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## Perils in Ohio Civil Procedure

William K. Gardner\*

UNDER THE COMMON-LAW PRACTICE, a party desiring to commence an action at law was required to "purchase" from the clerks in chancery a writ, and it was essential that he or his solicitor knew his writs, because the rule of *caveat emptor*, so to speak, applied. If the writ obtained did not fall within the class of the conventional type of action stereotyped for his particular kind of claim, he lost his case, regardless of its merits. Likewise, it was necessary that his declaration (petition) contain the appropriate formal allegations.

Under the code practice, in order to commence an action, all that is necessary is that the party file with the clerk of the proper court a complaint, or petition, containing a statement of facts constituting a cause of action "in ordinary and concise language," with a demand (prayer) for the relief to which he claims to be entitled, and cause a summons to be issued thereon.<sup>1</sup>

Again, under the common-law practice, it was frequently necessary for a party to prosecute a prolonged chancery action before he could commence his action at law. For example, to set aside a voidable release, or to reform a contract or other written instrument. Under the code he may set up both of his causes of action, one in equity and the other at law, in the same petition.<sup>2</sup>

Even in Ohio, previous to 1936, if a party desired to appeal from a judgment in an action at law, it was necessary to institute a proceeding in error in the appellate court, by filing a petition in error and causing a summons in error to be issued, or secure a waiver thereof. If he mistook his action at law for one in chancery, and merely filed an "appeal," the latter would be dismissed, and, as frequently occurred, he would find that it was too late to institute a proceeding in error, and he was through. His only reward would be the experience of his counsel. Under the present appellate procedure, in order to perfect his appeal, in either an action at law or a chancery suit, all that is necessary

\* Professor of Law, Cleveland-Marshall Law School; Compiler of Gardner's Ohio Civil Code; Author of Gardner's Bates Ohio Civil Practice; etc.

<sup>1</sup> Oh. Rev. Code, §§ 2703.01, 2309.04.

If he is mistaken as to the relief to which he is entitled, the court may nevertheless grant him such relief as the allegations of his pleading and the evidence entitle him to. Pittsburgh, C. C. & C. R. Co. v. Reynolds, 55 Ohio St. 370 (379), 45 N. E. 712 (1896).

<sup>2</sup> Oh. Rev. Code, § 2309.05.

is for the appellant to file a notice of appeal with the trial court. If it is necessary to obtain leave to appeal, which is seldom, a copy of the notice of appeal must also be filed with the appellate court. All that is jurisdictionally essential is that the notice of appeal be filed within the statutory period of time, and properly designate the judgment appealed from, either by date or other appropriate reference.<sup>3</sup> The notice should state whether or not the appeal is on "questions of law," (in an action at law), or on "questions of law and fact" (in a chancery action). If the notice of appeal incorrectly designates the latter, his appeal will not be dismissed, but will be retained as an appeal on questions of law, and the court will give him not more than thirty days to prepare and file his bill of exceptions (record of the evidence and proceedings in the court below).<sup>4</sup>

Thus, it will be seen from the foregoing examples, and many others which might be cited, civil procedure has been much improved and greatly simplified as compared with by-gone days. However, just as in any profession, trade or athletic game, there are certain rules to be followed, and the cautious lawyer, if he is not familiar with all the rules, should examine the appropriate statutes and decisions before he attempts to commence any action or to perfect an appeal.

There are a number of pitfalls, even under code practice, of which many lawyers have learned to their regret. A few of them will be pointed out in this article. It would be impracticable to set forth here all the rules of civil procedure.

### Jurisdiction

One of the first "red lights" to be observed, is the matter of submitting, unwittingly, the jurisdiction of the *person* of the defendant to the court. A party may not consent to the jurisdiction of the court over the subject-matter of an action, when that is lacking; nor may he waive or be estopped from asserting the lack thereof, except where jurisdiction of the subject-matter depends upon a question of fact which is susceptible of being controverted, such as domicile, residence, etc.<sup>5</sup>

<sup>3</sup> Oh. Rev. Code, §§ 2505.04, 2505.05, 2505.07.

