July 2015

Failure of Commencement, The Forgotten Defense - A Comment on Ohio Civil Rule 3(A)

Virginia L. Scigliano

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository.
Follow this and additional works at: http://ideaexchange.uakron.edu/akronlawreview

Part of the Law Commons

Recommended Citation
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/4

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.
FAILURE OF COMMENCEMENT,
THE FORGOTTEN DEFENSE —
A COMMENT ON OHIO CIVIL RULE 3(A)

by

VIRGINIA L. SCIGLIANO*

I. INTRODUCTION

In applying Ohio's Rules of Civil Procedure this court has labored under a belief that they were designed to facilitate the administration of substantial justice in permitting the judiciary to resolve the merits of the controversies presented to them rather than to prevent such resolution by the hypertechnical application of procedural rules and statutes which can probably only be mastered by those members of the legal profession who occupy its top 1% in intellectual agility.1

The simplicity of the wording of Ohio's Rule 3(A) for commencement of a lawsuit disguises the complexities that are involved in the interpretation and use of the rule. The basis for these complexities are found in the 129 years of history of the rule and the interpretations given to the rule that extend beyond the mere language of the rule.

This article will provide an in depth analysis of Rule 3(A). The analysis is divided into four sections. The first section examines the historical development of Rule 3(A) and the problems that developed and exist today. Section two discusses the meanings and specific interpretations given to the language of the rule. The unstated prerequisites of existence and capacity are analyzed in section three. And, in section four, Rule 3(A)'s forgotten defense is discussed and a model is developed for using the defense of failure to commence.

II. HISTORICAL BACKGROUND AND THE RELATION BACK DOCTRINE

To become a civil action a lawsuit must come into existence at some point in time.2 That point in time is considered to be the moment of commencement.3

*Ph.D., University of Texas at Austin; President of CHEMISTRE.


2Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285, 288 (1954). In Kossuth the injuries resulted from an automobile accident. The petition was filed timely but a summons was not issued. As specified in OHIO REV. CODE ANN., § 2305.17 commencement, or existence, is the date of the service of the summons. Therefore, the action did not come into existence, since a summons was not served.

3Browne, Ohio Civil Rule 8(C) and Related Rules, CLEVELAND STATE L. REV. 331, 362 (1978). Browne notes that in Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954) "where there is a failure of commencement no action even comes into existence." Id. An action is in existence when it is commenced.
Basically the moment of commencement can be determined in two ways: the moment in time when the initiating document is filed with the court, or the moment in time when the court acquires jurisdiction over the person of the defendant.

Very early, Ohio opted for the second method of commencement. Thus, in the first Code of Civil Procedure enacted in 1853 we found the following provisions pertaining to the commencement of a lawsuit:

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

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

Section 20: An action shall be deemed commenced within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, otherwise united in interest with him: where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made.

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

The first paragraph of Section 20 of the 1853 Code presented difficulties when the concept of commencement was considered in conjunction with the statute of limitations. For example, an action would not be deemed to be commenced if the statute of limitations ran prior to or during the time interval between the filing of the petition and praecipe and the actual service of the summons,

---

1 J. SWAN, PRACTICE AND PRECEDENTS, 177 (Columbus 1845) referring to a complaint as a declaration. Over the years different jurisdictions have given the initiating document various names. These names have ranged from declaration to petition, and then finally to a complaint. Today the initiating document is titled a complaint in Ohio.

2 CAL. CIV. PROC. CODE ANN. § 350 (West 1954). This section states that "an action is commenced, within the meaning of this Title, when the complaint is filed (enacted 1872)."

3 OHIO R. CIV.P. 3(A). Although RULE 3(A) states service, the actual meaning is jurisdiction over the person of the defendant.


5 Id. at § 56. Prior to the 1853 Code in 1 J. SWAN, PRACTICE AND PRECEDENTS, 110 (Columbus 1845) it stated that "common law actions are in general, commenced by summons. . . ."

6 Id. at § 55.

7 Id. at § 56.

8 Id. at § 20.

9 Eastman and Kane, Commencement of a Civil Action in Ohio for Application of the Statute of Limitations, 16 OHIO ST. L.A. J. 140-41 (1955). According to the authors, this section (referring to OHIO REV. CODE ANN. § 2305.17 (Page 1965)), formerly §§ 11230 & 11231 of the GENERAL CODE and formerly § 20 of 1853
because commencement was deemed effective with the service of the summons. Without service there was no commencement and without commencement the statute of limitations could bar the action. To commence a law suit successfully, plaintiff's attorney was, in effect, required to file the petition and praecipe well within the statute of limitations period. The rule had the effect of shortening the statute of limitations period for any given action.

To resolve this problem, the General Assembly enacted the second paragraph of Section 20:

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

This provision in the statute gave the plaintiff a grace period of sixty days if the petition and praecipe were filed prior to the running of the statute of limitations. If service was achieved within sixty days, the date of service was deemed to relate back to the date on which the petition was filed and commencement was considered to have taken place as of the filing date of the petition.

Ohio Laws 51) has presented problems of construction and application. In passing, it may be well to note that this section determines the time of commencement of the action only for the purpose of the statute of limitations, and that only this section fixes the time of commencement for that purpose. There seems to be some degree of confusion on this proposition, probably because Ohio Revised Code Section 2703.01 (11279) determines the time of commencement of the action for other purposes.

The supreme court has said that this section provides the manner of commencing all civil action, but it is equally clear that it fixes the time of commencement for purposes other than the statute of limitations. Of course, summons must issue within the period of the statute of limitations; the date of the summons is the date of issuance, and this date becomes the date of commencement, if the summons is thereafter served. But issuance of summons so dated does not, without service, commence the action and arrest the statute of limitations.

Id.

"Baltimore and O.R. Co. v. Ambach, 55 Ohio St. 553, 45 N.E. 719 (1896).

"For example, if the plaintiff knew that there would be difficulty in obtaining service on the defendant in a situation involving an action subject to a two-year statute of limitations, filing would have to be sufficiently early in the two-year period to guarantee service on the defendant. Although the statute of limitations period span two years, the threat of not obtaining valid and effective service needed for commencement could theoretically shorten that period by a year or even more.

"1853 Ohio Laws 60, § 20.

"In Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213, 216 (1966) service was not achieved within the sixty days attempt to commence provision of Ohio Rev. Code Ann., § 2305.17 (Page 1965) (formerly §§ 11230-11231 of the General Code and § 20 of 1953 Ohio Laws 60) and the court found that "a nonexistent case cannot be dismissed." Also, in Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285, 288 (1954) the trial court improperly dismissed a case, otherwise than on the merits, in which service had not been achieved within the 60 days grace period of the attempt to commence provision and the statute of limitations had run. On appeal the court stated that "although on the Lorain county court docket there appears the words, 'dismissed without prejudice', what that court did was merely to strike the petition from the files . . . (and) (i)t seems axiomatic that a nonexistent case can not be dismissed." Id. at 288. Plaintiff's claim "ignores the limiting provision of that section (Gen. Code 11231, and Ohio Rev. Code Ann., § 2305.17 (Page 1965)) which is that the attempt to commence an action is equivalent to its commencement only if the party diligently endeavors to procure service and if such attempt be followed by service within sixty days." Id. at 288.

These cases point out the differentiation that was made by the court. If timely service is improperly made within the sixty day period the action is not commenced. Wasyk v. Trent, 174 Ohio St. 574, 191 N.E.2d 58 (1963); Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285 (1954). And, if the summons is
From 1853 until 1965, the statutory provisions governing the commencement of civil actions remained substantially the same. These provisions provided for a date of service rule with a date of filing rule exception for statute of limitation cases. Therefore, commencement was the date of service, when service was accomplished prior to the expiration of the statute of limitations, and commencement was the date the petition was filed, if filed prior to the running of the statute of limitations with service being accomplished after the expiration of the statute of limitations, but prior to the expiration of sixty days following the date of the filing of the petition. Of course, in this latter situation, the action was an "action attempted to be commenced" during the period of time between the filing of the petition and the date of service, or for the duration of the sixty day period.

In 1965 the General Assembly: (1) abolished the date of service rule, (2) lengthened the period in which an action was attempted to be commenced from sixty days to one year, and (3) made the year long attempt to commence period applicable to all actions whether or not there were statute of limitations problems. From 1965 on every action was deemed to be commenced at the date of filing if service of the summons was achieved within the year. The date of service related back validating the date of the filing of the complaint as the date of commencement. It is this relation back factor and the attempt to be commenced period that had caused all of the difficulty in the interpretation of the earlier statutes. Instead of eliminating the problem that had previously occurred only in statute of limitation cases, the General Assembly exacerbated the problem and made every case a potential problem. The effect of this was to create a patchwork date of filing rule which depended upon a timely relation back of the date of service rule.

