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THE OHIO RULES OF CIVIL PROCEDURE AND THEIR EFFECT ON REAL PROPERTY TITLES

by Alvin W. Lasher*

I. Background—Scope

THE REVOLUTION IS HERE! It has come quietly, almost without a murmur of opposition or civil discord. Indeed, many who will be most profoundly affected by it were not—are not even now, perhaps—aware of its coming. But it is here, nevertheless. The revolution in question, of course, relates not to some massive proletarian uprising which many today profess to see upon the horizon, but to the revolution in Ohio procedural law which became effective on July 1, 1970. For a revolution indeed it is, bringing changes so sweeping in their nature that the procedural law, both statutory and judge-made, which was in effect in Ohio on June 30, 1970 is now largely of interest only to legal historians and other collectors of the relics of a bygone age (including those associated with the land title industry). The practicing attorney must immediately bring himself abreast of this radical turn of events, since the new Ohio Rules of Civil Procedure apply to all civil cases in process on July 1 as well as to those commenced on or after that date.¹

It all began in 1968 with the adoption by the Ohio General Assembly and the electorate of the so-called Modern Courts Amendment to the Ohio Constitution under the sponsorship of the Ohio State Bar Association.² Among other things, this Amendment transferred the law-making power with respect to procedural matters from the General Assembly, where it had traditionally resided,³ to the Supreme Court of Ohio, leaving the

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1 Ohio Civ. Rule 86 (hereinafter cited as “Rule [s]”).

2 Modern Courts Proposal Submitted To Ohio General Assembly, 40 Ohio Bar 327 (1967); Modern Courts Amendment To Be On Ballot, 41 Ohio Bar 313 (1968).

3 Ohio courts have traditionally deferred to the legislature on questions of procedural law, at least since the adoption of the Field Code in 1853, and have apparently never claimed full rule-making power. See, Comment, The Rule-Making Power of Ohio Courts, 1 Ohio St. L. J. 123 (1935).
legislature with only a veto power over the acts of the Supreme Court and totally eliminating the Governor from this segment of the legislative process.\textsuperscript{4} The Supreme Court, with the aid of a specially appointed Rules Advisory Committee of the Ohio Judicial Conference, then spent the next two years developing the Ohio Rules of Civil Procedure in the form in which they were finally adopted by the acquiescence of the 108th General Assembly when it adjourned its second session \textit{sine die} without having taken affirmative action to disapprove them.

The Rules Advisory Committee submitted its initial draft of the proposed Civil Rules to the Supreme Court in late 1968. After extensive changes had been made by the Court, and by the Committee at the Court's behest, the Rules were filed by the Court with the General Assembly on January 13, 1970. Beginning in late 1969, a Joint Committee of the House and Senate of the legislature held a series of hearings on the Rules, and at the conclusion of these hearings, relayed certain suggestions for further changes to the Court. Some, but not all, of these suggested changes, together with a few from other sources, were embodied in a group of amendments to the Rules which the court submitted to the legislature on April 30, 1970, one day before the constitutional deadline. Several in number, these amendments were mostly of a technical nature and made very few changes in the basic nature of the Rules as originally filed with the legislature.

Before adjourning, the General Assembly enacted legislation to repeal some 350 sections of the Ohio Revised Code, effective July 1, 1971, which it deemed to be clearly in conflict with or pre-empted by the Rules.\textsuperscript{5} This was unnecessary from a legal standpoint, since under the provisions of the Modern Courts Amendment the Rules automatically supersede all conflicting statutes, but it was apparently hoped that it would help to clear away some of the confusion (which will be discussed later) as to when one is to resort to the Rules and when to the statutes for guidance on certain points of adjective law in certain fields. Un-

\textsuperscript{4} Ohio Const. art. IV, § 5 (B).

\textsuperscript{5} Ohio Acts 1970, No. 489 (Amend. H. B. 1201) eff. Sept. 16, 1970 (hereinafter cited as "Amend. H. B. 1201"). The repealing provisions of this Act are not absolute until July 1, 1971. Until that date, the enactment of the law is stated to be prima facie evidence that the statutes listed therein are in conflict with the Civil Rules. The failure to include a particular statute in the Act is declared to be no evidence as to its status, one way or the other. See Puckett, \textit{Effect of the Ohio Rules of Civil Procedure on Existing Statutes}, 43 Ohio Bar 835 (1970) for a good explanation of this Act.
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fortunately, this legislation was not as thorough as it could have been, and many procedural statutes which have either clearly been or should have been superseded by the Rules still remain on the books. Conversely, a few statutes were repealed which should not have been.

Thus has ended the 117-year reign in Ohio of the Field Code and related procedural reforms of the past century. When the Court has developed rules relating to appellate and criminal procedure the revolution will be complete. But what manner of thing is it that has been wrought, how will it affect the day-to-day work of the real property practitioner and the title examiner, and will it be a help or a hindrance from their perspective? It is the task of this article to attempt some answers to such questions, however tentative or incomplete those answers must of necessity be at this early period in the operation of the Rules. Only those aspects of the Rules which bear most directly upon the work of the typical real estate lawyer, such as venue and service of process, and to some extent, pleading, parties and judgments, will be examined in detail. Those Rules relating to discovery proceedings and trial practice in civil cases (which constitute a large share of the text of the Rules) will not be discussed, since they have but a remote bearing upon the usual concern of the title attorney, nor will any comments be made concerning the overriding goals and purposes of the Rules. What has been done and its practical consequences, rather than its social or jurisprudential significance, will be the main thrust of this article.

Contrary to a somewhat widespread impression, the Ohio Supreme Court has not simply adopted the Federal Rules of Civil Procedure. The numbering system and the underlying philosophy of the Ohio Rules are similar to the Federal Rules, as are many of their specific provisions, and in isolated instances the text is identical, word-for-word, with the Federal counterpart. But to carry the parallel any further than that would be highly misleading. Some things have been borrowed from prior Ohio procedural statutes and a few from the procedural rules of other states, but much is quite new. Indeed, almost everything in the Ohio Rules which is of crucial concern to the title examiner is without exact precedent in pre-existing Ohio law, in the Federal Rules or in similar Rules adopted by many of our sister states. To a considerable extent Ohio has gone its own way, clinging but tenuously to its own past or to the example of other jurisdictions.
This will be seen most clearly with regard to the new rules concerning venue and service of process to which we shall first turn our attention.

II. Venue

The Ohio Civil Rules have effectively eliminated all jurisdictional aspects of venue. The central idea behind Rule 3, the venue section of the Rules, is that venue is mostly a matter of convenience to the litigants and, to a lesser degree, to the courts. Not only can a judgment not be collaterally attacked on the ground of improper venue, it cannot be attacked directly unless the issue of improper venue is properly raised by motion or pleading under Rule 12 prior to the expiration of the time for amendment of pleadings as a matter of right under Rule 15. This is true in all circumstances and in all types of cases. Thus, even in "local" actions, venue may now be laid by the mutual consent, ignorance or neglect of the parties or their attorneys. The court can order a change of venue sua sponte only if the defendant has made no appearance or if it concludes that a fair trial cannot be had in the original venue.

Even if venue is improperly laid and the issue is timely and properly brought to the attention of the court, the court will simply transfer the action to a proper venue, the only penalty to the plaintiff being the court costs and reasonable attorney fees chargeable to his failure to bring the action in the proper forum initially. When service has been had on the defendant and the action is later held to have been brought in an improper venue, it will not be dismissed, but transferred, and additional service on the defendant will not be required after the transfer. If the defendant is in default of answer, he must be notified of the change of venue by the clerk of the court to which the action has

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6 This statement is not meant to imply that Ohio has adopted a forum non convivis concept in connection with the new rules relating to venue. This was proposed in a law review article, published shortly before the adoption of the Modern Courts Amendment, which seems to have had considerable influence on the work of the Rules Advisory Committee. Miller, Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of Ohio Statutes, 29 Ohio St. L. J. 116 (1968). Rule 3 as adopted, however, gives Ohio courts no power to transfer cases to another venue solely on grounds of convenience.

7 Rule 3 (G).

8 Rules 12 (B), 12 (G) and 12 (H).

9 Rules 3 (C) (3) and 3 (C) (4).

10 Rule 3 (C) (2).
been transferred, but this merely sets a new answer day and is in no way jurisdictional.\textsuperscript{11}

The notion that venue is basically a matter of convenience has led the Court even further. Under the prior statutory law, which is now a dead letter to nearly everyone except title men, almost every type of action involving title to real estate had to be brought in the county in which the real estate was situated.\textsuperscript{12}

While the former venue provisions were probably motivated in large part by the concept of local vis-à-vis transitory actions which had its roots in feudal law, they had the distinct advantage from the point of view of the title attorney of insuring that most of the relevant records pertaining to court proceedings affecting real estate titles were kept in the same county where the rest of the title records were kept. They were thus an important adjunct to the recording statutes. The one notable exception to the former venue rules relating to real estate actions concerned probate land sale proceedings, which under Ohio Revised Code Section 2127.09, could also be, and usually were, brought in the county in which the fiduciary was appointed. But if this happened to be a county other than the one where the land was situated, the statute required that a complete transcript of the proceedings be later filed in the county where the land was located.\textsuperscript{13} Now we suddenly find that under Civil Rule 3, any real estate action may be brought not only in the county where the land is, but also in any other county in the state in which, under the facts of the particular case, venue would otherwise

\textsuperscript{11} Rule 3 (C)(3).

\textsuperscript{12} See, e.g., Ohio Rev. Code § 2307.32 (repealed eff. Jul. 1, 1971). (Sections of the Ohio Revised Code repealed as of July 1, 1971 by Amend. H. B. 1201 will hereinafter be indicated as having simply been repealed without giving the effective date of such repeal.)

\textsuperscript{13} There were, of course, some other minor exceptions to the general rule. See, e.g., Ohio Rev. Code §§ 2307.33-.34 (repealed); Gustafson v. Buckley, 161 Ohio St. 160, 118 N.E. 2d 403 (1954). See Ohio Rev. Code § 2703.27 as to how the resulting records problem was partially overcome, and note its similarity to the corresponding provisions of Rule 3 (F). This latter code section has not been repealed, but its requirement that a certified copy of the judgment be filed with the county recorder in the situs county is almost certainly in conflict with Rule 3 (F) which requires that a "certificate of the judgment" be filed with the appropriate clerk of court. Out-of-county divorces are, of course, a perennial problem to the title examiner, but this is unavoidable. Ohio Rev. Code § 5301.39 provides a means whereby this problem may be partially solved in some cases. The administration of decedents' estates elsewhere than in the county where the real estate is situated may leave gaps in the records of the situs county, but there are ample statutory provisions for filling these gaps. See Ohio Rev. Code §§ 2107.21, 2129.01-.02 and 2129.05-.07.
be proper under the Rules, such as, in the county in which the defendant resides or has his principal place of business, in the county in which the plaintiff resides if the defendant is not an Ohio resident, in the county in which the defendant conducted activity which gave rise to the claim for relief, etc. This is expressly sanctioned by the Rules and is in addition to the fact noted above that venue in real estate actions, as in all other actions, may now sometimes be irrevocably laid not by the venue rules per se, but by agreement of the parties or by mere accident.