If the appeal is on questions of law and fact, as in a chancery action, an appeal bond must be furnished within the time for filing the notice of appeal, but failure to do so does not result in dismissal of the appeal. It will be retained as an appeal on questions of law. See *infra*, note 4.

<sup>4</sup> Oh. Rev. Code, §§ 2321.05, 2505.23.

<sup>5</sup> *State ex rel. Clary v. Probate Court*, 151 Ohio St. 497, 39 Oh. Op. 319, 86 N. E. 2d 765 (1949).

Unlike jurisdiction of the subject-matter, however, lack of jurisdiction of the person may be waived, and frequently is, unintentionally. It has been said that if a party wishes to object to the jurisdiction of the court over his person, he should stay out of court for all other purposes. Even unsuccessful objection to jurisdiction of the subject-matter constitutes an entry of appearance of the person.<sup>6</sup>

If a party wishes to object to the jurisdiction of the court over his person, he should do so at the earliest opportunity. This is usually done by a motion to quash service. Although the statute gives this as a ground for specific demurrer, lack of jurisdiction of the person can seldom be successfully attacked by demurrer, for the reason such lack does not appear "on the face of the petition."<sup>7</sup> There is one instance, however, in which a party may object to the jurisdiction of the person and also plead his defense as to the merits. Where the allegations of the petition are such that, if true, the court would have jurisdiction of the person of a defendant, a motion to quash service would be improper, as that would involve trying the facts of the case. In such instance, the objecting defendant may file his answer, consisting of a general or specific denial, and this has the effect of denying the facts which are necessary to constitute jurisdiction, as well as the facts alleged as to the merits. In such case, when it first appears at the trial of the merits that the facts alleged in the petition which are relied upon to constitute jurisdiction, such as proper joinder of defendants, are not sustained by plaintiff's evidence, the objecting defendant may, and should, promptly move for dismissal of the action as to him for lack of jurisdiction of his person.<sup>8</sup>

Where lack of jurisdiction of the person is disclosed by petition and the record, without the necessity of trying the facts alleged in the petition, if the defendant timely files his motion to quash service and that is overruled, he may then plead to the merits and continue to object to the jurisdiction of his person, by answer, without entering his appearance. In the event it should later be decided by the trial court or a reviewing court that

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<sup>6</sup> Klein v. Lust, 110 Ohio St. 197, 143 N. E. 527 (1924); Handy v. Insurance Co., 37 Ohio St. 366 (1881).

<sup>7</sup> Oh. Rev. Code, § 2309.08.

<sup>8</sup> Glass v. McCullough Transf. Co., 159 Ohio St. 505, 50 Oh. Op. 425, 112 N. E. 2d 823 (1953); Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N. E. 565 (1927).

there was lack of jurisdiction of the person, the defense is still available.<sup>9</sup>

### Amendment of Statute

An Ohio statute provides that when a statute is amended or repealed, if the amendment or repeal relates to the *remedy*, it does not affect pending actions or proceedings unless so *expressed*.<sup>10</sup> This provision has resulted in the failure of some proceedings, especially appeals.<sup>11</sup> When the legislature, in amending a statute, neglects to expressly state (as it frequently does) that the amendment shall apply to pending actions, this results in there being two rules of law. One applicable to actions pending at the time of the amendment, and another applying to actions commenced after the amendment becomes effective. It would be in the interest of justice for this statute to be amended to state, in effect, that the amendment *shall* affect pending actions unless otherwise expressed.

### Will Contests

Within the last few years a great number of will-contest actions have been dismissed, otherwise than on the merits, for the reason that plaintiff failed to commence the action as to all necessary parties within the statutory period of time (six months after the probate of the will). Actions to contest wills are purely statutory, and in all such actions, where the statute specifies the time within which the action must be commenced, the time limit is part of the right. If the action is not commenced within the time limit, there are no exceptions which will toll the statute. Accordingly, the Ohio courts have applied the statute strictly.

