulding County 1975).

¹⁶⁰ See *Kent, Substituting the Administrator or Executor*, 54 CLEV. B.J. 242, 242-43 (1983).

commencement.¹⁶¹

If the deceased defendant has liability insurance, the supreme court's rationale in *Heuser v. Crum*¹⁶² may provide an alternative to the procedure outlined above. If the defendant has sufficient liability insurance such that no portion of the plaintiff's recovery shall come from the assets of the estate, and if that liability insurance has not itself become an asset of the estate because of a previous claim made against the defendant or his estate,¹⁶³ then the plaintiff can move for leave to amend and substitute the liability carrier for the original defendant. The insurer then can be effectively served with the amended complaint and a summons within the year following the filing of the original complaint. If the plaintiff had been negotiating with the liability carrier before the expiration of the statute of limitations (as is quite likely to be the case), such negotiations will obviate the notice and knowledge requirements of Civil Rule 15(C)(1) and 15(C)(2).¹⁶⁴ While this method has not been tested in litigation, it is certainly worth an attempt in those cases where the plaintiff cannot demonstrate that the deceased defendant's personal representative had the notice and knowledge required by Civil Rule 15(C).¹⁶⁵

If the death of the defendant is discovered too late in the one year post-filing period to allow for effective service on the defendant's personal representative or liability insurance carrier, the plaintiff might just as well gamble on the riskiest remedy of all. This consists of a Civil Rule 41(A)(2) court-ordered voluntary dismissal of the action against the deceased defendant and the filing of a new action against the defendant's

¹⁶¹ *Williams v. Jerry L. Kaltenbach Enters., Inc.*, 2 Ohio App. 3d 113, 440 N.E.2d 1219 (1st Dist. 1981)(Hamilton County); *Samstag v. McDonough*, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975)(Cuyahoga County).

Rahm v. Hemsoth, No. L-79-006 (Ohio 6th Dist. Ct. App. Oct. 26, 1979)(Lucas County), suggests that the personal representative of the deceased might be substituted under the provisions of Civil Rule 25(A) if the time limits of Rule 25 are met. However, as pointed out in *supra* note 152, Civil Rule 25 does not apply to this situation because the originally named defendant is not a "party" to the action.

¹⁶² 31 Ohio St. 2d 90, 285 N.E.2d 340 (1972). The *Heuser* court's rationale is quoted in *supra* note 149.

The facts in *Heuser* are, of course, distinguishable from the situation discussed in the text, since in *Heuser* the liability carrier was named as a co-defendant in the original complaint, and thus the action was clearly commenced against the carrier. However, if the supreme court will adhere to the position it took in *Heuser*—that the insurer of a deceased defendant is the sole entity that can be required to respond in damages to the plaintiff's allegations—the difference between the facts in the case and the text will be insignificant, and there should be no reason why the insurer discussed in the text could not be substituted for the insured under the provisions of Civil Rules 15(C) and 21.

¹⁶³ See OHIO REV. CODE ANN. § 2117.07 (Page 1981), and the cases cited *supra* notes 143, 162.

¹⁶⁴ See *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983); *Kent*, *supra* note 160.

¹⁶⁵ For a case in which the plaintiff could not make the necessary demonstration, see *Samstag v. McDonough*, 75 Ohio Op. 2d 354 (8th Dist. Ct. App. 1975)(Cuyahoga County).

personal representative under the provisions of section 2305.19. Since the "nullity" theory has been abandoned, it can be argued plausibly that the action against the deceased defendant was "an action attempted to be commenced."¹⁶⁶ Further, a Rule 41(A)(2) voluntary dismissal of that action by court order is a "failure" of that action other than on the merits.¹⁶⁷ Therefore, the action against the deceased defendant was an action attempted to be commenced which failed other than on the merits after the statute of limitations had expired, and under the provisions of section 2305.19, the plaintiff has a year from the date of dismissal in which to file a new action against the deceased defendant's personal representative.¹⁶⁸

The risk involved in this remedy is that section 2305.19 does not apply when the parties and the relief sought in the new action are different from those in the original action.¹⁶⁹ Obviously, the relief sought in both actions is the same, but the problem arises out of the requirement that the parties be the same. Will the personal representative of the deceased defendant be deemed the same party as the deceased defendant? The question is an open one, but in *Baker v. McKnight*¹⁷⁰ the Ohio Supreme Court cited with approval the following passage from *Eberbach v. McNabney*:¹⁷¹ "Though Castor [the named defendant] is dead, his legal existence is not extinguished, but shifted to the special administrator of his estate in existence at the date of the original complaint. The special administrator stands in the shoes of the decedent in defending against liability for his alleged torts."¹⁷² The court also quoted the unreported appellate opinion in *Barnhart v. Schultz*¹⁷³ to the effect that "[t]he eventual substitution of the fiduciary of the alleged tortfeasor's estate was not a new cause of action and did not involve an entire change in any of the parties."¹⁷⁴ Based on these two passages, an argument may be made that the deceased defendant and his personal representative are one and the same party for purposes of section 2305.19; whether this argument will be

¹⁶⁶ See *infra* section IV. B.

¹⁶⁷ See *Chadwick v. Barba Lou, Inc.*, 69 Ohio St. 2d 222, 431 N.E.2d 660 (1982). A voluntary dismissal by notice may have the same effect. See *Harris v. Sheedy Paving, Inc.*, No. 82AP-965 (Ohio 10th Dist. Ct. App. Oct. 6, 1983)(Franklin County).

¹⁶⁸ In pertinent part, OHIO REV. CODE ANN. § 2305.19 (Page 1981), states: "In an action commenced, or attempted to be commenced, . . . if 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 after such date."

¹⁶⁹ *Children's Hosp. v. Department of Pub. Welfare*, 69 Ohio St. 2d 523, 433 N.E.2d 187 (1982).

¹⁷⁰ 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983).

¹⁷¹ 413 N.E.2d 958 (Ind. Ct. App. 1980).

¹⁷² *Baker*, 4 Ohio St. 3d at 128, 447 N.E.2d at 107 (footnote omitted)(quoting *Eberbach v. McNabney*, 413 N.E.2d 958, 962 (Ind. Ct. App. 1980)).

¹⁷³ No. C-75377 (Ohio 1st Dist. Ct. App. Jan. 26, 1977)(Hamilton County).

¹⁷⁴ *Baker*, 4 Ohio St. 3d at 128 n.3, 447 N.E.2d at 107 n.3 (quoting *Barnhart v. Schultz*, No. C-75377, slip op. at 4 (Ohio 1st Dist. Ct. App. Jan. 26, 1977)(Hamilton County)).

successful remains to be seen.

Turn now to the problem posed by individuals being sued in their representative capacity and postulate that the complaint must be filed immediately because the statute of limitations is about to run. Suppose that the plaintiff knows that the alleged tortfeasor is dead and has reason to believe that his estate is in administration, but does not know the identity of the tortfeasor's personal representative. May the plaintiff file the complaint against "John Doe, real name unknown, administrator or executor of the estate of John L. Pressly, deceased"?

If a personal representative has in fact been appointed as administrator or executor at the time the complaint was filed, and was alive at that time, the answer appears to be in the affirmative. This is a straight forward Civil Rule 15(D) case, and if the plaintiff follows the requirements of that Rule, the action will be commenced against the personal representative of the deceased tortfeasor.

But what if the personal representative has not been appointed as such at the time the complaint was filed? Clearly, no action has been commenced against him since he has no legal existence,¹⁷⁶ and not even a "John Doe" action can be commenced against a nonexistent defendant.¹⁷⁶ After his appointment as administrator or executor, can he be substituted for "John Doe" by an amendment made under the provisions of Civil Rules 15(C) and 21, assuming the notice and knowledge requirements of Rule 15(C) can be satisfied? In *Nissen v. Callahan*,¹⁷⁷ the Court of Appeals for Cuyahoga County held that he could not; however, this holding was based on the "nullity" theory of *Barnhart v. Schultz*.¹⁷⁸ Since that theory was overruled in *Baker v. McKnight*,¹⁷⁹ it would seem that substitution by amendment would now be in order, the amendment relating back to the date the original complaint was filed so that the date of commencement would be the date of the original filing.¹⁸⁰

The case of the entity that has no legal existence poses a more difficult problem simply because there may not be any person or entity that can

¹⁷⁶ *Nissen v. Callahan*, No. 38132 (Ohio 8th Dist. Ct. App. Jan. 11, 1979)(Cuyahoga County).

¹⁷⁶ *Vocke v. City of Dayton*, 36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973)(Montgomery County).

¹⁷⁷ No. 38132 (Ohio Dist. Ct. App. Jan. 11, 1979)(Cuyahoga County).

¹⁷⁸ 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978). The court expressed the "nullity" theory as follows:

It is accepted law that an action may only be brought against a party who actually or legally exists and has the capacity to be sued Because a party must actually or legally exist, "one deceased cannot be a party to an action" . . . and a suit brought against a dead person is a nullity

Id. at 61, 372 N.E.2d at 591.

¹⁷⁹ 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983).

¹⁸⁰ Although not directly on point, *Hobbs v. Kurek*, No. 45432 (Ohio 8th Dist. Ct. App. Apr. 28, 1983)(Cuyahoga County), tends to support this conclusion.

be substituted for the named defendant. If there is no available substitute, the action against such an entity simply fails of commencement.¹⁸¹ If there is an available substitute, the action will be commenced as of the date the original complaint was filed if the person or entity can be substituted under the provisions of Civil Rules 15(C) and 21; otherwise it too will fail of commencement.¹⁸²

2. The Existence of the Plaintiff

Here, too, there are three fundamental rules that govern commencement:

1. If the action is brought by an individual in his individual capacity, he must be alive at the time the complaint is filed, or the action will fail of commencement as to him.¹⁸³

2. If the action is brought by an individual in his representative capacity, he must be alive and have the legal authority to act as a representative at the time the complaint is filed, or the action will fail of commencement as to him as representative.¹⁸⁴

3. If the action is brought by an entity, that entity must have legal existence at the time the complaint is filed, or the action will fail of commencement as to the entity.¹⁸⁵

Again, of course, the application of these rules leads only to the conclusion that the action cannot be commenced by the nonexistent named plaintiff; application does not mandate the conclusion that the action cannot be commenced by someone other than the named plaintiff or that a new action cannot be commenced by some other party. If the statute of limitations has not expired, for example, a new action can be commenced by the personal representative of the named plaintiff who was deceased at the time the original complaint was filed.

If the statute of limitations has expired before the nonexistence of the named plaintiff is discovered, may some appropriate person be substituted for the named plaintiff and thus commence the original action? A

¹⁸¹ *Safeco Ins. Co. v. Colerain Township Trustees*, No. C-800050 (Ohio 1st Dist. Ct. App. Mar. 4, 1981)(Hamilton County).

¹⁸² *Catchings v. Cleveland Pub. Schools*, No. 43730 (Ohio 8th Dist. Ct. App. Apr. 1, 1982)(Cuyahoga County).

¹⁸³ See *Levering v. Riverside Methodist Hosp.*, 2 Ohio App. 3d 157, 441 N.E.2d 290 (10th Dist. 1981)(Franklin County).

¹⁸⁴ *Douglas v. Daniels Bros. Coal Co.*, 135 Ohio St. 641, 22 N.E.2d 195 (1939).

¹⁸⁵ *State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St. 2d 120, 296 N.E.2d 544 (1973); *Lock Bros. Excavating Co. v. Dye*, No. 3039 (Ohio 11th Dist. Ct. App. Mar. 1, 1982)(Trumbull County); *SES, Inc. v. Scott*, No. WD-81-44 (Ohio 6th Dist. Ct. App. Dec. 11, 1981)(Wood County); *Council of Whitehall v. Rogers*, 69 Ohio App. 2d 124, 432 N.E.2d 216 (10th Dist. 1980) (Franklin County); *Group of Tenants v. Mar-Len Realty, Inc.* 40 Ohio App. 2d 449, 321 N.E.2d 241 (3d Dist. 1974)(Allen County); *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982).

number of the cases that have considered this point have held that the substitution cannot take place.¹⁸⁶ For the most part, however, these cases were decided after *Barnhart v. Schultz*¹⁸⁷ and before *Baker v. McKnight*,¹⁸⁸ and the decision in each was premised on the "nullity" theory espoused by *Barnhart*.¹⁸⁹ Since that theory was repudiated by *Baker*, the question is again open.

Baker v. McKnight is authority for the conclusion that substitution may now take place if the cause of action survives the death or nonexistence of the named plaintiff. The question to be decided is: What Civil Rule governs the substitution? It is reasonably clear that Civil Rule 25 does not furnish the authority for substitution under these circumstances since, by its terms, it applies to the death of a "party" to the action, and a nonexistent plaintiff cannot be a party.¹⁹⁰ Some courts have held or implied that the substitution is governed by the provisions of Civil Rule 15(C).¹⁹¹ That is only partially correct. The first sentence of Rule 15(C), dealing with the relation back of the claim set forth in the amended complaint, most assuredly applies and must be satisfied if substitution is to occur,¹⁹² but the balance of the Rule dealing with the bringing in of new parties applies to new party defendants only and has no application to the substitution of a new party plaintiff. Rather, in this situation, the controlling Rule is Rule 17(A), which in pertinent part provides:

Every action shall be prosecuted in the name of the real party in interest No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification

¹⁸⁶ See, e.g., *Excavating Co. v. Dye*, No. 3039 (Ohio 11th Dist. Ct. App. Mar. 1, 1982)(Trumbull County)(when action is knowingly brought in name of nonexistent corporation, no substitution of individual plaintiffs is allowed); *SES, Inc. v. Scott*, No. WD-81-44 (Ohio 6th Dist. Ct. App. Dec. 11, 1981)(Wood County)(business which was not incorporated in Ohio lacked capacity to sue or to amend its complaint to substitute another party); *Levering v. Riverside Methodist Hosp.*, 2 Ohio App. 3d 157, 441 N.E.2d 290 (10th Dist. 1981)(Franklin County)(refusing to allow substitution of party succeeding to decedent's claim); *Council of Whitehall v. Rogers*, 69 Ohio App. 2d 124, 432 N.E.2d 216 (10th Dist. 1980)(Franklin County)(barring substitution of a real party in interest when purported plaintiff was not a person entitled to maintain action).

¹⁸⁷ 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978).

¹⁸⁸ 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983).

¹⁸⁹ See *supra* note 178.

¹⁹⁰ *Levering v. Riverside Methodist Hosp.*, 2 Ohio App. 3d 157, 159, 441 N.E.2d 290, 292 (10th Dist. 1981)(Franklin County).

¹⁹¹ See, e.g., *Gates Towing v. Branch Motor Express*, 1 Ohio App. 3d 149, 440 N.E.2d 61 (10th Dist. 1981)(Franklin County); *Deansgate, Inc. v. Frederick*, No. 37428 (Ohio 8th Dist. Ct. App. July 20, 1978)(Cuyahoga County); *Bell v. Coen*, 48 Ohio App. 2d 325, 357 N.E.2d 392 (9th Dist. 1975)(Summit County).

