

CIVIL PROCEDURE—LIMITATION OF ACTIONS - OHIO REVISED CODE § 2305.15 — THE APPLICATION OF OHIO’S SAVING CLAUSE TO RESIDENT DEFENDANTS — *Wetzel v. Weyant*, 41 Ohio St. 2d 135, 323 N.E.2d 711 (1975).

I. INTRODUCTION

In *Wetzel v. Weyant*,¹ the Supreme Court of Ohio applied the Ohio “saving clause,” Ohio Revised Code, § 2305.15, to suspend the running of the statute of limitations during a resident defendant’s accumulated three and one-half weeks outside the state. Although the defendant was continually amenable to service of process, either at his Ohio residence or by mail, sufficient to provide personal jurisdiction over him, the court cited its earlier decisions on the subject and the lack of legislative response to those decisions as support for its holding that temporary absences from the state by an Ohio resident after a cause of action accrues against him are within the meaning of the saving clause.²

This case note will review the background of saving clauses and statutes of limitations, which the clauses in effect alter. It will examine the Ohio Supreme Court’s rationale as reflected by previous decisions related to *nonresident* defendants. Finally, this case note will consider the practical implications of the *Wetzel* decision for plaintiffs and *resident* defendants.

II. BACKGROUND

A. *The Saving Clause*

The institution of the earliest saving clauses reflected the awkwardness of early forms of service of process. Once established, however, the concept of a saving clause persisted through legislative and judicial inertia. Now the development of service of process to its present relatively sophisticated level has made the saving clause an

¹ 41 Ohio St. 2d 135, 323 N.E.2d 711 (1975).

² OHIO REV. CODE ANN. § 2305.15 (Page Supp. 1975):

When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, 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 may be brought.

anachronism in most situations.

English statutes of the 13th Century authorized the taking of a criminal defendant's body into custody, and by the 16th Century arrest under a writ of *capias ad respondendum* had become the method of service of process for several types of civil causes of action.³ In such cases a court's in personam jurisdiction depended upon the potential defendant's physical presence within the range of its power. The first statute of limitations was introduced in England in 1623,⁴ and in 1705 it was held to bar an action against a debtor who had avoided service of process for the statutory period by being outside the court's jurisdiction.⁵ A defendant might thus employ the prevalent method of service of process in tandem with a statute of limitations to permanently thwart a plaintiff's claim to legal redress.

The legislative reaction was swift in defense of plaintiffs' rights. The statute of 4 Anne chapter 16 section 19 (1705) provided that if a defendant was "beyond the seas" during the statutory period, the statute of limitations was tolled until his return to the court's jurisdiction.⁶

Implicit in that and in subsequent saving clauses was the primary objective of insuring to plaintiffs the entire statutory period during which they could effectively serve process and obtain in personam jurisdiction over defendants. In the historical context it is evident that the saving clause originated as a corrective mechanism, the application of which was probably intended to be commensurate with the need to protect plaintiffs from the danger of having the statute of limitations period run while being unable to effectively gain personal jurisdiction over a defendant.

The first Ohio saving clause was enacted in 1809. In the spirit of the statute of 4 Anne, it provided for suspension of the running of the statute of limitations when a prospective defendant was out of the state upon accrual of the cause of action or when he subsequently "left the state or county, and remained out of the same, in a place or places, unknown to the [plaintiff]." In 1853, the Ohio saving clause was changed significantly to resemble closely its present wording. Conspicuously absent was the original requirement that the defen-

³ W. BLUME, *AMERICAN CIVIL PROCEDURE* 274 (1955).

⁴ 21 Jac. 1, c. 16 (1623).

⁵ Note, *Tolling the Statute of Limitations During the Debtor's Absence*, 46 HARV. L. REV. 706 (1933).

⁶ 4 Anne, C. 16, § 19 (1705).

⁷ Ch. 12, § 1, [1809] 7 Laws of Ohio 107.

dant “remain” outside the jurisdiction as a condition for application of the clause.⁸

B. *Early Cases*

The Ohio Supreme Court based its decision in *Wetzel v. Weyant* on several earlier cases in which it had applied the saving clause as worded since 1853 to defendants who were not residents of Ohio.⁹

*Stanley v. Stanley*¹⁰ was the court’s first attempt to construe the Ohio saving clause after its modification in 1853. The defendant had left Ohio and become a resident of West Virginia before the cause of action accrued against him. The court held that although each of the defendant’s subsequent entries into Ohio commenced the running of the statute of limitations, each departure suspended the statute. The statute of limitations ran only while he was physically present in Ohio.