It is possible to have four classes of defendants in an action to contest a will: (1) the executor; (2) the devisees and legatees; (3) the heirs at law, and (4) one who is both a legatee or devisee and an heir at law. The respective members of each of the last three classes are "united in interest" with all other

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<sup>9</sup> *Gibson v. Summers Constr. Co.*, 163 Ohio St. 220, 56 Oh. Op. 223, 126 N. E. 2d 326 (1955); *State ex rel. Rhodes v. Solether*, 162 Ohio St. 559, 55 Oh. Op. 440, 124 N. E. 2d 411 (1955).

<sup>10</sup> Oh. Rev. Code, § 1.20 (G. C. § 26).

<sup>11</sup> *Lengthening the time for filing a motion for new trial: Von Gunten v. New Justice Coal Co.*, 147 Ohio St. 511, 34 Oh. Op. 415, 72 N. E. 2d 253 (1947). *Extending time for filing bill of exceptions: Woodward v. Eberly*, 167 Ohio St. 177, 4 Oh. Op. 2d 223, 147 N. E. 2d 255 (1958).

members of such class, but not with members of any other class. The executor stands alone. If it happens that he is also an heir at law, or a devisee or legatee, he must be made a party and served with summons in both capacities; that is, officially and individually.

Under an Ohio statute, an action is commenced as to each defendant at the *date of the summons* which is served on him "or on a co-defendant who is . . . united in interest with him."<sup>12</sup> In will-contest actions the courts constantly hold that unless a summons is issued within the statutory period (and timely served) for at least one member of each class so *united in interest*, the action will be dismissed.<sup>13</sup> One of the latest decisions of the Supreme Court is that *all* of the necessary parties *must* be made parties to the action within the six-months period. If all of the heirs at law are not known, the petition should name the "unknown heirs," who should be served by publication.<sup>14</sup> The decision did not go so far as to hold that service must be made on *all* the necessary parties within the six months, but it shows the trend. It is therefore suggested that service be had on *all* the necessary parties within such period.

### Persons Under Disability

There are two sections of the statute providing for a twenty-one year limitation. One as to actions to recover real property,<sup>15</sup> and the other for the revival of judgments.<sup>16</sup> Both of them contain a saving provision as to persons under disability, and are probably intended to have the same effect, but their language is substantially different. The first is quite ambiguous and should be clarified.

<sup>12</sup> Oh. Rev. Code, § 2305.17.

This section has been considered as being applicable to actions to contest wills, although, by its express terms, it does not include such. It is not improbable that the Supreme Court may eventually hold that it does not apply to such actions. The section should be amended so as to specifically apply to will contests, and other statutory actions, including divorce actions. The Supreme Court has held that a divorce action is not commenced until service is completed. *Gehelo v. Gehelo*, 160 Ohio St. 243, 52 Oh. Op. 114, 116 N. E. 2d 7 (1953).

<sup>13</sup> See, for example, *Peters v. Moore*, 154 Ohio St. 177, 42 Oh. Op. 254, 93 N. E. 2d 683 (1950); *Gravier v. Gluth*, 163 Ohio St. 232, 56 Oh. Op. 228, 126 N. E. 2d 332 (1955); *Staley v. Scheck*, 99 Oh. App. 242, 58 Oh. Op. 405, 133 N. E. 2d 189 (1954) [motion to certify overruled, 3-16-55].

<sup>14</sup> *Fletcher v. First Nat. Bank*, 167 Ohio St. 211, 4 Oh. Op. 2d 268, 147 N. E. 2d 621 (1958).

<sup>15</sup> Oh. Rev. Code, § 2305.04.

<sup>16</sup> Oh. Rev. Code, § 2325.18.

