

PITFALLS ASSOCIATED WITH THE OHIO SAVING STATUTE

I. INTRODUCTION

Saving statutes afford a plaintiff whose timely commenced action is dismissed for various procedural reasons a specified time in which to bring a second action. Such statutes are perfectly consistent with the goals statutes of limitations are designed to serve. Statutes of limitations

promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.¹

Since saving statutes are available only to plaintiffs whose actions were timely commenced, they are not at odds with any policy of preventing unfair surprise.

The Ohio saving statute is embodied in Ohio Revised Code § 2305.19.² Thirty states in addition to Ohio have provided by statute for the bringing of a new action after a timely commenced first action has failed otherwise than upon its merits.³ These statutes appear to have their origins in the English Limitation Act of 1623.⁴ The first

¹ Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

² Section 2305.19 of the Ohio Revised Code provides in part:

In an action commenced, or attempted to be commenced, if in due time a judgement for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or 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.

³ See a listing of these states and their statutes at Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 431 n.9 (1965).

⁴ 21 Jac. 1, ch. 16, § 4:

If in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such given against the plaintiff, or outlawry reversed, and not after.

Gaines v. City of New York, 215 N.Y. 533, 537, 109 N.E. 594, 595 (1915).

Ohio saving statute was enacted in 1831⁵ and has been a source of litigation ever since.

The Ohio saving statute, while remedial in nature, presents many pitfalls for the unwary practitioner. Most of the litigation concerning this statute has centered around two of these pitfalls: (1) the meaning of "failure otherwise than upon the merits" and (2) the meaning of "commenced or attempted to be commenced" as these phrases are used in the statute. This note will explore the parameters of the Ohio saving statute, in an effort to set forth the various facets of these frequently recurring pitfalls.

II. THE MEANING OF "FAILURE OTHERWISE THAN UPON THE MERITS"

A. *The Problem of Voluntary Dismissals*

*Manos v. Jackson*⁶ is a typical recent case of misplaced reliance on the Ohio saving statute. The plaintiff, Emanuel Manos, who was injured in an automobile collision on July 16, 1970, commenced a personal injury action against the defendants on November 20, 1970. That action was dismissed without prejudice upon plaintiff's motion by the Summit County Court of Common Pleas on May 2, 1973. On July 13, 1973, the plaintiff commenced this action in the same court, alleging the same claims that were set forth in the dismissed complaint. The defendants moved to dismiss on the ground that the statute of limitations had run. The plaintiff opposed the motion, arguing that he had a right to one dismissal, without prejudice, under rule 41(A),⁷ and that the dismissal of the former action was a "failure otherwise than upon the merits" within the meaning of Revised Code § 2305.19. The trial court granted the defendants' motion, and the plaintiff appealed. The plaintiff argued that rule 41(A) changes the interpretation that should be placed upon Revised Code § 2305.19, so that a voluntary dismissal should be considered as being a "failure otherwise than upon the merits." The court of appeals for Sum-

⁵ 51 Laws of Ohio 61 (1853).

⁶ 42 Ohio App. 2d 53, 328 N.E.2d 414 (1974).

⁷ OHIO R. CIV. P. 41(A)(1):

an action may be dismissed by the plaintiff without order of the court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

mit County affirmed the judgment of the trial court, holding that rule 41(A) merely supplants Revised Code § 2323.05,⁸ but that it creates no relief from the existing interpretation of the language in Revised Code § 2305.19.

The case of *Manos v. Jackson* is not a particularly novel one.⁹ It is merely a recent application of the old rule that a voluntary dismissal without prejudice is not a "failure otherwise than upon the merits" within the meaning of Revised Code § 2305.19.¹⁰ The case is worth noting, however, because it illustrates the fact that some Ohio attorneys either have not learned the rule or still persist in challenging it, often at great risk to their clients.

As early as 1893, in *Siegfried v. Railroad Co.*,¹¹ the Ohio supreme court held that a voluntary dismissal without prejudice was not a failure in the action.