¹⁹² See, e.g., *Douglas v. Daniels Bros. Coal Co.*, 135 Ohio St. 641, 22 N.E.2d 195 (1939)(allowing amendment and relation back when party mistakenly brought wrongful death action as administrator but had not yet been appointed).

of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Since a nonexistent plaintiff cannot be a "party," it necessarily follows that a nonexistent plaintiff cannot be a real party in interest. Thus, if the action survives at all, it must survive to someone who is a real party in interest. Such a "successor in interest" may ratify the attempted commencement¹⁹³ of the action by the original plaintiff, or can be joined with an existing co-plaintiff, or can be substituted for the nonexistent plaintiff. As the last sentence of Rule 17(A) indicates, this cure by ratification, joinder, or substitution effectively relates back to the filing of the original complaint so that the action will be deemed commenced by the "successor in interest" as of the date of the filing of the original complaint. Of course, if the action does not survive the nonexistence of the original plaintiff or if there is no successor in interest, there can be no cure, and the action must be disposed of by striking the complaint from the files for failure of commencement. The same would be true if the cure was not effected within a reasonable time after the nonexistence of the plaintiff was discovered.¹⁹⁴

In an appropriate case, then, the nonexistence of the plaintiff can be cured by ratification, joinder, or substitution. However, the mechanics of effecting the cure can present some subtle problems. To begin with, let us suppose the action is brought by a person in his individual capacity, but who is dead at the time the complaint is filed. If the action survives his death, his successor in interest is his estate as represented by his personal representative, executor or administrator. As there is no existing plaintiff, ratification is an inappropriate method of cure since that requires someone in existence whose acts may be ratified by the deceased's personal representative. Likewise, since there is no existing co-plaintiff, joinder is inappropriate for it requires someone with whom the personal representative can be joined as a co-plaintiff. Thus as a practical matter, substitution is the only appropriate measure.

How substitution is to be effectuated may well depend upon who first

¹⁹³ It is unfortunate that OHIO R. Civ. P. 17(A) was copied from FED. R. Civ. P. 17(A) without taking into consideration the peculiar problem of commencement under OHIO R. Civ. P. 3(A). Thus, OHIO R. Civ. P. 17(A) states that a reasonable time must be allowed for "ratification of commencement of the action" when it should read "for ratification of the attempted commencement of the action." See *infra* section IV. B.

¹⁹⁴ OHIO R. Civ. P. 17(A) states that the action must be "dismissed" if the cure is not effected within a reasonable time. That assumes that the action was commenced by an existing plaintiff who was not a real party in interest. Where the action was attempted to be commenced by a nonexistent plaintiff, and the cure for that nonexistence is not effected within a reasonable time, the proper disposition of the action is the striking of the complaint from the files for failure of commencement. See *supra* note 157.

discovers the death of the named plaintiff. If the defendant discovers the death of the named plaintiff and challenges commencement on that ground,¹⁹⁵ the defendant's challenge, in whatever form it may be presented, should be taken as a motion to have the personal representative substituted for the deceased. Pursuant to that challenge, the court should grant leave to file an amended complaint substituting the personal representative for the named plaintiff. Since Rule 17(A) is controlling here and since it is specific in this instance, it should prevail over Civil Rule 21, and leave to amend under the latter Rule is not required. Once leave under Rule 17(A) is granted, it is for the personal representative to decide whether to enter the case. If he decides to enter the case, he will cause the amended complaint to be filed; if he decides not to enter the case, or if he does not file the amended complaint within a reasonable time after the court grants leave to do so, the original complaint should be stricken from the files for failure of commencement.

If the original plaintiff's attorney discovers the death before the defendant challenges, the problem becomes more difficult. A Rule 17(A) motion to substitute the personal representative cannot be made because there is no plaintiff to make it. Likewise, a Rule 25(A) motion to substitute cannot be made by the personal representative since Rule 25(A) does not apply. In this situation, it would appear that the proper procedure is a Civil Rule 24(A)(2) motion to intervene as a substitute for the named plaintiff. The Rule 24(C) pleading which would accompany such a motion would be an amended complaint substituting the personal representative for the named plaintiff. All things being equal, the court should grant the motion to intervene and should permit the service and filing of the amended complaint. In either of these events, since the amended complaint does not change the cause of action, but merely changes the party-plaintiff, the amended complaint will relate back to the original complaint under the provisions of Rule 15(C), and the action will be deemed commenced by the personal representative as of the date the original complaint was filed under the provisions of Civil Rule 17(A). These rules should also apply when the action is brought by an entity that has no legal existence at the time the complaint is filed; the real parties in interest should be substituted for the nonexistent entity.¹⁹⁶

Substitution may also be allowed under Rule 17(A) when an action is brought in a representative capacity by one who has real or legal existence as an individual or entity, but who has no legal existence as repre-

¹⁹⁵ See *e.g.*, *Levering v. Riverside Methodist Hosp.*, 2 Ohio App. 3d 157, 441 N.E.2d 290 (10th Dist. 1981)(Franklin County).

¹⁹⁶ This is, in effect, what the supreme court did in *State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St. 2d 120, 296 N.E.2d 544 (1973), when it simply deemed the action to have been brought by the individual judges of the Cleveland Municipal Court and the counterclaim to have been brought by the individual council members of the Cleveland City Council. See *id.* at 121-22, 296 N.E.2d at 546-47.

sentative. Typical is the action brought by a purported executor or administrator who has not been formally appointed at the time the complaint is filed.¹⁹⁷ Here, however, ratification would be an appropriate cure. Since the action was brought by an existing person or entity, any acts as an individual or as an entity may be ratified by the same person or entity as executor or administrator after formal appointment as such.¹⁹⁸ For the sake of the record, however, and because Ohio has had very little reported experience with ratification, substitution after appointment, even though a mere paper transaction, would be a more appropriate remedy.

Despite the possibility of cure by ratification, joinder, or substitution, the most important lesson to be learned from the cases discussed in this subsection is the converse of that taught by the supreme court in *Barnhart v. Schultz*.¹⁹⁹ The plaintiff's attorney should ascertain the real or legal existence of his client before filing the complaint, or he should file the complaint early enough in the statutory period of limitation to allow him to bring a new action if it later develops that his client was not in existence at the time the complaint was filed. Cure by ratification, joinder, or substitution is, after all, a measure of desperation, and there is no guarantee that it will be successful.

D. The Capacity to Sue or Be Sued

If the plaintiff does not have legal capacity to sue at the time the complaint is filed and if that lack of capacity is not cured prior to the entry of final judgment, no action is commenced by that plaintiff.²⁰⁰ Likewise, if the defendant does not have legal capacity to be sued at the time the complaint is filed and if that lack of capacity is not cured prior to the entry of final judgment, no action is commenced against that defendant.²⁰¹

The cure for lack of capacity depends upon the cause. If a plaintiff lacks the capacity to sue because of minority or incompetency, it may be

¹⁹⁷ See, e.g., *Douglas v. Daniel Bros. Coal Co.*, 135 Ohio St. 641, 22 N.E.2d 195 (1939).

¹⁹⁸ *Id.* at 645, 22 N.E.2d at 197. In this case the amended petition not only substituted the widow as administratrix for the widow as individual, but also expressly ratified the acts performed by the widow as individual. *Id.*

¹⁹⁹ 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), *rev'd on other grounds*, *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983). See *supra* note 145 and accompanying text.

²⁰⁰ See *Walsh v. J.R. Thomas' Sons*, 91 Ohio St. 210, 110 N.E. 454 (1915); *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N.E. 221 (1900); *SES, Inc. v. Scott*, No. WD-81-44 (Ohio 6th Dist. Ct. App. Dec. 11, 1981)(Wood County); *Citizens Loan & Sav. Ass'n v. Krickenberg*, 46 Ohio App. 228, 188 N.E. 396 (2d Dist. 1932)(Darke County); *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982).

²⁰¹ See *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 372 N.E.2d 589 (1978), *rev'd on other grounds*, *Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983); *Little v. Little*, No. 6197 (Ohio 2d Dist. Ct. App. June 27, 1979)(Montgomery County).

cured by joining a "next friend," or the plaintiff's duly appointed guardian "or other like fiduciary," or by appointing a guardian ad litem to represent the plaintiff.²⁰² Likewise, if the defendant lacks the capacity to be sued because of minority or incompetency, a cure can be effectuated by joining the defendant's duly appointed guardian or other fiduciary, or by appointing a guardian ad litem to represent the defendant.²⁰³ If an individual, partnership, corporation, or other legal entity lacks the capacity to sue because of a failure to register a fictitious name with the appropriate state official, this lack of capacity can be cured by the registration of the name.²⁰⁴ If a foreign corporation lacks the capacity to sue because it has not obtained a license to do business in Ohio, this defect can be cured by compliance with the licensing laws.²⁰⁵

To be effective for commencement purposes, however, the cure must be accomplished prior to the entry of final judgment. If it is, it is deemed to relate back to the filing of the complaint and, all other things being equal, the action is deemed commenced as of the date the complaint was filed.²⁰⁶ If cure is not accomplished before final judgment, the action fails of commencement, and the judgment is void.²⁰⁷

In the Ohio system, capacity to sue or be sued is presumed,²⁰⁸ and lack of capacity to sue or be sued is a quasi-affirmative defense.²⁰⁹ Thus, if the defense of lack of capacity is not properly raised either by motion or responsive pleading, it is waived,²¹⁰ and so, too, is the defense of failure of commencement to the extent that the latter defense is premised on lack

²⁰² OHIO R. CIV. P. 17(B).

²⁰³ *Id.*

²⁰⁴ See *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982); OHIO REV. CODE ANN. § 1329.10(B) (Page 1979); *id.* § 1777.04 (Page 1978).

²⁰⁵ OHIO REV. CODE ANN. § 1703.29 (Page 1978).

²⁰⁶ See cases cited *supra* note 200. If the statute which deprives the plaintiff of capacity to sue makes no provision for cure after the complaint has been filed, the cure cannot be accomplished at all, and the action must fail of commencement. *National Computerized Employment Serv., Inc. v. Advanced Robotics Corp.*, No. CA-2839 (Ohio 5th Dist. Ct. App. Oct. 15, 1982)(Licking County).

²⁰⁷ *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N.E.2d 221 (1900).

²⁰⁸ *E.g.*, *Crow Motor Sales, Inc. v. Eyestone*, 31 Ohio App. 2d 35, 285 N.E.2d 894 (3d Dist. 1972)(Wyandot County). OHIO R. CIV. P. 9(A) states: "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party."

²⁰⁹ In the words of OHIO R. CIV. P. 9(A):

When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

²¹⁰ *Akron Nat'l Bank v. Mathers*, No. 9008 (Ohio 9th Dist. Ct. App. Jan. 4, 1979)(Summit County); *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982).

of capacity to sue or be sued.²¹¹ To this rule of waiver, however, there is at least one exception: If lack of capacity to sue is imposed by statute as a penalty for not complying with other statutory requirements, that lack of capacity to sue (and failure of commencement to the extent that it is based on lack of capacity to sue) cannot be waived by the defendants because a waiver would violate the public policy underlying the statutory deprivation of capacity to sue.²¹²

IV. THE DATE OF COMMENCEMENT

A. *The Relation Back to the Date of Filing*

Assume the existence of all of the elements of commencement except jurisdiction over the person of the defendant, and suppose the following two situations:

1. The complaint is filed on August 1, 1984, and effective service is obtained nine months later, on May 1, 1985.

2. The complaint is filed on August 1, 1984, and effective service is obtained fourteen months later, on October 1, 1985.

In the first situation, the action is commenced as of August 1, 1984. The effective service on May 1, 1985, relates back to the date on which the complaint was filed, so that the date of commencement is the date on which the complaint was filed and not the date on which jurisdiction over the person of the defendant is acquired.²¹³

In the second situation, if the defendant has not waived the defense of failure of commencement, the action is not commenced at all; rather, at the stroke of midnight on August 1, 1985, the action "self-destructs," and all that was done prior to that date is void and a nullity.²¹⁴ However, it has been held that if effective service occurs more than a year after the filing of the complaint, but prior to the expiration of the statute of limitations, the action is deemed commenced as of the *date of service*.²¹⁵ This

²¹¹ *GMS Management Co.*, 5 Ohio Misc. 2d at 9.

²¹² *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 539, 59 N.E. 221, 223 (1900); *GMS Management Co.*, 5 Ohio Misc. 2d at 10.

²¹³ *St. Thomas Hosp. v. Beal*, 2 Ohio App. 3d 132, 440 N.E.2d 1240 (9th Dist. 1981)(Summit County); *Fieno v. Beaton*, 68 Ohio App. 2d 13, 426 N.E.2d 203 (1st Dist. 1980)(Hamilton County); *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975)(Hamilton County).

²¹⁴ *Saunders v. Choi*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984); *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984); *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977); *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966); *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954); *Conway v. Smith*, 66 Ohio App. 2d 65, 419 N.E.2d 1117 (8th Dist. 1979)(Cuyahoga County); *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982).

²¹⁵ *St. Thomas Hosp. v. Beal*, 2 Ohio App. 3d 132, 440 N.E.2d 1240 (9th Dist. 1981)(Summit County).

holding is incorrect; not only is it inconsistent with all other decisions on point, but it cannot be sustained by any fair reading of either section 2305.17 or Civil Rule 3(A).

In any event, the general rule with respect to the date of commencement is this: If all the elements of commencement are satisfied, an action is commenced as to a given party on the date on which there is filed with the court a pleading which asserts a claim by or against that party. There is one exception to this general rule: When an amended pleading substitutes a new party for an original party who had no real or legal existence at the time the original pleading was filed, the amended pleading relates back to the date of the original pleading, and the action is deemed commenced as to the substitute party as of the date the original pleading was filed.

B. An "Action Attempted to Be Commenced"

The operation of a number of the Civil Rules is expressly conditioned upon the commencement of the action. Civil Rule 30(A), for example, states: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." The problem presented by Rules such as this is: What is meant by the word "commencement"?

If the word is understood in terms of its meaning in section 2305.17 or Civil Rule 3(A), some interesting difficulties are presented. In the first scenario described in the previous section, for example, there was a nine-month period of time during which it was not known whether the action had been commenced, and in the second situation described in the previous section, there was a twelve-month period of time before it was known that the action had not been commenced. Could depositions be taken during that nine-month or twelve-month period, or would the parties have to wait until there was effective service before they could begin discovery? If "commencement" is given its strict meaning, one could argue logically that no discovery can take place until the commencement of the action had been determined. However, such a conclusion would be inconsistent with Civil Rule 1(B), which enjoins a construction of the Civil Rules that will eliminate "delay, unnecessary expense and all other impediments to the expeditious administration of justice." Further, in any given case, a determination that the attempted service was effective so as to commence the action may very well depend upon the plaintiff's ability to obtain discovery from the defendant or from some third person. Not infrequently this is the case when "long-arm" service is attempted under Civil Rule 4.3. Yet, if Civil Rule 30(A)'s "commencement" is read in its strict sense, the plaintiff is in a "dog chasing its tail" situation; he cannot take the necessary depositions until after he has established that the action has been commenced, and he cannot establish that the action has been commenced until after he has taken the depositions. When the in-

terpretation of a Civil Rule leads to such an absurd result, that interpretation must be rejected. Therefore, when the word "commencement" appears in a Civil Rule, such as Rule 30(A), it must be given a meaning other than that of Civil Rule 3(A); but how is it to be read? That question might be better phrased: What is the status of the action between the time the complaint is filed and the acquisition of jurisdiction over the defendant or the expiration of the one-year period, whichever first occurs?