Some of the consequences of this modified rule are the lengthening of the statute of limitations by as long as a year and, in the right circumstances, through the application of the Savings Statute by as much as two years and perhaps indefinitely. On the other hand, a timely filed action could find that it failed actual commencement long before the statute of limitations expired


1Id. The history of the statute is: OHIO REV. CODE ANN., §§ 2703.01, 2703.02 & 2305.17 (Pages 1974) OHIO REV. CODE ANN., §§ 2305.17 (Pages 1962) (superseded); OHIO GEN. CODE, §§ 11230, 11231, 11279 & 11280 (19190); OHIO REV. STAT., §§ 4987, 4988, 5035 & 5036 (1880).

1Id.

2Id.

3Compare 1853 OHIO LAWS 60, 66 §§ 20, 55, 56 with OHIO R. CIV. P. 3(A).

2If a complaint is filed one day preceeding the running of the statute of limitations for that action, the one year service provision of OHIO R. CIV. P. 3(A) allows the statute of limitations to be extended by one year.


3Under the right circumstances a filing preceding the running of the statute of limitations for a particular action, coupled with a subsequent dismissal by the court, otherwise than on the merits, could invoke the one year provision of OHIO R. CIV. P. 3(A) and the additional one year savings provision of OHIO R. CODE ANN., § 2305.19 (1981).
simply because jurisdiction over the person of the defendant was not acquired within a year following the filing of the initiating document.24

With the enactment of the Modern Courts Amendment to the Ohio Constitution,25 the supreme court was given the power and authority to rectify the damage done by the General Assembly. Unfortunately, the Supreme Court enhanced the damage by enacting Civil Rule 3(A) which reads as follows:

A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing.26

Thus, the built-in contradiction in Section 20 of the 1853 Code27 (that had created the essential problem of the metaphysical concept of attempted to be commenced and the relation back ambiguities) was retained through all of the code modifications and amendments and was carried over into Rule 3(A).28 While other jurisdictions29 opted for a simplified version of commencement where the filing of a complaint with the clerk of the court commences the action,30 the State of Ohio had chosen to retain and expand its metaphysical concept of attempted to be commenced. The exception designed to accommodate the statute of limitations became the rule.

III. THE LANGUAGE OF THE RULE

The brevity of the rule disguises its actual complexity. Rule 3(A) states that a civil action is commenced in Ohio "by filing a complaint with the court, if service is obtained within one year from such filing."31 The vital components of the Rule are: "civil action", "filing", "complaint", "court", "service" and

---

24Browne, Ohio Civil Rule 8(C) and Related Rules, 27 CLEVELAND STATE L. REV. 329, 364 (1978).
25Browne's article states that the
26OHIO R. Civ. P. 3(A).
271853 OHIO LAWS 60 (superseded). See OHIO R. CIV. P. 3(A).
28OHIO R. Civ. P. 3(A).
29In California, the court stated that:
[alt the common law, as is claimed by appellant, actions were commenced by the issuance of a capias and delivery to the Sheriff, with intent to have it served. But from time immemorial a different rule prevailed in equity, and the filing of the bill (complaint) was a commencement of the action to take the case out of the operation of the statute. (2d ed. Revised State. of N.Y. 227; 2 Barb. Ch. Prac. 53; 1 Id. 53; 3 Paige, 204, 7 Id. 197; 24 Wend. 587; 2 Denio, 577.) So in England. (Newland's Ch. Prac. 1, ed. of 1818; 1 Daniel's Ch. Prac. secs, 468, 469.) In this State a uniform rule is established by the Legislature, applicable alike to actions at law and suits in equity.
Pimental v. City of San Francisco 21 Cal. 351 (1863).
30CALIF. CIVIL PROCEDURE CODE ANN., § 350 (West 1954) states that "an action is commenced, within the meaning of this Title, when the complaint is filed. (Enacted 1872)." Also, FED. R. CIV. P. 3 states that "a civil action is commenced by filing a complaint with the court."
31OHIO R CIV. P. 3(A).
the "one year" time period. Although apparently simple, each of these components is complex and subject to multiple interpretations through the application of other rules, case law and one's creative processes. A discussion of these components and their requirements follow.

The first component of the Rule limits its application to civil actions. As a general rule this is true, but under the provisions of Civil Rule 1(C), the "commencement concept" of Civil Rule 3(A) is to be applied to special statutory proceedings if, by its nature, it is clearly applicable. The few cases on point suggest that it is clearly applicable if the special statutory procedure is adversary in nature, and the use of the "commencement concept" will not frustrate the purpose of the proceeding.

The second component of Rule 3(A), the filing requirement, can not be understood in terms of Rule 5(E) and its filing requirements alone; rather a review of the case law in this area is essential to provide a framework that can be used to define the requirements for filing. This framework includes the elements of time, place, person, method and content. Time, the first element, poses only one major problem for commencement. Filing must occur prior to the running of the statute of limitations for actions limited by statutes of limitations. If filing occurs subsequent to the running of the state of limitations for a particular action, a statute of limitations defense, if properly raised by the respondent, can effectively bar the action. Lack of knowledge as to the relationship between the statute of limitations and Rule 3(A) has aborted a number of actions that were otherwise properly commenced.

The place and person elements for filing are interrelated. The person who receives the initiating document is either the clerk of the court or in special circumstances the judge. Rule 5(E) governs the person requirement and states:

The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the
office of the clerk."

A difficulty encountered in Rule 5(E) is the reference to the filing of "pleadings and papers." Although the rule requires that "pleadings and other papers" are to be filed with the clerk, it also states that the judge may permit "the papers" to be filed with him or her. There are at least two possible interpretations for the phrase, "the papers." Either the rule intends that "the papers" to be filed with the judge include "pleadings and other papers" referred to in the first sentence of the rule or "the papers" referred to in the third sentence are limited to "other papers" and, therefore, exclude pleadings. If the interpretation of "the papers" means "pleadings and other papers" then a filing of the initiating document can occur with the clerk of the court and, if permitted by the judge, with the judge. If the interpretation of "the papers" means only "other papers" and not pleadings, then the filing of pleadings can occur only with the clerk of the court. Unfortunately the Ohio Rules Advisory Committee Staff Note to this rule does not clarify it.

The forth element required for filing is the method of filing. The court requires an actual delivery of the initiating document not a constructive one. By definition actual delivery means that the initiating document must be given to the clerk of the court. In addition, the phrase "given to the clerk" is defined as the clerk's taking "knowing possession and custody" of the document. An example of what is not actual delivery may clarify its meaning. A leaving of the document at the clerk's office, pushing it under the clerk's office door after working hours, or placing it in the mail are all considered to be constructive delivery, not actual delivery, and are consequently not effective delivery. Anything less than actual delivery is not considered to be an effective delivery.

Concomitant with the method and person elements for filing is the issue of selecting the place for filing, i.e., the proper court for the action. Prior to the enactment of Rule 3(A), Ohio Revised Code section 2305.17 had defined the place for filing as the "proper court," which was defined as the court with the appropriate subject matter jurisdiction. Today, Rule 3(A) requires that filing be with "the court" only. The issue raised by the phrase "the court" is whether

"Ohio R. Civ. P. 5(E).

"Ohio R. Civ. P. 5. The Staff Notes states only that "Rule 5(E) defines the act of filing pleadings and other papers."

"King v. Paylor, 69 Ohio App. 193; 43 N.E.2d 313, 314 (1st Dist. 1942) states that "a filing can only be accomplished by bringing the paper to the notice of the officer, so that it can be accepted by him as official custodian."

"In Kahler-Ellis Co. v. Ohio Turnpike Commission, 225 F.2d 922, 923 (6th Cir. 1955) the court stated that "[h]ere, only the act of depositing the notice in the mails occurred within thirty days. This is not a filing; only when the clerk acquires custody has it been filed." Id. Also in Casaldera v. Diaz 117 F.2d 915, 916 (1st Cir. 1941) the court stated that "[f]iling means delivery of the paper into the actual custody of the proper officer."

"Snabes v. Fether, No. CA-5052 (Ohio App. Stark County, filed July 5, 1979), reprinted in 54 Ohio Bar 1913 (1979). Also, in Oravec v. Board of Review, No. 42836 (Ohio App. Cuyahoga County, filed May 14, 1981) the court was specific in defining the method of filing and concluded "that filing means the actual delivery . . . determined by the date upon which the (document) is actually received." Id.

"Howard v. Allen, 30 Ohio St. 2d 130, 283 N.E.2d 167, 170 (1972). The court stated that "[i]t is apparent
“the court” as specified in Rule 3(A) is equivalent to the “proper court” as specified in former section 2305.17. The phrase, “the court,” in Rule 3(A) would seem to purport a different meaning but at least one decision has interpreted “the court” stated in Rule 3(A) to mean the “proper court” as defined by section 2305.17. Thus, in Moyer v. Moyer43 “the institution of proper proceedings means commencement of an action pursuant to Rule 3(A) in a court with subject matter jurisdiction.”44 Although Moyer states the general rule, there is one exception to the rule when the action is commenced mistakenly in the wrong division of a multidivision court. It has been held to be prejudicial error for the court to dismiss the action rather than to transfer it to the appropriate division.45 Still, “proper court” is defined as the court with appropriate subject matter jurisdiction over the action.”