### Answer; Denial or New Matter

The statute provides that the answer to the petition shall contain, *inter alia*, a general or specific denial of matters controverted; a statement "in ordinary and concise language" of "new matter constituting a defense," etc.<sup>17</sup> This statute seems to be sufficiently definite, and it has been the practice ever since the adoption of the civil code in 1853 to set forth certain specific denials, if desired, followed by a general denial of all other averments of the petition. A general denial of all matter intended to be controverted is sufficient. However, one Court of Appeals has held that where the answer contains certain specific denials, a general denial is ineffective to put in issue any matter in the petition not specifically denied. That is, that the answer must contain either a general denial or specifically deny all matter controverted.<sup>18</sup> It would be well if the statute were amended to clarify the situation.

Although this is not due to any ambiguity in the statute, many lawyers and some courts have difficulty in distinguishing between new matter, or an affirmative defense, and that which is in effect a denial. We lawyers are disposed to verbosity, and it often occurs that an answer, after containing a general denial, continues to set forth what purports to be new matter by way of affirmative defense, but which, in fact, is merely another way of denying certain allegations of the petition. For example, pleading a different oral contract from that alleged in the petition, or alleging that plaintiff's injuries were due *solely* to his own negligence, or that of a third party.<sup>19</sup> In either case, a general denial puts the plaintiff on proof as to his allegations, and any evidence which tends to controvert his allegations can be introduced under a general denial. These unnecessary averments sometimes have the effect of misleading the trial court into the error of charging the jury that the burden is upon the defendant to prove the *purported* new matter in his answer.<sup>19</sup> The writer has

<sup>17</sup> Oh. Rev. Code, § 2309.13.

<sup>18</sup> *Hermanies v. Standard Oil Co.*, 58 Oh. Op. 20, 131 N. E. 2d 233 (1955) [motion to certify overruled, 10-19-55]. The court apparently felt that the defendant had taken unfair advantage of the plaintiff, and sought means of remedying the situation.

<sup>19</sup> See *Montanari v. Haworth*, 108 Ohio St. 8, 140 N. E. 319 (1923); *Taylor v. Cincinnati*, 143 Ohio St. 426, 28 Oh. Op. 369, 55 N. E. 2d 724 (1944) (negligence cases); *McNutt v. Kaufman*, 26 Ohio St. 127 (1875) (contract); *Hrybar v. Metropolitan Life Ins. Co.*, 140 Ohio St. 437, 24 Oh. Op. 437, 45 N. E. 2d 114 (1942) (answer pleading suicide in action on accident policy; erroneous charge that burden was on defendant).

found that a good rule for determining whether or not certain allegations in the answer actually constitute new matter, or are merely a denial of the allegations of the petition, might be stated as follows: If the allegations of the petition and the purported new matter in the answer could both be true, in the nature of things, then the answer does contain new matter, or an affirmative defense, of which defendant has the burden of proof. If they could not both be true, in the nature of things, the purported new matter in the answer is, in effect, a repetition of the denial of the averments of the petition, and no reply is required to the answer.'

### Two-Issue Rule

This ingenious conception, which might be styled as the natural offspring of an unwed Portia, has been the source of much confusion, and often results in the affirmance of a judgment where there is actually prejudicial error. It is, perhaps technically logical, but often quite inequitable. It is not statutory, but doubtless a statute would be required to abolish it. Reviewing courts apply it where there is more than one issue, and the jury returns a general verdict which could have been based on any one of the issues. If one of the issues is free from error, there will not be a reversal, although there was error as to another issue. It will be presumed that the jury founded its verdict on the issue as to which there was no error, in the absence of an affirmative showing to the contrary. Therefore, such error becomes immaterial. The effect of the rule may be avoided by submitting to the jury interrogatories to be answered with its general verdict, thus disclosing on which issue they based their verdict. If the answers disclose that the verdict was based on the issue as to which there was error, there will be a reversal. Otherwise, the judgment will be affirmed.<sup>20</sup>