The abolition of the traditional distinction between local and transitory actions seems certain to produce practical results which tradition-minded real estate lawyers will find startling. It does not take much imagination to foresee, for example, that if a lender holds a delinquent mortgage on property in another county and his defaulting mortgagor has moved to the county where the lender is located, or out of the state, he may well choose to bring his foreclosure in the county with the less congested court docket, or where it will be most convenient for him. It takes considerably more imagination, however, to envision the hardships this state of affairs may impose on the already overburdened title attorney and how those hardships are to be mitigated. Let us see how the title records problem has been handled under the Rules.

Rule 3 (F) provides that when an action affecting the title to or possession of real property is commenced in a county other than the county where the land is situated, a certified copy of the complaint (petition) must be filed by the plaintiff with "the clerk of the court" in the county in which the real estate is located. The rule further provides that unless and until the plaintiff does this, "third persons will not be charged with notice of the pendency of the action." Thus for the first time in Ohio, we now have something akin to a "lis pendens notice" applying to real estate actions generally, which has long been standard in a number of other states, except that we are only required to file it in those cases in which the action is brought in a county other than the one in which the land is situated, rather than in all cases involving title to real property as in most other jurisdictions. We have, however, long had a lis pendens notice statute applying generally to all actions affecting registered land. It should also be paren-

14 Rule 3 (B).
15 Ohio Rev. Code § 5309.58. Due to the provisions of Rule 1 (C) discussed infra, this statute undoubtedly survives the Rules.
thetically noted that Rule 3 (F) has only an incidental relationship to the general lis pendens statute, which provides, in effect, that third persons cannot acquire an interest in or a lien upon the property which is the subject matter of the action after service of summons is had upon the property owner. Rule 3 (F) now simply imposes the further requirement that notice be filed in the situs county in those cases in which plaintiff chooses to bring the action in another county. This Rule further provides that after final judgment the clerk of the court which rendered the judgment shall forward a “certificate of the judgment” to the “corresponding court” of the county where the real estate or any portion of it is situated. The clerk of the court receiving a certified copy of the complaint and/or a “certificate of judgment” is directed to “file and record” it in the records of his court. The beginning and end of the out-of-county action thus will usually be reflected somehow in the records of the situs county.

The draftsmen of the Rules appear, then, to have at least recognized and attempted to do something about the fact that the radical changes they had made in the venue rules relating to real property actions undercut the manifest purposes of the recording statutes. Unfortunately, their solution to the problem is woefully inadequate. The most glaring deficiency is the failure to provide for the filing of a full transcript of the out-of-county proceedings in the county where the land is located, rather than a “certificate of judgment.” Every attorney familiar with the title practice knows that a title examiner is interested in much more about the court cases he encounters in the chain of title than their apparent outcome. It is elementary, for instance, that no judgment is any better than the jurisdiction of the court which rendered it, whether over the subject matter of the action or over the persons it purports to bind. Therefore, it has always been considered essential that the title attorney examine the jurisdictional bases of any judgment through which title is derived in addition to the record of the judgment itself. Yet under Rule 3 (F), a title examiner, or any attorney whose client seeks his advice as to the state of the title, will not infrequently be asked to choose between taking many judgments on which the very validity of the title depends at face value or chasing about the state at his client’s expense in order to examine into the jurisdictional facts behind them. Another deficiency is the failure to provide for the

filing of notice in the county in which the real estate is situated if the action is subsequently dismissed or the judgment is later vacated or appealed. Obviously, this will also impose additional burdens on the title attorney and increase either his risk or the cost of his services to his client in many cases. The writer has no quarrel with the idea of making the venue rules turn upon the question of convenience, but he does wonder why the great public interest in maintaining marketability of title to real property was given so little recognition.

The problem of providing adequate records in the county of the situs is apt to be further complicated by the muddled and imprecise wording of Rule 3 (F) which gives rise to a whole host of unanswered questions: Who is “the clerk of the court” with whom the lis pendens notice must be filed? The clerk of the court of common pleas? If so, what is the “corresponding court” to whose clerk the “certificate of judgment” is to be transmitted? If the action is a probate land sale proceeding, is the “certificate of judgment” to be sent to the probate judge and clerk ex-officio of the probate division of the common pleas court of the situs county? If, for example, an action were brought in Cleveland Heights Municipal Court in Cuyahoga County to cancel a land installment contract involving land situated in Cuyahoga Falls in adjoining Summit County, would the “corresponding court” be the Municipal Court of Cuyahoga Falls? If the answer to either of the last two questions is “yes,” is it really the intent of this Rule that the lis pendens notice is to be filed with the common pleas clerk while the “certificate of judgment” may sometimes be filed with the clerk of another court? What is a “certificate of judgment” anyway? Is it a certified copy of the final order or decree, or something akin to what is used to obtain a lien under the judgment lien statute? If the former, what would that be in a foreclosure case—a certified copy of the judgment of foreclosure or a certified copy of the judgment of confirmation, or both? How does the clerk of the receiving court “file and record” the certified copies of complaints and “certificates of judgments” which are transmitted to him? With the records of his own court or in a separate set of records? Is he required to index them, and if so, how? In the indices to the records of his own court or in separate indices? Is he to file and record a “certificate of

17 See Ohio Rev. Code § 2703.27 and note 13, supra.
18 Ohio Rev. Code § 2329.02.
judgment” rendered in the same case in which he has previously received a lis pendens notice in the same or in a different file or set of records? Does the first paragraph of Rule 3 (F) apply to real estate actions brought in a United States District Court in Ohio? As matters now stand, none of these questions is capable of being intelligently answered under the Rules, and in practice there will probably be almost as many answers as there are real estate attorneys, clerks of court and manufacturers of printed forms. In short, Rule 3 (F) appears to be a title examiner’s nightmare which will continue unless and until the Supreme Court of Ohio sees fit to completely revamp this Rule.

In the interim, title companies and title attorneys should insist that a full transcript (as opposed to a “certificate of judgment”) of all completed out-of-county proceedings affecting real property titles be filed in the county in which the land is located. Where the proceedings are dismissed subsequent to the filing of the lis pendens notice or the judgment is later vacated or appealed, a certified copy of the entry of dismissal or vacation or the notice of appeal should be filed in the situs county. All lis pendens notices, transcripts and certified copies should be filed in the office of the clerk of the court of common pleas, or in the clerk’s office of the probate division where appropriate; otherwise, the phrase “corresponding court” should be ignored. In any county in which the clerk’s office or the probate court refuses to accept transcripts on the ground that the Rules call for a “certificate of judgment” instead, consideration should be given to filing them with the county recorder, if he maintains a quasi-official set of “miscellaneous records.” Finally, an extra effort should be made to encourage all officials with whom records relating to out-of-county actions may be filed to index and file or record them in such a manner that they can be readily found during the ordinary course of a title examination.

19 See 28 U.S.C. § 1964 which appears to provide the means whereby the lis pendens notice provisions of Rule 3 (F) could have been made to apply to actions in a federal court affecting title to Ohio property. Whether the provisions of this Rule are so worded as to make them applicable to real estate actions in federal court via the federal statute cited is another question.
III. Service of Process

A. Certified Mail Service

Even more revolutionary than the new venue rules are the new rules pertaining to service of process. One relatively minor departure from the previous practice is that a copy of the complaint (petition) must now be served with the summons and the plaintiff must supply the clerk with sufficient copies of the complaint to comply with this requirement. This is not entirely new, however, since the same requirement has long existed in the divorce and alimony statutes, and in a few areas of the state, it had been mandatory in all cases by local court rule. The real departure from prior Ohio practice are the provisions relating to certified mail service. Mail service was formerly allowed if approved by local court rule, but comparatively few courts ever adopted such a rule, and little use was made of it in many of those who did. It was extensively used only by some municipal courts, and since all but one of these (Cleveland) had no jurisdiction over matters affecting title to real property, title attorneys seldom encountered it. Service of process by certified mail has now been made the primary method of service in all types of cases in all courts as to both resident and non-resident defendants whenever their whereabouts are known. Unless the plaintiff specifically requests some other type of service in writing (or if service is to be made outside the state, unless it is ordered by the court) service will automatically be made by certified mail. What induced the Supreme Court to adopt such a policy in an era characterized by notoriously slow mail deliveries, an ever-increasing number of cases involving neglect of duty and malfeasance of office by postal employees, nationwide postal strikes and the like, we will not pause to speculate. Our task will revolve around the how of the matter rather than the why.

The category of certified mail which is to be used by the clerk of the court to effect service is “return receipt requested”

20 Rule 4 (B).

21 See, Ohio Rev. Code §2703.23 (repealed). The wording of this statute was broad enough to allow service by ordinary mail, or by registered mail with or without the requirement of a return receipt. With the later enactment of Ohio Rev. Code §1.02 (I) service could also have been made by certified mail with or without return receipt. In the writer’s experience, however, most of the courts which made extensive use of mail service used ordinary mail. Some statutes dealing with mail service in special situations, generally involving out-of-state defendants, affirmatively required the use of return receipts. See, e.g., Ohio Rev. Code §2307.383 (repealed).

22 Rules 4.1, 4.3, and 4.4.
with instructions to the delivering postal employee to show on the receipt "to whom, when and address where delivered.” Immediately upon the filing of the complaint, the clerk will issue the summons and mail it with a copy of the complaint to the defendant at the address shown in the complaint. No praecipe or written request for service is necessary in order to initiate certified mail service in the first instance. The clerk will then note the fact of mailing on the docket, and when the receipt is returned by the postal authorities, he will likewise note that fact on the docket. In the case of out-of-state service, Rule 4.3 (B) (1) stipulates that the process is to be mailed to the defendant’s "last known address,” but Rule 4.1 (1) is silent as to the quality of the address to be used in the case of in-state service. Neither of these Rules limits the type of address which may be used to the defendant’s place of residence, and it is consequently to be assumed that the process may be sent to any address at which the defendant can receive mail.