To fail, implies an effort or purpose to succeed. One cannot, properly, be said to fail in anything he does not undertake, nor, in an undertaking which he voluntarily abandons. . . . A failure in the action, by the plaintiff, otherwise than upon the merits, imports some action by the court, by which the plaintiff is defeated without a trial upon the merits.¹²

The 1931 case of *Buehrer v. Provident Mut. Life Ins. Co.*¹³ reaffirmed the holding of *Siegfried*, and it is the law of Ohio today.

In *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.*,¹⁴ the trial court sustained a demurrer to an amended petition on the ground of misjoinder of parties defendant, whereupon the plaintiff voluntarily dismissed the action without prejudice. The Ohio supreme court held that such a dismissal without prejudice constituted a failure "otherwise than upon the merits," thus enabling the plaintiff to take advantage of the saving provisions of Revised Code § 2305.19. The court in *Cero* was careful to distinguish both *Siegfried* and *Buehrer*.

⁸ Revised Code § 2323.05 read, in pertinent part:

An action may be dismissed without prejudice to a future action:

(A) By the plaintiff, before its final submission to the jury, or to the court, when the trial is by the court . . .

Section 2323.05(A) was supplanted by rule 41(A); see note 22 *infra*.

⁹ See, e.g., *Hayden v. Ford Motor Co.*, 364 F. Supp. 398 (N.D. Ohio 1973).

¹⁰ The fact that a dismissal is granted "without prejudice" to the commencement of a new action bears more on the question of the finality of the judgment in general than it does upon the question of the applicability of the saving statute.

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

¹² *Id.* at 296, 34 N.E. at 332.

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

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

In those two cases, the court noted, the actions were voluntarily dismissed. Such dismissals were not attributable to an adverse ruling by the court, as in *Cero*.¹⁵

In the wake of *Cero*, and despite the language in *Cero* which distinguished both *Siegfried* and *Buehrer*, some practitioners labored under the mistaken conception that *Cero* had abrogated the *Siegfried* and *Buehrer* holdings and had held that any voluntary nonsuit or dismissal of a case before judgment qualified as a case which failed "otherwise than upon the merits." Such contention was rejected in the 1969 case of *Beckner v. Stover*.¹⁶ In *Beckner* the plaintiff brought an action for personal injury that came on for trial subsequent to the running of the statute of limitations. Prior to a noon recess, the last defense witness had been excused by both parties. When court was reconvened, the plaintiff requested further cross-examination of the excused witness. The trial court would permit neither the recall of the witness, nor the introduction of certain other evidence, whereupon the plaintiff moved that her case be dismissed without prejudice. The plaintiff refiled her action the same afternoon, and the trial court sustained a motion by the defendant to dismiss. The court of appeals reversed.

In holding that such a voluntary dismissal was not a failure otherwise than upon the merits within the meaning of Revised Code § 2305.19, the Ohio supreme court distinguished the "adverse rulings" in *Cero* from those in *Beckner*. In *Cero*, the sustaining of two successive demurrers to the plaintiff's petition virtually forced the plaintiff to dismiss the action. In *Beckner*, the trial court was merely requiring the parties to tailor their conduct to fit that court's opinion of judicatory decorum.

The court in *Beckner* gave a convincing policy argument for its decision:

To hold otherwise would be to establish a rule whereby litigants could substitute a voluntary dismissal without prejudice for an appeal from claimed errors occurring during a trial. Under such a practice, parties could try and retry their causes indefinitely until the most favorable circumstances for submission were finally achieved. In our opinion, Section 2305.19 neither provides for nor permits such a practice.¹⁷

A final point worth noting about *Beckner* is that the court there

¹⁵ *Id.* at 85-86, 167 N.E.2d at 777.

¹⁶ 18 Ohio St. 2d 36, 247 N.E.2d 300 (1969).

¹⁷ *Id.* at 40, 247 N.E.2d at 302.

did not find § 2323.05(A), Revised Code,¹⁸ to be at odds with the saving statute. Although § 2323.05 did give a plaintiff authority to dismiss his action without prejudice at any time prior to its final submission to the jury or court, the court explained that the prosecution of new proceedings on a cause so dismissed is governed by the applicable statute of limitations.