Significantly, the only extant means at the time of the *Stanley* decision by which the plaintiff could serve the nonresident defendant with process sufficient to give an Ohio court personal jurisdiction over him required the defendant’s physical presence within the state. The saving clause as applied thus fulfilled its implicit objective of providing the plaintiff with the full statutory period in which to effectively bring his action. However, the *Stanley* court expressly refused to declare whether the same decision would have been forthcoming had the defendant been a resident of Ohio temporarily absent from the state.¹¹ Such hesitancy may have reflected the court’s awareness that service of process sufficient for personal jurisdiction over a resident defendant was available in Ohio merely by leaving a copy of a summons “at his usual place of residence. . . .”¹² A resident defendant’s physical presence in the state was no longer necessary for commencement of an in personam action.¹³

⁸ Title 2, ch. 4, § 21, [1853] 51 Laws of Ohio 60.

⁹ *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 269 N.E.2d 121 (1971); *Meekison v. Groshner*, 153 Ohio St. 301, 91 N.E.2d 680 (1950); *Couts v. Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950); *Commonwealth Loan Co. v. Firestine*, 148 Ohio St. 133, 73 N.E.2d 501 (1947); *Stanley v. Stanley*, 47 Ohio St. 225, 24 N.E. 493 (1890).

¹⁰ 47 Ohio St. 225, 24 N.E. 493 (1890).

¹¹ *Id.* at 229, 24 N.E. at 495.

¹² Title 5, ch. 2, § 62, [1853] 51 Laws of Ohio 67.

¹³ According to the Michigan Supreme Court, the purpose of a saving clause is to give

It was not until 1947 that the Ohio Supreme Court again dealt with the saving clause. In *Commonwealth Loan Co. v. Firestine*¹⁴ personal jurisdiction in Ohio had been available throughout the statute of limitations period over the nonresident defendant, who had executed a warrant of attorney to confess judgment on a cognovit note in his absence. Nevertheless, the court held the statutory period to be tolled during the defendant's absence from Ohio. Although acknowledging that the majority of states did not apply saving clauses where an in personam proceeding was available, the court construed the Ohio saving clause literally and refused to create an exception to its application where the Ohio legislature had not explicitly done so.¹⁵

Commonwealth Loan was reaffirmed three years later in *Couts v. Rose*.¹⁶ Again the nonresident defendant was susceptible to personal judgment in Ohio throughout the statute of limitations period, in this case by being amenable to substituted service of process under the Ohio nonresident motorist statute.¹⁷ Because the legislature had not expressly excluded application of the saving clause in such a situation and because the court did not consider it repealed with respect to nonresident motorists by the nonresident motorist statute, the Ohio Supreme Court decided the defendant's absence from Ohio did suspend the running of the statute of limitations.

In effect, the plaintiff was thereby given an option: he could proceed during the statutory period by means of substitute service against the absent nonresident defendant or he could wait until the defendant entered the state, if ever, and serve him then. The latter period might extend indefinitely. While conceding that the purpose of a statute of limitations is to insure prompt litigation of claims, the court contended in *Couts v. Rose* that a person who leaves the jurisdiction "is not in a favorable position to complain of such possible delay, as against a policy which is clearly sanctioned by the provisions of Section [2305.15]."¹⁸

the plaintiff the same amount of time in which to commence his suit against an absent defendant as would be available if the defendant were actually a resident of that state. *McLaughlin v. Aetna Life Ins. Co.*, 221 Mich. 479, 191 N.W. 224 (1922); *Gray v. Jones*, 80 Mich. 504, 45 N.W. 489 (1890).

¹⁴ 148 Ohio St. 133, 73 N.E.2d 501 (1947).

¹⁵ *Id.* at 136-37, 73 N.E.2d at 504. See 4 AM. JUR. TRIALS *Statutes of Limitation* at 608, Figure 10 (1966) for a map of the United States showing state statutes tolling the statute of limitations during a defendant's absence.

¹⁶ 152 Ohio St. 458, 90 N.E.2d 139 (1950).

¹⁷ General Code § 6308-1, OHIO REV. CODE ANN. § 2703.20 (Page Supp. 1975).

¹⁸ *Couts v. Rose*, 152 Ohio St. at 462, 90 N.E.2d at 141 (1950).

The final case cited by the majority in *Wetzel* was *Seeley v. Expert, Inc.*,¹⁹ which involved a nonresident motorist defendant as did *Couts v. Rose*. The plaintiff was also a nonresident of Ohio. Although relying primarily on the "principles of *stare decisis* and legislative acceptance"²⁰ of its previous decisions concerning the saving clause, the court extended the application of the rationale of the earlier cases and held that "[t]he literal language of the Ohio 'savings clause' is tied to the tolling of acts which prevent *personal service* in Ohio rather than to acts which would prevent any judgment *in personam*."²¹ The court thus justified application of the saving clause "in cases where suit may be commenced *at any time* and a judgment *in personam* obtained despite the absence of the defendant from the state of Ohio."²² The linking of the saving clause to the availability of personal service in *Seeley* represents a unique effort to express a legislative purpose based on the literal phrasing of the clause. As will be seen,²³ the validity of that purpose was drawn in question with the adoption, nearly ten months before the *Seeley* decision, of the Ohio Rules of Civil Procedure, particularly Rule 4.1, which replaced personal service with certified mail as the "basic and preferred method of service."