<sup>20</sup> The rule had its origin in *Sites v. Haverstick*, 23 Ohio St. 626 (1873), in which a woman sought recovery of certain land. The answer pleaded two defenses: (1) invalidity of the marriage through which she claimed the land, and (2) that she had executed a deed to defendants for the land. Her reply denied the invalidity of the marriage, and alleged that the deed was obtained through fraud. Thus, there were two issues: invalidity of the marriage and fraud. By the finding against her on either of these issues, the verdict must necessarily have been against her. The jury found for the defendant "on the issues." She assigned as error the court's charge to the jury on the invalidity of the marriage. The Supreme Court refused to reverse, presumably on the ground the verdict could have been sustained on the issue of fraud, concerning which there was no error. The rule is

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### Joinder

The Ohio statute provides for joinder of related and certain other causes of action, whether legal or equitable, or both,<sup>21</sup> but also provides that the causes so united, "except as otherwise provided," must affect all the parties to the action.<sup>22</sup> It is not anywhere specifically "otherwise provided," but it is otherwise provided that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs."<sup>23</sup> This is merely permissive.<sup>24</sup> Parties who are "united in interest" must be joined as plaintiffs or defendants. This is mandatory.<sup>25</sup> Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.<sup>26</sup> Under this latter provision, the Supreme Court has gone all out in approving the joinder of defendants, and especially in tort actions.

Persons whose wrongful acts concur in producing a single, indivisible injury may be joined as defendants, even though the respective degree of care required of them differs. For example, a common carrier of passengers may be joined with one who is required to exercise only ordinary care;<sup>27</sup> and one guilty of wanton misconduct under the guest statute may be joined with one guilty of ordinary negligence.<sup>28</sup> Where two or more persons under circumstances creating primary liability, either by a com-

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frequently applied where there is an issue of negligence of defendant and also an issue of contributory negligence of plaintiff. *Knisely v. Community Trac. Co.*, 125 Ohio St. 131, 180 N. E. 654 (1932). It has been applied in a will-contest action. *Niemes v. Niemes*, 97 Ohio St. 145, 119 N. E. 503 (1917). The court has refused to extend the rule to a case in which there was error as to the primary issue of defendant's negligence. *Bush v. Harvey Trans. Co.*, 146 Ohio St. 657, 33 Oh. Op. 154, 67 N. E. 2d 851 (1946). Interrogatories submitted to jury: *Swoboda v. Brown*, 129 Ohio St. 512, 2 Oh. Op. 516, 196 N. E. 274 (1935); *Fantozzi v. New York, C. & C. R. Co.*, 161 Ohio St. 485, 53 Oh. Op. 368, 120 N. E. 2d 104 (1954).

<sup>21</sup> Oh. Rev. Code, § 2309.05.

<sup>22</sup> Oh. Rev. Code, § 2309.06.

<sup>23</sup> Oh. Rev. Code, § 2307.18.

<sup>24</sup> *Clark v. McClain Fire Brick Co.*, 100 Ohio St. 110, 125 N. E. 877 (1919).

<sup>25</sup> *Id.* See R. C. § 2307.20.

<sup>26</sup> Oh. Rev. Code, § 2307.19.

<sup>27</sup> *Meyer v. Cincinnati St. R. Co.*, 157 Ohio St. 38, 47 Oh. Op. 34, 104 N. E. 2d 173 (1952).