All of the above cited cases, dealing with the effect of a voluntary dismissal on the application of the saving statute, were decided prior to the adoption of the Ohio Rules of Civil Procedure in 1970. Only one post-rules case dealing with this subject, *Brookman v. Northern Trading Co.*,¹⁹ was decided before *Manos v. Jackson*. The decision of the Tenth District Court of Appeals in *Brookman* was relied upon heavily by the court in *Manos v. Jackson* to justify its holding. In *Brookman*, counsel for plaintiff took the position that the voluntary dismissal of a prior action based on the same claim, being the first one filed by the plaintiff in the trial court, was totally without prejudice and, under rule 41(A)(1), carried an immunity from the possible operation of Revised Code § 2305.19. Counsel urged that there was an existing conflict between the statute and the rule which the Ohio constitution resolves in favor of the rule.²⁰

The Tenth District Court of Appeals made short shrift of this argument. It explained that rule 41(A)(1)²¹ merely supplants Revised Code § 2323.05, and that the rule creates no relief from the provisions of Revised Code § 2305.19.²²

¹⁸ See note 8 *supra*.

¹⁹ 33 Ohio App. 2d 250, 294 N.E.2d 912 (1972).

²⁰ OHIO CONST. art. IV, § 5(B):

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

²¹ See note 7 *supra*.

²² *Beckner v. Stover*, n. 16, *supra*; Staff Notes to OHIO R. CIV. P. 41, OHIO REV. CODE ANN. (Page 1971) warn:

Rule 41(A)(1) and voluntary dismissal without prejudice without a court order before commencement of trial may be limited by court interpretation of the "savings statute," § 2305.19, R.C. The statute provides for recommencement of the action within one year "if the plaintiff fails otherwise than upon the merits." If plaintiff voluntarily dismisses without a court order under Rule 41(A)(1) and after the applicable statute of limitations has run for his particular action, has he failed otherwise than on the merits and may he file over again under the "savings statute"? The answer is not clear; hence plaintiff would be taking a dangerous chance.

When the rules were amended (the changes having become effective July 1, 1971), minor changes were made in rule 41, but no clarification as to its applicability to Revised Code § 2305.19 was made. At the time of revision, the supreme court had the *Beckner* decision before it. The passage of Amended House Bill 1201, effective July 1, 1971 (133 Laws of Ohio 3017) repealed a large number of statutes that were found to be in conflict with the Rules of Civil Procedure (also effective July 1, 1970), among which was Revised Code § 2323.05.

It would appear more strongly that the intention of the framers of Civ. R. 41(A)(1) was to limit the possibility of continuing voluntary dismissals possible under R. C. 2323.05, rather than to authorize one voluntary dismissal under R.C. 2305.19, which section speaks only of a dismissal by the plaintiff in the presence of a failure "otherwise than upon the merits."²³

Since the adoption of the Ohio Rules of Civil Procedure, the Ohio supreme court has not ruled on the status of voluntary dismissals under the Ohio saving statute. However, if it does, its ruling probably will not differ from that of the Tenth District Court of Appeals in *Brookman* or the Ninth District Court of Appeals in *Manos*. If rule 41(A) indeed supplants Revised Code § 2323.05, as seems to be the case,²⁴ then there is no sound reason to speculate that the Ohio supreme court would treat rule 41 as affecting Revised Code § 2305.19 differently than it held that Revised Code § 2323.05 affected that statute in *Beckner*.²⁵

B. Other Problems in Determining the Meaning of Failure "Otherwise than upon the Merits"

In determining what constitutes a failure otherwise than upon the merits, the courts have struggled with issues other than voluntary dismissals. In *Howard v. Allen*,²⁶ the court of appeals for Franklin County considered, among other things, the meaning of the phrase, "otherwise than upon the merits." It noted that rule 41(B)(4) enumerates those circumstances that shall operate as a failure otherwise than upon the merits.²⁷ The court also pointed out that, in accordance with

²³ *Brookman v. Northern Trading Co.*, 33 Ohio App. 2d 250, 254, 294 N.E.2d 912, 915 (1972).

²⁴ See note 22 *supra*.