Among the cases cited by the *Wetzel* majority, *Stanley v. Stanley*, decided in 1890, alone applied the saving clause in a manner which served its historically based purpose by ensuring to a plaintiff the entire statutory period in which to effectively bring suit where he would otherwise have been unable to do so. Subsequent cases, while relying on *Stanley*, apply the saving clause to the significantly different situation in which the plaintiff's ability to gain personal jurisdiction over the nonresident defendant is not impaired by the defendant's absence from Ohio.

III. WETZEL V. WEYANT

A. *The Facts*

The Ohio Supreme Court's decision in *Wetzel v. Weyant* relies to a great extent on the previously discussed cases. On April 2, 1971, the two parties were involved in an automobile accident in Fremont,

¹⁹ 26 Ohio St. 2d 61, 269 N.E.2d 121 (1971).

²⁰ *Id.* at 72, 269 N.E.2d at 128-29.

²¹ *Id.* at 72, 269 N.E.2d at 128.

²² *Id.* at 65, 269 N.E.2d at 125.

²³ See text accompanying notes 37-42, *infra*.

Ohio. Both parties were residents of Ohio. On April 3, 1973, the plaintiff filed a complaint against the defendant charging he had negligently caused her bodily injuries as a result of the collision. The pertinent part of the defendant's answer asserted that the plaintiff's suit was not commenced within the two year statute of limitations period for bodily injury actions. The trial court agreed and dismissed the cause in response to the defendant's motion for a judgment on the pleadings despite stipulation that the defendant had temporarily left Ohio three times during the two year period for a total of three and one-half weeks.

The court of appeals reversed, having found no exception for temporary absences in § 2305.15, the Ohio saving clause. It held that the statute of limitations was tolled during the time of the defendant's absences from Ohio, and that the plaintiff's suit was thereby commenced within the properly extended two year period.²⁴

B. *The Ohio Supreme Court's Decision*

In its short opinion upholding the court of appeals' decision, the Supreme Court of Ohio refused to overrule the line of cases from *Stanley* through *Seeley* as requested by the defendant. As in *Seeley*, the court also noted that its prior decisions had received at least tacit approval from the General Assembly, which had not altered the saving clause since before *Commonwealth Loan* was decided in 1947. The court therefore refused to create "judicial legislation" in the area of statutes of limitations, which it deemed subject to "legislative prerogative."²⁵

To justify the court's construction of the saving clause as applying to even temporary absences from the state, Justice Herbert analyzed the statute's wording with respect to its legislative history.

In 1853, the General Assembly enacted the forerunner of R.C. 2305.15, and the language was practically identical to that which exists today. 51 Ohio Laws 57, Section 21. At the same session, the General Assembly provided that an attempt to commence an action constituted its commencement, so long as service of process was accomplished within 60 days. 51 Ohio Laws 57, Section 20. . . . The 60-day period was likely considered quite short in that time of undeveloped ability to travel and communicate over distances,

²⁴ 41 Ohio St. 2d 135, 136, 323 N.E.2d 711, 712 (1975).

²⁵ *Id.* at 138 n.2, 323 N.E.2d at 713 n.2.

hence the disjunctive “or” between “depart” and “abscond or conceal,” and between “absence” and “concealment.”

Short of constitutional impingement, and none is presented to us, 122 years of nearly identical statutory language, buttressed by five consistent opinions from this court, should be more than enough to neutralize a temptation to rewrite the statute to better suit the facts at hand.²⁶

Had it desired, the court in *Wetzel* might have distinguished those “five consistent opinions” and followed the spirit, if not the letter, of the Ohio saving clause. Each of the five cited cases concerned a nonresident defendant and, except in *Seeley v. Expert, Inc.*, a resident plaintiff. In *Stanley v. Stanley*, the plaintiff had no means of serving process on the departed defendant which would grant an Ohio court personal jurisdiction over that defendant. The defendant in *Wetzel*, however, openly resided in Ohio throughout the two year period following the accident and was continually amenable to effective service of process in Ohio despite his three and one-half weeks of physical absence from the state. Just as the rule of the *Stanley* case was broadened to support the decisions in later cases in which personal jurisdiction in Ohio courts over a nonresident defendant was continually available during the statutory period, so must the rule of those decisions be broadened to apply the saving clause in *Wetzel* to a resident defendant. The distinction between resident and nonresident defendants acquires even greater significance if one assumes that the state legislature may not have perceived the need to change a statute which had so far adversely affected only nonresident defendants.