Rule 4.1 (1) provides that if the “return receipt shows failure of delivery to the addressee,” the clerk is to notify the plaintiff or his attorney of this fact by mail and enter the fact of such notification on the docket. Rule 4.3 (B) (1), relating to certified mail service out-of-state, contains a similar requirement of notification when a “failure of delivery” occurs but, curiously, it omits the phrase, “to the addressee” in this connection, as well as the requirement that the notification be docketed. Such notification is apparently provided for the purpose of affording the plaintiff timely opportunity to request additional service by certified mail or a different type of service altogether where the initial results are nil or, at best, equivocal. The phraseology of the Rules is rather ambiguous on the question of when the notice is to be sent, however. If there is truly a “failure of delivery,” the whole envelope, not just the return receipt, will come back; and the reason why delivery failed will be shown not on the return receipt but on the envelope itself by means of one of those all-too-familiar stamps in red ink with the pointing finger and blocks to be checked to indicate why delivery was not made.
But if the envelope is delivered somewhere to someone, no matter how improperly, only the return receipt will come back, and it will not show a "failure of delivery," so far as the Post Office Department is concerned, anyway, no matter how doubtful the "delivery" reflected by the receipt may sometimes appear to the discerning eye.

Postal regulations require delivery to the addressee personally only when this service is specifically requested and an additional fee is paid;\(^{27}\) and the Rules do not require, or even authorize, this particular method of certified mail service. Is the clerk only to notify the plaintiff or his attorney when the whole envelope is returned undelivered, then? The wording of Rule 4.3 (B) (1) is easily susceptible to such an interpretation. Rule 4.1 (1), however, causes considerably more difficulty. In the strictest sense, any return receipt not signed by the defendant himself indicates a "failure of delivery to the addressee." So in the case of an in-state defendant, is the clerk to send the notice whenever the return receipt is not signed by him personally? What if the return receipt is signed by the defendant's "agent," rather than by the defendant himself, but it indicates that the delivering postman faithfully observed both the spirit and letter of the postal regulations?\(^{28}\) What if the data on the return receipt appears questionable in some respect? Surely the draftsmen of the Rules did not intend to impose upon clerks of court the intolerable burden of policing all return receipts relating to certified mail service on defendants within the state and deciding which ones show bad or doubtful service. Regardless of the draftsmen's intent, for reasons that will be presently discussed, it seems doubtful that many clerks will either be inclined to or capable of assuming such a task. Therefore, despite the notification provisions in the new service of process rules, the plaintiff's attorney cannot dispense with checking the records relating to service on his own, if he wishes to be reasonably sure that his defendant is in fact before the court.

(Continued from preceding page)


A much more important question than the one of when the clerk is to notify plaintiff’s attorney that “the return receipt shows a failure of delivery,” etc., is the question of what the return receipt must show in order to raise a presumption that the service was proper. Unfortunately, the Rules give one no guidance whatever on this point. Therein lies the principal difficulty with certified mail service from the perspective of the title attorney: the difficulty of interpreting the results from the record. He must decide whether the record indicates that service was probably good, probably bad or so doubtful that his client’s title ought not to be made to depend upon it. But what tests should he apply in arriving at his decision? When the return receipt appears to be signed by the defendant personally, service will, of course, be presumptively good. The return receipt, however, will probably be so signed with comparative infrequency, since it seems probable that the process will normally be sent to the defendant’s residence address (it being the one most often available) and most men, as well as a substantial number of women, are usually at work when the mail is delivered. If the envelope is addressed to the defendant’s residence, the return receipt is quite likely to be signed by his spouse, child, mother-in-law, baby-sitter or cleaning lady. And even if addressed to his place of employment, it is most apt to be signed by a receptionist, mail clerk or office boy. Moreover, the signature on the receipt will often be unreadable; and even if it is legible, the relationship between the addressee and the person who received delivery will not be indicated, for no space is even provided for this information on the receipt form. Then in many instances there will be the carelessness of the delivering postman to contend with. The form may be improperly filled out or some of the essential data may be omitted. How is one to judge the record in circumstances such as these?

This question has already become the subject of what bids fair to be a long and bitter controversy among practicing attorneys and title men. At least four different positions have emerged. In the view of some, service (on an in-state defendant, at any rate) can be assumed to be good only if the return receipt is signed by the defendant personally. Their contention is, perhaps surprisingly, based upon the troublesome wording of Rule 4.1 (1) just discussed, requiring the clerk to notify the plaintiff when “the return receipt shows failure of delivery to the addressee.” Proceeding on the assumption that there has been a “failure of
delivery to the addressee” whenever the receipt is signed by someone other than such addressee, they arrive at the conclusion that Rule 4.1 (1) contemplates delivery to the defendant personally as the only valid mode of certified mail service within the state. The writer is unimpressed by this argument. If this is really what the Rule means, why did the draftsmen not provide that the postal authorities be instructed to deliver the envelope containing the process to the addressee only, since this species of certified mail delivery is one of the standard options available to the mailer? And why do the Rules require the postman to be instructed to show the address where the envelope was delivered? If service is only to be deemed valid when delivery is made to the defendant himself, this information would appear to be virtually superfluous. If personal service were effected by a process server, surely no one would maintain that the precise location where the writ happened to be handed to the defendant would have the slightest bearing on the question of whether good service had been obtained. Why should the rule be any different when the process is served by a postman? It would therefore appear that the troublesome phrase, “to the addressee” in Rule 4.1 (1) relates only to the question of when the clerk of courts is to send notice of non-delivery to the plaintiff, or else its appearance in this Rule and its absence in Rule 4.3 (B) (1) is just an accident of draftsmanship.

At the opposite pole stands the argument that whenever the return receipt (as opposed to the whole envelope) comes back, service should be taken to be complete, no matter who has signed it or what it may show or fail to show concerning the delivery. The proponents of this view maintain that the ultimate facts with

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30 39 C.F.R. § 168.4 (1970). This type of certified mail delivery was possibly rejected by the Rules draftsmen because it might lead to an inordinate number of refusals to accept delivery or failures on the part of addressees to claim certified letters which are returned to the post office because of the inability of carriers to effect delivery on the first attempt. If the addressee is temporarily absent from the indicated place of delivery when the postman calls, the postman is supposed to leave a “notice of arrival” in the mailbox. The letter is then held at the post office for 15 days, and if it is not claimed by the addressee during that time, it is either returned to the sender or he is requested to instruct the postal authorities regarding its disposition. 39 C.F.R. §§ 161.9, 168.5 (1970). The same delivery rules also apply in the case of the other categories of certified mail, but the letter may be delivered to an “authorized representative” of the addressee as well as to the addressee himself. Hence, the envelope is less likely to be returned undelivered if delivery is not restricted to the addressee personally.
regard to the service are more important in the long run than the
closeusions one may or may not be allowed to draw from the data
shown by the return. We are reminded that the perfect-looking
return is not safe from attack, and one showing a number of
flaws on its face may be amended to conform to the facts when-
ever the facts themselves reveal that service was proper. Hence,
they contend, the concern over what the return must show in
order to raise a presumption of valid service is mere "shadow
boxing." The issue is just a question of proof, they say, and the
return is only one of the possible sources of evidence. Why all
the hand-wringing, then, over rebuttable presumptions and proof
that may turn out to be more apparent than real? This argu-
ment is sometimes buttressed with the assertion that certified
mail service under the Rules will more often achieve the ideal
objective of service of process—actual notice to the defendant
that he has been sued—than service by leaving a copy of the
summons at the defendant's usual place of residence, the method
most frequently used under the former statute. Although resi-
dence service made by a process-server usually resulted in a re-
turn that looked as if the service were valid, we must remember
that this may often have been only a comforting illusion. There-
fore, despite the manifold questions generated by the admitted
limitations of the return receipt, are not the provisions of the
Rules relating to certified mail service to be preferred to the pre-
Rules statutory and case law regarding sheriff's service?

Both of the foregoing lines of argument are obviously aimed
at denigrating the traditional importance of the return of service,

31 Krabill v. Gibbs, 14 Ohio St. 2d 1, 235 N.E. 2d 514 (Syllabus 2) (1968);
Lenz v. Frank, 152 Ohio St. 153, 87 N.E. 2d 578 (1949); Hayes v. Kentucky
Joint Stock Land Bank, 125 Ohio St. 359, 181 N.E. 542 (1932).

32 Rule 4.6 (B); Krabill v. Gibbs, 14 Ohio St. 2d 1, 235 N.E. 2d 514 (Syllabus
3) (1968); Paulin v. Sparrow, 91 Ohio St. 279, 110 N.E. 528 (1915).

33 Young, "Rules of Civil Procedure, Probate," Reference Manual for Con-
tinuing Legal Education Program—Probate V, pp. 7.30-.32 (Ohio Legal Cen-
ter Institute Publication No. 65, 1970). The remarks cited in this work give,
perhaps, a little more weight to the question of what the return receipt may
show than this writer has suggested, but they clearly support the proposi-
tion that it is not really a very significant problem.

34 Conversation of the author with Prof. Stanley E. Harper, Jr. (former
Staff Director, Rules Advisory Committee) and Mr. Charles E. Crowley
(former Assistant Staff Director, Rules Advisory Committee) in Columbus,
Ohio, October 30, 1970. This is also the writer's understanding of the posi-
tion of Judge John V. Corrigan (former Chairman, Rules Advisory Com-
mittee) as gleaned from the Judge's address to the Convention of the Ohio
Land Title Association, entitled "Service of Process Under the New Rules,"
in Cleveland, Ohio, September 25, 1970.
and this is their common weakness. If one could be persuaded that the return does not really mean very much, it would not really make much difference, of course, what it shows. But the problem cannot be wished away that easily. Although the time is long since past when absolute verity was imported to the return, the cases and the literature scarcely support the contention that it no longer has any real significance. A return which indicates that service was proper may not be unassailable, but it still raises a presumption of good service which must be overcome by a degree of proof greater than a mere preponderance of the evidence. Moreover, if the record shows good service, the rule remains (albeit in a somewhat weakened state) that the judgment cannot be collaterally attacked by the parties or their privies on the ground that it is void for want of jurisdiction over the defendant’s person. On the other hand, a return which shows defective service raises no presumption whatever and the judgment may be attacked collaterally as well as directly. The return or other record of service may be only evidence, but the courts have always considered it to be a very important piece of


36 “Clear and convincing evidence” is the usual phrase. Nickerson v. Nickerson, 85 Ohio App. 372, 87 N.E. 2d 915 (Court of Appeals Montgomery Co., 1949); Sjorgen v. Sjorgen, 50 Ohio L. Abs. 13, 77 N.E. 2d 739 (Court of Appeals Ashtabula County, 1948); Harris v. First Spiritualist Church, 22 Ohio App. 315, 153 N.E. 312 (Court of Appeals Lucas County, 1926); McCormac, Ohio Civil Rules Practice § 6.19 (1970); cf., Krabill v. Gibbs, 14 Ohio St. 2d 1, 235 N.E. 2d 514 (Syllabus 4) (1968). The Krabill case indicates in the syllabus cited that if the evidence of the return is successfully rebutted by the defendant, the plaintiff must then prove facts showing “beyond a reasonable doubt” that service was proper. This would seem to imply that the defendant’s proof must have been “clear and convincing.” One remark in the opinion in this case, however, casts some doubt on this conclusion. Id. at 7. On questions of burden of proof and presumptions relating to the return, see also 44 Ohio Jur. 2d, Process, §§ 80-82 (1960).