<sup>28</sup> *Glass v. McCullough Transf. Co.*, 159 Ohio St. 505, 50 Oh. Op. 425, 112 N. E. 2d 823 (1953).

bination of their actions create a nuisance causing damage or by their concurrent negligence directly produce a single indivisible injury, and where it is impossible to measure or ascertain the amount of damage created by any one of them, they may be joined as defendants, even though their acts are not concurrent in point of time, but occur at different times over a period of years. In such case, the causes of action based upon nuisance and negligence may also be joined.<sup>29</sup>

About the only prohibition against joinder of defendants in tort actions, where there is a single injury, is in the case of *primary* liability on the part of one and *secondary* liability of the other.<sup>30</sup>

There is no reason why the same liberality should not apply as to joinder in actions *ex contractu*. The statute on joinder of defendants does not make any distinction between tort actions and contract actions.<sup>31</sup>

The provision for joinder of defendants is broader and more liberal than that for joinder of plaintiffs.<sup>32</sup> Only such persons as have an interest in the "subject of the action," and in obtaining the "relief demanded" may be joined as plaintiffs. Where there is only one cause of action, no problem is presented. But where there are several causes of action, in order to join several parties as plaintiffs must all of them have an interest in each cause of action? It is this writer's opinion that if the various causes of action arise out of the same subject of action, and all of the plaintiffs have an interest in at least one of the causes, that is sufficient to warrant joinder as parties plaintiff.<sup>33</sup> Otherwise, there would probably be a misjoinder of parties and of causes.<sup>34</sup> The statute needs clarification in that respect.<sup>35</sup>

<sup>29</sup> *Schindler v. Standard Oil Co.*, 166 Ohio St. 391, 2 Oh. Op. 2d 340, 143 N. E. 2d 133 (1957).

<sup>30</sup> *Larson v. Cleveland R. Co.*, 142 Ohio St. 20, 26 Oh. Op. 228, 50 N. E. 2d 163 (1943); *Shaver v. Shirks Motor Express Co.*, 163 Ohio St. 484, 56 Oh. Op. 404, 127 N. E. 2d 355 (1955).

<sup>31</sup> Cf. *Lewis v. Hickok*, 149 Ohio St. 253, 36 Oh. Op. 568, 78 N. E. 2d 569 (1948).

<sup>32</sup> See 39 Am. Jur., Parties, § 34.

<sup>33</sup> For example, if A and B each hold separate promissory notes executed by the same party or parties, and both notes are secured by a mortgage, they could join in an action to foreclose the mortgage, in which they would each have an interest. They might also recover personal judgments on their respective notes in two additional causes of action, in which neither would have any interest in the cause of the other.

<sup>34</sup> See *Ulmer v. Squire*, 71 Oh. App. 369, 26 Oh. Op. 296, 50 N. E. 2d 178 (1942).

<sup>35</sup> See Oh. Rev. Code, § 2307.18.

### What Constitutes a Single Cause of Action

Considerable confusion has arisen since the Supreme Court has changed its position and ruled that a claim for bodily injuries and a claim for property damage, arising out of the same occurrence, constitute but a single cause of action.<sup>36</sup> In this era of legislating on many subjects, it might be well for the legislature to attempt to stabilize the matter, but it might make it worse.

### Concurrent Motions for Directed Verdict

It was formerly the *stare decisis* rule that parties making concurrent motions for a directed verdict at the close of all the evidence, without reserving the right to go to the jury, waived jury trial, and authorized the court to discharge the jury and decide conflicting evidence. The rule was without logic or justice. Fortunately, the Supreme Court has overruled that untenable practice.<sup>37</sup> Perhaps there is now no need for the legislature to intervene.

### Special Verdicts

At common law a jury had the right to return either a general or a special verdict.<sup>38</sup> That was the law of Ohio until October 4, 1955, when the statute was amended to provide that, unless otherwise directed by the court, a jury shall render a general verdict.<sup>39</sup> While juries seldom, if ever, returned special verdicts without being so directed, they had the right to do so. This uncontrolled power of the jury has been removed. When requested by *either* party, the court shall "submit in writing each determinative issue to be tried by the jury and direct the jury to give a special verdict."<sup>40</sup> Hence, a jury may not now attempt to write its own special verdict, as formerly, which would have been disastrous. Under the practice, the court usually granted permission to all parties to submit a form of special verdict, and the jury might have approved either or prepared its own verdict. No doubt the purpose of a special verdict was to prevent a jury

<sup>36</sup> *Rush v. Maple Heights*, 167 Ohio St. 221, 4 Oh. Op. 2d 279, 147 N. E. 2d 599 (1958) [overruling 4th Syl. of *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 30 Oh. Op. 542, 61 N. E. 2d 707 (1945)].