The first part of the answer may be found in section 2305.19. In pertinent part, that statute states:

In an action commenced, or attempted to be commenced, . . . if 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, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date.²¹⁶

This statute contrasts an action "commenced" with an action "attempted to be commenced." Obviously, they are two different things, and the difference between them provides the ultimate answer to the question posed above. To discover that difference—and discover the second part of the answer—it is necessary to examine the language of section 2305.17 as it read before the 1965 amendment:

Within the meaning of such sections [i.e., the various statutes of limitation], 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.²¹⁷

Thus, during that period of time following the filing of the complaint in which the plaintiff is diligently endeavoring to procure a service, the plaintiff is "attempting to commence the action," and the status of the action during that period of time is that of "an action attempted to be commenced."²¹⁸ If the plaintiff obtains jurisdiction over the person of the

²¹⁶ OHIO REV. CODE ANN. § 2305.19 (Page 1981).

²¹⁷ *Id.* § 2305.17 (Page 1954).

²¹⁸ As is noted in *Howard v. Allen*, 28 Ohio App. 2d 275, 277 N.E.2d 239 (1971), *aff'd on other grounds*, 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972):

R.C. 2305.19 applies also if the original action was "attempted to be commenced." This poses a more vexing problem. In [*Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966)], the Supreme Court applied a statutory definition of what constituted an attempt to commence an action. That statute, R.C. 2305.17, was amended in 1965 to delete the definition of "attempted commencement," and modified the definition of "commencement" to essentially the same definition as contained in Civil Rule 3(A). There is now no definition of what constitutes an action attempted to be commenced within the meaning of R.C. 2305.19 set forth

defendant within the year, the status of the action shifts from "an action attempted to be commenced" to "an action commenced"; but if the year expires without the acquisition of jurisdiction, the status of the action shifts from "an action attempted to be commenced" to "an action that has failed of commencement." This "action attempted to be commenced" simply self-destructs.

For procedural purposes, "an action attempted to be commenced" is treated in all respects as if it were "an action commenced." If the "action attempted to be commenced" later becomes "an action commenced," all that was done during the "attempted to be commenced" period is validated; but if the "action attempted to be commenced" later becomes "an action that has failed of commencement," it was no action at all—it never existed—and all that was done during the "attempted to be commenced period" is void and a nullity. Thus, when Rules such as Rule 30(A) speak of something that may be done "after commencement of the action," they refer to those actions occurring "after the action has attempted to be commenced by the filing of the complaint."

An "action attempted to be commenced" has one very interesting, if somewhat perplexing, characteristic—if the action is terminated for any reason other than failure of commencement, the very act of termination transforms it into an action commenced. Thus, if an action attempted to be commenced is dismissed for lack of subject matter jurisdiction, the dismissal results in the commencement of the action. This is a necessary consequence of the nature of commencement. As pointed out in *Kossuth v. Bear*,²¹⁹ an action that has not been commenced does not exist; if the action does not exist, no judgment can be entered in that action, be it a judgment on the merits or other than on the merits, and the only legitimate action the court can take is to strike the complaint from the files for failure of commencement. But Section 2305.19 recognizes that actions attempted to be commenced can fail either on the merits or otherwise than on the merits; that is, a court can enter a judgment in an "action attempted to be commenced." However, such an action can sustain a judgment only if it is an action commenced. Therefore, it must necessarily follow that the termination of an "action attempted to be commenced"

either by statute or civil rule. Unless it can be held that the definition, of an attempt to commence an action, of former 2305.17 continues to define the terms used in R.C. 2305.19, it would appear that the good faith filing of a complaint followed by service within one year from such filing, which service is later determined to be ineffective, would constitute an attempt to commence the action within the meaning of R.C. 2305.19.

28 Ohio App. 2d at 277, 277 N.E.2d at 241. The court was correct in concluding that former § 2305.17 continues to define the term "attempted to be commenced" as found in § 2305.19; it was incorrect in its speculation that a defective service made within the year constitutes an action "attempted to be commenced." See *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977).

²¹⁹ 161 Ohio St. 378, 383-84, 119 N.E.2d 285, 288 (1954). See *supra* note 1.

for any reason other than failure of commencement results in the commencement of that action.

In any given case, the application of Civil Rule 1(B) would require the same result. An "action attempted to be commenced" is not an action commenced, and accordingly it cannot bear a judgment. Therefore, if the "action attempted to be commenced" is challenged on a ground other than failure of commencement, the trial court would have to ascertain first if the action had been commenced before it could sustain that challenge; but such a determination might require the court to wait out the year following the filing of the complaint. Such a year-long delay in ruling on a challenge to the action is wholly inconsistent with the requirement of Civil Rule 1(B) that the Civil Rules be construed to eliminate delay. Therefore, if Civil Rule 1(B) is to be given effect, it must necessarily follow that the sustaining of a challenge to an "action attempted to be commenced"—other than a challenge based on failure of commencement—results in the commencement of the action.

V. CHALLENGING FAILURE OF COMMENCEMENT

A. *Why the Challenge Must Be Made: Commencement by Default*

Failure of commencement goes to the existence of the action itself. Therefore, to an extent, the defense of failure of commencement is a challenge to the court's subject matter jurisdiction; in effect, it says that the court may not exercise its subject matter jurisdiction because there is no action in existence for which that jurisdiction can be exercised. This is not a challenge to the court's subject matter jurisdiction in general, but is a challenge to its subject matter jurisdiction in a particular action. Unlike a challenge to the court's subject matter jurisdiction over a particular type or category of action, which cannot be waived, this is a challenge to the court's subject matter jurisdiction over an individual case within that type or category, and as such, it can be waived.²²⁰ Accordingly, if it is not timely and properly asserted, the defense of failure of commencement is waived, and the result is commencement by default.

B. *Failure of Commencement: The Appropriate Defense*

1. Not Contained in Other Defenses

The defense of failure of commencement is truly a "forgotten"²²¹ de-

²²⁰ Cf. *Mantho v. Board of Liquor Control*, 162 Ohio St. 37, 122 N.E.2d 14 (1954) (failure of liquor license applicants to object to prosecution of an appeal waived the defense that the court of appeals had no subject matter jurisdiction.)

²²¹ The term is Scigliano's. See Scigliano, *supra* note 5.

fense for two reasons: 1) it is not expressly mentioned in the Rules but is found by implication from what is said in Civil Rule 3(A); and 2) it arises out of the applicability of explicit Rules' defenses such as the defense of lack of jurisdiction over the person or lack of capacity to sue or be sued. It is, perhaps, this latter point that creates the most difficulty for the pleader. Even though failure of commencement arises out of some other defense, it is not an inherent part of that other defense but is, rather, a separate and distinct defense in its own right. A comparison of the result achieved by the defense of lack of jurisdiction over the person and the result achieved by failure of commencement will demonstrate the accuracy of this conclusion. Suppose that the plaintiff does not obtain jurisdiction over the person of the defendant within one year of the filing of the complaint. This is the essential prerequisite to both the Civil Rule 12(B)(2) defense of lack of jurisdiction over the person and the Civil Rule 3(A) defense of failure of commencement. If the defendant moves to dismiss the action for lack of jurisdiction over the person, the action will be dismissed other than upon the merits.²²² Since this is a "failure" other than upon the merits, section 2305.19 will come into play if the dismissal took place after the statute of limitations expired, and the plaintiff will have a year from the date of the dismissal in which to commence a new action. If, on the other hand, the defendant moves to strike the complaint from the files for failure of commencement, the complaint will be stricken, but the action will not be dismissed.²²³ Since striking the complaint from the files is a judicial declaration that no action ever existed, no action has "failed" within the meaning of section 2305.19, and the expiration of the statute of limitations will bar the commencement of a new action.²²⁴ Since the results achieved by these two defenses are strikingly different, it follows that the defenses themselves must be different and that neither is contained in the other. If neither defense is contained in the other, it also follows that both must be asserted separately, or the one not asserted is waived.

In sum, failure of commencement is a separate and distinct defense. It is not raised by the assertion of the applicable Rules defense out of which it arises; to avoid its waiver, it must be asserted separately.

²²² See OHIO R. Civ. P. 41(B)(4): "A dismissal (a) for lack of jurisdiction over the person . . . shall operate as a failure otherwise than upon the merits."

²²³ *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954). See *supra* note 1 for a more complete discussion of this point.

²²⁴ *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966); *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954). See also *Browne*, *supra* note 98, at 483-84 ("savings provision" of § 2305.19 does not apply after court has granted a motion to strike a complaint from the files for failure of commencement).

2. Not Waived by Being Joined with Other Defenses

If the defense of failure of commencement and the Rules' defense out of which it arises can produce inconsistent results, can both be asserted in the same pleading, or will the assertion of both result in the waiver of failure of commencement? The answer may be found in Civil Rules 8(E)(2) and 12(B). In pertinent part, Civil Rule 8(E)(2) states:

A party may also state as many separate . . . defenses as he has regardless of consistency and whether based on legal or equitable grounds.

Civil Rule 12(B) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

Thus, the defense of failure of commencement will not be waived merely because it is joined with some other defense in the same pleading or motion. However, when it comes time to press for the adjudication of the various defenses asserted, the pleader may well have to elect between his defenses. If the pleader presses for the adjudication of the Rules' defense out of which failure of commencement arises, without also pressing for an adjudication of the failure of commencement defense in the alternative, his election of the Rules' defense, if sustained, will result in the waiver of the failure of commencement defense since the sustaining of the Rules defense will result in the commencement of the action.²²⁵

C. Who May Assert the Defense

1. The Defendant

Since failure of commencement is a defense, it is obvious that the defendant may assert it. Since it is a waivable defense, however, the defendant need not assert it, and if he does not the action will be commenced by default. Indeed, if the defendant has a good defense on the merits and the statute of limitations would not bar a second action, it might be to the defendant's advantage not to assert it, since the successful assertion of the failure of commencement defense in the first action would simply invite a second action, prolong the litigation, and increase the costs to the defendant. In such a case, the better part of wisdom would allow the first

²²⁵ See *supra* section IV. B.

action to commence by default and then move for summary judgment on the defense on the merits.

2. The Problem of Multiple Defendants

In the abstract, commencement deals with the existence of the *action* as such. Therefore, if the action is commenced as to any defendant, it should be deemed commenced as to all. Rule 3(A), however, links commencement to the acquisition of jurisdiction over the defendant. Although the purpose of this linkage is to establish a failure-to-prosecute time point after which the court would be justified in dismissing an action as to those defendants not served,²²⁶ it has the unfortunate result of requiring the action to be separately commenced as to each defendant named in the complaint.²²⁷ Thus in any given case, the action may be commenced as to some defendants but not as to others.²²⁸

Suppose that at the end of the year following the filing of the complaint, several of the named defendants remain unserved. If one of these defendants successfully asserts the defense of failure of commencement, should the ruling on that defense inure to the benefit of the others in the same situation? There does not seem to be any reported decision on this point, but the correct answer would appear to be in the negative. The defense of failure of commencement should be considered a defense personal to each defendant, and the defense should be deemed waived as to those defendants who do not assert it. But an exception to this rule would be justified if *all* of the defendants remain unserved at the end of the year. In such case, the ruling with respect to the defendant who raised the defense could legitimately inure to the benefit of all, since it would further the purpose of Rule 3(A)—clearing the docket of cases in which service has not been obtained in one year.²²⁹

May a defendant who has been served raise the defense of failure of commencement on behalf of one who has not? Again, as a general rule, the answer should be in the negative because the defense is personal and granting it in this instance would not clear the docket since the case would proceed as to the defendant who had been served. However, if the defendant who had not been served was an indispensable party, and if the action could not proceed in his absence,²³⁰ the result should be other-

²²⁶ See note 117 and accompanying text. OHIO R. Civ. P. 4(E), on the other hand, establishes a separate and distinct six-month failure-to-prosecute time point for the dismissal of actions as to those defendants who have not been served. How these two Rules are to be reconciled remains to be seen. In any event, with the enactment of Civil Rule 4(E), it is no longer necessary to link commencement with the acquisition of jurisdiction over the person of the defendant. See Browne, *supra* note 5, at 164-65.

²²⁷ Lash v. Miller, 50 Ohio St. 2d 63, 64-65, 362 N.E.2d 642, 643 (1977).

²²⁸ *Id.*

²²⁹ See *supra* note 117 and accompanying text.

²³⁰ See OHIO R. Civ. P. 19(B).

wise; in this instance, granting the defense of failure of commencement as to the unserved defendant would result in the action being dismissed as to the served defendant for failure to join an indispensable party, and Rule 3(A)'s goal of clearing the docket would be achieved.

3. The Plaintiff

There are occasions when the plaintiff may find some comfort in his own failure to commence the action. Suppose that the defendant has filed an answer in which he includes the defenses of insufficiency of service of process, lack of jurisdiction over the person, and failure of commencement. A Rule 12(D) preliminary determination of those defenses is not sought by either party.²³¹ Shortly after the trial of the action begins, but before the court rules on those defenses, the plaintiff's attorney is notified that his key witness, whom he has carelessly failed to subpoena, will not appear as promised. If the plaintiff proceeds with the trial, he will lose; but if he can withdraw the case from the court's consideration, there is still time left on the statute of limitations in which to bring a new action. Unfortunately, he cannot voluntarily dismiss the action by notice since the trial has commenced, and the defendant will not stipulate to a voluntary dismissal. Further, the judge will neither grant a continuance nor a voluntary dismissal by court order because the plaintiff failed to subpoena the witness. Can the plaintiff withdraw the case from the court's consideration by moving to strike his own complaint on the ground that the defendant's defense of failure of commencement is well taken, and there is no existing action before the court?

Although there is a natural reluctance to allow a party to profit from his own procedural error, the Rules are not concerned with procedural profit or loss; they are intended to facilitate the trial of cases on their merits when trial is warranted.²³² Since allowing the plaintiff to terminate the present action so that he can bring a second action is consistent with the intent of the Civil Rules, and since this would be the exact result if the defendant pressed the defense of failure of commencement, there does not seem to be anything in principle which would prevent the plaintiff from taking advantage of his own failure to commence the action or from moving to strike his own complaint from the files on this ground. Further, there is nothing in the Civil Rules which prohibits the plaintiff from conceding the validity of a defense which the defendant has as-

²³¹ See, e.g., *First Bank of Marietta v. Cline*, 12 Ohio St. 3d 317, 466 N.E.2d 567 (1984)(defendant did not waive affirmative defenses asserted in answer by failure to request a preliminary hearing under Rule 12(D)); Browne, *Civil Rule 12(D): Defusing the Time Bomb*, 55 CLEV. B.J. 104 (1984)(describing advantages of using Rule 12(D) motion to obtain pretrial rulings on defenses asserted in answer).