37 Moor v. Parsons, 98 Ohio St. 233, 120 N.E. 305 (1918); In re Estate of Lombard v. Doty, 58 Ohio L. Abs. 459, 97 N.E. 2d 87 (Court of Appeals Madison County, 1950); but see, Lenz v. Frank, 152 Ohio St. 153, 87 N.E. 2d 578 (1949); The traditional rule has been weakened by the ease with which the court seemed able to skirt it in the Lenz case: what was really a collateral attack was simply termed a direct attack. See “Validity of Judicial Sales—Failure to Comply with Notice to Defendant—Rights of Owner of Property Sold,” Survey of Ohio Law, 1956, 8 West. Res. L. Rev. 263 (1957). The rule does not apply to persons not parties to the original case. See, Phillips v. Etwell, 14 Ohio St. 240 (1863).

evidence; and the writer, for one, is not convinced that they will now suddenly cease to treat it as such simply because it may sometimes give one an overly-optimistic or an overly-pessimistic view of the necessary jurisdictional facts. Certainly, the title attorney, who must of necessity evaluate marketability of title chiefly from the state of the public records, will not easily be persuaded that the condition of those records as they relate to service of process may now be largely ignored. This is particularly true in view of the fact that most of the cases he encounters in his work, such as foreclosures, suits to quiet title, divorces, etc., involve defendants who were in default for failure to appear. So far as he is concerned, the return is usually the only evidence of service which is available. To the lawyer seeking to attack a default judgment against his client on the ground of improper service, the vulnerability of the return of service is doubtless an encouraging note. The plaintiff's attorney wishing to forestall such an attack will likewise be heartened by the fact that he now has a more reliable method of service available to him. But it is difficult to see how these facts will make the title examiner's job significantly easier.

By now it will have become apparent that the truth probably lies somewhere in between the two extremes just discussed. Exactly where it lies, however, is not so easy to say. It has been suggested that when the certified mail return receipt is signed by someone other than the defendant it should still be taken as indicating good service if it indicates that delivery was made in accordance with postal regulations. If that is indeed what the Ohio Supreme Court had in mind, however, it is difficult to understand why the Court did not say so. Furthermore, the postal regulations themselves are not altogether reassuring. Delivery of a certified letter may be accepted and receipted for by an employee of the addressee, by a member of his family (not necessarily an adult, apparently) or by a person previously designated in writing by him to receive his mail, which writing must be filed with the post office. But if the addressee resides in a hotel or apartment house, it may also be delivered to any person designated by his landlord by written agreement with the postal authorities. And if he is deceased, it may be delivered to his ad-

ministrator, executor, widow or widower. Some of the provisions of these regulations obviously serve as a warning that the question of the identity of the signer and his relationship to the addressee cannot simply be ignored. In certain types of cases this question may, indeed, be crucial. In a divorce, alimony or annulment case, for example, is a return receipt signed by the plaintiff to be regarded as showing good service on the defendant? This type of information, it must be remembered, is not shown on the return receipt form, although it may occasionally be available elsewhere in the record or may sometimes be obtained by the mailer and certain other persons from the post office. So even if one is content to accept a delivery made in accordance with postal regulations as being good service, one is still faced with the problem that the record will often fail to indicate whether delivery was so made or not. It should also be remembered that the problem will many times be compounded by the failure of the postman to do his job properly. Besides failing to complete the receipt form in the prescribed manner, he may deliver the letter to anyone at the indicated address who just happens to be willing to sign for it, regardless of whether this is a proper person to accept delivery. Those familiar with mailmen’s habits know that this sort of thing happens all too frequently, postal regulations to the contrary notwithstanding.

Those who drafted the Rules obviously sought to overcome some of these difficulties by requiring service to be made by that class of certified mail in which, for an additional fee, the postman


43 Under Ohio Rev. Code §§ 3105.05–06 (repealed), it was generally considered that if the defendant in a divorce, alimony or annulment action was an Ohio resident and his whereabouts was known, he had to be personally served. See, Kinney & Simpson, supra, note 38, at p. 44. Under the Rules this is clearly no longer the case. Nevertheless, it is difficult to believe that the Rules contemplate that process may be served on the defendant in a domestic relations case by delivering it to the opposing party, whether service is made by certified mail under Rule 4.1(1) or by residence service under Rule 4.1(3). Argument to the contrary has been made, however. Corrigan, supra, note 34. This is not an insignificant problem, since many marriage partners continue to reside at the same place, for a time at least, beyond the commencement of divorce proceedings.

44 Certified mail delivery records are kept by the post office for 2 years. 39 C.F.R. § 168.5 (1970). These may contain certain information not shown on the return receipt, such as the name of a recipient whose signature is illegible. 39 C.F.R. § 161.9 (1970). Written authorizations by patrons to deliver their mail to certain designated persons may also be on file. 39 C.F.R. §§ 154.2, 154.6, 161.9 (1970). Unfortunately in the writer’s experience, such records are usually treated by the postal authorities as confidential, so they would probably not be routinely available to a title examiner.
is supposed to show the address where he delivered the envelope, as well as the date he delivered it and the signature of the person to whom he handed it. It is fair to assume that this requirement was made with the thought in mind that if the envelope is delivered to the correct address, this would be roughly equivalent to residence service under the former statute no matter who signs for it. But the rules do not require the envelope be addressed to the defendant's residence, and as we shall see later, the Rules now require residence service to be made by leaving the writ with "some person of suitable age and discretion" who resides at the same place.\(^{45}\) And once again, postmen oftentimes fail to follow the sender's instruction to "show address where delivered" although the directions are properly indicated on the receipt card and the necessary additional fee is paid. (The writer has in his hand a case in point as he pens these words.) If the postman does his job properly and we make the leap of faith necessary to regard delivery of process by certified mail as some sort of residence service, we cannot forget the chilling precedents under the former residence service statute.\(^{46}\) Was the place where the writ was delivered really the defendant's place of residence (or some other place where he regularly receives mail)? The precedents under the former mail service statute\(^{47}\) (which, incidentally, required that the envelope be sent to the defendant's residence address and provided that if it was not returned undelivered, the equivalent of residence service would be presumed) are even less reassuring.\(^{48}\) Will a presumption of due delivery be raised on the basis of a properly completed return receipt, and if so, how strong will it really prove to be when put to the test? Then if it is assumed that all of the hurdles have been cleared and a return receipt comes back indicating with a reasonable degree of probability that service was proper, the clerk may perchance lose the precious little green receipt card.

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\(^{45}\) Rule 4.1 (3). Even under the former statute (Ohio Rev. Code § 2703.08 [repealed]), which did not contain such a requirement, it had been indicated by at least one court that if the process server chose to actually hand the summons to someone at the defendant's residence, not just anyone would be acceptable. See, Prunkle v. Drzewiecki, 8 Ohio L. Abs. 304 (Court of Appeals Lucas County, 1930).

\(^{46}\) Lenz v. Frank, 152 Ohio St. 153, 87 N.E. 2d 578 (1949); Hayes v. Kentucky Joint Stock Land Bank, 125 Ohio St. 359, 181 N.E. 542 (1932).

\(^{47}\) Ohio Rev. Code § 2703.23 (repealed).

\(^{48}\) Shaman v. Roberts, 87 Ohio App. 328, 94 N.E. 2d 630 (Court of Appeals Franklin County, 1950); Porter v. Toops, 44 Ohio L. Abs. 329, 62 N.E. 2d 769 (Court of Appeals Franklin County, 1945).
from the file. How then does one go about proving service to a skeptical title examiner?

The truth of the matter is that the Rules relating to certified mail service need considerable amendment if they are to constitute a workable system, from the standpoint of the real estate lawyer and the title examiner, at any rate. What is most needed is some sort of definition of what constitutes good certified mail service, coupled with a rule of proof which will give us some guidelines as to when we may reasonably assume from certain data in the record that a given case falls within the terms of that definition. Some officially recognized means of supplementing the information (or correcting the misinformation) shown by the return receipt may also be needed in certain instances, depending on what definition and rule of proof are chosen. If amendments along these lines are not forthcoming, we will all just have to "muddle through" for the next thirty years or so until a substantial body of case law has been built up which fills the gaps left in the Rules.

Meanwhile, the title examiner should choose the most conservative tests for determining the sufficiency of the certified mail return in those cases in which it is not signed by the defendant personally, and he should not seek for or rely upon much information beyond the public records in order to determine whether the return indicates that the tests chosen have been met. If he is to get his work done, he cannot make a "federal case" out of every title he has to examine involving litigation in which certified mail service was employed. In metropolitan areas he should probably utilize whatever city directories and telephone books are available as aids in determining whether the defendant appeared to be living at the address to which the return receipt shows the process was delivered. He should then check the record and whatever directories are available to see if the individual who signed the receipt appears to have been a person of responsible age living at the same address. If the return does not meet these tests, he should take exception to the service. He should not accept returns which show delivery to the defendant's place of employment, to a post office box or the like (unless signed by the defendant himself) because he will have no means

49 In the Porter case, supra note 48, the court stated that directory listings were not competent evidence on the question of where a person maintained his residence at any given time. While this may possibly be true, technically, title attorneys in urban areas have long made extensive use of directories for a number of purposes, and they have certainly proven reliable enough as a risk reducing tool.
of verifying whether the recipient was a suitable person to accept delivery on the defendant's behalf; and he should categorically reject returns which are illegible, incomplete or obviously erroneous in one or more of their essential elements. What else can he do!

The author's message to the practitioner is quite simple: Attorneys representing mortgage lenders in foreclosure actions and others bringing suit in matters involving the title to real estate would do well to request personal service (and in the alternative, residence service) on all in-state defendants in the first instance, if they desire to keep title objections based on service to a minimum. The trouble it takes to file a written request with the clerk and the resulting modest increase in court costs seem a small enough price to pay in order to avoid exposing the title to the risks attendant upon certified mail service. The postman was not meant to be a process server and those who choose to use him as such will surely do so at their peril.