The fifth element of filing, content, poses its own questions of interpretation also. In Rule 3(A) it states that the “complaint” must be filed. The complaint contains the required content. The content for the complaint is prescribed by Rules 10(A) and 10(B).46 These rules outline the basic elements of the complaint. For example, the complaint must include a caption,47 name of the court,48 title of the action,49 case number,50 designation,51 and the names and addresses of all parties.52 In addition, each paragraph of the document, that is the body of the complaint that sets forth a claim(s) for relief, must be numbered consecutively,53 separated as to each claim, and must include a heading54 for each section. But the requirements of Rules 10(A) and 10(B) are not the only rules that define the elements of the complaint. In addition, Rule 8(A) specifies that the complaint must include a statement of the claim,55 and

that the word ‘court’ as used in Civ. R. 3(A) refers to an Ohio court, since Rule 1(A) provides that the Ohio Rules of Civil Procedure be limited to courts of this state.”

44 Id.
45 Siebenthal v. Summers, 56 Ohio App. 2d 168, 381 N.E.2d 1344, 1345 (10th Dist. 1978). In this case “[t]he clerk docketed the case on the docket of the General Division of the Franklin County Court of Common Pleas, rather than the Probate Division. Defendant filed a motion to dismiss for lack of subject matter jurisdiction. Plaintiff filed a motion for an order transferring the action to the Probate Division.” Id. The issue in the case was “whether an action can be transferred from the docket of one division of the Court of Common Pleas, in which it has for whatever reason been improperly docketed, to another division of the same court.” Id. at 1347. The court concluded that “Civ. R. 73(B) authorized the General Division of the Court of Common Pleas under the circumstances of this case to transfer the action from its docket to the docket of the Probate Division of the same court.” Id. at 1348.
46 Ohio R. Civ. P. 10(A) and 10(B).
47 Ohio R. Civ. P. 10(A).
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Ohio R. Civ. P. 10(B). The rule does not specify consecutive but custom has so specified.
54 Id.
55 Ohio R. Civ. P. 8(A). The complaint should simply tell what happened and link it to the defendant.

http://ideaexchange.uakron.edu/akronlawreview/vol16/iss2/4
a demand for judgment. Additionally, Rule 11 mandates that each pleading must be signed by the attorney of record or the pleader. This signature must meet the ethical requirements of Rule 11 also. Therefore, the content of the initiating document, the complaint, is defined by Rules 10(A), 10(B), 8(A), and 11. In addition to the above rules, local rules have to be examined to determine if additional requirements are specified for the complaint. For example, in a multi-judge court the name of the judge to whom the case has been assigned may be required by local rule. Therefore, multiple rules govern the content of the complaint and these requirements include those set by local rules for a particular court as well as the civil rules.

A case that may provide guidance on this point is Spratt v. Frederickson where the defendant, on appeal, claimed that her personal letters that were filed with the court in response to the plaintiff’s complaint constituted an answer within the meaning of the rules. The court’s response was that the letters were not sufficient to meet the rule requirements for an answer because the letters did not meet the requirements set forth in Rule 10(A), 10(B) or 5(D). If one extends the court’s position on the sufficiency of an answer to be applicable to the complaint, then it would appear evident that the minimum acceptable for a complaint includes the requirements set forth in Rules 10(A), and 10(B). Since the plaintiff had signed the letters, one could interpolate from this act and its implied inclusion by the court that the court’s intent was to include Rule 11 signature as part of the minimum also. Still, the Spratt requirements may be too harsh.

Ohio R. Civ. P. 8(A) states:

a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relied in the alternative or of several different types may be demanded.

Id.

And, it should be noted that in situations involving damages Ohio R. Civ. P. 54(C) applies.

Ohio R. Civ. P. 11 states:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address...

Id.


Ohio R. Civ. P. 54(C), 9, 10(C) and 10(D) delineate other specifications in special circumstances. For example, in Sexton v. The New York Central Railroad Co., 112 Ohio App. 498, 172 N.E.2d 167, 168 (1959) "the plaintiff's praecipe did not recite, nor did the summons carry, the amount for which judgment was claimed. In our opinion, the motion to quash the original service of summons was, therefore, properly sustained." Id. In accord with Ohio REV. CODE ANN., § 2703.02 (Page 1981) the amount of money for which the judgment is sought must be included.

Cuyahoga County R. Civ. P. of the Court of Common Pleas, RULE 8 states the local rules as to pleadings and motions.

Id. at RULE 8(A).


Id.
Another way of analyzing the minimum content for the complaint is to contrast the requirements of Rule 8(A) with those found in Rules 10(A) and 10(B). The substantive defects of Rule 8(A) are typically challenged by defenses whereas form defects of a Rule 10(A) or 10(B) nature are challenged by objection. Since an objection merely suspends an action until the defect is corrected, then it would seem unlikely that a Rule 10(A) or 10(B) defect should do more than suspend the action until the defect is corrected. If this analysis is correct, then Rule 8(A) would appear to set forth the minimum requirement for the complaint.

Additional support for Rule 8(A) is found in Rule 15(C). Substantive defects of a Rule 8(A) type can be corrected by amendment and Rule 15(C) provides that the amendment will relate back to the date of the original complaint:

> whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . (emphasis added.)

This would indicate that less than perfection is acceptable in the complaint. From an analysis of Rule 8(A) and Rule 15(C) it appears that the complaint, at a minimum, must contain three elements: the statement of the claim or an attempted statement of the claim, the demand for judgment and an appropriate signature.

Additional support for the argument that minimum for the complaint is specified by Rule 8(A) are cases that differentiate the requirements for the caption from those of the complaint, stating that the caption is not a part of the complaint, and that if it were not for the statute there would be no need for a caption. It is vital to note that the function of the initiating document is to bring the lawsuit into existence. Once the parties have commenced their action, evidence and proof for the cause of action will be supplied through discovery and rules of evidence. Therefore, logic would posit that formal defects

---

46OHIO R. CIV. P. 15(A).
47Id.
48Id.
49Hunt v. Rohrbaugh, 171 Ohio St. 92, 168 N.E.2d 299, 305 (1960) found that a defective verification did not destroy the petition. "[t]he fact that the verification was defective or even lacking did not destroy the character of the original petition." Id. If no verification had been attached, the pleading would still have been a petition. The dissent was quite interesting in this case and stated that "the statutory thing to be amended must exist, before the power [to amend] can be exercised." Id. at 106. The dissent refers to Shomokin Bank v. Zadok Street, 16 Ohio St. 1, 10 (1864) where the court stated that "I know the general power of amendment given to the courts by the code is very broad, and is only limited by the 'justice' of the case. But the statutory thing to be amended must exist, before the power can be exercised." Id.
50OHIO R. CIV. P. 8(A) and 11.
51Hunt v. Rohrbaugh, 171 Ohio St. 92, 168 N.E. 299, 299 (1960) stated that the petition was still a petition without the verification.
52OHIO R. CIV. P. 10(A).
are not as significant as substantive defects. Still, the seriousness of the defect must be balanced against the cost of delay and inconvenience that are imposed by a refusal to accept anything less than perfection in the complaint. But until there is a clear definition by the court as to the minimum allowable for a complaint, the minimum requirements will remain at issue.

If the above elements of time, person, place, method and content are met for filing and the complaint meets all requirements set forth in the rules, Rule 3(A) still requires service, or more properly stated, an acquisition of jurisdiction over the person of the defendant. Rule 3(A) specifies service, but upon close examination it is apparent that Rule 3(A) actually intends jurisdiction over the person of the defendant as the essential requirement. This intention can be supported by analyzing the requirements of Rule 4(D) in the context of Rule 3(A). For example, Rule 4(D) states:

Service of summons may be waived in writing by any person entitled thereto under Rule 4.2 who is at least eighteen years of age and not under disability.73

If service were intended by Rule 3(A), rather than jurisdiction, then Rule 4(D) would be rendered meaningless, because a waiver of service would render commencement impossible since service will never be obtained when there was a waver of service. In addition to Rule 4(D), a waiver of service can occur when the defendant makes a general appearance.74 In this situation specifically the court has acquired jurisdiction over the person of the defendant but has not achieved it by means of service. In situations where waiver occurs commencement would not be achieved if Rule 3(A) were taken literally to mean service instead of jurisdiction over the person of the defendant. Consequently, Rule 3(A) must be read to purport jurisdiction over the person of the defendant rather than service.

But, if the Rule means "acquisition of jurisdiction over the person of the defendant," why does it speak in terms of "service"?75 Perhaps because, in the vast majority of cases, jurisdiction over the person is acquired by the service of a summons. This is the norm, and Rule 3(A) speaks to the norm rather than to the exception. Therefore, the Rule speaks of "service," rather than jurisdiction.