²³² See OHIO R. Civ. P. 1(B) and the cases cited in Justice Clifford Brown's dissent in *First Bank of Marietta v. Cline*, 12 Ohio St. 3d 317, 319, 466 N.E.2d 567, 569 (1984).

serted, and that, in effect, is what the plaintiff is doing when he moves to strike his own complaint for failure of commencement. The defendant can hardly complain if the plaintiff then takes advantage of the procedural situation in which he finds himself after conceding the validity of the defendant's defense. If the defendant wished to avoid this result, he could have waived the defense which made it possible. Under the right circumstances, then, the plaintiff can also assert failure of commencement, although it stretches the point to call it a defense when the plaintiff directs the question to his own action.

4. The Court on Its Own Initiative

May the trial court, on its own initiative, terminate an action for failure of commencement? Although the authority on this point is sparse, it answers the question affirmatively. Thus, in *Saunders v. Choi*,²³³ the Court of Appeals for Cuyahoga County stated:

The trial court could have taken such action sua sponte so appellant's stated assignment of error that the attorney did not have the authority to make the motion is irrelevant to our decision. Striking a complaint for failure of service is an appropriate action to clear a court's docket. The entry "dismissing" the complaint in this case should be read as an order "striking" the complaint.²³⁴

This, of course, is consistent with the principle of Rule 3(A) that cases should be cleared from the docket if jurisdiction over the person of the defendant has not been acquired within one year following the filing of the complaint;²³⁵ to this end it does not matter whether the court acts on its own initiative,²³⁶ on the initiative of the defendant, or even on the initiative of the plaintiff.²³⁷

²³³ No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd on other grounds*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984).

²³⁴ *Id.* slip op. at 7. See also *Nationwide Mut. Ins. Co. v. Pitstick*, 7 Ohio Misc. 2d 53 (C.P. Hamilton County 1983), in which the court appears to have acted on its own initiative in "dismissing" the action for failure of commencement.

²³⁵ As the Ohio Supreme Court stated in *Saunders v. Choi*:

Among other things, the purpose of Civ. R. 3(A) is designed to promote the prompt and orderly resolution of litigation, as well as eliminating the unnecessary clogging of court dockets caused by undue delay. The rule puts litigants on notice that a reasonable time will be afforded in order to obtain service of process over defendants. Such a rule goes to the essence of civil procedure and is not, in our view, a mere technicality designed to deny parties their day in court.

12 Ohio St. 3d at 250, 466 N.E.2d at 893.

²³⁶ See OHIO R. Civ. P. 4(E) which expressly grants the court the power to dismiss a case on its own initiative if service is not obtained on the defendant within six months after filing the complaint.

²³⁷ See *supra* section V.C. 3.

If the trial court decides to act on its own initiative, must it first give the plaintiff's attorney notice and an opportunity to be heard? The technical answer to this question depends upon the answer to a second question: Can the plaintiff's attorney put forth any reasonable argument or set forth any set of circumstances from which it might be concluded that the action was commenced? If the answer to this question is in the affirmative, then elementary concepts of due process would require a notice from the court and an opportunity to be heard. If, however, it is absolutely clear from the record that the action had not been commenced,²³⁸ then notice and hearing would serve no useful purpose; with the expiration of the year in which to obtain service, the "action attempted to be commenced" simply self-destructs, and there is nothing which the plaintiff can do to change that result. Therefore, the court's action in terminating the litigation is simply an express confirmation of a state of facts apparent from the face of the record. Where no cure is possible and no challenge to the record may be maintained, no notice and hearing is required.

D. When May the Defense Be Asserted

As a general rule, a defense need not be asserted until it becomes "available"²³⁹ to the pleader; it becomes "available" when it is ripe for adjudication.²⁴⁰ This does not mean, however, that a pleader cannot assert a defense that is not yet "available" at the time of its assertion. If the pleader anticipates that the defense will mature before the time of its adjudication then he may assert it although it would not be ripe for adjudication—that is, even though it would not be an "available" defense—at the time of its assertion. Consider the answer as an example. Subject to the provisions of Civil Rules 12(D) and 56, defenses included in the answer will ordinarily not be adjudicated until the time of trial. Therefore, if the pleader legitimately anticipates the maturation of a defense prior to the time of trial, he may include that defense in his answer even though that defense would not be ripe for adjudication at the time the answer was served and filed.

To a more limited extent, the same is true when a motion is the vehicle for asserting the defense. If the pleader legitimately anticipates that the defense will mature before the court rules on the motion, then he may assert that defense by motion even though it is not "available" at the time the motion is served and filed. However, since the time between the service of the motion and the court's ruling on it is relatively short—it

²³⁸ See, e.g., *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984)(service upon defendant was not obtained during the one year following the filing of the complaint.).

²³⁹ See OHIO R. Civ. P. 12(G), 15(E).

²⁴⁰ The problem of "availability" is discussed at greater length in Browne, *supra* note 98, at 470.

could be as short as seven days²⁴¹—it is obvious that few defenses will mature between the service of the motion and its disposition by the court. Accordingly, a motion is not a very practical vehicle for asserting an “unavailable” defense; as a general rule, it may be said that only “available” defenses can be asserted by motion.

The timing of the failure of commencement defense and the vehicle by which it is presented to the court is thus determined by its “availability,” and its “availability” is, in turn, determined by the “availability” of the underlying Rules’ defense out of which it arises.

Ordinarily, the Civil Rule 9(A) defenses of nonexistence and lack of capacity to sue or to be sued will be available at the time the complaint is filed. Therefore, if either of these defenses is the underlying cause of failure of commencement, the failure of commencement defense can be asserted at any time within twenty-eight days after the service of the summons and complaint²⁴² or within the time for response as extended by court order under the provisions of Civil Rule 6(B).²⁴³

If the underlying cause of failure of commencement is lack of jurisdiction over the person of the defendant, the problem of “availability” becomes more complex.²⁴⁴ As a general rule, the Civil Rule 12(B)(2) lack of jurisdiction defense can arise out of any one or more of three separate and distinct situations: 1) there is no constitutional basis for the court’s exercise of in personam jurisdiction over the defendant; 2) there has been no service of a summons on the defendant; or 3) the summons served on the defendant was insufficient under Rule 12(B)(4), or 12(B)(5), or both.²⁴⁵

A typical example of the first situation is an action against an out-of-state defendant who is not impliedly present in Ohio and who has had no substantial minimum contacts with Ohio. In such case, the due process clause of the fourteenth amendment to the Constitution of the United States would prohibit an Ohio court from exercising in personam jurisdiction over the out-of-state defendant, and it is fair to say that the court thus lacks jurisdiction over the person of the defendant.²⁴⁶ In most cases, the existence of this condition will be apparent at the time the complaint is filed, so that both the 12(B)(2) defense of lack of jurisdiction and the concomitant defense of failure of commencement will be “available” at that time. Accordingly, either or both defenses can be asserted within the

²⁴¹ See OHIO R. CIV. P. 6(D).

²⁴² See OHIO R. CIV. P. 12(A)(1).

²⁴³ See Browne, *supra* note 98, at 449-51.

²⁴⁴ For a more extensive discussion of this problem see Browne, *supra* note 98, at 473-84.

²⁴⁵ *Id.*

²⁴⁶ See, e.g., *Kleinfeld v. Link*, 9 Ohio App. 3d 29, 457 N.E.2d 1187 (3d Dist. 1983)(Allen County); *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App. 3d 236, 456 N.E.2d 1309 (10th Dist. 1982)(Franklin County); *Culp v. Polytechnic Inst.*, 7 Ohio App. 3d 352, 455 N.E.2d 698 (10th Dist. 1982)(Franklin County).

time prescribed for the defendant's response to the complaint—normally within twenty-eight days after the service of the complaint and the summons.

The second situation—no service of summons—can be divided into at least three situations: 1) service was not effected because the named defendant was not in existence at the time of attempted service; 2) service was not effected because the defendant could not be located; or 3) no attempt at service was ever made (e.g., through oversight, the clerk's office never issued a summons for a particular defendant, and as a result, none was ever served).

In situation 1), the defense of lack of jurisdiction and the defense of failure of commencement both become available when the fact of nonexistence is spread upon the record. However, since the defendant does not exist, there is no party who can assert either defense. In this situation, it is the court, acting on its own initiative, who may "assert" the defense of failure of commencement by striking the complaint from the files.²⁴⁷

Situations 2) and 3) present a different problem. Civil Rule 3(A) gives the plaintiff a year following the filing of the complaint in which to obtain service. Therefore, unless some fact of record makes it obvious that service will never be effected, the court cannot reach the conclusion that there has been no service until the expiration of the year granted by Rule 3(A). Accordingly, neither lack of jurisdiction nor failure of commencement becomes "available" until that time.²⁴⁸ Of course, if some fact of record makes it obvious that service will never be effected, the court need not necessarily wait out the year before making a determination that the action has failed of commencement; in such case, both lack of jurisdiction and failure of commencement become "available" whenever the record positively and unquestionably reflects that service will not be made.²⁴⁹

At this point, Civil Rule 4(E) complicates the equation. In substance, the Rule provides that if there has been no attempt to obtain service within six months following the filing of the complaint, the action may be dismissed without prejudice either on the court's own motion or at the instance of the defendant. Does this bring forward the defenses of lack of jurisdiction and failure of commencement so that under this Rule they now become "available" at the six-month mark? The answer is negative. The basis for a Civil Rule 4(E) dismissal is failure to prosecute, not lack of jurisdiction.²⁵⁰ Further, a dismissal of the action is wholly inconsistent with failure of commencement and is not a remedy for failure of commencement; the only authorized remedy for failure of commencement is

²⁴⁷ See *supra* notes 233-38 and accompanying text.

²⁴⁸ *Yancey v. Pyles*, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1st Dist. 1975)(Hamilton County); *Hayden v. Ours*, 44 Ohio Misc. 62 (C.P. Paulding County 1975).

²⁴⁹ *Lozier v. Thorne*, No. 5-78-34 (Ohio 3d Dist. Ct. App. May 25, 1979)(Hancock County).

²⁵⁰ *Browne*, *supra* note 5, at 164.

the striking of the complaint from the files.²⁵¹ Finally, that which is dismissed under the provisions of Civil Rule 4(E) is an "action attempted to be commenced," and as was noted elsewhere,²⁵² the dismissal of an "action attempted to be commenced" results in the commencement of that action. Therefore, Civil Rule 4(E) does not bring forward to the six-month mark the defense of failure of commencement; rather, the application of Rule 4(E) to any given case will actually result in the destruction of failure of commencement as a defense.

Civil Rule 4(E) and other exceptional circumstances aside, in situations 2) and 3), the defense of failure of commencement will not be "available" until the end of the year following the filing of the complaint. This does not mean, however, that it cannot be asserted at some earlier time. While it is unlikely that it could be asserted by a motion prior to the end of the year, it could be included in a responsive pleading if the defender chose to serve such a pleading. The defense of failure of commencement is not susceptible to a Civil Rule 12(D) pre-trial determination because it is not a Rule 12(B) defense,²⁵³ and it is not the proper subject for a Rule 56 motion for summary judgment, since summary judgment contemplates a determination on the merits.²⁵⁴ Therefore, if it is included in a responsive pleading, the defense will not be adjudicated until the trial of the action.²⁵⁵ In situations 2) and 3), however, the trial of the action cannot take place until more than one year following the filing of the complaint because, under the terms of Civil Rule 3(A), the court must give the plaintiff at least that length of time to perfect service. Therefore, the defender can anticipate that the defense will mature, if at all, before the trial of the action, and he can legitimately include the defense in his responsive pleading.

The third situation presents many of the same problems that were found in the second. If service was effected on the defendant, the quashing of the summons for insufficiency of process or the quashing of the service for insufficiency of service of process is a prerequisite to a finding of lack of jurisdiction over the person and, by extension, a prerequisite to a finding of failure of commencement. The quashing of the service or the summons will not immediately give rise to either defense; Civil Rule 3(A) gives the plaintiff a year in which to effect service. Therefore, if the plaintiff persists in attempting to get valid service (thereby precluding the application of Civil Rule 4(E)), the defenses of lack of personal jurisdiction and failure of commencement will not become "available" until the end of

²⁵¹ *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954).

²⁵² See *supra* section IV. B.

²⁵³ OHIO R. Civ. P. 12(D) applies only to "[t]he defenses specifically enumerated (1) to (7) in subdivision (B)" of Civil Rule 12. Failure of commencement is not one of those defenses.

²⁵⁴ See *Sizemore v. Smith*, 6 Ohio St. 3d 330, 335-36, 453 N.E.2d 632, 637-38 (1983)(C. Brown, J., dissenting).

²⁵⁵ *First Bank of Marietta v. Cline*, 12 Ohio St. 3d 317, 466 N.E.2d 567 (1983).

that year.²⁵⁶ Of course, if the plaintiff abandons his attempt to get valid service after the initial service is quashed, such abandonment will warrant a dismissal under Civil Rule 4(E). If the action is dismissed under that Rule, the dismissal will commence the action and will defeat the defense of failure of commencement. Thus, the need to wait out the year to determine the "availability" of the failure of commencement defense will, for all practical purposes, defeat the assertion of that defense by motion prior to the expiration of the year; but for the reasons stated above, it will not prevent the assertion of that defense in the responsive pleading.

As a rule of thumb, then, in all three situations in which failure of commencement arises out of lack of jurisdiction over the person, the defense of failure of commencement can be asserted in the responsive pleading served within the time prescribed or within the time as extended for the service of the responsive pleading. However, in the second and third situations (no service or defective service), the defense of failure of commencement normally cannot be asserted by motion until after the expiration of the year following the filing of the complaint.

E. How May the Defense Be Asserted

1. Before Judgment

a. Motion to Strike the Complaint from the Files

Civil Rule 7(B)(1) stipulates that a motion must "set forth the relief or order sought," but the only relief which can be granted in a failure of commencement situation is the striking of the complaint from the files for failure of commencement.²⁵⁷ Therefore, if the defense of failure of commencement is available for assertion by motion,²⁵⁸ the motion to be used for this purpose is a motion to strike the complaint from the files for failure of commencement and not a motion to dismiss.²⁵⁹ Indeed, if a mo-

²⁵⁶ Browne, *supra* note 98, at 479-82.

²⁵⁷ Kossuth v. Bear, 161 Ohio St. 378, 384, 119 N.E.2d 285, 288 (1954).