Furthermore, the “five consistent opinions” cited by the court do not include all of the relevant Ohio Supreme Court decisions that have determined the application of the saving clause. In cases dealing with corporate defendants, the court has equated “presence” in the state with amenability to service for purposes of the saving clause. The foreign corporate defendant in *Title Guaranty & Surety Co. v. McAllister*²⁷ was subject to a substitute form of service of process in Ohio throughout the ten year statute of limitations period. Although it neither did business nor had any agent in Ohio during that time, the Ohio Supreme Court refused to extend the statutory period by means of the saving clause:

²⁶ *Id.* at 138 n.2, 323 N.E.2d at 712-13 n.2.

²⁷ 130 Ohio St. 537, 200 N.E. 831 (1936).

[T]he test of the running of the statute should be the liability of the party invoking its bar to the service of process during the whole of the period described. If such process can be served during that time, and a personal judgment obtained, such party is not "out of state" or "concealed" within the meaning of Section 11228, General Code [§ 2305.15 Ohio Revised Code].²⁸

*Moss v. Standard Drug Co.*²⁹ continued the application of the test based on amenability to corporate defendants,³⁰ but with the result of bringing that defendant within the scope of the saving clause. The nonresident corporation in *Moss* was not qualified to do business in Ohio and had no statutory agent amenable to service in the state. No long-arm statute was in force in Ohio at that time, and the statutory period lapsed without the defendant ever having been amenable to service of process in the state. After the statutory period had passed, the plaintiff filed an affidavit of attachment against the defendant corporation's Ohio property (merchandise and accounts receivable), an action that allowed service by publication. Because the record showed no evidence of the defendant having owned property in Ohio before commencement of the attachment proceeding,³¹ the court was able to apply the saving clause while adhering to the amenability to service test for corporations first enunciated in *Title Guaranty*.

A more recent case, *Thompson v. Horvath*,³² involved a domestic corporate defendant which had formally consented to substituted service of process on the Ohio Secretary of State. Subsequent to the origin of a cause of action against the corporation, most of its officers and its statutory agent left Ohio and the corporation's name was changed. The Ohio Supreme Court held that the statute of limitations was not tolled by the saving clause. Justice Herbert's majority opinion distinguished *Commonwealth Loan* and *Couts* on the basis of their having concerned individual rather than corporate defendants. He also avoided a literal construction of the saving clause on that basis for the sake of practicality. "Although the savings statute does speak in terms of presence or absence rather than in terms of amenability to process, the literal application of the presence test

²⁸ *Id.* at 546-47, 200 N.E. at 835.

²⁹ *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 112 N.E.2d 542 (1953).

³⁰ *Id.* at 465, headnote 3, 112 N.E.2d at 543.

³¹ *Id.* at 474, 112 N.E.2d at 547.

³² *Thompson v. Horvath*, 10 Ohio St. 2d 247, 227 N.E.2d 225 (1967).

makes sense only when the defendant is a real person, whose location determines presence *vel non*.”³³

The Ohio Supreme Court has also held the saving clause inapplicable to actions in rem. In *Crandall v. Irwin*,³⁴ the court held that the defendant's absence from Ohio had no effect on the statute of limitations because the action in rem could be commenced throughout the statutory period without the necessity of imposing personal jurisdiction on the defendant. Thus there was no need to toll the statute. In *Seeley v. Expert, Inc.*, however, the mere absence of need to toll the statute of limitations was held insufficient justification for failing to apply the saving clause absent a specific legislative provision.³⁵

Actions in rem and those brought against corporate defendants are distinguishable from those suits in which personal jurisdiction is necessary over an individual defendant. The treatment of the saving clause in these two types of actions by the Ohio Supreme Court, however, shows that the court has on occasion looked beyond the words of the statute to its practical effects and objectives despite the lack of specific legislative authorization to do so. These flexible and practical decisions adhere to the historic objectives of saving clauses.

C. *Effects of Wetzel v. Weyant*

Prior to *Wetzel* the general rule in Ohio had been that the saving clause was applied only against nonresident defendants.³⁶ Now, however, plaintiffs will be encouraged to commence actions against resident defendants even where it appears the plaintiff has allowed the entire statutory period to run. Once the complaint is filed, discovery

³³ *Id.* at 251, 227 N.E.2d at 228. The distinction between corporations and “real person[s]” made by the court in *Thompson* may appear to contradict the *Moss* holding's inclusion of corporate defendants within the meaning of the word, “person,” which appears in the Ohio saving clause. *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 112 N.E.2d 542 (1953). In *Thompson*, however, the Supreme Court of Ohio was *not* excluding corporations from those persons to whom the saving clause applies, but *was* applying to corporate defendants a different standard, as it had in *Moss*, from that which it applies to natural people.

³⁴ 139 Ohio St. 253, 39 N.E.2d 608, *aff'd on rehearing*, 139 Ohio St. 463, 40 N.E.2d 933 (1942). *Moss v. Standard Drug Co.*, 159 Ohio St. 464, 112 N.E.2d 542 (1953), clearly distinguished the situation involved therein from actions in rem. “In the instant case we are considering not an action in rem but an action in personam in which the quasi in rem procedure in attachment is incidental.” *Id.* at 473, 112 N.E.2d at 547.