Again, the Rule means more than it states. While it specifies "service," it really intends "the effective service of a valid summons."76 Accordingly, we

73PHIO R. CIV. P. 4(D).
74Akron-Canton Regional Airport v. Swinehart, 62 Ohio St. 2d 403, 406 N.E.2d 811, 815 (1980) "By filing this answer, an appearance was made and appellees consented to the personal jurisdiction of the court . . . Because of the invalid service the time for the answer had not begun to run until that appearance. The answer filed upon that date was therefore timely and the cause should proceed from that point. Id.
75OHIO R. CIV. P. 3(A) states that "a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." And, validity and effectiveness of service of process is governed by OHIO R. CIV. P. 4-4-6.
must inquire into the essentials of a valid summons and the elements of effective service. A valid summons includes the essentials stated in Rule 4(B).

Specifically, the Rule states that the summons:

shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address. . . .”

Likewise, effective service of process must be achieved for successful commencement of the action. Effective service can be achieved by means of certified mail, personal or residence service as delineated in Rules 4.1 through 4.6. In addition, Rule 4.6(A) specifies the geographical limitations of service to be “anywhere in this state.” And Rule 4.1 specifies the individuals who can serve the process. In fact, Rule 4.1(2) designates the bailiff as the process server for the municipal court when service is by personal means and within the geographical jurisdiction of the court. And, Rule 4.1(2) designates the sheriff of the defendant’s county of residence as the proper process server for all other courts and geographical areas. An additional option is offered in Rule 4.1(2) that provides for service to be made by a private process server, if the process server is eighteen years of age or older, is not a party to the action and is designated as a process server by court order. Therefore, the service specified in Rule 3(A) is governed by Rules 4 through 4.6, and is limited to valid and effective service.

However, even if service is letter perfect as far as the rules are concerned, it will not be effective service if the means selected for serving the summons are not reasonably calculated to give the defendant actual notice. The test for effective service is stated in Akron-Canton Regional Airport v. Swinehart:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. "Id"
In addition to the requirements for filing, the specifications for the content of the complaint and the specifics of jurisdiction over the person, Rules 3(A) provides a one year limitation for achieving service. The one year requirement of Rule 3(A) is merely an extension of the 1853 code’s “attempt to commence period of sixty days.” The significant issue that is still unresolved is what is meant by a “year” in Rule 3(A) and how is it calculated? If Rule 6(A) is a guide to Rule 3(A), then the time period for calculating the one year period begins the day following the filing of the complaint. This aspect of Rule 6(A) may appear simple enough but when the calculation is considered at the ending of the year the situation poses some dispute. For example, is the end of the year midnight on the calendar anniversary of the initiating date, or is it 365 days subsequent to the day following the filing of the complaint? If the year ends on a Saturday, Sunday or legal holiday will the time be extended to the following day that is not a legal holiday or a Saturday or Sunday? For example, Rule 6(A) states that:

In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act, even, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

Now, the “Saturday, Sunday or legal holiday” provision is included in the Rule to provide a grace period when something, such as filing, must be done in the clerk’s office, and the clerk’s office is closed. But service of process is effected on the individual defendant wherever he or she may be found, and valid service does not require that anything be done in the clerk’s office. Further, an otherwise valid service is not rendered invalid because it is made on the defendant on a Saturday, Sunday or legal holiday. Therefore, the “Saturday, Sunday or legal holiday” provision of Rule 6(A) has no logical application to the service requirement of Rule 3(A), and one may legitimately speculate whether it serves to extend the one year period provided by Rule 3(A) when the last day of that year falls on a Saturday, Sunday or legal holiday.

The difficulties in applying Rule 6 to Rule 3(A) were raised in Rahm v. Hemsoth. In this case, Ohio Revised Code section 1.14, rather than Rule 6(A), was construed with Rule 3(A) and provided that the end of the year time period did not end on a Saturday, Sunday or legal holiday but was extended to the

---

**Ohio R. Civ. P. 3(A).**

**1853 OHIO LAWS 60 § 20, paragraph 2.**

**Id.**

**Id.**

**Rahm v. Hemsoth, 53 Ohio App. 2d·147, 372 N.E.2d 358, 358 (6th Dist. 1976).**
next working day. Given the act which is to be performed, service on the defendant, if service is validly made on a holiday then the provision of section 1.14 applied to Rule 3(A), in the Rahm case, does not make much sense. More clarification is needed in the computation of the one year requirement of Rule 3(A).

If one were to restate Rule 3(A), given the information above, the rule might read as follows: a civil action is commenced by filing a complaint with the clerk of the court having subject matter jurisdiction, prior to the running of the statute of limitations for the action. Filing consists of actual delivery of the complaint to the clerk of the court with the complaint complying with Rules 10(A), 10(B), 8(A) and 11. Jurisdiction over the person of the defendant must be acquired by valid and effective service, unless waived, and must be obtained within one calendar year subsequent to the date of the filing of the complaint. If the calendar year ends on a weekend or holiday these days can be excluded from the one year calculation. The date on which the defendant actually receives service relates back and validates the date of the filing of the original complaint as the official commencement date. All other time periods for the action are calculated from the date of defendant’s actual receipt of service.

The problem inherent in the interpretation of the language of Rule 3(A) are aggravated further when placed in the context of existence, capacity to sue or be sued and the defenses that challenge a failure of commencement. These problems will be analyzed now.

IV. EXISTENCE AND CAPACITY: THE UNSTATED PREREQUISITES

Although Rule 3(A) delineates the essentials for commencing an action, the filing of a complaint with the clerk of the court provided that service is achieved within one year, there are two major, essential and unstated prerequisites for the Rule. These unstated prerequisites are the plaintiff’s and defendant’s existence and their capacity to sue or be sued. Without existence and capacity the action may not be commenced.

91Ohio R. Civ. P. 3(A).

92Id.

93BLACK’S LAW DICTIONARY 188 (5th rev. ed. 1979) defines capacity as “legal qualification (i.e., legal age), competency, power or fitness. Ability to understand the nature and effects of one’s acts. The ability of a particular individual or entity to use, or to be brought into, the courts of a forum.” Id. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971) defines existence as “reality or actuality as opposed to appearance, the state or fact of having being especially as considered independently of human consciousness and as contrasted with nonexistence, the manner of being that is common to every mode of being, the state common to physical objects, objects of thought, or anything else.” Id. at 796.

In Perkins v. Mining Co., 155 Ohio St. 116, 98 N.E.2d 33, 36 (1951) the court stated that: [h]istorically, at common law, a legal unit, or an entity recognized by the law, was either a natural person or not. If not, it was a corporation and consent of the king was necessary for its creation. Blackstone’s Commentaries, Book I, 123, 467, 472, 475. In the United States, the necessity of the king’s consent was replaced by the necessity of the legislature’s consent. 2 Kent’s Commentaries, 276 . . . The decisions of this court have usually recognized that, in order to be a corporation, an organization must be a legal unit or be recognized as an entity by the law of the state or country in which it was organized.

Id.
The requirement of plaintiff’s existence is made explicitly clear in *Levering v. Riverside Methodist Hospital,* where on plaintiff’s appeal from summary judgment for defendant the lower court’s decision was affirmed. The court found that since the plaintiff had been deceased when counsel filed the complaint, the complaint was a nullity for lack of a party-plaintiff. Also, in *Group of Tenants v. Mar-Len Realty, Inc.* an ad hoc group of tenants was not found to be a legal entity or a party capable of initiating any action or any appeal. The court stated that “the existence of an identifiable complainant is essential to the existence of an action.” The tenants that were not designated by name, could move in and out of the law suit at any time with no one responsible for the action or for any one set of facts indicative of the action. Thus, the “group” of unnamed persons had no definable membership and thereby lacked legal existence as a group, the state of being necessary for commencing an action.

This necessary prerequisite of plaintiff’s existence was enunciated in the earlier 1973 case of *Cleveland Municipal Court v. Cleveland City Council.* The complaint was brought by the Cleveland Municipal Court against the Cleveland City Council, neither of which had legal existence as such. The court stated that “absent express statutory authority, a court can neither sue nor be sued in its own right,” since it does not have existence. The same deficiency was found for the Cleveland City Council. The court in this case examined specific facts that were stated in the complaint, counterclaim and the subsequent motion to dismiss and found sufficient data to indicate that the action was being brought by identifiable individual judges and councilmen. Finding the judges and councilmen to have existence the court allowed the action to proceed.