B. Out-of-State Certified Mail Service: Its Special Problems

One of the most disturbing features of the new service of process rules is to be found in the second paragraph of Rule 4.3 (B) (1) concerning certified mail service outside the state. The Rule states: "In the event that the return receipt shows failure of delivery, service is complete if the serving party or his attorney ... files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served." Assuming that the confusing language about the return receipt showing failure of delivery comprehends the situation where the whole envelope is returned undelivered by the postal authorities, this would appear to make the mere attempt to serve an out-of-state defendant the equivalent of service, if the plaintiff or his attorney is willing to swear that he did the best he could to find the defendant but was, unfortunately, not able to do so. If this is what this provision really means, are we not, constitutionally, treading on very thin ice? In the case of Wuchter v. Pizzuti, the Supreme Court of the United States laid down the rule that in order for a personal judgment to pass muster under the due process clause of the Fourteenth Amendment, the state law must be such as to "indicate that there is a reasonable probability that if the [rules relating to service of

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50 276 U.S. 13 (1928).
process] are complied with, the defendant will receive actual notice.\textsuperscript{51} While this indicates that it is not necessary that the defendant actually receive the process, it does make clear that the state law must be reasonably calculated to achieve that end; and it is difficult to see how a rule which would allow the plaintiff to cause process to be mailed to any address he chooses, and then if it is returned by the post office undelivered, excuse the failure to achieve actual notice by swearing that he did the best he could, is capable of meeting the federal constitutional test. As Mr. Justice Holmes said in \textit{McDonald v. Mabee},\textsuperscript{52} when dealing with questions of due process, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."\textsuperscript{53} The author sees no evidence of such caution in the provisions of Rule 4.3 (B) (1) in question. If the envelope containing the process is returned undelivered by the postal authorities, this is not service, personal or substituted, actual or constructive. It is not even a "feint," as Mr. Justice Jackson termed service by publication of a certain type in \textit{Mullane v. Central Hanover Bank & Trust Co.}\textsuperscript{54}—it is a boomerang! Such "service" is almost certainly insufficient to support a personal judgment against the defendant, and in the writer's considered opinion, it is also insufficient to support a judgment in rem or quasi-in-rem. In spite of the great inroads that have been made upon the doctrines set forth in \textit{Pennoyer v. Neff},\textsuperscript{55} since they were first announced, we surely have not reached the point where a state may exercise jurisdiction over either the person or the property of an out-of-state defendant with a type of "notice" to him which not only never reaches his usual haunts, but never even leaves the hands of the agency charged with the responsibility of delivering it.\textsuperscript{56}

\textsuperscript{51} Id. at 24. Emphasis added.
\textsuperscript{52} 243 U.S. 90 (1917).
\textsuperscript{53} Id. at 91.
\textsuperscript{54} 339 U.S. 306, 315 (1950).
\textsuperscript{55} 95 U.S. 714 (1877).
\textsuperscript{56} The inroads made in the \textit{Pennoyer} rules have resulted in an extensive enlargement of the types of cases in which state courts may exercise extraterritorial in personam jurisdiction. \textit{See, e.g.} Hess v. Pawlowski, 274 U.S. 352 (1927); \textit{International Shoe Co. v. Washington}, 326 U.S. 310 (1945). But this line of cases does not deal with the question of the quality of the notice to which an out-of-state defendant is entitled. On this question the rules have not been appreciably liberalized. Indeed, in the area of in rem jurisdiction the rules have, if anything, become more strict, as the \textit{Mullane} case, \textit{supra} note 54, shows. \textit{See}, Ehrenzweig & Louisell, \textit{Jurisdiction in a Nutshell} §7, p. 37 (1964).
It is interesting to speculate about what may have led the draftsmen of the Rules into the apparent constitutional trap in Rule 4.3 (B) (1). It seems certain that the idea underlying the objectional features of the Rule stems from Hendershot v. Ferkel.\footnote{144 Ohio St. 112, 56 N.E. 2d 205 (1944).} That was a case involving the interpretation of the former statute dealing with jurisdiction over and service of process upon non-resident motorists\footnote{Ohio Rev. Code § 2703.20. This statute was not repealed by Amend. H. B. 1201, supra note 5, though why it was not is somewhat of a mystery. All, or almost all, of its provisions have clearly been superseded by Rule 4.3. Perhaps claimants’ counsel were fearful that the provisions allowing service under this section of the Code even on resident defendants when they are concealing their whereabouts would be lost if the statute were entirely repealed. If so, one wonders whether or not they considered the provisions of Ohio Rev. Code § 2703.14 (L) and Rule 4.4 (A) which would seem to allow service by publication under these circumstances. Maybe they did not like the fact that the wording of this latter statute appears to make authorization to employ it in a given case depend upon the question of the defendant’s intent in concealing himself.} in which it was held that it did not matter if the notice, which the statute required to be sent by registered or certified mail to the defendant at his “last known address” after purely fictitious service was had upon the Secretary of State, was returned undelivered by the post office, provided the plaintiff had used due diligence in ascertaining the defendant’s last known address. The decision was based almost entirely on the court’s reading of the statute, although the court did make an assertion in passing that the statute was constitutional, as no doubt it was, if properly interpreted.\footnote{Hess v. Pawlowski, 274 U.S. 352 (1927); but see, Wuchter v. Pizzuti, 276 U.S. 13 (1928).} The first difficulty with the Hendershot case is that the court’s interpretation of the wording of the statute was probably erroneous, as the court itself later seemed to recognize (but was disinclined to do anything about),\footnote{See, Conner v. Miller, 154 Ohio St. 313, 96 N.E. 2d 13 (1950).} inasmuch as the statute’s requirement that the return receipt “of such defendant” be attached to and made a part of the return of service seems necessarily to entail the further requirement that the envelope containing the summons be somehow delivered. But granting the court’s interpretation of the statute for the sake of argument, one immediately encounters the next and highest hurdle which is whether the court’s interpretation was itself constitutional, and this the court did not even discuss. In the writer’s opinion, the Hendershot rule, taken as a general proposition, does indeed transgress the bounds of the Fourteenth Amendment due...
process clause, just as Civil Rule 4.3 (B) (1) does. In any event, more than one court has found it necessary to be much stricter than the one in *Hendershot* in its interpretation of mail service statutes in order to avoid doubts concerning their constitutionality.61

In real estate actions, when process addressed to an out-of-state defendant is returned undelivered, title attorneys should insist on additional service upon the defendant by certified mail at a better address or by some other means that will stand, including service by publication under Rule 4.4 if after diligent inquiry the plaintiff is unable to discover the defendant’s whereabouts.62 In those cases in which the envelope is not returned undelivered, but the return receipt presents a cloudy picture as to whether the envelope was so delivered that the out-of-state defendant might be reasonably expected to have received it, a supporting affidavit by the plaintiff ought to be acceptable if it contains sufficient factual averments. If the envelope is returned marked “refused,” under Rule 4.6 (C) the process may be re-mailed to the same address by ordinary mail.63 But if the de-

61 See, e.g. Wize v. Herzog, 114 F. 2d 486 (D.C. Cir. 1940); Yoz v. Durgan, 298 F. Supp. 1365, *rehearing denied* 302 F. Supp. 1282 (E.D. Tenn. 1969). (The decision in the *Yoz* case is principally based on the distinctive wording of the Tennessee Non-Resident Motorists Statute, but the court was not unaware of the constitutional aspects of the problem.) *But see*, Williams v. Egan, Okla., 303 P. 2d 273 (1957). (In the *Williams* case, the court purports to follow the *Hendershot* rule, but it should be noted that the defendants in this case made general appearances and defended on the merits. Also, like *Hendershot*, the court does not seem to recognize the constitutional implications of the problem.) The writer recognizes that when considered strictly on its facts, *Hendershot* may well have been constitutional. See, Hinton, *Non-Resident Service in Automobile Accident Cases*, 24 Ohio Bar 486 (1951). It was obviously just another chapter in the history of the continuing battle between “The Little Claimant” and “The Great Big Insurance Company”—one in which counsel for the insurer certainly displayed no lack of imagination in using the procedural technicalities of the law in his attempt to avoid his client’s having to pay the claim. See, *Hendershot v. Ferkel; Motorists Mut. Ins. Co.*, 147 Ohio St. 111, 56 N.E. 2d 205 (1946). The vice of Rule 4.3 (B) (1) consists of its having made the rule of the *Hendershot* case applicable to all types of cases involving out-of-state defendants under all circumstances. A more frank approach to the problem would doubtless have achieved a more satisfactory solution. See, e.g. Keller v. Rappoport, 21 N.Y. 2d 490, 236 N.E. 2d 451 (1968) and the discussion in 38 U. Cin. L. Rev. 369 (1969). If the offending motorist has disappeared from the scene and cannot be located despite the best efforts of the injured party, and if liability insurance is definitely in the picture, why not provide that a copy of the process be mailed to the insurance company?

62 See, McCormac, *supra* note 36, at § 3.06.

63 Rule 4.6 (C) is also applicable if the defendant refuses to accept personal service from a process server. Service may be made under this Rule on (Continued on next page)
fendant was away from home when the postman rang and has in a sense refused service by deliberately ignoring the usual notice to pick up a certified letter at the post office, so that the envelope is returned marked "unclaimed," service by some means other than ordinary mail under Rule 4.6 (C) will be necessary, inasmuch as the term "unclaimed," while it may include "refusal," usually means something much broader.

C. Other Types of Service

Personal service and residence service have been retained under the Rules and remain basically the same as under the former statutes, except as hereinafter discussed. Perhaps the most important thing to remember is that these modes of service will not be employed unless the party desiring service, or his attorney, makes a specific written request for them. It would also seem that the exact type of service desired must be stated in the request and that the plaintiff will get just what he asks for and no more. Thus, if personal service is requested and the sheriff or other process server finds that he cannot make personal service before the return day, he will return the writ "not found" unless his instructions require him to make residence service in the alternative. Although in the absence of instructions to the contrary, service will be made by the sheriff or other appropriate official, service may be made by anyone eighteen years of age or older who is not a party to the action and who has been previously designated for that duty by order of the court. The return of such a private process server need no longer be under oath as formerly. Quaere, whether an attorney or an employee of a party would be considered a "party" for the purpose of this Rule. Quaere, also, whether this Rule contemplates the appoint-

(Continued from preceding page)

both in-state and out-of-state defendants. In the case of certified mail service, it speaks of the "receipt" showing a refusal, whereas it would actually be shown on the face of the returned envelope or by means of a separate notice. Note 26, supra. Also, the process should obviously be mailed to the address where refusal occurred, rather than to "the address set forth in the complaint," if the returned envelope or notice of refusal shows that the letter had been forwarded to another address.