²⁵ See *Beckner* n. 16 *supra*. Whether an action timely commenced which is voluntarily dismissed by the plaintiff comes within the operation of the saving statutes of the various states which have them should depend primarily on the language of the statute. However, although these statutes contain far from uniform language, the opposing results which have been reached in different jurisdictions appear to have been based to a greater extent on differences in judicial attitude. [See Annot., 79 A.L.R.2d 1293 (1961)] The statutes of Indiana [Ind. Ann. Stat. tit. 34, art. 1, ch. 2, § 8 (Burns 1971)] and Iowa [Iowa Code Ann. § 614.10 (1946)] apply when a plaintiff fails from any cause "except negligence in the prosecution." In both these states, the courts have held that a voluntary dismissal constitutes such negligence in the prosecution as to preclude use of the saving statute. See *Pardey v. Town of Mechanicsville*, 112 Iowa 68, 83 N.W. 828 (1900); *Pennsylvania Co. v. Good*, 56 Ind. App. 562, 103 N.E. 672 (1913).

²⁶ 28 Ohio App. 2d 275, 277 N.E.2d 239 (1971), *aff'd* 30 Ohio St. 2d 130, 283 N.E.2d 167, *appeal dismissed*, 409 U.S. 908 (1972).

²⁷ "A dismissal (a) for lack of jurisdiction over the person or the subject matter, or (b) for failure to join a party under Rule 19 or Rule 19.1 shall operate as a failure otherwise than on the merits."

rule 41(B)(3),²⁸ a court may designate a dismissal as being "otherwise than on the merits" even though the circumstances surrounding the dismissal do not coincide with those listed under rule 41(B)(4). Thus, the practitioner should take special note of the fact that it is often possible to have the words, "otherwise than upon the merits" added to the journal entries as insurance against future saving statute problems. At the time *Howard* was decided, rule 41(B)(4) included within its operation a dismissal for improper venue. When rule 41 was amended,²⁹ the reference to dismissal for improper venue was deleted. Thus, it would appear that unless the court in its order of dismissal specifies otherwise, a dismissal for improper venue might not operate as a failure otherwise than on the merits.³⁰ Of course, this problem would arise only in very exceptional circumstances, as Ohio courts rarely dismiss actions for improper venue, but rather transfer them to a county where venue is proper according to rule 3(c).

A third problem having to do with the meaning of the phrase "failure otherwise than on the merits" concerns the date of failure. The exact date of failure is important because the new action provided for in Revised Code § 2305.19 must be commenced within one year of the failure otherwise than on the merits of the first action. The rule in the majority of jurisdictions is that the date of affirmance on appeal, and not the date of the trial court's judgment constitutes the date of failure.³¹ Early Ohio cases held that the date of failure was the date of the trial court's judgment,³² but later Ohio cases are in accord with the majority view.³³

The final problem associated with the interpretation of "failure otherwise than upon the merits" deals with actions that are not governed by the general statute of limitations. The courts have been

²⁸ "A dismissal under this subdivision and any dismissal not provided for in this rule, except as provided in subsection (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies."

²⁹ Amendment effective July 1, 1971.

³⁰ In *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965), a case involving improper venue, the United States Supreme Court stated that had petitioner's action arose under Ohio law, rather than under the Federal Employers' Liability Act, he would have been able to avail himself of the Ohio saving statute. *But see Timens v. Beranrd Pipe Line Co.*, 4 Ohio App. 2d 249, 212 N.E.2d 73 (1965).

³¹ *See generally*, Annot., 79 A.L.R.2d 1270 (1961).

³² *Atcherly v. Dickinson*, 34 Ohio St. 537 (1878); *Price v. Kobacker Furniture Co.*, 25 Ohio App. 44, 158 N.E. 551 (1927).

³³ *LaBarbera v. Batsch*, 5 Ohio App. 2d 151, 214 N.E.2d 443 (1966), *rev'd on other grounds*, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967); *Colello v. Bates*, 88 Ohio App. 313, 100 N.E.2d 258 (1950); *Albers v. Great Cent. Transp.*, 32 Ohio Op. 200 (C.P. Hamilton County 1945).

confronted with the question of whether to allow a new action following a failure otherwise than upon the merits in cases involving a statutory right of action or a contractual right of action, both of which carry their own limitations period. Ohio courts have held the saving statute inapplicable to statutory rights of action,³⁴ since a limitation contained in a purely statutory right is an inherent part of the right created, and a lapse of such period operates to extinguish the right. In addition, Revised Code § 2305.19 must be read in conjunction with Revised Code §§ 2305.03 to 2305.22, inclusive, and when so read applies only to actions not otherwise limited by periods affecting the right of action.³⁵