The converse of the plaintiff’s existence is the necessary existence of the defendant. Without a defendant there can be no action. In *Vocke v. Dayton,* the Court of Appeals for Montgomery County found that a plaintiff’s suit against a “John Doe” was insufficient to identify an existent defendant for the action. In this case the plaintiff filed a suit against the city of Dayton and three individuals referred to as John Doe. Since the plaintiff did not comply with Rule 15(D) that requires a description of the alleged John Doe’s and their addresses, the court found that she “lacked not only the names, but also any

---

*No. 81AP-374 (Franklin County, filed July 14, 1981). Ses, Inc. v. Scott, No WD-81-44 (Wood County, filed December 11, 1981).*

*Id.*


*Id.*

*Id.*

*34 Ohio St. 2d 120, 296 N.E.2d 544, 544 (1973).*

*Id. at 547.*

*Id. at 546.*

*36 Ohio App. 2d 139, 303 N.E.2d 892 (2d Dist. 1973).*
really specific clue to the identity of those sought to be sued." The court added that "Civil Rule 3(A) contemplates, as did R.C. 2305.17 that when an action is commenced it should be commenced against someone. When the city's action was dismissed from the law suit (because of sovereign immunity) the action had been commenced against no one." The court's conclusion in Vocke was that "[u]nless the action is against some such person, it has not been brought against anyone, and is therefore not actually begun at all." The defendant and the plaintiff are essential for commencement of the action.

Also, questions of existence arise in situations where an individual is deceased and consequently cannot be a defendant in the action. In Brinkley v. Neuling the court stated that "[i]t is elementary that one deceased cannot be a party to an action." This point was highlighted further in Chandler v. Dunlop when the court stated that since the defendant "was dead at the time, no action could have been commenced thereby against him and the writ was a nullity as against him." The court found that there could not have been an action.

Theoretically, the importance of defendant's existence for commencing the action was accepted law as early as 1900. But as late as 1978 in Barnhart v. Schultz appellees attempted unsuccessfully to amend the complaint with a Rule 15(C) amendment. In this case the complaint designated the sole defendant as one that was deceased at the time the complaint was filed. The court reiterated what it had stated in earlier cases that "there is no complaint against an existing party for the amended complaint to relate back to." Therefore, in Barnhart the Supreme Court reversed the Court of Appeals and upheld the trial court's dismissal of the action for lack of a defendant.

Id. at 895.
Id. at 896.
Id. at 896.
256 Wisc. 334, 41 N.W.2d 284, 284 (1950).
Id. at 285.
311 Mass. 1, 39 N.E.2d 969, 969 (1942).
Id. at 975.
Id.
Id. Also, Baker v. McKnight, No. OT-81-14 (Ohio County, filed January 15, 1982).
Ohio R. Civ. P. 15(C) states that:
whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him. . .

Id.
Id. In Barnhart the court specifically stated that:
we hold, therefore, that a complaint in negligence which designates as a sole defendant one who
Some of the difficult questions in the area of existence are what if plaintiff dies before defendant is served. What if defendant dies prior to being served? What if after the plaintiff dies, the defendant is successfully served? The courts have answered these questions only partially. In situations where the plaintiff does prior to the filing of the complaint or the defendant dies prior to being served, the courts view the action as a nullity. The action cannot be commenced. If the plaintiff dies subsequent to the filing of the complaint but prior to service, counsel can move to substitute the party plaintiff under Rule 25(A). This substitution is possible because the plaintiff has submitted to the court's jurisdiction by filing and is technically a party. As is seen in *Barnhart* this is not the case with the defendant because the defendant does not become a party until the court acquires jurisdiction over the person of the defendant. Still, the courts have not as yet clarified all of these situations.

Concomitant with plaintiff and defendant's existence are the additional Rule 3(A) unstated prerequisites involving plaintiff's capacity to sue and defendant's capacity to be sued. In *Barnhart v. Schultz*, the Ohio Supreme Court stated that "it is accepted law that an action may only be brought against a party who actually or legally exists and has the capacity to be sued." Although capacity was stated by *Barnhart* to be accepted law, the questions left unanswered by the case are what is capacity and what are the implications for commencement if capacity does not exist?

Capacity to sue or be sued is in some ways similar to existence and in other ways different. Capacity is similar to the concept of existence in that it is a necessary, unstated prerequisite for commencement; it differs from existence in that it is governed, in general, by the civil rules. Historically, a number of early cases tended to confuse one's capacity to sue or be sued with one's standing to sue as a real party in interest. Thus, in *Petitt v. Morton* the court states:

```
died after the cause of action accrued but before the complaint was filed has neither met the requirements of the applicable statute of limitations, nor commenced an action pursuant to Civ. R. 3(A) and such complaint may not be amended to substitute any administrator of the deceased defendant's estate for the original defendant after the limitations period has expired, even though service on the administrator is obtained within the one-year, post-filing period provided for in Civ. R. 3(A).
```

Id. at 592. Also, *Catchings v. Cleveland Public Schools*, No. 43730 (Cuyahoga County, filed April 1, 1982); *Dewey v. Prater*, No. L-81-169 (Lucas County, filed December 18, 1981); *Nissen v. Callahan*, No. 38132 (Cuyahoga County, filed January 11, 1979); *Little v. Little*, No. CA 6197 (Montgomery County, filed June 27, 1979); *Samstog v. McDonough*, 75 Ohio Op. 2d 354 (8th Dist. 1975).

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

Id. at 591.

In *Petitt v. Morton*, 28 Ohio App. 227, 162 N.E. 627, 627 (8th Dist. 1928) the specific details as to the probating of the earlier will were as follows:

```
In 1905, Milton Morton, the father of defendant, executed a will and testament, which is said to be the last will and testament of the decedent, Milton Morton, which was admitted to probate in due form in the same year.

It is claimed that this will is an instrument of no legal force and effect, because it was forged by the defendant and fraudulently probated by him. . . . It appears that earlier on the same day that this will was made, there was another will made which named as devisee a nephew of the decedent, the plaintiff in error, Morton Petitt, and it appears that the forgery was not discovered until years afterward. . . .
```

Id. at 627. The action in *Petitt* began after the statute of limitations had run for will probate. The issue
there can be no suit in law or equity if the plaintiff has no capacity to sue. That is determined by whether, in any manner, he has an interest in the subject-matter of the action, and in the case at bar and his interest must amount to an equitable or a legal ownership in some portion of the property. . . .

The plaintiff was not a real party in interest and had no interest in the subject matter of the action; therefore, he did not have "capacity to sue."

In time the two concepts, capacity and standing to sue, were separated and the term capacity was limited to disability. This distinction between standing to sue and capacity to sue or be sued is now reflected in Rule 17. Rule 17(A) treats standing to sue, while capacity to sue in Ohio is basically defined by Rule 17(B).

In Rule 17(B) the major disabilities relate to minors and incompetent persons. Each can sue or defend it appropriately represented by a next friend, a guardian, a guardian ad litem, or other fiduciary. If a minor or incompetent person is not represented in an action "the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent."

Although Rule 17(B) accounts for suits by or against minors and in competent persons, the concept of capacity to sue or be sued is not exhausted by a discussion of these two disabilities alone. Legal entities have more com-

was "that the plaintiff [had] no capacity to sue or to maintain his action because the unprobated will [had] never been admitted to probate under the statute, or otherwise, in the county of Cuyahoga, where the property is located." Id. at 627.

And in State v. City of Cleveland, 141 Ohio St. 518, 49 N.E.2d 175, 176 (1943) the court stated that the realtor was acting merely as agent for others in the purchase of water for property owners in the City of Cleveland; that he was reimbursed by those owners for sums paid by him for water, and that he has in fact no pecuniary interest in the water rates charged by or paid to the City of Cleveland. Generally, agents have no implied power to institute action even in respect to the subject matter of their agency.

Id.

Also, in Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533, 535 (1965) the court stated that "at common law, a married woman lacks capacity to sue or be sued in her own name. This rule has been changed by statute in Ohio. Sections 2307.09 and 2323.09, Revised Code; Damm v. Elyric Lodge No. 465, Benevolent Protective Order of Elks, 158 Ohio St. 107, 107 N.E.2d 337." Id.

"128 Ohio App. 227, 162 N.E. 627, 628 (8th Dist. 1928).

"129 Ohio R. Civ. P. 17(B), states that:

whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representatave may sue or defend on behalf of the minor or incompetent person. Subject to subdivision (C) of this rule, if a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.

Id.

In addition, OHIO R. Civ. P. 17(A) states that "every action shall be prosecuted in the name of the real party in interest." Id.

"130 Ohio R. Civ. P. 17(B).

"131 Id.
plex problems. A business entity doing business under a fictitious or trade name cannot commence an action in the state of Ohio until the entity has reported the use of the fictitious or trade name to the Secretary of State and complied with the requirements of Ohio Revised Code section 1329.01(C). In addition, partnerships that are using fictitious names must file a certificate naming the partners and providing their addresses. This latter certificate must be filed with the county recorder where the principal business office is located and where the business owns real property. Ohio Revised Code sections 1329.10(C), 1329.01(C) and 1777.02 define the requirements for corporation and partnership capacity, but the code sections do not explain the consequences if the corporation or partnership does not have capacity at the time an action is attempted to be commenced.