³⁵ “In essence, defendants are asserting that where there is *no need* to toll the statute of limitations, R.C. 2305.15 does not apply even though no legislation specifically so provides.” *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 67, 269 N.E.2d 121, 126 (1971).

³⁶ *Westhoven v. Snyder*, 40 Ohio App. 2d 91, 318 N.E.2d 167 (Ct. App. Henry Cty. 1973); *Kossuth v. Bear*, 96 Ohio App. 219, 114 N.E.2d 80, *rev'd on other grounds*, 161 Ohio St. 378 (1953); *Lindsay v. Maxwell*, 4 Ohio N.P. 354, 7 Ohio Dec. 273 (C.P. Green Cty. 1897); 34 O. JUR. 2d *Limitation of Actions* § 116 (1958).

procedures will enable the plaintiff to learn from the defendant himself if and when he was absent from Ohio during the statutory period. *Wetzel*, then, will encourage litigation and create imprecise statutory periods within which suits must be commenced.

As expressed in the court's syllabus, every temporary departure from Ohio by a potential defendant suspends the running of the statute of limitations.³⁷ In dissent, Justice Celebrezze anticipated that

[p]erhaps tomorrow a traveling salesman living in Ohio, whose business has taken him out of the state three days each week for the past ten years, will have a personal injury action brought against him concerning an auto accident which occurred over four years ago. According to the majority, that action will be saved by their interpretation of R.C. 2305.15.³⁸

Also saved will be actions against Ohio residents who leave the state daily for employment, shopping, or recreational purposes. Even these absences measured in hours would toll the statute of limitations. The Ohioan who resides near the state boundary and works in a neighboring state might be substantially affected.³⁹

D. *Procedural Developments*

Accentuating the unreasonableness of this result are the present Ohio systems of commencing civil actions and serving process. Ohio Rule of Civil Procedure 3(A), enacted in 1971, provides that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." As Justice Herbert notes in *Wetzel*, this is an extension of the sixty day period that was provided in 1853 during the same session of the General Assembly in which the "forerunner of R.C. 2305.15" was enacted. According to Justice Herbert, the relative brevity of that sixty day period was

³⁷ *Wetzel v. Weyant*, 41 Ohio St. 2d 135, 323 N.E.2d 711 (1975).

³⁸ *Id.* at 140 (dissenting opinion).

³⁹ The existing Ohio judicial rule that fractions of a day are not generally considered in the legal computation of time and that the day on which an act is done or an event occurs must be wholly included or excluded from that computation [*Freulich v. Monnin*, 142 Ohio St. 113, 50 N.E.2d 310 (1943)] has heretofore not been applied to this type of situation. If it were, it is unclear whether any part or all of each day a resident defendant left the state for a period measured in hours would toll the statute of limitations, but a rule which considered the defendant absent for the entire day would be more consistent with the Ohio Supreme Court's application of § 2305.15.

probably a significant factor in the legislature's application of the saving clause to innocent departures from the state as well as to conscious efforts to evade service of process through departure or concealment.⁴⁰

Civil Rule 4.1(1) states that "[s]ervice of any process [within Ohio] shall be by certified mail unless otherwise permitted by these rules. . . ." According to an official staff note explaining a 1971 amendment to Rule 4.1(1), the phrase "to the addressee" was deleted from a paragraph dealing with a failure of delivery "to avoid any possible impression that certified mail service pursuant to Rule 4.1(1) requires delivery of the envelope to the addressee only."⁴¹ Certified mail has thus replaced personal service as the "basic and preferred method of service of original process. . ."⁴² in Ohio and can be accepted by persons other than the actual defendant.⁴³ Consequently, in most situations the presence or absence of a resident defendant who maintains a residence in the state does not diminish the effectiveness of service of process.

In the event the service of process by certified mail is refused at the point of delivery, Civil Rule 4.6(C) allows for effective service by ordinary mail, which is complete when the clerk of court enters the fact of mailing upon the record. If the certified mail service is returned unclaimed, ordinary mail again may be used under Civil Rule 4.6(D), provided it is not returned with an endorsement showing failure of delivery. Such a failure of delivery is one situation in which certified mail and the supplemental use of ordinary mail would not be adequate to inform the defendant of the suit against him. The address provided by the plaintiff to the clerk might be erroneous, or the defendant might have successfully concealed his presence from postal authorities.

The Ohio long-arm statute, Civil Rule 4.3, also allows out-of-state service upon "a resident of this state who is absent from this state" and who has at least the minimum required contact with Ohio.⁴⁴ Service is generally to be by certified mail to the defendant's

⁴⁰ 41 Ohio St. 2d at 138 n.2, 323 N.E.2d at 712 n.2 (1975).

⁴¹ OHIO R. CIV. P. 4.1(1), Staff Note, 1975 Supp.