However, the courts have taken the opposite view when confronted with contractual limitations. Both the Ohio courts and the sixth circuit court of appeals have held that the saving statute is not nullified by a limitation in an insurance policy providing that no action shall be maintained against the insurance company unless brought within a certain period after a loss is ascertained.³⁶ Thus, if a first action, begun within the limitations period provided by contract, is dismissed otherwise than on the merits after the limitations period has run, the plaintiff who has so failed may avail himself of Revised Code § 2305.19.

III. THE MEANING OF "COMMENCED OR ATTEMPTED TO BE COMMENCED"

The second great pitfall associated with Revised Code § 2305.19 concerns the interpretation of the phrase "commenced or attempted to be commenced" within the meaning of the statute. In *Hoehn v. Empire Steel Co.*,³⁷ the Ohio supreme court stated that a suit must have been filed in the "proper" court under Revised Code § 2703.01³⁸

³⁴ This is true both of state-created and of federally-created rights. See *United States v. Boomer*, 183 F. 726 (8th Cir. 1910); *George L. Rackle & Sons Co. v. Western & S. Indem. Co.*, 54 Ohio App. 274, 6 N.E.2d 1007 (1936); *Purtee v. General Motors Corp.*, 78 Ohio L. Abs. 92, 151 N.E.2d 747 (Ct. App. 1956).

³⁵ A civil action, unless a different limitation is prescribed by statute, 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.

³⁶ *Leithauser v. Hartford Fire Ins. Co.*, 124 F.2d 117 (6th Cir. 1941); *Cortesi v. Firemen's Fund Ins. Co.*, 27 Ohio Cir. Dec. 100 (1915); *Greulich v. Monnin*, 37 Ohio L. Abs. 27, 45 N.E.2d 212 (Ct. App. 1942), *aff'd*, 142 Ohio St. 113, 50 N.E.2d 310 (1943).

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

³⁸ 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.

This section was repealed by Section I of House Bill 1201, effective July 1, 1971, as it

before the action was commenced under § 2305.17,³⁹ and before the saving statute could apply.

This requirement was eliminated in *Wasyk v. Trent*.⁴⁰ There, a plaintiff instituted a civil action in a federal court. The defendant appeared by counsel and filed a motion to dismiss on the ground that there was no diversity of citizenship. The trial court, after a hearing, dismissed the action on that ground. The plaintiff then started an action in an Ohio court and the defendant moved for summary judgment on the ground that the statute of limitations was a bar to the action. The Ohio supreme court held that the action had been commenced in federal court, and that the plaintiff could avail himself of the Ohio saving statute. Thus, it is clear that jurisdiction of the subject matter of a case is not a prerequisite to commencement or attempted commencement of an action within the meaning of § 2305.19, Revised Code.

The question of whether a court must obtain in personam jurisdiction over the defendant before an action will be considered "commenced" or "attempted to be commenced" is a more complicated one. Some early court of appeals decisions indicated that in personam jurisdiction was not a *sine qua non* for application of the saving statute. In *Templeman v. Hester*,⁴¹ the court of appeals for Hamilton County held that, although no valid service of summons was obtained in time to commence the action under General Code § 11230 (O.R.C. § 2305.17), the plaintiff could avail himself of the saving statute. The court seemed to say, albeit in a circuitous way, that the action had been "attempted to be commenced" by the erroneous issuance of summons for the defendant as an adult within the statute of limitations, even though proper service of summons was not made within sixty days thereafter.

In *Haisman v. Crismar*,⁴² another case involving a minor defen-

conflicts with Civ. R. 3(A), which reads "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing."

³⁹ Revised Code § 2305.17, as it read before its amendment in 1965:

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.

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

⁴¹ 65 Ohio App. 62, 29 N.E.2d 216 (1940).

⁴² 18 Ohio L. Abs. 180 (Ct. App. 1934).

dant served as an adult, a similar result was reached. The defendant filed a successful motion to quash the service of summons after the statute of limitations had run on the ground of minority. The court of appeals for Mahoning County held that the action was "attempted to be commenced" by the defective service and that the action was in fact commenced with service of summons upon the defendant after she reached the age of majority.