Millare, *Fictitious Name Reporting*, 51 O. Bar 1003, 1003 (1978) states that “A fictitious name is a business name used by someone which does not fully identify the owner-user, for example, Bill’s Market. The stated purpose of the code revision is to make it easier for the public to determine with whom it is doing business and should aid those having legal complaints in identifying the proper party to designate as the defendant when suit is brought.”

Ohio REV. CODE ANN. § 1329.10(C) states that:

no person doing business under a trade name or fictitious name shall commence or maintain an action in the trade name of fictitious name in any court in this state or on account of any contracts made or transactions had in the trade name or fictitious name until it has first complied with Section 1329.01 of the Revised Code and, if the person is a partnership, it has complied with Section 1777.02 of the Revised Code, but upon compliance, such an action may be commenced or maintained on any contracts and transactions entered into prior to compliance.

Id. at § 1329.02(C).

Ohio REV. CODE ANN. § 1329.01(C) states that:

any person who does business under a fictitious name, and who has not registered and does not wish to register the fictitious name as a trade name or who cannot do so because the name is not available for registration, shall report the use of the fictitious name to the secretary of state. The secretary of state shall prescribe the forum for the report, which shall include the name and address of the user, the nature of the business conducted, the exact form of the fictitious name used and, if the user is a general partnership, the names and residence addresses of all the partners and, if the user is a limited partnership, the name and residence address of the general partners. The secretary of state shall give information concerning the identity of the user to anyone who inquires concerning it.

All fictitious names in use at the time of the effective date of this section or for which use is commenced between the effective date and December 31, 1978, shall be reported to the secretary of state not later than January 1, 1979. Thereafter, all reports shall be made within thirty days after the date of the first use of the fictitious name.

It should be pointed out that fewer difficulties are encountered when the corporation or partnership that is using a trade or fictitious name is being sued. Ohio REV. CODE ANN. § 1329.10(C) states that “an action may be commenced or maintained against the user of a trade name or fictitious name whether or not the name has been registered or reported in compliance with Section 1329.01 of the Revised Code.”

Although this section permits a defendant that is lacking capacity to sue, to be sued a question unanswered still is the applicability of this section in situations where the defendant may counterclaim and is essentially a plaintiff. Can the counterclaim be barred because of a lacking of capacity by a defendant?

Ohio REV. CODE ANN. § 1777.02 states that:

every partnership transacting business in this state under a fictitious name, or under a designation not showing the names of the persons interested as partners therein, must file, with the clerk of the court of common pleas of the county in which its principal office or place of business is situated and of each county in which it owns real property, a certificate to be indexed by him, stating the names in full of all the members of the partnership and their places of residence. The county auditor shall not transfer and the county recorder shall not record any conveyance of real property to or from any such partnership, unless such instrument is endorsed by the clerk of the court of common pleas showing that such partnership has filed the certificate required by this section.
What if one of these legal entities lacks the capacity to sue at the time when it files the complaint, but acquires that capacity at some later date? Does a cure to lack of capacity relate back to the date of filing for commencement purposes, or does commencement occur as of the date of the cure? If the capacity cure does not relate back, then the running of the statute of limitations for a particular action may prevent a timely commencement of the action even though the complaint was filed before the statute ran. In addition, since lack of capacity is a quasi affirmative defense under Rule 9(A), does a waiver of the defense result in commencement? If it does waive the defense, is this waiver effective at the date on which the complaint was filed or at the date on which the defense is waived? And, how specific must the challenge to capacity be?

The case law, although split, appears to favor a capacity defect as being a procedural defect and not a substantive one. The court has maintained a liberal position in correcting a defect in capacity, whereas existence problems render the case a nullity.

In *Citizen's Loan and Savings Ass'n v. Krickenberger* the court held that the curing of capacity could occur after the action had commenced. Although the defect in capacity concerned a partnership’s necessity of filing the partners names with the clerk of the court to have the statutory capacity to sue, the court stated that the cure could occur after commencement. In this case the court used “commencement” in a nontechnical sense rather than in the technical sense of Rule 3(A). Therefore, the court indicated that a cure to capacity can occur after “commencement,” meaning the beginning of proceedings. Still, the court provided no clue as to whether the cure related back to the proceedings that occurred prior to the curing of the defect. It seems

1246 Ohio App. 228, 188 N.E. 396 (2nd Dist. 1932). On appeal in Goubeaux v. Krinkerberger, 126 Ohio St. 302, 185 N.E. 201 (1933) the lower court’s holding were affirmed holding that the organization was a partnership.

"In *Citizen's Loan and Savings Ass'n v. Krickenberger*, 46 Ohio App. 228, 118 N.E. 396 (2d Dist. 1932) the court stated that:

the plaintiff, therefore, not being an individual, and admittedly not being a corporation, and being an association for profit, we are of the opinion that the only status it could assume would be that of a partnership. We are also of opinion that under Section 11260 of the General Code the plaintiff as such partnership may maintain this action, and that a compliance with Section 8104, General Code, may be had by the plaintiff after commencement of the action.

*Id.* at 398.

*Id.* at 396-98. In Goubeaux v. Krickenberger 126 Ohio St. 302, 185 N.E. 201, 202 (1933) the court affirmed the lower court’s decision in Citizen’s. The court stated that “the common pleas court held that such association was a partnership and required the plaintiff association to cause a list of its depositors as of the time of the filing of the suit to be filed in the office of the clerk of the courts before it should become entitled to any judgment or decree in the case.” *Id.* And the court added that “an appeal to the Court of Appeals, which also held that the association was a partnership and required that the association should cause the list of its depositors or members to be filed with the clerk preliminary to the recovery of any judgment or decree in this cause against the original defendants.” *Id.* In Cobble v. Farmer’s Bank, 63 Ohio St. 528, 59 N.E. 221 (1900) the Ohio Supreme Court stated that “the judgment entered was no judgment, as there was no party to the suit in whose favor a valid judgment could be rendered.” *Id.* at 223. In the Cobble case creditors of the deceased claimed that a judgment on a cognovit note was invalid since the partnership involved in the action had not appropriately filed a new certificate with the clerk of the court providing the clerk with the changes in the names of the firm members. Without the filing of the certificate, the partnership did not legally exist and the judgment on the note was reversed, since the prior judgment could not be entered for a nonexistent party. *Id.*
reasonable to assume that the cure did relate back since the court did not invalidate any of the prior proceedings. This issue remains unclear in all of the cases and can pose an important issue in statute of limitations situations.

In addition, *Ritzler v. Eckleberry*, held that lack of capacity by the defendant, a minor, could be cured "after the evidence [had] been taken and both parties rested and before a verdict, finding or judgment [had] been entered." The court stated that lacking any "showing that the interest of the minor was harmed or damaged by the delay" the cure for the defect in capacity would be allowed. Again, the case does not discuss how the cure of the defect in capacity affected the issue of commencement. A reasonable interpretation would be that the cure did relate back to cover all of the proceedings, since none of the proceedings were invalidated.

Although the above cases seem to indicate that a capacity defect can be cured subsequent to the filing of a complaint and even at the trial, the rules also point out that a challenge to capacity will be waived if not raised by the parties. Specifically, Rule 9(A) states that:

> It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly with the pleader’s knowledge.

The rule is limited further by Rule 12(H) which states that all defenses and objections are waived unless presented by motion, responsive pleading or amendment. In fact in *Canterbury v. Pennsylvania Rd. Co.*, lack of capacity was deemed to be waived since it was not timely raised by appropriate defense. And in *Gove Associates, Inc. v. Thomas* the court was even more explicit about the nature of the response challenging capacity. The court stated that "the complaint argues that plaintiff never proved its corporate capacity to make a contract or sue. The pleading burden was on the defendant to deny the plaintiff’s capacity by specific negative averment. Civ.R. 9(B). The answer contained...
only a general denial. Consequently this objection was waived. Civ.R. 12(H).”

However, the courts are not clear as to whether the waiver is effective on the date that the defense was raised or effective as to the date the complaint was filed. When the defense of lack of capacity is asserted the courts have been clear in stating that the defense must be specific, and it cannot be employed by a general denial.

One of the unanswered questions is how capacity relates to situations where the statute of limitations is involved. It is reasonable to assume that the cure to a defect in capacity relates back, given the courts position of considering capacity as a procedural defect and leaving the proceedings to be unaffected in cases where a cure to capacity has taken place. It is probably unlikely that a cure in statute of limitations situations would not relate back, but this point remains an issue to be decided by the courts. Additional support for the relating back of the cure is found in Rule 17(A) that specifies a relation back in situations involving real parties in interest. Since capacity is discussed in subdivision (B) of the same rule it is reasonable to assume a similar relation back when a defect in capacity occurs. When the issue of capacity and the relation back factor are interposed with the statute of limitations problems the issue of the curing of capacity becomes questionable. The courts have not addressed this issue yet.