⁴² *Id.*

⁴³ Personal service is available upon written request by the plaintiff. OHIO R. CIV. P. 4.1(2).

⁴⁴ OHIO R. CIV. P. 4.3(A). According to the United States Supreme Court, "[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service." *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).

last known address. Although the summons may be returned upon failure of delivery, "service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served."⁴⁵

These relatively recent developments in the method of serving process do not eliminate the need for a saving clause in the case where a resident defendant successfully conceals his whereabouts so that even service by ordinary mail is returned undelivered. The clause is also necessary where the defendant's address or location is simply unknown to the plaintiff absent any attempt by the defendant to abscond or conceal himself and despite the plaintiff's "reasonable diligence" to discover his whereabouts in the state. In this latter situation, the plaintiff's cause of action apparently is not now protected by § 2305.15: the defendant has *not* departed from the state, absconded, or concealed himself.

The recent developments in methods of service do obviate the necessity of protecting a plaintiff's claim beyond the statutory period by reason of the resident defendant's temporary absences from the state where, as in *Wetzel*, the defendant openly maintains a residence in Ohio throughout that period. In such a situation, the tolling of the statute of limitations actually gives the plaintiff *more* time than the statutory period in which to effectively commence his action, and deprives a resident defendant who temporarily departed from the state the full benefit of the statute of limitations even though his absence did not adversely affect the plaintiff's ability to commence the action.

Arguments concerning the lack of a need to apply the saving clause were considered and rejected by the supreme court in *Seeley v. Expert, Inc.*,⁴⁶ which was decided after the enactment of the Ohio Rules of Civil Procedure. The determinative point of the court's argument was that, although procedural developments "may have eliminated much of the need for a 'savings clause,' it must be recognized that a court, in interpreting a legislative enactment, may not simply rewrite it on the basis that it is thereby improving the law."⁴⁷

Wetzel can be distinguished from earlier cases in that the Ohio Supreme Court was dealing with a resident defendant who was continually susceptible to effective service of process by virtue of his

⁴⁵ OHIO R. CIV. P. 4.3(B)(1).

⁴⁶ 26 Ohio St. 2d 61, 269 N.E.2d 121 (1971).

⁴⁷ 26 Ohio St. 2d at 71, 269 N.E.2d at 128.

openly maintaining a residence in Ohio. In *Stanley v. Stanley*, which involved a nonresident, the court expressly reserved the question of whether residents were within the scope of Ohio's saving clause.⁴⁸ In *Commonwealth Loan Co. v. Firestine*,⁴⁹ the court explained away the majority rule that the statute would not be applied if service of process sufficient for in personam jurisdiction were available. The *Commonwealth Loan* court stated:

That result has often been reached in those instances where the defendant, although absent from the state for considerable periods of time, maintains a home or place of business in the state where service on him can be effectively obtained by leaving a copy of the summons at one of such establishments.⁵⁰

The court thus implicitly distinguished such a situation from that involving a nonresident defendant, with which it was then confronted.

IV. LIMITATION OF ACTIONS: POLICY AND JUDICIAL ATTITUDES

The saving clause exists, of course, strictly as a supplement to statutes of limitations, the length of which it extends in appropriate situations. In fact, Justice Herbert's majority opinion in *Wetzel* does not distinguish between the two provisions in terms of the legislative policy upon which he declares they are based.⁵¹

In Ohio, the articulation of the legislative policy of these provisions has been left primarily to the courts, which have variously described statutes of limitations as being designed to "protect the individual from being prosecuted upon stale claims"⁵² and to "assure an end to litigation and to establish a state of stability and repose."⁵³ Accordingly, a person against whom a cause of action may have arisen possesses a legislated interest in being protected from that claim after evidence to defend against it is likely to have been lost.⁵⁴ Perhaps more significantly, all persons who deal with the prospective

⁴⁸ 47 Ohio St. 225, 229-30, 24 N.E. 493, 495 (1890).

⁴⁹ 148 Ohio St. 133, 73 N.E.2d 501 (1947).

⁵⁰ *Id.* at 136-37, 73 N.E.2d at 503.

⁵¹ "Furthermore, statutes of limitation are a legislative prerogative and their operation and effect are based upon important legislative policy." *Wetzel v. Weyant*, 41 Ohio St. 2d 135, 138, 323 N.E.2d 711, 713 (1975).

⁵² *Townsend v. Eichelberger*, 51 Ohio St. 213, 216, 38 N.E. 207, 208 (1894).

⁵³ *Wylar v. Tripi*, 25 Ohio St. 2d 164, 171, 267 N.E.2d 419, 423 (1971).