²⁵⁸ As a rule of thumb, a defense is available for assertion by motion if it will be ripe for adjudication within thirty to ninety days after the motion is made. See Browne, *supra* note 98, at 453-54 nn.49-50.

²⁵⁹ Saunders v. Choi, No. 45101, slip op. at 7 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd on other grounds*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984). If the movant is in the presence of the court during a hearing or trial, the motion can be made orally; otherwise, it must be made in writing. Ohio R. Civ. P. 7(B)(1). Cf. First Bank of Marietta v. Cline, 12 Ohio St. 3d 317, 318, 466 N.E.2d 567, 569 (1984)(defense properly raised by written motion was not waived by failure to request a pretrial hearing on the motion). The written motion to strike may be supported or opposed by documentary evidence in testimonial form, since its resolution will often require the proof of facts not apparent in the record. Cf. Grossi v. Presbyterian Univ. Hosp., 4 Ohio App. 3d 51, 54, 446 N.E.2d 473, 476 (7th Dist. 1980)(Jefferson County)(court can consider affidavits setting forth juris-

tion to dismiss is used to challenge failure of commencement, it could well be argued that the motion waives the defense of failure of commencement, since it asks for a form of relief that is consistent with an action that has been commenced but inconsistent with an action that has not been commenced.

If the failure of commencement appears from the record at the time the complaint is filed or shortly thereafter, may the defense be raised by a motion to strike made prior to the service of the responsive pleading? A literal reading of Civil Rule 12(B) would require a negative answer, since that Rule allows only those defenses listed therein to be raised by pre-answer motion. Traditionally, however, courts have permitted a pleader to raise any defense by pre-answer motion if the motion is made in good faith, and if the defense would likely abate the suit or avoid recovery on the claim if granted. This traditional practice is consistent with the mandate of Civil Rule 1(B), and it has been used in failure of commencement situations.²⁶⁰

If the defense of failure of commencement was asserted in the answer as an anticipated defense, may the motion to strike be made at the trial on the merits? Clearly it can if the defense is then "available." Defenses asserted in the answer are generally adjudicated at the trial, and the motion to strike would be an appropriate vehicle for obtaining that adjudication.²⁶¹

Given the same situation, can the motion to strike be made at some time after the service of the answer but prior to the time of trial? The Civil Rules do not directly address this question, except to the extent that they provide for a motion for judgment on the pleadings or a motion for summary judgment, but neither of those motions would be an appropriate vehicle for raising failure of commencement.²⁶² Nevertheless, if the motion to strike is made after the defense of failure of commencement becomes "available," the answer is probably in the affirmative since such a motion would dispose of the action, and this type of pre-trial disposition is consistent with the principles of economy and expedition espoused in Civil Rule 1(B).

If the defense was not asserted in the answer as an anticipated defense,

dictional facts when deciding a motion to dismiss based upon lack of in personam jurisdiction); *Jurko v. Jobs Europe Agency*, 43 Ohio App. 2d 79, 85, 334 N.E.2d 478, 482 (8th Dist. 1975)(Cuyahoga County)(in considering motion to dismiss based upon lack of personal jurisdiction over the defendant, court could use oral and written evidence); *Melamed v. Catalano*, 20 Ohio Op. 3d 428, 432 (Clev. Hts. Mun. Ct. 1981)(documentary evidence in testimonial form could be submitted in support of a motion to transfer based on improper venue).

²⁶⁰ See *Saunders*, slip op. at 3, 7.

²⁶¹ See by analogy *First Bank of Marietta*, 12 Ohio St. 3d at 318, 466 N.E.2d at 569, holding that defense of insufficiency of service raised in answer was properly adjudicated at trial.

²⁶² See *supra* notes 253-54 and accompanying text.

may it be asserted by a post-answer motion to strike after it becomes available as a defense? Again, premised on the principles of economy and expedition which underlie Rule 1(B), the answer is probably in the affirmative. However, in this situation, it might be wiser first to bring the defense within the pleadings by means of a supplemental answer made under the provisions of Civil Rule 15(E), and then move to strike the complaint from the files.

b. The Responsive Pleading

In pertinent part, Civil Rule 12(B) provides that every defense shall be asserted in the responsive pleading if one is required, and Civil Rule 8(C) states that in pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense. The defense of failure of commencement is either an affirmative defense in its own right,²⁶³ or so close to it as to be a quasi-affirmative defense similar to those defenses enumerated in Civil Rule 12(B).²⁶⁴ Therefore, if the defense is "available" at the time the answer is served, and if it was not raised by a pre-answer motion to strike the complaint from the files, the defense must be asserted affirmatively in the answer, or it will be waived.²⁶⁵ This waiver, of course, may be overcome by the various forms of amendment,²⁶⁶ but if it is not it stands, and the action is deemed commenced by default.

If the defense of failure of commencement is not "available" at the time the responsive pleading must be served, it need not be asserted in that responsive pleading; in such case, after it becomes "available" as a defense, it should be brought into the pleadings by way of a supplemental responsive pleading.²⁶⁷ However, while the pleader need not include the unavailable defense of failure of commencement in his responsive pleading, he may do so, if he so desires, on the legitimate assumption that the defense will mature before trial.²⁶⁸

The actual assertion of the defense in the responsive pleading is relatively simple. However, care must be taken to include the Rules' defense which underlies the failure of commencement defense; if the Rules' defense is waived through omission, the failure of commencement defense will also be waived. Accordingly, a convenient pleading device is the pairing of the two defenses. Suppose, for example, that failure of commence-

²⁶³ Scigliano, *supra* note 5, at 290.

²⁶⁴ Browne, *supra* note 95, at 361-66.

²⁶⁵ Hoover v. Sumlin, 12 Ohio St. 3d 1, 3-4, 465 N.E.2d 377, 379-80 (1984).

²⁶⁶ See *id.*; Browne, *The New Civil Rule 12(H)*, 54 CLEV. B.J. 222 (1983); Browne, *supra* note 95, at 361-66.

²⁶⁷ Riley v. City of Cincinnati, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1984); Browne, *supra* note 95, at 450-51.

²⁶⁸ See *supra* section V. D.

ment arises out of a failure to serve the defendant with a summons. The Civil Rule 12(B)(2) defense and the failure of commencement defense might be paired as follows:

AFFIRMATIVE DEFENSES

6. For her first affirmative defense defendant states that this Court lacks jurisdiction over her person.

7. For her second affirmative defense defendant states that this action has not been commenced against her.

In some cases, more than a simple pairing might be required. If failure of commencement arises out of invalid service, as opposed to no service at all, the case for failure of commencement would have to be built as follows:

AFFIRMATIVE DEFENSES

12. For his first affirmative defense, defendant says that the service of summons upon him was insufficient.

13. For his second affirmative defense, defendant says that this Court lacks jurisdiction over his person.

14. For his third affirmative defense, defendant says that this action has not been commenced against him.

In this situation, insufficiency of service is the predicate for lack of jurisdiction, and lack of jurisdiction is the predicate for failure of commencement. All three defenses must be pleaded in order to avoid a waiver.

2. After Judgment

a. *An Appeal*

If the defender has appeared in the action, raised the defense of failure of commencement, and had it rejected by the court, the proper remedy is an appeal from that decision. Indeed, if the defender does not appeal, the trial court's decision on the question of commencement becomes *res judicata* and bars any collateral attack on the judgment.²⁶⁹

What if the defender has not appeared in the action?²⁷⁰ In that case he

²⁶⁹ Cf. *State ex rel. Witsamen v. Maumee Valley Guidance Center*, 6 Ohio St. 3d 26, 400 N.E.2d 1180 (1983)(failure to appeal on issue of subject matter jurisdiction); *City of Toledo v. Custer*, 24 Ohio St. 2d 152, 256 N.E.2d 284 (1970)(failure to appeal decision in appropriation proceeding); *Aetna Life & Casualty v. Daugherty*, No. 45368 (Ohio 8th Dist. Ct. App. Apr. 21, 1983)(Cuyahoga County)(failure to appeal assumption of subject matter jurisdiction); *Hughes v. Cz*, No. 39148 (Ohio 8th Dist. Ct. App. July 19, 1979)(Cuyahoga County)(same).

²⁷⁰ If the defendant has never been served with a summons he need not appear in the action even if he is aware of it. The Ohio Supreme Court in *Maryhev v. Yova*, 11 Ohio St.

may appeal and raise the question of failure of commencement for the first time on appeal, if the following conditions are met: 1) he learned of the judgment in time to take an appeal, and 2) the record made in the trial court will sustain the defense. If both of these conditions are met, a motion to vacate will not lie because it cannot be used as a substitute for an appeal.²⁷¹ Whether the opportunity to take an appeal in cases such as this would estop the defender from collaterally attacking the judgment in another proceeding has yet to be determined. In any event, if an appeal is taken, the assignment of error on appeal will be to the effect that the judgment is void for failure of commencement.

b. The Motion to Vacate a Void Judgment

The only judgment that may be entered in an action that has failed of commencement is an order striking the complaint from the files. The nonexistence of the action that has failed of commencement will not sustain any other judgment, and any other judgment would thus be void and a nullity.²⁷² Moreover, Civil Rule 60(B) does not apply to void judgments;²⁷³ therefore, a Rule 60(B) motion for relief from judgment cannot be used to challenge the entry of a void judgment in an action that has failed of commencement. Accordingly, if the defendant has not appeared in the action, and if he does not learn of the judgment in time to take an appeal or if the record made in the trial court will not, on its face, sustain the defense of failure of commencement, the defendant may raise that defense for the first time by the common law motion to vacate a void judgment.²⁷⁴

If only the parties to the judgment are affected by it, a void judgment may be vacated at any time.²⁷⁵ Further, unlike the vacation of a voidable

3d 154, 464 N.E.2d 538 (1984), said:

No action having been commenced, there was no obligation upon this defendant under the Civil Rules to move or otherwise plead within the year and her failure to do so would not have waived her right to the affirmative defense of lack of personal jurisdiction. Inaction upon the part of a defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service. *Haley v. Hanna* (1915), 93 Ohio St. 49, 112 N.E. 149. The Civil Rules do not change this common law of Ohio.

Id. at 157, 464 N.E.2d at 541.

²⁷¹ *E.g.*, *Blasco v. Mislik*, 69 Ohio St. 2d 684 (1982); *Steadly v. Montanya*, 67 Ohio St. 2d 297, 423 N.E.2d 1082 (1981); *Colley v. Bazell*, 64 Ohio St. 2d 243, 416 N.E.2d 605 (1980).

²⁷² *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954).

²⁷³ See *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982); OHIO R. Civ. P. 60(B) advisory committee note (1970).

²⁷⁴ *GMS Management*, 5 Ohio Misc. 2d at 4 (citing with approval *Pinkus v. Pinkus*, No. 43776 (Ohio 8th Dist. Ct. App. Apr. 15, 1982)(Cuyahoga County)).

²⁷⁵ *Lincoln Tavern v. Snader*, 165 Ohio St. 61, 133 N.E.2d 606 (1956); *Santiago v. S.S. Kresge Co.*, 2 Ohio Op. 3d 54 (C.P. Cuyahoga County 1976); *In re Sergeant*, 49 Ohio Misc. 36 (C.P. Montgomery County 1976).

judgment, which may require further proceedings in the trial court, the vacation of a void judgment completely terminates the litigation. Therefore, to prevail on a motion to vacate a void judgment it is not necessary for the movant to demonstrate that he has a meritorious defense to present if it is vacated, nor is it necessary that the motion be made within a reasonable time after the entry of the void judgment.²⁷⁶ Thus, the motion to vacate a void judgment has significant advantages over the Civil Rule 60(B) motion for relief from a voidable judgment.

c. Other Post-Judgment Remedies

As noted in the preceding section, a judgment entered in an action that has not been commenced, other than a judgment striking the complaint from the files, is void and a nullity. Accordingly, if the defendant has not made an appearance in the action, if he has not had an opportunity to appeal the void judgment, and if he has not moved to vacate it,²⁷⁷ he may raise the issue of failure of commencement by any of the post-judgment remedies provided for the challenge of void judgments.²⁷⁸ Thus, he could bring an action to have the judgment declared void, or an action to enjoin its enforcement, or he could attack it collaterally if it is made the subject of another action.²⁷⁹

VI. SUSTAINING THE CHALLENGE: THE APPROPRIATE JUDGMENT

Almost every court that has found the challenge to commencement well taken has *dismissed* the action for failure of commencement. Yet, as *Kosuth v. Bear*²⁸⁰ made absolutely clear, an action that has failed of commencement cannot be dismissed because it is nonexistent; the only correct disposition of the action is to strike the complaint from the files. The Court of Appeals for Cuyahoga County stated in *Saunders v. Choi*:²⁸¹

When an action fails of commencement it is as if no complaint was ever filed. If service is obtained anytime within one year of the filing of the complaint, the action is considered commenced as

²⁷⁶ *Peoples Banking Co. v. Brumfield Hay & Grain Co.*, 172 Ohio St. 545, 179 N.E.2d 53 (1961); *Lincoln Tavern v. Snader*, 165 Ohio St. 61, 133 N.E.2d 606 (1956); *Hayes v. Kentucky Joint Land Bank of Lexington*, 125 Ohio St. 359, 181 N.E. 542 (1932); *Kingsborough v. Tousley*, 56 Ohio St. 450, 47 N.E. 541 (1897); *Watts v. Brown*, No. 45638 (Ohio 8th Dist. Ct. App. Aug. 4, 1983)(Cuyahoga County).

²⁷⁷ If the defendant moves to vacate the void judgment, and the trial court finds against him, he is bound by that finding unless it is reversed on appeal. *Claxton v. Simons*, 174 Ohio St. 333, 189 N.E.2d 62 (1963).

²⁷⁸ *Ohio R. Civ. P.* 60(B) advisory committee note (1970).

²⁷⁹ *Id.* See *Santiago v. S.S. Kresge Co.*, 2 Ohio Op. 3d 54 (C.P. Cuyahoga County 1976).

²⁸⁰ 161 Ohio St. 378, 119 N.E.2d 285 (1954). See the material quoted at *supra* note 1.

²⁸¹ No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984).

of the date of filing. When service is *not* obtained within one year of filing the complaint, however, no case exists; there is nothing pending before the court and the action fails. *Kossuth v. Bear* (1954), 161 Ohio St. 378; *Mason v. Waters* (1966), 6 Ohio St.2d 212; *Lash v. Miller* (1977), 50 Ohio St.2d 63.

Therefore, the proper action of the trial court would have been to strike the complaint from the record for failure of commencement. As stated by the Ohio Supreme Court in *Kossuth, supra*, at 384:

"It seems axiomatic that a nonexistent case can not be dismissed. In the present instance, for lack of service, no case came into existence"

The trial court could have taken such action sua sponte Striking a complaint for failure of service is an appropriate action to clear a court's docket. The entry "dismissing" the complaint in this case should be read as an order "striking" the complaint.²⁸²

Therefore, the appropriate judgment in failure of commencement situations is an order striking the complaint from the files.