More recent cases have thrown doubt on the issue of whether in personam jurisdiction is a prerequisite to commencement or attempted commencement of an action. In *Kossuth v. Bear*,⁴³ the Ohio supreme court held that there must have been effective service of summons on a defendant before an action was commenced or attempted to be commenced under Revised Code § 2305.17.

In the 1959 case of *Webb v. Chandler*,⁴⁴ the court of appeals for Adams County held that regardless of when a petition is filed, a suit is not "commenced" until a summons is issued which thereafter properly served on the defendant. In that case, a minor defendant was served with summons treating him as an adult. After the summons was set aside because of the defendant's minority, proper service was not obtained within sixty days, and the court held that the plaintiff's action was never commenced or attempted to be commenced within the meaning of Revised Code § 2305.17. *Oliver v. Dayton*,⁴⁵ a decision of the Montgomery County Court of Common Pleas, also required that proper service be made within sixty days of the filing of a petition and praecipe.

In *Mason v. Waters*,⁴⁶ the defendant's residence was located near the border between two counties. In his praecipe, the plaintiff mistakenly requested the issuance of a summons to the sheriff of a county other than the one in which the defendant resided. This summons was served on the defendant, but was quashed after the running of the statute of limitations. The Ohio supreme court held that the saving statute is inapplicable where proper service is not achieved within the limitation period, holding that in personam jurisdiction is a prerequisite to its application.

The supreme court in *Mason*, as did the courts in *Kossuth*, *Webb*, and *Oliver*, applied a statutory definition of an attempt to commence an action. That statute, Revised Code § 2305.17,⁴⁷ was

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

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

⁴⁵ 23 Ohio Op. 2d 340, 191 N.E.2d 741 (C.P. Montgomery 1963).

⁴⁶ 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

⁴⁷ An action is commenced within the meaning of sections 2305.03 to 2305.22, inclusive,

amended in 1965 to omit the definition of an "attempt to commence," thereby modifying the definition of commencement to essentially that contained in rule 3(A).⁴⁸ It would seem that the 1965 amendment to § 2305.17 would enlarge the application of the saving statute in those cases where the plaintiff has attempted to commence his action. As the preceding cases illustrate, prior to the amendment the courts gave the words "attempted to be commenced" the same meaning in both Sections 2305.17 and 2305.19.⁴⁹ This resulted in greatly limiting the application of the saving statute, as the courts held that there was no attempt to commence an action unless the defendant was properly served within sixty days of the date of summons. Thus, "attempted to be commenced" was denied effect in the saving statute.

The effect of the amendment should be to make the saving statute applicable even when the defendant has not been properly served. The court of appeals for Franklin County seemed to agree in *Howard v. Allen*:⁵⁰

There is now no definition of what constitutes an action attempted to be commenced within the meaning of R.C. 2305.19 set forth either by statute or civil rule. Unless it can be held that the definition, of an attempt to commence an action, of former R.C. 2305.17 continues to define the terms as 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. 2305.19.⁵¹

Although the court in *Howard* appeared to say that effective service is not a prerequisite to the application of Revised Code § 2305.19, there is some language in the opinion that casts doubt on this proposition. The court quoted rule 41(B)(4),⁵² which supplies the definition of a "failure other than on the merits." Although a dismissal for lack of jurisdiction over the *person* is included, the court stated:

It is apparent that dismissals for insufficiency of process or

and sections 1302.98 and 1304.29 of the Revised Code, 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.

⁴⁸ See note 38 *supra*.

⁴⁹ See *Mason v. Waters*, note 46 *supra*; *Oliver v. Dayton*, note 45 *supra*.

⁵⁰ 28 Ohio App. 2d 275, 277 N.E.2d 239 (1971).

⁵¹ *Id.* at 277, 277 N.E.2d at 241.

⁵² See note 27 *supra*.

insufficiency of service of process are not among the dismissals which Rule 41(B)(4) provides shall operate as failures otherwise than upon the merits.⁵³

As mentioned earlier, the court did note that rule 41(B)(3) provides a method for obtaining dismissals otherwise than on the merits for situations not included under rule 41(B)(4). This method involves having the trial court, in its order for dismissal, specify that the dismissal shall not act as an adjudication on the merits.