V. FAILURE OF COMMENCEMENT: THE FORGOTTEN DEFENSE

During the one year period, the one year grace period in which the complainant is seeking to achieve service to commence the action, we refer to the status of the lawsuit as one “attempted to be commenced.” By definition

---

138Id. In Walsh v. Thomas’ Sons, 91 Ohio St. 211 (7th Dist. 1915) the defendant challenged the plaintiff partnership as lacking capacity because the issue of capacity was not clearly incorporated in plaintiff’s complaint. The court stated that “this section of the statute [referring to § 8108 of the GENERAL CODE superseded by OHIO REV. CODE ANN. § 1777.02] does not, in terms, require that the petition [complaint] must allege compliance with the registration acts.” Id. at 213. The court’s position in this early case was that capacity did not require a specific averment in the complaint, although a defense of lack of capacity could defeat the action. The court added that “noncompliance with the provisions relating to registration is a defensive matter, may be interposed as such, and will defeat the action unless compliance with § 8099, GENERAL CODE, be made during the progress of the cause. In this case, at the trial, the plaintiff did in fact offer proof of proper registration.” Id. at 214.

139An action attempted to be commenced refers to that period between the filing of the complaint and the achieving of service. Under the old Code, the sixty days attempt to commence period was equivalent to commencement provided plaintiff diligently endeavored to achieve service and it was achieved within the sixty days. Without service the cause was not commenced. Today, the provisions are the same except that the attempt to commence period is one year. During this attempt to commence period several situations may occur. For example, if the statute of limitations runs the action will not be commenced unless the conditions of OHIO R. CIV. P. 15(C) amendment are met. Obviously the statute of limitations can bar the action if the statute runs prior to the filing of the complaint. Likewise, if the statute of limitations runs subsequently to the filing of the complaint and service is not achieved within one year following the filing of the complaint, the statute can bar the action, unless conditions are found to meet Rule 15(C). Again, it should be noted that the statute of limitations defense will bar the action if timely asserted by the respondent, otherwise it will be waived.

This waiver feature was explicitly pointed out in Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668, 671 (1974) which stated that: a clear distinction exists in the Civil Rules between the affirmative defense of the bar of the statute of limitations pursuant to Civ. R. 8(C), and a Civ. R. 12(b)(6) defense. The purpose behind the
of the rule, the claim is not an action during this "attempt to commence period," it is a claim attempting to become an action. This prolonged period of existence for the lawsuit does not continue ad infinitum. It will be ended in one of two ways, either by valid and effective service or by the running of the one year period of time. If valid and effective service is achieved the lawsuit is commenced, but if service is not achieved we have a different situation — one that is more perplexing and more difficult to deal with.

What is the situation if service is not achieved within the one year period specified by the rule? The rule defines the requirements for commencement but it does not explicitly delineate the consequences if the requirements for commencement are not met. Logically, we can conclude that if service culminates in a commencement of the action, then a lack of service must culminate in a noncommencement or a "failure of commencement" of the law suit. The courts have reached a similar conclusion. For example, in *Kossuth v. Bear* the court stated that "for lack of service, no case came into existence." Therefore, if the lawsuit was not commenced it must be concluded that it did not come into existence. Therefore, a failure to meet the jurisdictional requirements set forth in Rule 3(A) must lead to a "failure to commence" situation.

In most cases, the circumstances that give rise to a failure to commence are the very same circumstances that give rise to the defense of lack of jurisdiction.
tion. In both situations the respondent is either served an invalid summons, is served ineffectively or, perhaps, is not served a summons at all. If the respondent is not served, or is invalidly or ineffectively served, the court does not have jurisdiction over the person of the defendant and likewise the law suit is not commenced. This similarity of the circumstances leads to a natural tendency to use similar responses in addressing either of the situations. But respondent’s decision to respond with the most apparent defense may be a fatal flaw.

The defense of lack of jurisdiction over the person of the defendant is easily recognizable, is specified by the rules and is well known. In addition, it appears logically applicable to the situation because of the similarity of circumstances. Since lack of jurisdiction is a visible rules defense, as Rule 12(B), and the defense of failure to commence is not, the latter defense, failure to commence, is overshadowed by Rule 12(B)(2) and becomes the “forgotten defense.” But lack of jurisdiction, Rule 12(B)(2), is not the most effective defense for a failure to commence situation.

For example, when the Rule 12(B)(2) defense of lack of jurisdiction over the person of the defendant is used it is asserted mainly by a motion to dismiss which in turn culminates in the involuntary dismissal specified by Rule 41(B)(4). But to dismiss the case the court must act to decide the motion to dismiss, and in acting the court is providing evidence of the existence of the law suite. If the lawsuit exists it obviously has been commenced. The responses

---

144Supra note 228. Two recent cases that have held otherwise are St. Thomas Hospital v. Beal, No. 10078 (Summit County, filed July 22, 1981), reprinted in 54 OHIO BAR 2182 (1982):
[i]he issue in this case is whether Civ. R. 3(A) requires that a complaint be dismissed when service is not obtained upon the defendant within one year of filing. ‘If service is obtained within one year of filing, then that case is commenced on the date of filing for purposes of the statute of limitations. However, where service is obtained more than one year after the filing of the complaint, then the case is deems commenced on the date of service.’ As long as the case is commenced within the applicable statute of limitations it may not be dismissed.

Id. 2182.

[p]laintiffs appeal from the judgement dismissing their complaint for failure to obtain service within one year after the filing of the complaint, held: reversed. Plaintiffs timely filed the praecipe for service, but the clerk delay issuing a summons for service. ‘[A] cause of action will not be barred by failure to obtain service within the time prescribed by R.C. 2305.17 and Civ. R. 3(A) “when such failure is caused by unreasonable delay attributable to the clerk of courts or the court itself.”

Id. 131.

144OHIO R. CIV. P. 12(B)(2).

144Browne, Ohio Civil Rule 8(C) and Related Rules, 27 CLEVELAND STATE L. REV. 331, 362-63 (1978).

14Id. at 364, n.112.

144OHIO R. CIV. P. 41(B)(4) states that “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.”

And, in Jurko v. Jobs Europe Agency, 40 Ohio App. 2d 79, 334 N.E.2d 478, 483 (8th Dist. 1975) the court stated that “a successful Rule 12(B)(2) motion will normally result in an order dismissing the action, but should not prejudice the plaintiff’s action on the merits and his right to either seek leave to amend his complaint or to file another complaint.” Id.

14In Siegfried v. Railroad Co., 50 Ohio St. 294, 34 N.E. 331 (1893) the court stated that the issue concerned whether or not plaintiff’s action failed. If it failed he invoked the one year savings clause and if he did
of the defendant and the court present interesting implications for the parties that are attempting to commence this action. The respondent's Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person of the defendant waives the defense of failure to commence. There can be no failure to commence when one is requesting the court to dismiss an action. Therefore, the respondent, in moving to dismiss waives the failure to commence and is barred from any further consideration of using the failure to commence defense. In addition, the court's action on the motion to dismiss is an involuntary dismissal, and is explicitly defined by Rule 41(B)(4) as a "failure otherwise than on the merits." Therefore, the dismissal itself further substantiates the court's recognition of the existence of the action. Since it is illogical to assume that a non-commenced lawsuit can be dismissed, it must be concluded to have been commenced. Given that the dismissal embellishes the law suit with existence, an additional set of circumstances develops as a consequence of the dismissal.

Under the provisions of the Savings Statute, the compliant will be granted an additional year beyond the date of the court's dismissal, to acquire jurisdiction over the person of the defendant. The grace period of Ohio Revised Code section 2305.19 is designed as a remedial provision to provide a diligent complainant with a one year grace period beyond the statute of limitations that may have run for an action so as to recommence the action. Respondent's

not fail, further action was barred. A voluntary dismissal is not a failure. But the court added that "to fail implied 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." Id. at 332. In addition, the court stated that "...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... (a) dismissal by the plaintiff involves no action of the court." Id at 332.

It is reasonable to apply OHIO R. CIV. P. 12(B)(2) to the common law defense of failure to commence when speaking of a waiver of these defenses. For example, in Bogar v. Ujlaki, 4 F.R.D. 352, 353 (Civ. An. No. 3050, District Court, W.D. Pennsylvania) (1945) the court stated that:

in his original answer, defendant moved to dismiss the complaint without mentioning the defense set out (later) in his amendment. He voluntarily appeared, answered to the merits, and not until five months later (and then without leave of court) did he file his objection to the service of process. By his original answer and delay in amendment, he had waived his right to assert lack of jurisdiction (or in our case failure to commence).

It has long been recognized, however, that the filing of an answer to the merits involves an appearance in the action for all purposes...

Id.

ID. OHIO R. CIV. P. 41(B)(4). Also, Dicello v. Palmer, No. 79AP-402 (Franklin County, filed February 12, 1980).