⁵⁴ *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828); *Summers v. Connolly*, 159 Ohio St. 396, 112 N.E.2d 391 (1953); *Doyle v. West*, 60 Ohio St. 438, 444, 54 N.E. 469 (1899).

defendant also have an interest "in the stability of his economic and personal affairs."⁵⁵

As previously discussed in an historical context,⁵⁶ saving clauses were instituted to prevent the running of statutes of limitations against plaintiffs unable to serve process and therefore unable to commence suit without resort to another jurisdiction. Perhaps foreseeing no further development in the methods of service of process, the draftsmen of the archetypal statute of 4 Anne phrased the protective clause in terms of the prevalent method, *capias ad respondendum*, which required the defendant's physical presence within the jurisdiction.⁵⁷ The statute thus did not express its objective but only enunciated the conditions under which it became applicable.

Subsequent enactments of saving clauses by American states have retained this standard of applicability despite the early use of residence as well as personal service for resident defendants.⁵⁸ Courts, charged with determining the applicability of the statutes but generally unaided by legislative history, attempted either to infer and effect policy objectives behind the statutes⁵⁹ or to construe the statutes literally while inferring no exceptions, as the Ohio Supreme Court has done with respect to individual defendants.⁶⁰ The court considered this issue in *Seeley v. Expert, Inc.*

Were this a question of first impression in Ohio, the adoption of such a rule might be justified upon the basis that the purposes to be served by tolling the statute of limitations are necessarily so interwoven into the statute—even though not expressed—that the application of the statute is limited to cases where suit cannot be instituted because the defendant is not amenable to process.⁶¹

The idea was rejected, in accordance with previous decisions, because

⁵⁵ Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 138 (1955). Professor Callahan concludes that this element of social stability is a more rational justification for statutes of limitation than is protection of the individual. The broadened impact of such a policy strengthens rather than weakens the over-all need for reliance on the consistent application of statutes of limitations.

⁵⁶ See text accompanying notes 3-8 *supra*.

⁵⁷ W. BLUME, *supra* note 3, at 274.

⁵⁸ See, e.g., Title 5, ch. 2, 62, [1853] 51 Laws of Ohio 67.

⁵⁹ *Coombs v. Darling*, 116 Conn. 643, 166 A. 70 (1933); *Blodgett v. Utley*, 4 Neb. 25 (1875); *Whittington v. Davis*, 221 Or. 209, 350 P.2d 913 (1960); *Summerrise v. Stephens*, 75 Wash. 2d 808, 454 P.2d 224 (1969).

⁶⁰ *Commonwealth Loan Co. v. Firestone*, 148 Ohio St. 133, 139, 73 N.E.2d 501, 504 (1947).

⁶¹ 26 Ohio St. 2d 61, 67, 269 N.E.2d 121, 126 (1971).

of the absence of express legislated exceptions.⁶²

Another dimension of the Ohio Supreme Court's motivation may lie in its past, and perhaps present, attitude toward statutes of limitations. "This court, in two recent cases [*Commonwealth Loan Co.* and *Couts*], has shown its philosophy to be in favor of not barring an action which has accrued to an Ohio citizen unless the statutes of limitation unequivocally require it."⁶³

V. CONSTITUTIONAL ISSUES

Although in many cases the statute preserves valid claims which would be lost otherwise, use of the saving clause against such defendants as the one in *Wetzel* creates inequity between those defendants who, while not frustrating commencement of the action, are temporarily absent from Ohio and those who remain in Ohio throughout the statutory period. A similar injustice arises as to those plaintiffs who are, in effect, granted extended periods in which to bring suit by reason of the prospective defendant's absence and those plaintiffs who are restricted to the statutory period because *their* adverse parties have remained in the state.

These consequent inequities may rise to the level of constitutional violations. Resident defendants are now classified into two groups. Those who exercise their "fundamental right of interstate movement"⁶⁴ thereby lose the full protection of the Ohio statute of limitations. Those who do not travel beyond the state's boundaries are fully protected by that statute. Because the classification affects a "fundamental" interest, its validity with respect to equal protection depends on "whether it promotes a *compelling* state interest."⁶⁵ The presence of such an interest in this situation is questionable. Recent developments in methods of service and jurisdictional scope have blurred the distinction between these types of defendants to the point that even the traditional, less stringent constitutional standard of a rational basis for classification may not be met.⁶⁶ The saving clause as construed by the Ohio Supreme Court may thus violate both the

⁶² *Id.*

⁶³ *Meekison v. Groschner*, 153 Ohio St. 301, 309, 91 N.E.2d 680, 684 (1950).

⁶⁴ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *accord*, *United States v. Guest*, 383 U.S. 745 (1966); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

⁶⁵ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *accord*, *Primes v. Tyler*, 43 Ohio St. 2d 195, 198-99, 331 N.E.2d 723, 726 (1975).