<sup>37</sup> *Carter-Jones Lbr. Co. v. Eblen*, 167 Ohio St. 189, 4 Oh. Op. 2d 256, 147 N. E. 2d 486 (1958).

<sup>38</sup> 3 Blackstone's Commentaries, 377.

<sup>39</sup> Oh. Rev. Code, § 2315.12 [Eff. 10-4-55].

<sup>40</sup> Oh. Rev. Code, § 2315.15 [Eff. 10-4-55].

from rendering a general verdict for a preferred party regardless of its finding on the evidence.

There has long been in existence in Ohio another section of the statute which permits either party to request the court to instruct the jurors, if they render a *general* verdict, specially to find upon particular questions of fact. The language of this section has been changed somewhat and now permits such finding of facts, if they render a general or special verdict.<sup>41</sup> This is an addition to the provision for a special verdict, and should be sufficient to test the soundness of the general verdict, or to "trip up" the jury, which is generally the motive of the party who expects to lose. Accordingly, there would seem to be no good purpose for an entire special verdict, the result of which is generally to invite reversible error on the part of the court in its instructions or general charge to the jury. Trial judges do not ordinarily have the time in the course of a jury trial to give proper consideration to the preparation of instructions and the necessary interrogatories required of a special verdict which will meet the approval of the Supreme Court.<sup>42</sup>

It is the considered opinion of this writer that the special verdict should be abolished entirely, or permitted only when requested by *all* parties and, perhaps, with the consent of the trial court. In a case in which there is a right of trial by jury, neither party may waive a jury without the consent of the other, nor, except in actions arising on contract, without the assent of the court.<sup>43</sup>

### Demurrer; Searching the Record

Should the demurrer be abolished? That would be unfortunate. If a petition fails to state a cause of action, why should the defendant be required to go to trial merely to have the plaintiff prove that he is without legal ground for recovery on his own version of the facts? That also applies to an answer which states new matter by way of purported defense, or a reply, by way of avoidance of a genuine affirmative defense. A motion to dismiss, or for judgment on the pleadings, would be a sub-

<sup>41</sup> Oh. Rev. Code, § 2315.16 [Eff. 10-4-55].

<sup>42</sup> See *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, 53 Oh. Op. 25, 118 N. E. 2d 147 (1954); *Miller v. McAllister*, 169 Ohio St. 487 (Ohio Bar Bull. July 20, 1959).

<sup>43</sup> Oh. Rev. Code, § 2315.20.

A jury cannot be waived in an action to contest a will. *Andes v. Shippe*, 165 Ohio St. 275, 59 Oh. Op. 363, 135 N. E. 2d 396 (1956). *Query* as to whether a special verdict could be rendered in such action.

stitute, but, if granted, that would deprive the party filing the defective pleading of the right to amend, should he be able to do so. "So great a favorite is the demurrer under the laws of the land," that the Supreme Court of Ohio has held, in effect, that a plea in abatement and motion to dismiss should be treated as a demurrer and, if sustained, plaintiff be given leave to amend.<sup>44</sup> The difference is one in name only.