Thus, the court said in essence that an action cannot fail otherwise than upon the merits, unless the trial court so specifies in its order for dismissal, or unless it has been properly commenced, and not just attempted to be commenced. An action under the amended provision is not commenced unless valid service is obtained within one year after filing a praecipe and petition. The decision in *Howard v. Allen* was affirmed by the Ohio supreme court on other grounds, and mention was made neither of the appellate court's definition of "attempted to be commenced" nor of its reasoning with regard to a failure other than upon the merits. Hence, the 1965 amendment to § 2305.17 has not yet had the beneficial effect of reviving the phrase "attempted to be commenced" in Revised Code § 2305.19.

There are two additional pitfalls associated with the interpretation of "commenced or attempted to be commenced" within the meaning of Revised Code § 2305.19. One minor one was discussed in the case of *Jacobs v. Haggerty*.⁵⁴ In the first action, on the motion of an adverse party, Jacobs was made a party defendant in a negligence action arising out of an automobile collision. Jacobs filed a cross-petition that was thereafter involuntarily dismissed. Jacobs then filed a new action as plaintiff. The court held that Jacobs had attempted to commence an action by the filing of his cross-petition, thereby bringing the second action within the scope of the saving statute. Thus, the practitioner should be aware that the assertion of a crossclaim has been held to be a sufficient attempt to assert a right of action to allow a plaintiff the use of § 2305.19.

A final pitfall often encountered in the interpretation of "commenced or attempted to be commenced" within the meaning of the saving statute concerns the failure of a first suit filed in a state other than Ohio. In *Howard v. Allen*,⁵⁵ the supreme court held that the Ohio saving statute applies only to actions "commenced or attempted

⁵³ *Howard v. Allen*, 28 Ohio App. 2d 275, 278, 277 N.E.2d 239, 241 (1971).

⁵⁴ 97 Ohio App. 553, 127 N.E.2d 775 (1953).

⁵⁵ 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972).

to be commenced" in Ohio within the appropriate period of limitations.

A suit in another state can no more toll the Ohio statute, applicable to suits in Ohio, than an unexpired claim under the statute of another state can operate to lift the statute of limitation and thereby make the saving clause available.⁵⁶

In *Andrew v. Bendix Corp.*,⁵⁷ the sixth circuit court of appeals reached a like conclusion one year prior to the decision in *Allen*. Numerous other states have held their saving statutes to have no application in situations in which the first action was brought in a court, whether state or federal, or in a sister state.⁵⁸

IV. CONCLUSION

Practitioners must be aware of the pitfalls of the Ohio saving statute in order to secure its benefits for their clients. Attorneys must keep in mind the criteria for failure "otherwise than upon the merits" and "commenced or attempted to be commenced" that have been developed by the Ohio courts. Although the Ohio supreme court has stated that the statute is remedial in nature and "is to be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure,"⁵⁹ in practice these "mere technicalities of procedure" surrounding Revised Code § 2305.19 continue to catch unwary practitioners.

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⁵⁶ *Id.* at 134, 283 N.E.2d at 169.

⁵⁷ 452 F.2d 961 (6th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).

⁵⁸ *Riley v. Union Pac. R.R.*, 88 F. Supp. 391 (D.C. Wyo. 1950), *aff'd* 182 F.2d 765 (10th Cir. 1950); *Baker v. Commercial Travelers Mut. Accident Ass'n of America*, 3 App. Div. 2d 265, 161 N.Y.S.2d 332 (1957), *appeal dismissed*, 4 N.Y.2d 828, 150 N.E.2d 233, 173 N.Y.S.2d 803 (1958); *Morris v. Wise*, 293 P.2d 547 (Okla. 1955); 51 AM. JUR.2d, *Limitation of Actions* § 306 (1970) states "where the action is regarded as controlled by the statute of limitations of the forum, it has usually been held that a plaintiff invoking the saving statute of the forum may not rely upon a nonsuit in an earlier action brought in another state."

⁵⁹ *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774 (1960).