At this point Civil Rule 3(A)'s linkage between commencement and in personam jurisdiction presents a difficulty. Suppose that in a single complaint plaintiff Lash asserts claims against defendants Miller and Astley. Miller is served within the year following the filing of the complaint, but Astley is not. As a consequence, the action has been commenced against Miller but not against Astley.²⁸³ Therefore, if Astley timely and properly asserts the defense of failure of commencement, the court cannot dismiss

²⁸² *Id.* slip op. at 7. The Ohio Supreme Court in its affirmance of the appellate decision noted:

The court of appeals ruled that plaintiff's failure to obtain service of process within one year of refiling her complaint previously dismissed without prejudice should cause the complaint to be stricken from the record (case No. 45101).

Under Civ. R. 3(A), an action is not deemed to be "commenced" unless service of process is obtained within one year from the date of the filing of the action. The record before us reveals that service of process over the appellee was not obtained until approximately two years had elapsed from the date of filing, and this presumes that the method of service of process undertaken was indeed valid.

In any event, since service of process was not obtained within the time constraints set forth in Civ. R. 3(A), appellant's action was therefore not timely commenced either under the Civil Rules or R.C. 2305.19 Since appellant failed to obtain service of process within the time period allotted in Civ. R. 3(A), under the procedural devices governing service of process set forth in Civ. R. 4 *et. seq.*, appellant's action must fail.

... The judgement of the court of appeals in case No. 45101 is hereby affirmed.

12 Ohio St. 3d at 248, 250-51, 466 N.E.2d at 891-93.

²⁸³ See *Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E.2d 642 (1977).

the action as to Astley because an action against him never came into existence, and it cannot strike the complaint from the files because the action against Miller did come into existence. What judgment, then, can the court enter in favor of Astley? In this situation, the proper judgment is an order striking the claim against Astley from Lash's complaint. It must be emphasized, however, that the order striking the claim against Astley from Lash's pleading is not a Civil Rule 12(F) order striking an insufficient claim from the pleading but a Civil Rule 3(A) order declaring that no claim has ever been asserted against Astley because the action against him has never come into existence.

Can the court strike the claim against Astley from the complaint, and give Lash leave to assert a new claim against Astley by way of amendment? If the statute of limitation applicable to the claim against Astley has expired at the time the order is entered, the court can not grant leave to assert a new claim by way of amendment, since the running of the statute of limitations will bar the claim against Astley.²⁸⁴ If the statute of limitations has not expired, however, leave to amend can be granted. To avoid the almost inevitable confusion, the amendment process should be a two-step process. First, Lash will serve and file an amended complaint against Miller alone and with no reference to Astley. This will clearly establish that the initial action was commenced only against Miller. Second, Lash will serve and file a second amended complaint which will be similar, if not identical, to the original complaint in that it asserts claims against both Miller and Astley. Thereafter, if Lash obtains timely and sufficient service on Astley, the action against Astley will be deemed commenced as of the date the second amended complaint was filed while the action against Miller will be deemed commenced as of the date the original complaint was filed.

Would Civil Rule 54(B) apply to an order striking the claim against Astley from Lash's complaint? The answer is in the negative. Civil Rule 54(B) applies to an order which "adjudicates fewer than all the claims." The order striking the claim against Astley does not "adjudicate" that claim; it does not dispose of it either on the merits or other than upon the merits. It is simply a declaration that the claim is not before the court *for adjudication* since the action against Astley was never commenced. Therefore, since the order striking the claim against Astley is not an order "adjudicating" that claim, it does not fall within the ambit of Civil Rule 54(B).

In any event, what the trial court cannot do—whether the action is a unitary action against a single defendant or a multiple-party action against two or more defendants—is dismiss the action or dismiss a claim for failure of commencement. What if the court's journal entry sustaining

²⁸⁴ See *Lash v. Astley*, No. 79AP-477 (Ohio 10th Dist. Ct. App. Jan. 22, 1980)(Franklin County).

the challenge to commencement expressly states that the action or claim is "dismissed"? If the trial court's journal entry clearly and unequivocally states that the basis for the "dismissal" is failure of commencement, no great harm will come to either party. In such case, the "dismissal" will be seen as a clerical mistake or oversight, and the journal entry will be read as if it struck the complaint from the files or the claim from the pleadings.²⁸⁵ However, in this situation the more prudent course would be a correction of the journal entry so that it states the proper disposition of the action or the claim.

What if the journal entry does not explain the basis for the dismissal? In such case, a reviewing court will presume regularity in the proceedings of the trial court. Therefore, since an action that has failed of commencement cannot be dismissed, a reviewing court will presume that the action was dismissed for a reason underlying failure of commencement—nonexistence of a party, lack of capacity to sue or be sued, or failure to acquire jurisdiction over the person of the defendant.

If the statute of limitations has not run, no great harm will come to the *defendant* from such an unexplained "dismissal." At the very best, such a dismissal will be construed as a dismissal on the merits, and *res judicata* will bar a subsequent action by the plaintiff. At the very worst, the dismissal will be construed as a dismissal other than upon the merits, and the plaintiff will be allowed to bring a new action at any time before the statute of limitations expires. Since the plaintiff could bring such a new action if the journal entry had been properly drafted to reflect failure of commencement as the basis for striking the complaint from the files or for striking the claim from the pleadings, the effect on the defendant will be the same, and the clerical mistake or oversight in the journal entry is of no consequence.

Nor will the *plaintiff* be harmed if the journal entry reads "dismissed without prejudice," or "dismissed otherwise than upon the merits,"²⁸⁶ or if the dismissal is unqualified, and the only possible ground for failure of commencement is lack of jurisdiction over the person of the defendant.²⁸⁷ In all of these situations, the dismissal will be other than upon the merits, and the plaintiff will be free to bring a new action before the statute of limitations runs. However, the *plaintiff* runs the risk of irretrievable harm if the dismissal in the journal entry is an unqualified dismissal, and the underlying basis for failure of commencement is either nonexistence of a party or lack of capacity to sue or be sued. In such case, the dismissal could be construed as a dismissal for nonexistence or lack of capacity, and

²⁸⁵ *Kossuth v. Bear*, 161 Ohio St. 373, 119 N.E.2d 285 (1954); *Saunders v. Choi*, No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984).

²⁸⁶ See OHIO R. CIV. P. 41(B)(3).

²⁸⁷ See OHIO R. CIV. P. 41(B)(4).

an unqualified dismissal for either of these reasons would operate as an adjudication upon the merits.²⁸⁸ Res judicata would then bar any new action by the plaintiff even if the statute of limitations had not run. Therefore, if the statute of limitations has not run, it is imperative that the *plaintiff* see that a journal entry "dismissing" the action or the claim be corrected to a journal entry that strikes the complaint or claim from the files for failure of commencement; otherwise, the plaintiff may forfeit his right to bring a new action before the statute of limitations expires.

On the other hand, if the statute of limitations has expired at the time the judgment is entered, it is the *defendant* who is placed in jeopardy by the unexplained "dismissal." If that dismissal could be construed as a dismissal other than upon the merits for one of the reasons underlying failure of commencement, the plaintiff could bring a new action against the defendant at any time within one year from the date of dismissal under section 2305.19, the "savings statute."²⁸⁹ The plaintiff could not do this if the journal entry made it explicit that the complaint was being stricken from the files for failure of commencement.²⁹⁰ Thus, if the defendant wants to prevent a second suit by the plaintiff, it will be incumbent upon him to have the journal entry corrected. This may not be easy to do; because failure of commencement is the "forgotten defense," it is not much used, and as a consequence, few trial judges have had any occasion to deal with its peculiarities. Thus, there may be some difficulty in convincing the trial judge that there is a significant difference between "dismissing" the action and "striking the complaint from the files."²⁹¹

Another difficulty is choosing the appropriate vehicle for obtaining the correction. If the action had been commenced in a federal district court, one would have access to a motion to alter or amend the judgment.²⁹² Unfortunately, the Ohio Rules of Civil Procedure have no counterpart to that very convenient and useful device, and the state court litigant will

²⁸⁸ See OHIO R. Civ. P. 41(B)(3).

²⁸⁹ See *supra* note 168.

²⁹⁰ See *infra* text accompanying notes 313-15.

²⁹¹ See, e.g., *Saunders v. Choi*, No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984). The trial judge in *Saunders* noted that "this case at this time does not legitimately stand on the Court's docket for it has never been commenced." *Id.* slip op. at 4. Thus, the trial judge was aware of the fact that failure of commencement was the basis for his action. Nevertheless, in the journal entry, he "dismissed" the action without prejudice. The defendant was forced to take a cross-appeal in order to have this journal entry corrected. *Id.* Fortunately, the court of appeals did recognize the distinction between a "dismissal" and the "striking of the complaint from the files," and found that: "The entry 'dismissing' the complaint in this case should be read as an order 'striking' the complaint . . . The decisions below are affirmed, with the caveat that the dismissal in case No. 45101 is to be read as striking the complaint from the record." *Id.* at 7, 9. As indicated in *supra* note 282, the supreme court expressly affirmed this disposition by the court of appeals.

²⁹² See FED. R. Civ. P. 59(e).

have to employ more cumbersome tools.

If, as in *Saunders v. Choi*,²⁹³ it is clear from the record that the trial judge intended to dispose of the action or the claim on the basis of failure of commencement, one might use a Civil Rule 60(A) motion to correct the judgment.²⁹⁴ This motion would argue that the use of the word "dismissed" in the journal entry was a "clerical error" or an "oversight," since the court clearly intended to strike the complaint from the files or to strike the claim from the pleading.²⁹⁵ This is, however, a very murky area of the law, and the precise scope of Rule 60(A) is uncertain. If, for example, the trial court intended to dispose of the action on the basis of failure of commencement, but it also intended to dismiss the action because it believed that dismissal was the proper method to be used in achieving its goal, it cannot be said that the use of the term "dismissed" was either "clerical error" or "oversight."²⁹⁶ In such case, use of the term "dismissed" would be substantive error, not merely formal error, and substantive error is not within the ambit of Civil Rule 60(A).²⁹⁷ Therefore, since it is seldom clear from the record whether the trial court used the

²⁹³ 12 Ohio St. 3d 247, 248, 466 N.E.2d 889, 891 (1984). See *supra* note 291.

²⁹⁴ OHIO R. CIV. P. 60(A) states:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

The syllabus in *Torres v. Sears, Roebuck & Co.*, 68 Ohio App. 2d 87, 427 N.E.2d 32 (8th Dist. 1980)(Cuyahoga County), reflects the general limitations on the use of a Civil Rule 60(A) motion to correct a judgment:

1. A court of record speaks only through its journal; it may, when the journal fails to reflect its actions accurately, correct the journal by an order *nunc pro tunc*, i.e., an order entered "now for then" and effective on the date the action was actually taken.
2. Orders *nunc pro tunc* are available to make the court's record speak the truth; they must be premised upon orders the court has actually made, but has not recorded or has incorrectly recorded. They are unavailable to make the record reflect orders the court should have made or intended to make, but did not.

Id. at 87, 427 N.E.2d at 33.

²⁹⁵ See, by analogy, *Maryland v. Baltimore Transit Co.*, 38 F.R.D. 340, 343-44 (D. Md. 1965), in which the court changed an entry dismissing a claim "with prejudice" to one dismissing it "without prejudice" because that had been its original intent. See also the cases discussed in § 5 of Annot., 13 A.L.R. FED. 794 (1972).

²⁹⁶ See *Cale Prods., Inc. v. Orrville Bronze & Aluminum Co.*, 8 Ohio App. 3d 375, 457 N.E.2d 854 (9th Dist. 1982)(Wayne County); *Akron Insulating Co. v. Cunningham*, No. 10548 (Ohio 9th Dist. Ct. App. June 30, 1982)(Summit County); Annot., 13 A.L.R. FED. 794, 812-15 (1972).

²⁹⁷ As it is said in *Musca v. Village of Chagrin Falls*, 3 Ohio App. 3d 192, 192, 444 N.E.2d 475, 476 (8th Dist. 1981)(Cuyahoga County)(syllabus I): "Civ. R. 60(A) authorizes the correction of clerical mistakes only. Substantive changes in orders, judgments or decrees are not within its purview."

word "dismissed" with intent or whether it used it inadvertently because it was unaware of the proper order to be entered, the party employing the Rule 60(A) motion to correct the record should be careful to preserve his right to appeal from the "dismissal." In this connection, it should be noted that the 60(A) motion to correct the judgment may be made after the filing of the notice of appeal.²⁹⁸

If the defense of failure of commencement was raised in the answer and determined by the court at the time of trial, then it may be said that it was an issue of law that was tried by the court.²⁹⁹ That being so, the correctness of a journal entry "dismissing" the action can be tested by a motion for new trial premised on the ground that the judgment is contrary to law.³⁰⁰ Due to the terminology involved, the use of a motion for new trial for this purpose is cumbersome; the party making such a motion is not asking for relitigation of the defense of failure of commencement but is simply asking for a change in the judgment entry. This can be accomplished under that provision of Civil Rule 59(A) which states that "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment . . . and enter a new judgment." On the other hand, if the defense of failure of commencement was raised by pre-answer motion, a motion for new trial under the same provision will not lie; a motion is heard, not tried,³⁰¹ and a "new" trial cannot be granted unless

²⁹⁸ See *supra* note 294. After the appeal has been docketed, however, the trial court can act on the motion to correct only with leave of the appellate court. *Meyer v. Board of Educ.*, No. 45065 (Ohio 8th Dist. Ct. App. Mar. 17, 1983)(Cuyahoga County).

²⁹⁹ OHIO REV. CODE ANN. §§ 2311.01, -.02, .04 (Page 1981).

³⁰⁰ OHIO R. CIV. P. 59(A)(7).

³⁰¹ *L.A. & D., Inc. v. Board of Lake County Comm'rs*, 67 Ohio St. 2d 384, 423 N.E.2d 1109 (1981); *Trustees v. McClannahan*, 53 Ohio St. 403, 42 N.E. 34 (1895); *Railway Co. v. Thurstin*, 44 Ohio St. 525, 9 N.E. 232 (1886); Note, *The Meaning of the Term "Trial" Within the Ohio Rules of Civil Procedure*, 25 CLEV. ST. L. REV. 515 (1976).

In *Brown v. Coffman*, 13 Ohio App. 3d 168, 468 N.E.2d 790 (2d Dist. 1983), the Court of Appeals for Montgomery County stated:

R.C. 2311.01 defines trial as "****a judicial examination of the issues, whether of law or of fact, in an action or proceeding." . . . An "issue" is defined by the Revised Code as an averment arising from the "pleadings" of one of the parties and controverted by the other. R.C. 2311.02. "Pleadings" is defined by Civ. R. 7(A) to include the complaint, answer, cross-claims, counterclaims, third party claims, and their corresponding replies. Since a trial must necessarily involve the examination of issues, and since issues may only be raised in the pleadings, it follows that a trial must be initiated by one or more of the pleadings. See Carroll, *The Meaning of the Term "Trial" within the Ohio Rules of Civil Procedure* (1976), 25 Clev.St. L.Rev. 515.