There is a rule of *stare decisis*, known to the common law, but possibly unknown to some infrequent pleaders and occasional court lawyers, termed, "the demurrer searches the record." This is a legitimate and salutary rule. It simply means that, when a demurrer is filed to a *fact* pleading subsequent to the petition, that is, to an answer or reply, the court will search the record and sustain the demurrer to the first pleading which is faulty in *substance*; that is, which fails to state a legal cause of action, or affirmative defense, as the case may be.<sup>45</sup> A party filing a demurrer to an answer or reply may find that it will be sustained as to his own prior pleading. If a petition fails to state a cause of action, the court is without authority to render a judgment on it. It is a nullity. Why, then, should the defendant be required to file an answer to such pleading? If he does so, through ignorance or otherwise, the answer is superfluous, and if the plaintiff demurs thereto, why should not his own impotent petition be stricken down? Of course, unless it appears that he would be unable to successfully amend, he should be given leave to do so. The same rule applies to a demurrer to the reply. It might be sustained as to the petition or to the answer, whichever is faulty in substance.

### Constructive Service

The statute provides that when service may be made by publication, personal service of a copy of the summons and petition may be made out of the state, and proved by affidavit.<sup>46</sup> Often this is preferable to service by publication. It is uncertain as to whether this statute is applicable to divorce actions. The statute providing for constructive service in divorce actions should be amended so as to specifically provide for such service

<sup>44</sup> *Morton v. Fast*, 159 Ohio St. 380, 50 Ohio Op. 335, 112 N. E. 2d 385 (1953).

<sup>45</sup> *Trott v. Sarchett*, 10 Ohio St. 242 (244) (1859); *Columbus, S. & C. R. Co. v. Mowatt*, 35 Ohio St. 284 (286) (1880); *State ex rel. Nimmo v. Cain*, 152 Ohio St. 203, 40 Oh. Op. 191, 88 N. E. 2d 579 (1949).

<sup>46</sup> Oh. Rev. Code, § 2703.19.

out of the state.<sup>47</sup> Service out of the state does not give jurisdiction of the person; only jurisdiction *in rem*. It is equivalent to publication, and no more.

### Appeals

As we have previously indicated, the present procedure in perfecting an appeal is simple. There are provisions for appeal in some special actions or proceedings, however, which should be corrected and made uniform with the provisions of the appellate procedure act. These special provisions have required resort to the Supreme Court before the cause could be tried on the merits, or to find that it could not be tried at all.

*From order discharging attachment.* The court may fix the time, not exceeding thirty days, for filing the appeal.<sup>48</sup>

*From child custody order.* Appeal bond is required, and the appeal is on questions of law, presumably, and must be filed in the usual time.<sup>49</sup>

*Appropriation proceedings,* by director of highways. Although the statute has been amended comparatively recently, it still provides for the filing of a "petition in error," as the means of appeal from the judgment of the court.<sup>50</sup> It should be amended to provide for the filing of a notice of appeal on questions of law, in the ordinary manner, and the reference to a petition in error should be omitted. A lawyer desiring to appeal from such a judgment, must file both a petition in error and a notice of appeal, or run the risk of having his appeal dismissed.

In conclusion, it might be said that there is no necessity for a complete revision of Ohio civil procedure. But some amendments, a few of which we have suggested, should be made, and should be sufficient to cure any deficiencies.

<sup>47</sup> Oh. Rev. Code, § 3105.06 provides that in certain specified cases notice of the pendency of a divorce action must be given by "publication" as provided by §§ 2703.14 to 2703.27, inclusive, of the Revised Code. This could be construed to include service out of the state, since R. C. § 2703.19 (service out of state) is included within §§ 2703.14 to 2703.27. However, a decree of divorce based on service out of the state would leave the parties in a state of insecurity.

<sup>48</sup> Oh. Rev. Code, §§ 2715.47, 2715.48.

See *Rice v. Wheeling Dollar Sav. &c. Co.*, 163 Ohio St. 606, 57 Oh. Op. 30, 128 N. E. 2d 16 (1955).

<sup>49</sup> Oh. Rev. Code, § 3109.07.

See *Volz v. Volz*, 167 Ohio St. 141, 4 Oh. Op. 2d 136, 146 N. E. 2d 734 (1957).

<sup>50</sup> Oh. Rev. Code, § 5519.02.