OHIO REV. CODE ANN., § 2309.19. Also, In The Matter of Johnson, No. 80AP-584 (Franklin County, filed February 24, 1981).

Id.

In Bush v. Cole, 1 Ohio App. 269, 271 (11th Dist. 1913) the court stated that:

this question was squarely before the supreme court of Kansas under a statute like our own in the case of Denton v. Atchison, 76 Kans. 89. The court in the opinion says 'the general periods of limitations are not changed by this provision, but it is intended to give a party who within the proper time brought an action which was disposed of otherwise than upon the merits after the statute of limitations had run a year of grace in which to reinstate his case and obtain a determination upon the merits. It is a substitute for the common law rule of journeys account, in which a plaintiff whose writ was abated for some matter of form which did not go to the merits might have a new writ within a reasonable time, computed by the number of days which the plaintiff must spend in journeying to reach the court. Under the rule of our statute, if the dismissal occurs after the
selection of the Rule 12(B)(2) defense of lack of jurisdiction has set into motion the crucial vehicle for the complainant to resurface the law suit after the dismissal, and to be granted an extra year to commence the action.

Still, knowing the above problems that can arise from incorrectly utilizing the Rule 12(B)(2) motion of lack of jurisdiction, does not provide the respondent with a "model" for responding correctly to the failure to commence situation. How can the defendant respond and avoid the consequences of the Rule 41(B)(4) dismissal and the Savings Statute?155

The "model" for responding is found in the effective use of the common law defense of failure to commence, the forgotten defense. But the effective use of this defense is dependent on other factors.156 The failure to commence situation will not arise until the Rule 3(A) year has run, unless the defect is incurable and the court will never acquire jurisdiction over the person of the defendant.157 Since the defense cannot arise until the year has ended, it must be used in conjunction with other, then available defenses.158 But how is the defense of failure to commence used with other defenses?

The form of the "model" response is to plead a failure to commence defense as an affirmative defense under the provisions of Rule 8(C).159 Although failure to commence is not specifically identified as an affirmative defense it is logical to conclude that is must be one since it cannot be an implied from a mere denial of the claim.160 If pleaded as an affirmative defense it is imperative to plead it with the other affirmative defenses then available.161 Therefore, the defense of failure to commence must be pleaded with the Rule 12(B)(2) defense of lack of jurisdiction and if appropriate the Rule 12(B)(4) defense of insufficiency of process and the 12(B)(5) defense of insufficiency of service of process.162

---

Id. at 171-72 (affirmed 91 Ohio St. 369, 110 N.E. 1056 (1914)).
This point is made also in Browne, Ohio Civil Rule 8(C) and Related Rules, 27 CLEVELAND STATE L. REV. 336 n.114 (1978).
111Ohio Rev. Code Ann. § 2305.19. Of course, this assumes that the respondent choses to answer and not to use an objection or a motion.
112Browne, Ohio Civil Rule 8(C) and Related Rules, 27 CLEVELAND STATE L. REV. 361-66 (1978).
113Id.
114Ohio R. Civ. P. 12(G) states that:
   a party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.
115Ohio R. Civ. P. 8(C).
116It cannot be a denial since it was not a claim asserted by the complainant. Ohio R. Civ. P. 8(B).
117Ohio R. Civ. P. 12(G).
118Ohio R. Civ. P. 12(H).
Therefore, the responsive pleading will include the Rule 12(B)(2) defense of lack of jurisdiction over the person of the defendant, the common law defense of failure of commencement, and the Rule 12(B)(4) defense of insufficiency of process or the Rule 12(B)(5) defense of insufficiency of service of process if applicable.

But the pleading of these defenses is only the first step in the implementation of the "model" response. When all pleadings have been entered, and when the year for acquiring jurisdiction has expired the second step to be taken by the respondent is to move for a preliminary hearing under Rule 12(D). Once the motion is heard and judgment is rendered in favor of the defendant, finding a lack of jurisdiction, the respondent may then move to strike the complaint from the files for failure to commence. This latter step is crucial and easily overlooked. But if the respondent uses a motion to strike the complaint instead of the motion to dismiss this separate motion has more favorable consequences for the respondents.

The motion to strike the complaint from the files for failure to commence does exactly what it purports to do. It strikes the complaint from the files, as if it did not exist. And, if the lawsuit did not exist when the action is terminated and the statute of limitations has run for that particular action, any further action is effectively barred. Since the complaint is stricken from the files it is not a dismissal and, therefore, if it is not a dismissal it cannot be a failure otherwise than on the merits and, consequently, it cannot invoke the Savings Statute.

14Ohio R. Civ. P. 12(D) states that "the defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party." Id.

15Id.

16Ohio R. Civ. Pro. Staff Note to Rule 12. Historically, the 1853 Code of Civil Procedure did not include the methods for asserting the defense of lack of jurisdiction of the person. Therefore, the profession itself invented "the motion to quash or set aside summons, service or return as the normal methods for asserting these defenses." Id. at 66. But it also appears probable that the framers of the 1853 Code did intend that all defenses were to be asserted in the answer, unless raised by demurrer. Id. Therefore, a respondent with a decisive defense would most likely not desire to defend by an answer waiting until the trial to prove the defense, but would prefer to utilize an unauthorized procedure, such as, a motion to dismiss, or a motion to strike for failure to commence. Id. This unauthorized approach would enable the defendant to reach a favorable judgment before the trial. Id. It is logical to conclude that the common law motion to strike for failure to commence was derived because of similar conditions.

17Browne, Ohio Civil Rule 8(C) and Related Rules, 27 CLEVELAND STATE L. REV. 331, 360-66 (1978).

18In Mason v. Water, 6 Ohio St. 2d 212, 217 N.E.2d 213, 213 (1966) the plaintiff served the defendant in the wrong county. "Defendant then filed an answer to plaintiff's petition, in which he sets forth, as a first defense, that the court lacked jurisdiction of his person and, as a second defense, that the action was not brought within the time limited for the commencement of such actions and was, therefore barred." Id. at 215. The trial court held for the plaintiff and the defendant appealed. On appeal the court stated that: Section 2305.17 (Rule 3(A)) provides that an action shall be deemed commenced on the date of the summons which is served on defendant. This contemplates an effective service of summons, which, in this case, was not obtained until September 26, 1963 (accident arose February 22, 1959 and it was a personal injury subject to a two-year statute of limitations). Since there was no effective service prior to that date, no action was commenced, nor was there an attempt to commence an action equivalent to its commencement within the meaning of Section 2305.17. Id. at 216. The court added that "from a reading of that statute [2305.19] it appears that in order for an action to fail otherwise than on the merits, that action must first be commenced or attempted to be commenced."
So the motion to strike the complaint from the files for failure to commence becomes the more favorable defense it utilized effectively. But the realities of its presence as a common law defense, rather than a rules defense, makes it likely that it will continue to be forgotten.

VI. CONCLUSION

Ohio's Rule 3(A), although simply stated in one brief sentence, is far from simple in application. An understanding of the historical context of Rule 3(A) and the language of the rule provide the necessary basis for an analysis and interpretation of the major problems related to Rule 3(A). The case law that is related to Rule 3(A) is complex and confusing unless it is placed in the historical milieu of the rule. Likewise, the interpretation of the rule extends beyond the mere language of the rule, and it is the case law as well as the civil rules that provide the actual interpretation for the rule. An understanding of this framework provided by the history and the interpretations of the language of the rule must precede any meaningful analysis and subsequent understanding of Rule 3(A).

Beyond the problems inherent in the history and the language of the rule are the unstated, major problems of existence and capacity that must be considered when using the rule since their absence can be fatal for the commencement of the lawsuit. And, likewise, the forgotten common law defense of failure to commence is truly forgotten and, yet, it presents the most effective defense to be utilized with Rule 3(A). The is time to reexamine the simplicity of the language of Rule 3(A) to determine if the language facilitates or hinders the judicial process.

Id.

In Hoehn v. Empire Steel Co., 172 Ohio St. 285, 175 N.E.2d 172, 172 (1961) the court stated that the action was never commenced "to the point where the court had any jurisdiction over the defendant. Therefore, the plaintiff cannot be said to have failed otherwise than upon the merits." Id.

And, in Kossuth v. Bear, 161 Ohio St. 378, 119 N.E.2d 285, 285 (1954) the court stated that:

as to the petition which was filed in Lorain county on May 29, 1950 [one day before the expiration of two years from the date of the accident], there was no service of summons. Therfore, it cannot be said that an action was even deemed to be commenced in Lorain county. In other words, notwithstanding the filing of the petition and issuance of summons, no case ever mature in Lorain county to the point where the court had any jurisdiction over the defendant or had any power to make any order based upon the allegations of the petitions so filed. There was no pending case to be 'dismissed.'

Id. at 288.

The court explained that "what the court did was to strike the petition from the files." Id. And, the court added that "it seems axiomatic that a nonexistent case can not be dismissed." Id.