A hearing, on the other hand, is initiated by a motion to the court. Civ. R. 7(B) governs the making of motions. When a motion is made, the judge may either dispose of it immediately or schedule it for a hearing. R.C. 2311.09. A pleading, while filed with the court, is directed primarily to the opposing party for the purpose of making or responding to a particular allegation. It is apparent, both by definition and by separate treatment in the rules, that the drafters of the Ohio

there has been an "old" trial.³⁰² If the motion for a new trial would not lie, the making of such a motion does not suspend the time for taking an appeal.³⁰³ Accordingly, if one is not careful in the use of this vehicle for obtaining a correction of the judgment entry, one may lose the right to appeal from the "dismissal." This anomaly again points out the need for an Ohio equivalent of the motion to alter or amend a judgment found in Federal Rule 59(e).

If correction of the journal entry would require the consideration of matters outside the record, an appeal would probably not be possible. Therefore, the party seeking the correction could use a Civil Rule 60(B)(1) motion for relief from judgment premised on "mistake" or "inadvertence,"³⁰⁴ or a 60(B)(5) motion premised on "any other reason justifying relief"³⁰⁵ for the dual purpose of obtaining the correction and establishing the necessary record if a subsequent appeal becomes necessary. If the record is adequate to support the correction, so that no inquiry outside the record need be made, an appeal from the "dismissal" would be feasible, and a Rule 60(B) motion on any ground ought not be available. This area of post-judgment relief is, however, a gray one; although the Ohio Supreme Court has repeatedly held that a Civil Rule 60(B) mo-

Civil Rules intended pleadings and motions to be distinct types of documents. Thus, it would seem that a trial could be distinguished from a hearing by merely looking to the method by which the particular proceeding was commenced. Carroll, *supra*, at 518.

An examination of the grounds for a new trial under Civ. R. 59(A) suggests that the drafters of the rule contemplated the term "trial" in its conventional sense, that is, an adversary proceeding, including pleadings, opening statements, presentation of evidence, closing arguments, and submission to the court or jury for final determination. See, also, R.C. 2315.01.

Id. at 169-70, 468 N.E.2d at 791..

³⁰² State *ex rel.* Batten v. Reece, 70 Ohio St. 2d 246, 436 N.E.2d 1027 (1982); L.A. & D., Inc. v. Board of Lake County Comm'rs, 67 Ohio St. 2d at 387, 423 N.E.2d at 1111; Rush v. City of North Olmsted, No. 42806 (Ohio 8th Dist. Ct. App. May 7, 1981)(Cuyahoga County).

³⁰³ L.A. & D., Inc. v. Board of Lake County Comm'rs, 67 Ohio St. 2d at 387, 423 N.E.2d at 1111; Shearson, Hayden & Stone v. Steiner, 66 Ohio App. 2d 10, 418 N.E.2d 1389 (2d Dist. 1979)(Montgomery County).

³⁰⁴ See Annot., 1 A.L.R. FED. 771 (1969).

³⁰⁵ As it is said in State *ex rel.* Gyurcsik v. Angelotta, 50 Ohio St. 2d 345, 364 N.E.2d 284 (1977): "It is generally held that court errors and omissions are reasons justifying relief under the 'other reason' clause. (See 15 A.L.R. Fed. 243-249, Section 12.)" *Id.* at 347, 364 N.E.2d at 285. One of the "errors and omissions" complained of in this case was the trial court's dismissal of the action for failure to prosecute without giving plaintiff's counsel that notice required by Civil Rule 41(B)(1). *Id.* This absence of notice would have been demonstrated in the record so that an appeal could have been taken in this case had plaintiffs learned of the dismissal in time to take that appeal.

See also Buckman v. Goldblatt, 39 Ohio App. 2d 1, 314 N.E.2d 188 (8th Dist. 1974)(Cuyahoga County), where the court said: "An application of the applicable law to the facts in this case leads to the conclusion that the levy and foreclosure were contrary to law. This impropriety results in a condition for the appellants that the catch-all provisions of Civ. Rule 60(B)(5) was patterned to correct." *Id.* at 6, 314 N.E.2d at 190.

tion cannot be used as a substitute for an appeal,³⁰⁶ it has not always followed its own rule.³⁰⁷ Due to this saying-one-thing-and-doing-another behavior by the supreme court and other courts,³⁰⁸ it is difficult to know with any degree of certainty whether a motion for relief from judgment would lie if an appeal could be taken from the entry of dismissal. It should be noted, though, that when a Rule 60(B) motion has been used in these circumstances outside of Ohio, it has generally been held that the motion is not made within a reasonable time unless it is made before the expiration of the time for filing the notice of appeal.³⁰⁹ In any event, since the 60(B) route is fraught with uncertainty, the party choosing to follow it should take all steps necessary to protect his right to appeal from the entry of "dismissal."³¹⁰

Finally, if the record adequately supports the need for correction, the aggrieved party can have the court of appeals make the correction by taking a timely appeal from the judgment, or a timely cross-appeal if the adverse party appeals. This latter method was the vehicle for correction employed by the prevailing defendant in *Saunders v. Choi*.³¹¹ While it is somewhat anomalous for a judgment winner to take an appeal from the judgment in his favor, he may do so if he can demonstrate prejudice to him by the judgment.³¹² As noted above, an unexplained "dismissal" has the capacity for causing considerable mischief for either party. If the statute of limitations has not run, it may deprive the unsuccessful plaintiff of his right to bring a new action before the statute expires; if the statute of limitations has run, it may deny the successful defendant the repose to

³⁰⁶ *Blasco v. Mislik*, 69 Ohio St. 2d 684 (1982); *Steadly v. Montanya*, 67 Ohio St. 2d 297, 423 N.E.2d 851 (1981); *Colley v. Bazell*, 64 Ohio St. 2d 243, 416 N.E.2d 605 (1980).

³⁰⁷ In addition to *State ex rel. Gyurcsik v. Angelotta*, 50 Ohio St. 2d 345, 364 N.E.2d 284 (1977), see *Svoboda v. Brunswick*, 6 Ohio St. 3d 348, 453 N.E.2d 648 (1983).

³⁰⁸ Compare *Buckman v. Goldblatt*, 39 Ohio App. 2d 1, 314 N.E.2d 188 (8th Dist. 1974)(Cuyahoga County)(applying Rule 60(B)(5) on grounds that judgment was "contrary to law") with *Haendiges v. Widenmeyer Elec. Constr. Co.*, 9 Ohio App. 3d 37, 457 N.E.2d 854 (9th Dist. 1983)(Medina County)(refusing to apply Rule 60 when appellant failed to satisfy procedural requirements of Rule).

³⁰⁹ See *Cale Prods., Inc. v. Orrville Bronze & Aluminum Co.*, 8 Ohio App. 3d 375, 379 n.2, 457 N.E.2d 854, 858 n.2 (9th Dist. 1982)(Wayne County); *Annot.*, 1 A.L.R. FED. 771 (1969).

³¹⁰ For suitable protective procedures, see *Majnaric v. Majnaric*, 46 Ohio App. 2d 157, 347 N.E.2d 552 (9th Dist. 1975)(Summit County).

³¹¹ No. 45101 (Ohio 8th Dist. Ct. App. May 5, 1983)(Cuyahoga County), *aff'd*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984). Defendant cross-appellant's second assignment of error is set forth as follows:

Where plaintiff's complaint was filed on August 30, 1979 and plaintiff failed to obtain service upon the defendant within the one-year period prescribed in Rule 3(A) of the Ohio Rules of Civil Procedure and defendant has moved for an order striking the complaint, based upon the failure of plaintiff to comply with Ohio Civil Rule 3(A), the trial court erred in dismissing the action without prejudice.

Id. slip op. at 6.

³¹² *Devlin Enters., Inc. v. Holmes*, No. 79 CA 39 (Ohio 7th Dist. Ct. App. June 26, 1979)(Mahoning County).

which he is entitled by allowing the plaintiff to bring a new action under the provisions of section 2305.19. Thus, prejudice is inherent in such a journal entry, and an appeal by the prevailing party would lie. Of course, if the original record made in the trial court would not support an assignment of error asking for a correction in the journal entry "dismissing" the case, the aggrieved party may first have to create a record for appeal by using a Rule 59(A)(7) motion for a new trial, a Rule 60(A) motion to correct the record, or a Rule 60(B)(1) or 60(B)(5) motion for relief from judgment as appropriate.

In sum, an action or claim cannot be dismissed for failure of commencement; the proper judgment is an order striking the complaint from the files or the claim from the pleading. A journal entry "dismissing" the action or claim may come back to haunt either party at a later date; therefore, when a court enters such an order rather than an order striking the complaint or the claim, the party likely to be prejudiced by the "dismissal" should take immediate steps to have the journal entry corrected. How this is to be done will depend upon the circumstances outlined above, and for want of a motion to alter or amend the judgment, it is bound to be a somewhat cumbersome process.

VII. THE CONSEQUENCE OF FAILURE TO COMMENCE

Courts do not fully understand the difference between an action commenced, an action attempted to be commenced, and an action that has failed of commencement; therefore, they often use the wrong language to describe the consequence of failing to commence an action. As noted in the previous section, they often "dismiss" an action that has failed of commencement even though the dismissal of such an action is impossible. Likewise, it is frequently said that when an action fails of commencement, the complaint does not exist.³¹³ This, too, is wrong; the complaint exists, but the action in which it was filed does not.³¹⁴ This improper use of language inevitably leads to confusion as to what may or may not be

³¹³ See, e.g., *Barnhart v. Schultz*, 53 Ohio St. 2d 59, 213 N.E.2d 168 (1978); *Levering v. Riverside Methodist Hosp.*, 2 Ohio App. 3d 157, 441 N.E.2d 290 (10th Dist. 1981)(Franklin County); *Nissen v. Callahan*, No. 38132 (Ohio 8th Dist. Ct. App. Jan. 11, 1979)(Cuyahoga County); *Group of Tenants v. Mar-Len Realty, Inc.*, 40 Ohio App. 2d 449, 321 N.E.2d 241 (3d Dist. 1941)(Allen County).

³¹⁴ In *GMS Management Co. v. Axe*, 5 Ohio Misc. 2d 1 (Clev. Hts. Mun. Ct. 1982), the court said:

It is sometimes said in these cases that the complaint is a nullity, or that there is no complaint. From what is said in *Kossuth v. Bear* (1954), 161 Ohio St. 378 [53 O.O. 280], however, it is apparent that the true doctrine is this: When the suit fails for want of commencement, no action ever comes into existence, and there is therefore no action to which the complaint can relate. As a consequence, the complaint must be stricken from the court's files because of the nonexistence of the action, and not because of the nonexistence of the complaint.

Id. at 4.

done after a court has found that an action has failed of commencement.

The key to understanding the consequence of failure of commencement is to understand that when a court finds that the action has failed of commencement it in no way adjudicates the claim or claims presented in that action. Its finding is limited to a declaration that the claim or claims are not before it for adjudication because there is no action pending in which they can be presented or in which it can exercise its jurisdiction. Thus, the court's decision on the question of commencement is merits-neutral; it is neither a finding "on the merits," nor a finding "otherwise than upon the merits."³¹⁵ What consequence does such a merits-neutral decision impose upon the parties to the action? The answer to this question depends primarily upon the statute of limitations applicable to the action.

A. *If the Statute of Limitations Has Not Run*

If the statute of limitations applicable to the action has not run at the time the court strikes the complaint from the files, the answer to the question posed above is a fairly simple one. Since the order striking the complaint from the files is merits-neutral, it does not raise the bar of res judicata. As a result, the same claim can be presented in a new action between the same parties. Therefore, the party who failed to commence the first action may bring a new action against the same defendant on the same claim at any time prior to the running of the statute of limitations applicable to that claim.³¹⁶ In short, having the original complaint stricken from the files for failure of commencement will be a hollow victory if the plaintiff is alert to the possibilities of a new action.

It must be emphasized, however, that the new action must be brought by filing the complaint before the statute of limitations expires, be it years, days, or hours in which this must be done; section 2305.19 does not apply and does not give the plaintiff a year in which to commence the new action.³¹⁷ Moreover, the court cannot extend the time for filing the new action beyond the expiration date of the statute of limitations.³¹⁸

B. *If the Statute of Limitations Has Run: The Savings Statute*

If the statute of limitations applicable to the action has expired at the time the court strikes the complaint from the files for failure of com-

³¹⁵ See *supra* note 1.

³¹⁶ *Lozier v. Thorne*, No. 5-78-34 (Ohio 3d Dist. Ct. App. May 25, 1979)(Hancock County).

³¹⁷ *Reese v. Ohio State Univ. Hosp.*, 6 Ohio St. 3d 162, 451 N.E.2d 1196 (1983); *Murdock v. Westbay Manor*, No. 47209 (Ohio 8th Dist. Ct. App. Mar. 22, 1984)(Cuyahoga County); *Uhas v. New York Cent. R.R.*, 70 Ohio App. 464, 46 N.E.2d 677 (6th Dist. 1942)(Erie County).

³¹⁸ *E.g.*, *Murdock v. Westbay Manor*, No. 47209, slip op. at 6.

mencement, the running of the statute of limitations—if pleaded—will bar a new action on the same claim against the same defendant unless section 2305.19, the “savings statute,” applies. In substance, the “savings statute” provides that if an action commenced, or attempted to be commenced, fails otherwise than upon the merits after the statute of limitations has expired, the plaintiff has one year from the date of failure in which to commence a new action.³¹⁹

There are three alternative reasons why the “savings statute” does not apply: 1) that which fails after the statute of limitations has expired is neither “an action commenced” nor “an action attempted to be commenced”; it is “an action that has failed of commencement”; 2) since no action ever came into existence, there was nothing to “fail” otherwise than upon the merits; or 3) if the action did fail, the failure was merits-neutral and was not a failure “otherwise than upon the merits.” Whatever the virtue in any one of these reasons, it is now well settled that the “savings statute” does not apply if the complaint is stricken from the files or the claim stricken from the pleading after the applicable statute of limitations has run.³²⁰

Does this mean that under these circumstances, a new action cannot be brought on the same claim against the same defendant? As a general rule, the answer is in the affirmative; the running of the statute of limitations will bar the new action.³²¹ However, it must be remembered that the running of the statute of limitations is not an automatic bar to a new action; to be an effective bar, the affirmative defense of the statute of limitations must be timely and properly pleaded.³²² Therefore, if the defendant waives the statute of limitations defense by failing to interject it into the new action, the new action can proceed since the termination of the first action for failure of commencement does not raise any *res judicata* bar.

Finally, care must be taken to distinguish between the effect of a Rule 3(A) termination for failure of commencement and a Rule 4(E) termination for failure to obtain service within six months. While the former will not be within the “savings statute” if it occurs after the statute of limitations has expired, the latter will. That which is terminated under the pro-

³¹⁹ For the pertinent text of OHIO REV. CODE ANN. § 2305.19 (Page 1981), see *supra* note 168.