⁶⁶ *Avery v. Midland County*, 390 U.S. 474 (1968); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

fourteenth amendment to the United States Constitution and article I, § 2 of the Ohio constitution.⁶⁷

VI. CONCLUSION

It is submitted that the Supreme Court of Ohio should have adopted a more flexible construction of § 2305.15 in *Wetzel v. Weyant*. The court based its decision on the precedential weight of previous decisions, the lack of legislative response to those decisions, and its disinclination to engage in "judicial legislation" by inferring an exception to the statute.⁶⁸ Justice Herbert's majority opinion in *Wetzel* does not distinguish between the facts of that and previous cases in referring to "122 years of nearly identical statutory language, buttressed by five consistent opinions from this court. . . ."⁶⁹ *Wetzel* is distinguishable, however, by virtue of the defendant's status as an Ohio resident who openly maintained a residence in the state and whose temporary absences from it could not have prevented effective service of process. Also, throughout those 122 years the Ohio legislature had little motivation to alter a statute which had adversely affected only nonresident defendants while aiding Ohio plaintiffs. Consequently, the legislature's inactivity in response to the previous decisions in question is not a clear basis for applying the saving clause to

⁶⁷ U.S. CONST. amend. XIV, § 1, states in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONST. art. I, § 2, states in part: "All political power is inherent in the people. Government is instituted for their equal protection and benefit"

In *Vaughn v. Ditz*, 430 S.W.2d 487 (Tex. 1968), the Texas Supreme Court held that absence from the state was not an unreasonable basis of classification when used to toll the statute of limitations for a *nonresident* defendant. Because Texas law requires notice of service to be sent to the defendant, his distance from the state and the related difficulty in determining his address were considered valid factors warranting classification, *id.* at 490. In the case of an Ohio *resident* defendant, however, those factors are not present, and *Vaughn* is clearly distinguishable.

To a less obvious extent, plaintiffs are also classified according to the actions of their prospective adversaries. In effect, this classification, like the guest-nonguest classification held invalid in *Primes v. Tyler*, "closes the courts and denies a remedy by due course of law to some but not all the people of this state. . . ." *Primes v. Tyler*, 43 Ohio St. 2d 195, 205, 331 N.E.2d 723, 729 (1975). Such a denial may constitute a violation of art. I, § 16 of the Ohio Constitution which provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. . . ."

⁶⁸ 41 Ohio St. 2d 135, 137-38, 323 N.E.2d 711, 712-13 (1975).

⁶⁹ *Id.* at 138 n.2, 323 N.E.2d at 712-13 n.2.

a resident defendant whose absence at no time thwarts service of process. Finally, the court's treatment of corporate defendants and in rem actions shows its efforts to implement the reasonable although not literal application of the saving clause in those situations for which no exceptions are expressed in the statute.⁷⁰ Thus, the prospect of "judicial legislation" has not always deterred the court's flexible construction of the statute.

After the court's appropriate application of the saving clause in *Stanley v. Stanley* in 1890, the facts of subsequent cases, while being within the literal language of the statute, led to decisions which frustrated the original objectives of saving clauses as well as statutes of limitations. Despite the availability of substituted forms of service, plaintiffs have been given extended periods in which to bring suit. The continuation of a literal construction of § 2305.15 with respect to Ohio residents who have not absconded or concealed themselves, as Justice Celebrezze notes in his dissent, will lead to increasingly unreasonable and inequitable results.⁷¹ The court should reconsider its holding and adopt a construction of the saving clause consistent with its ascertainable objectives.

Failure of the court to reconsider *Wetzel* should not deter the Ohio General Assembly from modifying the statute to coordinate its language with developments in methods of service of process, thereby effecting the statute's original, limited objective of ensuring to each plaintiff the full statutory period in which to effectively commence suit.⁷²

An alternative to the present saving clause could toll the running of the statute of limitations during a defendant's absence from the state if he is not then amenable to service of process sufficient to provide personal jurisdiction over him or if his whereabouts outside the state cannot be determined through reasonable diligence on the plaintiff's part. It also could toll the statute if the defendant's whereabouts inside Ohio are unknown after a similar exercise of reasonable diligence evidenced by an affidavit similar to that required in Civil Rule 4.3(B)(1).

While the need still exists in a limited number of situations to protect a plaintiff's cause of action by a saving clause, the wording

⁷⁰ See text accompanying notes 28-33 *supra*.

⁷¹ 41 Ohio St. 2d 135, 140, 323 N.E.2d 711, 713-14 (1975).

⁷² Cf. *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1007 (1960); Note, 19 U. CIN. L. REV. 397, 399 (1950).

of § 2305.15 is inconsistent with the present prevailing methods of service of process to the extent that its literal application is excessively broad, arbitrary, and unjust. The effect of the Ohio Supreme Court's adherence to that literal language is to extend the statute of limitations period for those resident defendants who exercise their constitutional right to engage in interstate travel without causing a corresponding diminution of plaintiffs' ability to bring suit.

The saving clause has been applied as a vehicle for softening the harsh effects on plaintiffs of a statute of limitations and for effecting the commendable policy goal of eluding mere procedural barriers and encouraging resolution of the merits of a case. Even so, more effective and just means should be implemented.

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