There seems to be no reason that such an alternative request could not be made. See Staff Note to Rule 4.1, "Civil Rules, Lawyers' Edition," Reference Manual for Continuing Legal Education Program, p. 20 (Ohio Legal Center Institute Publication No. 64, 1970); but see, Hollander, supra note 24 at p. 2.

Quaere, whether an attorney or an employee of a party would be considered a "party" for the purpose of this Rule. Quaere, also, whether this Rule contemplates the appoint-

See, Ohio Rev. Code § 2703.07 (repealed).
ment by the court of private process servers who may serve writs in any case or whether such appointments are to be made on an ad hoc basis only. Residence service must now be made by leaving the writ with "some person of suitable age and discretion" then residing at the same place as the defendant. This should help to put to rest some of those "hairy" questions about whether pinning the writ to a screen door, etc., etc. constitutes good residence service. But it should be noted that this means that the sheriff can no longer effect residence service if he finds no one at home. When the sheriff or other process server is unable to make the type of service requested within twenty-eight days, the clerk is supposed to notify the serving party or his attorney by mail.

Personal service is authorized outside the state as an alternative to certified mail service, but court approval is first required. Such service is to be made by a person not less than eighteen years of age who is not a party and who has been designated by order of court to make service, but the plaintiff is responsible for seeing that the writ is delivered to the process server. As under the previous law, residence service out-of-state is not authorized. The category of persons who may be personally served outside the state is broader than under the former statutes. It now embraces not only those who may be served by publication, but is co-extensive with the category of persons who may be served out-of-state by certified mail; and this will now include all persons over whom the courts of Ohio may exercise extraterritorial jurisdiction, whether in personam or in rem, under Rule 4.3 (A). The so-called "long arm" statutes, the non-resident motorists statute, etc. have been incorporated into this Rule, except that the "eyewash" service on the Secretary of State has been done away with.


67 See, e.g., Sours v. Dir. of Hwys., 172 Ohio St. 242, 175 N.E. 2d 77 (1961); Ohio Casualty Ins. Co. v. Reese, 24 Ohio Misc. 35, 52 Ohio Opin. 2d 361, (Municipal Court, Dayton, 1970). Rule 4.1 (3) is based on Fed. R. Civ. P. 4 (d) (1). It may have some difficulties of its own (see Hollander, supra note 24 at pp. 2-3), but it is obviously preferable to the former statute, which generated a plethora of litigation.

68 Rules 4.1 (2) and 4.1 (3).

69 Rule 4.3 (B) (2).


71 Ohio Rev. Code § 2703.20.
Service by publication may still be made under the Rules in all cases in which it is "authorized by law." 72 Ohio Revised Code Section 2703.14 has therefore not been nullified by the Rules, and it will continue to be the principal guide to the types of situations in which service by publication is permitted.73 All of the other sections of Chapter 2703 of the Revised Code pertaining to publication service have been replaced by Rule 4.4, however, so that on the questions of how and when one is to make service by publication this Rule must be consulted rather than the statutes. Under Rule 4.4 service by publication is permitted only if the residence of the defendant is unknown. If the residence of the defendant is known, service must be accomplished in some other manner, even though it would otherwise be authorized under section 2307.14.74 The procedure for obtaining service by publication is essentially the same as it was, except that the "second affidavit" question dealt with in Ohio State Bar Association Title Standard 6.1 should now cease to trouble the overly-conscientious. Standard 6.1 has been more than vindicated by the Rules; all of the required averments not only may, but apparently must be set forth in one affidavit which must be filed before publication is commenced.75

D. Service on Persons Under Disability, Business Organizations and Governmental Units

Rule 4.2 deals with the questions of who is to be served and how, and the directions are spelled out in considerable detail. Some of the more significant departures from the prior law with respect to service on persons under disability will be discussed here at some length. The Rules have also made several changes concerning the methods of serving corporations and other business entities, unincorporated associations and various governmental entities on the state and local levels. These will not be fully

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72 Rule 4.4 (A).
73 But see, Amend. H. B. 1201 which repeals Ohio Rev. Code § 3105.06 as of July 1, 1971. Does this mean that service by publication is no longer to be "authorized by law" in divorce, alimony and annulment cases after that date? This is an obvious error on the part of the Ohio General Assembly which should be corrected at the earliest possible opportunity. The pertinent portions of Ohio Rev. Code § 3105.06 should be re-enacted as a part of Ohio Rev. Code § 2703.14, with publication service on out-of-state defendants made permissive instead of mandatory so that it will not conflict with Rule 4.4 (B).
74 Rule 4.4 (B).
explained in this article, but everyone in the real estate and title practice should become familiar with them in depth.

A minor aged 16 or over may now be served in the same manner as an adult. “Double service” is still required on minors under sixteen, but the additional service may be made on any one of the following: father, mother, guardian, person having custody of the minor or the person with whom the minor resides. There is no longer any hierarchy of preferences concerning who must receive the additional service as there was under former Ohio Revised Code Section 2703.13. In practice, title examiners may sometimes find that the record does not disclose a minor defendant’s age. Rule 8 (H) places the duty of disclosing the fact of minority on the person who files pleadings and motions on the minor’s behalf, not upon the plaintiff, and this Rule does not require the age of the minor to be disclosed. If the record anywhere discloses the fact of a defendant’s minority, but not his age, the prudent examiner will take appropriate exception to the proceedings, unless “double service” was had upon the minor as required in the case of those under age sixteen, or unless the record is properly corrected to show that the minor was in fact sixteen years of age or older when service was made.

Under the new Rules, not only is “double service” not required with regard to an incompetent defendant, if the incompetent has a duly appointed guardian of either his estate or of his person and estate, or if he is confined to an institution for the mentally ill or mentally deficient, the incompetent’s guardian or the superintendent of the institution is to be served in place of the incompetent. If the incompetent has no guardian and is not in an institution, the incompetent alone is to be served. It is strange to note that a three-month-old baby must be individually served, but that a manic-depressive individual in a state hospital for the mentally ill, who may be in a lucid interval most of the time, is not entitled to receive a copy of the writ in his own right! This does not seem to be consonant with modern concepts concerning the nature of mental illness and the civil rights of the mentally ill. In the writer’s opinion, it may also be subject to challenge under the due process and equal protection clauses of the Fourteenth Amendment. The careful practitioner will see that the incompetent is served with a copy of the writ in addition to

76 See, Kinney & Simpson, supra note 38 at p. 31 regarding service on incompetents prior to the adoption of the Rules.
effecting service on his guardian or custodian, in spite of the provisions of Rule 4.2; the careful title attorney will probably demand no less.

Corporations and other business entities may now be served by sending the process by certified mail to any of their usual places of business. It is not necessary that the envelope be addressed to any particular officer, employee or member of the organization. If such entities are served by the sheriff or other process-server, however, it is still necessary that personal service be made on one of the designated officials or members of the organization. This is similar to the previous statutory provisions, but Rule 4.2 is more liberal with respect to the category of officers, employees or members of a particular kind of business entity on whom process must be served, and there are no longer any preferences within any category. The statutory methods of service peculiar to certain types of corporations, such as railroads and insurance companies, have now been abolished. Governmental entities or agencies are to be served in accordance with the Rules by serving either the officer in charge of the unit or agency or the appropriate legal officer (Attorney General, Prosecuting Attorney, Law Director, City Solicitor, etc.). On the whole, this portion of the Rules should prove to be a marked improvement over the prior law on the same subject.

E. Service on Pleadings Subsequent to the Complaint

According to the provisions of Rule 5, all pleadings, motions and other papers of a similar nature subsequent to the complaint must be served upon the attorney for each of the opposing parties if they are represented by counsel or upon the party himself if he has appeared without representation. Parties who have not appeared need only be served under this Rule in the case of a pleading setting forth new or additional claims for relief against them (in which case they must be served with process in accordance with Rules 4 through 4.6 rather than in the manner specified in this Rule), unless the court orders them to be served with some particular paper. This service must be accomplished

77 E.g., Ohio Revised Code §§ 2703.10 (repealed).
78 Ohio Rev. Code § 2703.10 (repealed).
79 E.g., Ohio Rev. Code § 2703.11 (repealed).
80 It should be noted that these provisions do not apply in the case of agencies of the federal government. They should continue to be served in accordance with federal law. See, e.g., 28 U.S.C. § 2410.
in the manner set forth in subdivision (B) of the Rule and is to be made by the party filing the paper or by his attorney. Service under this rule is rather informal and is proved only by a signed statement endorsed on the original of the paper that has been served before the paper is filed with the clerk. Rule 5 is almost identical to Rule 5 of the Federal Rules of Civil Procedure and is designed primarily to promote fair play and the free flow of information concerning developments in the case among counsel for the litigants. It has nothing to do with service of process per se, and title attorneys will not usually be concerned with it.

However, service made according to Rule 5 can sometimes be used in certain cases for serving subsequent pleadings, etc. containing "new matter" (such as amended and supplemental complaints, answers asserting cross-claims and the like) which under analogous prior law would have required service in accordance with the service of process statutes. Hence, service under this rule may occasionally assume jurisdictional import. When that is the case, though, great care should be exercised in deciding whether service should be made on an opposing party or on his attorney and whether it should be made under this Rule or under Rules 4 through 4.6 relating to service of process. If the precedents under the Federal Rules can be taken as a guide, it can by no means be stated categorically that all pleadings and other papers subsequent to the complaint may in all cases be served upon counsel or served in the manner prescribed by this Rule.

By its very nature, obviously, Rule 5 service cannot be employed to bring new parties into the case. Where service having jurisdictional significance can properly be made under Rule 5, the title attorney may sometimes encounter still another problem: that of verifying that the necessary service has in fact been made on the proper parties and in the required manner. The Rules do not affirmatively require the clerk to note proof of service of this type on the docket, and judging again from the federal practice, most clerks will not do so. Thus, in those cases where the endorsement showing proof of service with respect to a paper

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on which service is deemed necessary from a title standpoint has been lost or is otherwise unavailable, a title examiner will find that he has no alternative source of information.