³²⁰ *Saunders v. Choi*, 12 Ohio St. 3d 247, 466 N.E.2d 889 (1984); *Maryhew v. Yova*, 11 Ohio St. 3d 154, 464 N.E.2d 538 (1984); *Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966); *Hoehn v. Empire Steel Co.*, 172 Ohio St. 285, 175 N.E.2d 172 (1961), *rev'd on other grounds*, *Wasyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58 (1963); *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954); *In re Johnson*, No. 80AP-584 (Ohio 10th Dist. Ct. App. Feb. 24, 1981) (Franklin County); *DiCello v. Palmer*, No. 79AP-402 (Ohio 10th Dist. Ct. App. Feb. 12, 1981) (Franklin County); *Lash v. Astley*, No. 79AP-477 (Ohio 10th Dist. Ct. App. Jan. 22, 1980) (Franklin County).

³²¹ See cases cited *supra* note 320.

³²² OHIO REV. CODE ANN. § 2305.03 (Page 1981), provides: “When interposed by proper plea by a party to an action . . . lapse of time shall be a bar thereto.” (emphasis added).

visions of Rule 4(E) is "an action attempted to be commenced."³²³ Further, by the terms of the Rule, the termination is involuntary and "without prejudice." Since an involuntary termination is a "failure,"³²⁴ and a termination "without prejudice" is "otherwise than upon the merits,"³²⁵ a Rule 4(E) termination which takes place after the statute of limitations has expired is within the ambit of the "savings statute," and the plaintiff has one year from such termination in which to bring a new action.³²⁶

VIII. APPELLATE REVIEW

A. *The Defense Sustained*

An order striking the complaint from the files for failure of commencement has a three-fold effect: 1) it affects the plaintiff's substantial right to proceed in that action; 2) it determines the action; and 3) it prevents a judgment for the plaintiff in the action. Therefore, it is a final, appealable order under the provisions of section 2505.02 and 2505.03. This will be true even if the plaintiff could bring a new action before the statute of limitations expires. For purposes of appeal, the focus is on the effect the order has on the action in which it is entered and not the effect it may have on some other action. Accordingly, if the party aggrieved by the order wishes to challenge it on appeal, he must file his notice of appeal within thirty days after the order is entered.³²⁷

Likewise, in a multi-claim, multi-party action, an order striking a claim from the pleading: 1) affects the plaintiff's substantial right; 2) determines the action vis-a-vis the defendant against whom it was not commenced; and 3) prevents a judgment for plaintiff against that defendant. Further, since the order does not in any way adjudicate the claim which it strikes, Civil Rule 54(B) does not apply. Therefore, the order is a final, appealable order whether or not it contains the magic phrase "no just reason for delay."³²⁸

It must be remembered, however, that the order striking the complaint from the files, or the order striking the claim from the pleading, is merits-neutral; that is, it is not a decision on the merits which would raise the bar of *res judicata*. That introduces the problem posed by the Ohio Su-

³²³ Browne, *supra* note 5, at 168.

³²⁴ *Siegfried v. Railroad Co.*, 50 Ohio St. 294, 296, 34 N.E. 331, 332 (1893).

³²⁵ *Chadwick v. Barba Lou, Inc.*, 69 Ohio St. 2d 222, 226 n.4, 431 N.E.2d 660, 663 n.4 (1980); *Hensley v. Henry*, 61 Ohio St. 2d 277, 279, 400 N.E.2d 1352, 1353-54 (1980); *Nunes v. Board of Trustees*, No. 42804, slip op. at 4-5 (Ohio 8th Dist. Ct. App. Mar. 19, 1981)(Cuyahoga County).

³²⁶ Browne, *supra* note 5, at 168.

³²⁷ OHIO R. APP. P. 4(A).

³²⁸ OHIO R. CIV. P. 54(B).

preme Court's decision in *Hensley v. Henry*.³²⁹ In the syllabus of that case, the court stated: "Unless plaintiff's Civ. R. 41(A)(1)(a) notice of dismissal operates as an adjudication upon the merits under Civ. R. 41(A)(1), it is not a final judgment, order or proceeding, within the meaning of Civ. R. 60(B)." ³³⁰ The court then went on to note:

Civ. R. 60(B) is restrictive in that it permits the court to grant relief only from certain "*final* judgment[s], order[s], or proceeding[s]." (Emphasis added.) Under Civ. R. 41(A)(1), plaintiff's notice of dismissal does not operate 'as an adjudication upon the merits' because plaintiff had not previously "dismissed in any court, an action based on *** the same claim," and because the notice of dismissal did not "otherwise" state that it should so operate. As such, it is not a final judicial determination from which Civ. R. 60(B) can afford relief.³³¹

This case, of course, deals with a voluntary dismissal of an action and an attempt to reinstate it under the provisions of Rule 60(B). It is clear from what is said above that the decision did not turn upon either of those factors; rather, in defining finality, the supreme court confused the concept of finality with the bar of *res judicata*, and in effect, held that no decision is final unless it raises the bar of *res judicata*.³³²

There is no reason to suppose that a voluntary dismissal is any less final under the provisions of section 2505.02 than an involuntary dismissal, and there is no reason to suppose that the word "final," as it is used in Civil Rule 60(B), should not be subject to the definition of finality contained in that statute. Nevertheless, the court *could* limit this new definition of finality to voluntary dismissals or to the operation of Civil Rule 60(B). If it does not and adheres to this new definition of finality as one that applies across the board, then one would be forced to conclude that an order striking the complaint from the files for failure of commencement or a claim from a pleading for that reason is not a final, appealable order because it is not an order that "operates as an adjudication upon the merits."

³²⁹ 61 Ohio St. 2d 277, 400 N.E.2d 1352 (1980).

³³⁰ *Id.* at 277, 400 N.E.2d at 1352.

³³¹ *Id.* at 279, 400 N.E.2d at 1353 (footnotes omitted).

³³² What the supreme court probably intended to say was this: Civil Rule 60(B) may only be used to obtain relief from final judgments, orders, or proceedings. A voluntary dismissal by notice under the provisions of Civil Rule 41(A)(1)(a) operates automatically upon the filing of the notice "without order of the court." *Perdue v. Handelman*, 68 Ohio App. 2d 240, 429 N.E.2d 165 (10th Dist. 1980)(Franklin County). See also *Zimmie v. Zimmie*, No. 43299, slip op. at 3 (Ohio 8th Dist. Ct. App. Feb. 3, 1983)(Cuyahoga County) ("A notice of dismissal involves no action by the court; it is not an order of the court.") Therefore, since there was no order of the court dismissing the action, there cannot be a final order, and Civil Rule 60(B) has no application. There simply was no order to which the motion for relief could be directed.

Unless the *Hensley* doctrine is limited to voluntary dismissals,³³³ it will also pose problems in connection with dismissals under Civil Rule 4(E). Since a Rule 4(E) dismissal for failure to obtain service within six months is a dismissal "without prejudice," it does not operate as an adjudication upon the merits³³⁴ and would not be a final, appealable order under *Hensley*.

B. The Defense Denied

The trial court's order rejecting the defense of failure of commencement will affect the defendant's substantial right to have the litigation terminated, but it does not determine the action, nor does it prevent the defendant from obtaining a judgment on the merits in the action. Therefore, it is not a final order under the provisions of section 2505.02, and because it is not final, it is not an appealable order under the provisions of section 2505.03.

Likewise, an order overruling a Rule 4(E) motion to dismiss for failure to obtain service within six months neither determines the action nor prevents a judgment in favor of the defendant. Therefore, it is not a final, appealable order. Accordingly, no immediate appeal can be taken from the rejection of the challenge made under the auspices of Civil Rules 3(A) or 4(E). That rejection becomes *reviewable* on appeal, however, when a final appealable order is entered in the action, and an appeal is taken therefrom.³³⁵

IX. CONCLUSIONS AND RECOMMENDATIONS

Failure of commencement is an anomalous defense. It is not expressly mentioned anywhere in the Ohio Rules of Civil Procedure; it does not exist in its own right, but arises out of the existence and validity of some other Rules' defense, such as lack of jurisdiction over the person, lack of capacity to sue or be sued, or nonexistence of a party. The nature of the defense is completely misunderstood by the vast majority of both bench and bar, and for all practical purposes, it would not exist at all if the Ohio

³³³ To date, the courts of appeals appear to be either ignoring the *Hensley* definition of finality or limiting it to voluntary dismissals. See, e.g., *Jordan v. Appelbaum*, No. 46675 (Ohio 8th Dist. Ct. App. Nov. 23, 1983)(Cuyahoga County); *Vic Tanny Int'l Inc. v. Car-rabine*, No. 42220 (Ohio 8th Dist. Ct. App. Apr. 23, 1981)(Cuyahoga County).

³³⁴ See cases cited *supra* note 325.

³³⁵ See *Hollington v. Ricco*, 40 Ohio App. 2d 57, 318 N.E.2d 442 (8th Dist. 1973)(Cuyahoga County):

The concept of reviewability is to be distinguished from the concept of appealability, which focuses on the ripeness of finality of an order or judgment. See 4 Am. Jur. 2d, Appeal & Error § 47, at 570 (1962). Thus, while an interlocutory order is normally said to be non-appealable in the sense that it is not final, it does not follow that it is non-reviewable once an appeal is properly filed.

Id. at 67 n.11, 318 N.E.2d at 449 n.11.

Rules of Civil Procedure enacted in 1970 did not perpetuate the historical linkage between commencement and jurisdiction over the person of the defendant.

In 1853, when the statutory predecessor of Civil Rule 3(A) was first enacted,³³⁶ there was a real need for that linkage. As one commentator points out,³³⁷ the original statute dealing with commencement chose the date of service on the defendant as the date of commencement.³³⁸ Carried to its logical conclusion, this required service on the defendant before the statute of limitations applicable to the action expired. This would deny to the plaintiff the full period of time granted by the statute of limitations.

³³⁶ Code of Civil Procedure of the State of Ohio, § 20, 1853 Ohio Laws 57, 60.

³³⁷ See Scigliano, *supra* note 5, at 265-69.

³³⁸ Section 20 of the 1853 Code of Civil Procedure provided as follows:

An action shall be deemed commenced within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him: where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made.

An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the party faithfully, properly and diligently, endeavors to procure a service: but such attempt must be followed by service within sixty days.

1853 Ohio Laws 60.

This section had to be read in conjunction with §§ 55 and 56 of the Code which read:

§ 55. A civil action must be commenced by filing in the office of the clerk of the proper court, a petition, and causing a summons to be issued thereon.

§ 56. The plaintiff shall, also, file with the clerk of the court, a precipe, stating the names of the parties to the action, and demanding that a summons issue thereon.

1853 Ohio Laws 66.

Prior to its amendment in 1965, this section had evolved into OHIO REV. CODE ANN. § 2305.17 (Page 1954), and read as follows:

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.

By 1965, these provisions had evolved into OHIO REV. CODE ANN. §§ 2703.01 and 2703.02 (Baldwin 1964)(repealed 1971):

2703.01 Summons to be issued on petition. A civil action must be commenced by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.

2703.02 Precipe. At the time of filing a petition there shall also be filed with the clerk of the court a precipe, stating therein the names of the parties to be served with summons, the nature of the relief sought and if it is for the recovery of money, the amount for which judgment is asked, with interest, if any, and demanding that a summons issue.

Therefore, a "savings clause"³³⁹ was included in the Code which would permit commencement within the statute of limitations if the petition was filed and summons issued before the statute of limitations expired, and service on the defendant was obtained within sixty days thereafter. Thus the original Code linked the filing of the petition and the acquisition of jurisdiction over the person of the defendant in order to save an action that was timely filed, but so late in the statutory period of limitations that service on the defendant could not be acquired before the statute ran.

With the amendment of the statute in 1965,³⁴⁰ however, that linkage was no longer required since the amended statute made the date of the petition's filing the date of commencement. The linkage between filing and jurisdiction was retained for the purpose of establishing a "failure-to-prosecute" point beyond which the action should not be continued without jurisdiction over the defendant.³⁴¹ This concept of a "failure-to-prosecute" point one year after the filing of the complaint was carried over into Civil Rule 3(A).³⁴²

It is this linkage between commencement and the acquisition of jurisdiction over the person of the defendant that has spawned most of the metaphysical problems discussed in the previous sections of this Article, and it is the basis for that anomalous concept of an "action attempted to be commenced." However, since 1965, when the date of commencement was transferred from the date of service on the defendant to the date the petition was filed with the court, there has been no inherent need to link commencement with jurisdiction, and the linkage that does now exist in Civil Rule 3(A) is nothing more than an accident of history.

This becomes obvious when one considers Civil Rule 4(E), which establishes a six-month "failure-to-prosecute" point which is completely divorced from commencement. Indeed, Rule 4(E)'s six-month "failure-to-prosecute" point renders Rule 3(A)'s one-year "failure-to-prosecute" point redundant, and the continued co-existence of two different "failure-to-prosecute" points must necessarily produce further confusion in an area that is already widely misunderstood. Therefore, since the advent of Rule 4(E), there is no longer any need for Rule 3(A)'s linkage between commencement and jurisdiction, and the bench and bar would be better off if it did not exist.

Its elimination is simple; all that would be required is an amendment of Rule 3(A) so that it would read as follows: "A civil action is commenced

³³⁹ The "savings clause" is the second paragraph of § 20 of the original Code of Civil Procedure, and the second paragraph of OHIO REV. CODE ANN. § 2305.17 (Page 1954), as it read prior to its amendment in 1965. See *supra* note 338.

³⁴⁰ Act of July 16, 1965, 1965 Ohio Laws 1675, 646. See text accompanying note 17 for the language of the amended section.

³⁴¹ See *supra* note 117 and accompanying text.

³⁴² *Id.*

by filing a complaint with the court." While this would not eliminate the defense of failure of commencement, it would so reduce the occasions for its use that the defense would become statistically insignificant. Further, and perhaps more importantly, it would completely eliminate the absurdity of an "action attempted to be commenced." Finally, the failure to prosecute problem arising from the plaintiff's failure to obtain jurisdiction over the person of the defendant would be resolved under the provision of the new Rule 4(E), and the problems of commencement and failure to prosecute would no longer be intertwined as they now are.

This is not to say that Rule 4(E) is perfect; when used in conjunction with section 2305.19, the "savings statute," it can be manipulated in such a way as to extend effectively the statute of limitations by anywhere from eighteen months to two years and perhaps longer.³⁴³ However, a new Rule 3(A), combined with the imperfect Rule 4(E), is preferable to the chaotic situation that now exists, since it would not only bring the Ohio Rules more in line with their federal counterparts but it would also eliminate almost all of the confusion that now surrounds the concept of commencement. "Commencement" ought to be a spare and simple concept completely unrelated to the acquisition of jurisdiction over the person of the defendant. It can be if Rule 3(A) is amended to read: "An action is commenced by filing a complaint with the court."

³⁴³ Browne, *supra* note 5, at 168.