F. Waiver of Service

The new Civil Rules contain no provisions concerning waiver of service of process. It is to be assumed that upon general principles service may still be waived in writing by any competent, adult party except, possibly, in divorce and alimony cases, where our courts have traditionally frowned on waiver of service.\(^{83}\) But in view of the fact that the subject of waiver of service was dealt with in the former statutes,\(^{84}\) its omission from the Rules is curious. One thing is clear, and that is that the filing by a defendant of an answer or other pleading can no longer be regarded as ipso facto constituting a general appearance and, hence, a waiver of service of process. This important fact is to be gleaned not from the provisions of the Rules which ostensibly deal with the question of service but from the Rules relating to pleading. Rule 12, which is based on the corresponding Federal Rule, abolishes the traditional distinction between a "special appearance" and a "general appearance."\(^{85}\) In their place it introduces a concept somewhat akin to the "limited appearance," whereby a defendant may simultaneously challenge the court's jurisdiction over him and plead to the merits of the plaintiff's case. He can now clearly "eat his cake and have it too."\(^{86}\) Under Rule 12 (B) he may at his option assert jurisdictional defenses or challenge the sufficiency of the process or the service of it either by a responsive pleading or by a pre-pleading motion; and under Rule 12 (H) such defenses are not finally waived by his failure to raise them in most cases until the time has expired within which he may amend his plea without leave of court under Rule 15 (A).

Rule 12 (G) specifies that if the defendant chooses to make a pre-pleading motion under Rule 12, he must include therein all de-


\(^{84}\) Ohio Rev. Code § 2703.09 (repealed).

\(^{85}\) 2A Moore, Federal Practice ¶ 12.12 (2nd ed. 1965).

\(^{86}\) The classic "limited appearance" has, of course, been confined to quasi in rem actions. See Ehrenzweig & Louisell, supra note 56, § 6, at p. 31. It is analogous to the kind of appearance permitted under Rule 12, but not completely so.
fenses and objections then available to him which the Rule permits him to raise by such a motion. So in a few cases all defenses concerning lack of jurisdiction over the defendant's person may have already been waived by him by the time he files his answer, because of his having filed a pre-pleading motion which failed to assert any such defenses. (The defense of lack of jurisdiction over the subject matter is never waived.) This kind of waiver is apt to be rare, however.87 More importantly, if the defendant properly and timely challenges the court's jurisdiction over his person and the court gives an adverse ruling on the question, he may nevertheless proceed to the merits of his opponent's case without fear of waiving any of his jurisdictional objections for the purpose of a later direct attack or collateral attack88 upon the court's final judgment or order. Under Rule 12, service of process may be waived by the defendant's failure to raise the question timely, but not by that sort of conduct formerly known as a "general appearance." Ordinarily, therefore, before a title attorney can now accept a defendant's pleading as an automatic substitute for service of process on that defendant, he must first make sure that the defendant has raised no question concerning the court's jurisdiction over his person either by motion, pleading or amendment and that the necessary time period has elapsed (twenty-eight days after service on opposing counsel in accordance with Rule 5, or until his own attorney is served with a responsive pleading if one is permitted under Rule 7).

IV. Pleading, Parties and Judgments

The new rules of pleading89 closely resemble the Federal Rules on the same subject, that is, they embody the so-called "notice" concept of pleading under which great stress is laid upon brevity, simplicity and conciseness of expression. Only the "bare bones" of the plaintiff's case or the defendant's defense

87 McCormac, supra note 36, §§ 6.17, 6.19.
88 It is recognized that a collateral attack could usually be forestalled under the doctrine of res judicata (or more properly, collateral estoppel), but this is an affirmative defense which the plaintiff in the original action would have to plead and prove in the subsequent action. Rule 8 (C); McCormac, supra note 36, §§ 7.21, 7.31. The confused distinction between a direct attack and a collateral attack should also be remembered in this connection. See notes 37 and 38, supra, and works cited therein. On rare occasions involving successive appeals, etc., a direct attack may be prevented by the doctrine of "law of the case." See 31 U. Cin. L. Rev. 178, 182 (1968).
89 Rules 7 through 16.
need be pleaded. Ideally, at least, all legal technicalities and the argot of the profession are to be dispensed with. If on occasion a title attorney, after carefully reading the file on a particular case, goes away with the feeling that he does not really know what it was all about, he must not despair. His brothers in the District of Columbia, for example, have survived and prospered under the same conditions for over thirty years. The tools of the pleading art have also been redesigned and the nomenclature changed. That old favorite of law professors, the demurrer, has been outlawed, and its work will now be done by motions of various kinds; replies are now permitted only in response to a counterclaim; a petition is now called a complaint; the response to a complaint will now always be called an “answer,” even though it pleads a counterclaim or cross-claim; pleadings need no longer be verified. No revolution is complete without the appropriate turn-over in symbolism, terminology and tactics. One thing that may be of particular concern to title men is that the Rules do not affirmatively require that full land descriptions be pleaded, as the provisions of former Ohio Revised Code Section 2309.39 (now repealed) were generally thought to demand. One or two of the model forms in the Appendix to the Rules indeed appear to indicate that the new pleading rules are not intended to be very strict in this respect, but good practice would certainly seem to dictate that specific descriptions of real estate should continue to be pleaded for the sake of the title, even though looser practices might stand the test of a motion for a more definite statement under Rule 12 (E).

The purge has not been confined to language and style, however. One old friend has been liquidated—quite by accident it seems—whose comforting presence will be sorely missed by all good real estate lawyers and title men: the necessary party whose name and whereabouts are both unknown and who must, perforce, gain entry into the fray via the classified section of the local newspaper. Rule 15 (D) permits a defendant whose name is unknown to be made a party, but then goes on to require personal service upon him. This covers the case of the defendant whose name is unknown but whose whereabouts is known, and it is comparable to former Ohio Revised Code Section 2309.62. Not another word about unknown parties, however, is to be found in the Rules. As a result, it would appear that Ohio Revised Code Section 2703.24 (which is the inseparable companion of Section 2309.62 and which deals with the question of the unknown
party whose address is also unknown) has been repealed by the Rules by implication, because of the fact that Rule 15 (D) is in open conflict with section 2703.24.90 If personal service must be had on all unknown defendants as the Rules, however inadvertently, seem now to require, then the practical effect of this in the case of an unknown defendant whose whereabouts remains unknown even after diligent inquiry is that to make him a party would be a vain act. Thus did our dear comrade apparently meet his untimely demise. Surely we must persuade the august gentlemen of the high bench to resurrect him by judicial construction or amendment of the Rules at the earliest possible opportunity, else the suit to quiet title is apt to go the way of the dinosaur and the dodo.

Even though minors aged 16 and over may now be served as adults, all minors regardless of age, must still be defended in the litigation by a guardian ad litem (unless their legal guardian makes an appearance in their behalf). Incompetent persons must likewise be represented in the action, but the name for their specially-appointed surrogates has been changed from “trustee for suit” to “guardian ad litem,” thus eliminating the previous distinctive professional jargon, which in practice had almost ceased to be used anyway.91 Minors eighteen years of age and older may still sue and defend in their own right in domestic relations cases only, without the benefit of a next-friend or guardian ad litem. This recent statutory reform was retained by the Court in the Rules.92 Real property practitioners should note that in order to take a default judgment against a minor or an incompetent, the defendant under disability or his representative must be served with written notice of the application for judgment at least seven days prior to hearing. This is in addition to the requirement for the appointment of a guardian ad litem and the filing of his answer.93

Rule 25 modifies and clarifies the prior statutory procedures for reviving an action when a party subsequently dies or becomes

90 This statute was not included in Amend. H. B. 1201, however. There are a few unknown party provisions relating to specific special statutory proceedings which have without question survived the Rules through the provisions of Rule 1 (c) and/or Rule 73, e.g., Ohio Rev. Code § 2123.02 (action to determine heirship).

91 Rule 17 (B); cf. Ohio Rev. Code §§ 2307.13, 2307.16 (repealed).


93 Rule 55 (A).
incompetent.\textsuperscript{94} It does not, however, affect the substantive law as to which actions survive and which abate upon the death of a party;\textsuperscript{95} nor does it appear to make any significant change in the pre-existing rules as to when pending actions that survive must be revived by or against a party's personal representative, heirs or devisees when the party dies or becomes incompetent, and when they may proceed without revival. The language of the Rule, though, following that of Federal Rule 25, speaks of an order for "substitution of parties" rather than an order to revive, and the revivor statute has been repealed.\textsuperscript{96} Upon the death or incompetency of a party where the action does not abate, the successor or representative of the deceased or incompetent party, or any of the remaining parties, may make a motion for substitution of parties. A copy of the motion and notice of hearing thereon is then served upon the remaining parties under Rule 5 and upon the parties to be substituted in the manner prescribed by the Rules relating to service of process.\textsuperscript{97} If upon hearing the court finds the substitution proper, the appropriate additional parties will be substituted and the action will continue as before. If the court should find that other parties not mentioned in the motion should also be joined in the action, presumably the clerk must be requested to issue additional process which should then be served in accordance with Rules 4 through 4.6; otherwise no further service seems to be necessary. It is the duty of the attorney for the deceased or incompetent party to suggest the fact of death or incompetency upon the record within fourteen days after he acquires knowledge of it, and such suggestion must be served on the remaining parties in accordance with Rule 5.\textsuperscript{98} When a suggestion of death has been so served, a motion for substitution of parties must be made within 90 days thereafter, else the action will be dismissed as to the deceased party. This limitation would appear to supersede those contained in Ohio Revised Code Sections 2311.33 and 2311.34 but, strangely enough, these sections have not been repealed.

One of the few places in the Rules where technicality seems to have triumphed over substance is to be found in Rule 58.

\textsuperscript{94} Ohio Rev. Code §§ 2311.23-.37 (repealed, except §§ 2311.33-.34).
\textsuperscript{95} McCormac, supra note 36, § 4.27.
\textsuperscript{96} Ohio Rev. Code § 2311.25 (repealed).
\textsuperscript{97} Rules 17 (A) and 17 (B).
\textsuperscript{98} Rule 17 (E).
This Rule requires that a judgment must be "designated" as a judgment and is effective only when so designated. Though some commentators have suggested otherwise, it would appear that this means that the journal entry must include the word, "judgment" in its heading or caption. Rule 54 (A) defines a judgment as including a decree and "any order from which an appeal lies." The writer therefore concludes that in a foreclosure case, both the foreclosure decree and the confirmation entry must be labeled as judgments, and that unless and until they are so labeled, they would not be operative. Happily, a failure to abide by the provisions of Rule 58 can be easily corrected by the court sua sponte or on motion and order under Rule 60 (A).

Under Rule 70, a court may now transfer title to real property by in rem decree if it chooses to do so. It may be recalled that under former Ohio Revised Code Section 2323.08 it was questionable in many cases whether this could be done without coupling it with an in personam order requiring the party himself to make the necessary conveyance by a certain date, the in rem decree to take effect in the event of the party's default. (There were, of course, certain recognized exceptions, such as alimony awards.) Under the Rules, either technique is now clearly acceptable in all cases.

The former statutory provisions concerning vacation and modification of judgments have been considerably changed by the Rules. Unfortunately, limitations of space and time do not permit a discussion here. In the future, those having occasion to seek such relief on behalf of a client or to consider any of the complex title questions which oftentimes arise from this type of a proceeding, or from the possibility of one, should carefully read Rule 60. In the case of vacation or modification proceedings completed before July 1, 1970, title attorneys must, of course, still consult former Ohio Revised Code Section 2325.01 and the related statutes and cases. In the past, one of the principal disappointments of the title industry with regard to this chapter of the Code has been the tendency of the courts to ignore or strictly construe the protection supposedly afforded a bona fide purchaser by section 2325.03 when judgments affecting title were set aside because of improper service of process. Since the Legislature has

101 "Validity of Judicial Sales" (etc.), supra note 37, at 265.
now repealed section 2325.01, and section 2325.03 depends upon an incorporation by reference of the previous section for most of its meaning, the poor good faith purchaser would now seem to be in a worse position than ever. Furthermore, section 2325.02, which contained a five-year limitation with respect to the re-opening of judgments based on service by publication, and which is also referred to in section 2325.03, has been entirely repealed, and Rule 60 contains no comparable limitation. Section 2325.02 should be at least partly re-enacted, and section 2325.03 should be given extensive legislative repair.

V. Application of the Rules in Probate Proceedings

The question of what application the Rules are to have in probate proceedings is possibly the most nettlesome one of all; certainly it is the one least susceptible, at this point in time, of anything like a satisfactory answer. To fully appreciate the quandary, one must attempt to construe Rule 73, which concerns the applicability of the Rules to proceedings in the probate division of the common pleas court, with Rule 1, which deals with the application of the Rules generally. Rule 1 (A) states that the Rules shall apply in all types of civil proceedings in all Ohio courts, except as stated in subdivision (C). Rule 1 (C) then says, in effect, that the rules shall apply to certain types of proceedings, including appropriations, forcible entry and detainer, small claims under Ohio Revised Code Chapter 1925, hospitalization of the mentally ill, and “all other special statutory proceedings,” only to the extent that specific procedure is not otherwise provided by law in these cases. Moreover, the rules will not apply, according to Rule 1 (C), to these types of cases to the extent that, by their very nature, they would clearly be inapplicable. (It would seem that title men may safely conclude that the Rules hardly apply at all to land title registration proceedings, but what else is excluded from their application and to what extent is already becoming a clouded question.) Rule 1 (C) does conclude with the proviso, however, that where the special pro-

102 Whether this ground for reopening a judgment survives in Rule 60(B) is impossible to tell, but the Rule is certainly broad enough in its language. If judgments obtained by means of publication service can be vacated under the Rule on a basis similar to that provided in the prior statute, some time limitation on such vacations which is more definite than the doctrine of laches seems highly desirable. See, McGill v. McGill, 88 Ohio L. Abs. 381, 179 N.E. 2d 523 (Court of Appeals Cuyahoga County, 1962), which illustrates the beneficial effects of the former statute.
cedural statutes relating to the excepted types of proceedings
make reference to general procedural statutes, the Rules shall
apply in place of the latter statutes (which have now, of course,
been repealed or superseded by the Rules). Now comes Rule 73
which says that the Rules shall indeed apply to proceedings in
the Probate Division except to the extent that specific procedure
is otherwise provided by law or to the extent that by their nature
they would clearly be inapplicable. Then added to this “Rube
Goldberg” construction is the fact that the probate court has its
own peculiar statutes relating to such things as service of process
and service of notice of various types; these apply to all pro-
ceedings in the probate court, but in certain statutory proceed-
ings, such as land sale proceedings and the like, the probate code
provides that the action may be brought in either the probate
court or the regular common pleas court. The peculiar probate
procedural statutes apply only if the plaintiff chooses to bring
the proceeding in the probate division.103 (This was the case all
along and was confusing enough in itself.)

Now where does all that leave us? The writer quite frankly
does not know. He does have some ideas on the matter which
are set forth in the Appendix following the conclusion of this
article. But these ideas are strictly his own. They do not pre-
tend to be either the complete or the final solution. It is not diffi-
cult to foresee that there may well be eighty-eight or more differ-
ent interpretations of the phrases, “special statutory proceed-
ings,” “specific procedure provided by law,” and “by their nature
clearly inapplicable.” What answers one gets will undoubtedly
depend on which legal scholar or probate judge one happens to
ask.104 No matter what answers one is content to accept, the end
result is a perplexing hodge-podge well calculated to drive the
average practitioner or title man to frustration. Is a petition still
to be called a petition in the probate court, or is it to be called
a complaint? If a probate action is brought on the regular side
of the common pleas court, does one then call it a “com-

103 Adams & Hosford, Ohio Probate Practice & Procedure (5th Ed., Davies,
1961); 4 Hauser & Van Aken, Ohio Practice—Real Estate Transactions,
104 See, e.g., Young, supra note 33, pp. 7.01–7.80 for the most complete guide
on the subject which has been published to date. While this writer does not
agree with all of the conclusions of its author (as will be evident from a
perusal of the “Guidelines” appended hereto), every Ohio probate practi-
tioner and title attorney should find it helpful during the period of tran-
sition from the Code to the Rules. Incidentally, the length of this work is
a good measure of the complexity of the problem.

http://ideaexchange.uakron.edu/akronlawreview/vol4/iss1/10
plaint”? 105 Is it necessary to plead the plaintiff's capacity to sue in a probate land sale proceeding? 106 If a probate land sale proceeding is brought in a county other than the one where the land is located, is it necessary to file a certified copy of the petition (complaint?) in the county of situs in order to charge third parties with notice of the pendency of the action? When the action is completed, should a complete transcript or only a "certificate of judgment" be filed in the situs county? 107 How are incompetents to be served in adversary actions in the probate court? How are minors over age sixteen to be served? Minors aged fourteen and fifteen? Minors under fourteen? 108 Remember that if the action is brought in the regular common pleas court, the probate service statutes do not apply! Etc., etc., ad infinitum. Incidentally, the question concerning service on minors is an interesting one and points up very neatly the hodge-podge results which will surely flow from the application of the Rules to probate court proceedings via Rule 1 and Rule 73. It appears that in probate court a minor aged sixteen or over may be served by serving him alone. A minor aged fourteen or fifteen, on the other hand, must be served by serving the minor and his guardian, father, mother, etc., but in no particular order of preference. A minor under fourteen may be served in the same manner as one fourteen or fifteen, but he may also be served by serving only his guardian, father, mother, etc. in the order of preference set forth in section 2101.29 (A).

The principal, or perhaps the only, way out of this quagmire is for the Ohio Supreme Court to amend Rule 73, and the sooner, the better. 109 The necessary amendment should be done in the manner of Rule 75 which relates to procedure in domestic relations cases. This latter Rule is a real boon, for it not only makes crystal clear what application the Civil Rules have to this type of proceeding (the Rules apply across the board here, with the

105 It is probably immaterial which term is used. Rule 1 (B).
106 Compare Rule 9 (A) with Ohio Rev. Code § 2127.10.
107 Compare Rule 3 (F) with Ohio Rev. Code § 2127.09.
108 Compare Rule 4.2 with Ohio Rev. Code § 2101.29.
109 Some benefits could also be gained from a little selected revision of the probate code. Since Rules 1 (C) and 73 practically reverse the conflicts provision of the Modern Courts Amendment as to probate matters, this has resulted in the creation of certain anachronisms in probate code procedures, such as the ones suggested above. Although these are not technically in conflict with the Rules, it would lessen the confusion if they were simply given the legislative axe.
specific exceptions set forth in Rule 73 itself), it also does away with the peculiarities of the statutory provisions regarding service of process and the like which heretofore obtained in the domestic relations code. Relief along these lines may already be on its way, but it may still be a long time in coming.\(^{110}\) In the meantime, the only safe course for the probate practitioner is to make sure, so far as it is possible to do so, that he employs those procedures that are capable of being upheld under both the Rules and the probate code; and title men must of necessity judge their work in the same light.\(^{111}\)

VI. Conclusion

By this time the reader may have gathered that the author does not exactly regard the new Civil Rules with a great deal of enthusiasm. Considering them solely in relation to his role as a title lawyer, this is quite true. From that perspective, the specific criticisms he has made must, of course, stand or fall on their own merit, and only time—a lot of it—will tell. The writer has no general criticisms to make of the Rules considered as a whole or of their underlying purpose and philosophy. They are undoubtedly deserving of the paens of praise which have lately begun to be heaped upon them. Perhaps the inevitably parochial view of an attorney whose entire professional life has been spent in the title industry is too limited to admit of a sound and sure judgment on such weighty matters, however. What is unmistakably clear, or should be, to all members of the profession, whatever their specialties, is that a revolution has been made; and that like all revolutions, it has swept away some good things with the bad, while new and different problems have been created in its wake. Many of these newly created problems will now be left to real property practitioners and title men, as well as to the legal reformers among us, to solve. It is hoped that this article will be of some small help to those who will now shoulder that burden.


\(^{111}\) See Item 6 of the Appendix.
Some Guidelines for Application of the Civil Rules to Proceedings in Probate Court

1. Venue. Proper venue for all adversary actions in probate court relating to decedent’s estates, testamentary trusts and guardianships is still the county in which the fiduciary was appointed. (See Ohio Revised Code* Secs. 2101.11, 2109.02, 2111.02, 2111.37, 2113.01, 2129.08, and 2129.09 as to the county in which a fiduciary is to be appointed in the first instance. Although venue is no longer “jurisdictional” (Rule 3 (G)), the last paragraph of O.R.C. Sec. 2101.24, should still operate to prevent another probate court from interfering in the matters over which a particular probate court has previously assumed control unless specifically authorized to do so by statute; otherwise, utter chaos might result in the administration of the estates of decedents and persons under disability. Rule 3 (B) is therefore clearly inapplicable to the typical adversary probate proceeding. It is even more obviously inapplicable to ex parte probate proceedings, since the special venue statutes above cited constitute specific procedure provided by law. O.R.C. Sec. 2127.09, the special venue statute relating to land sale proceedings under Chapter 2127, is also not superseded by Rule 3 (B) and such proceedings must still be brought in either the county in which the land is located or the county in which the fiduciary was appointed, regardless of whether they are brought in the probate court or the common pleas court.** Moreover, if such a proceeding is brought in a county other than the one where the land is situated, this statute controls over the provisions of Rule 3 (F) and a full transcript of the proceeding, rather than a certificate of judgment, must be filed in the situs county. The provisions of O.R.C. Sec. 2127.09 are specific procedures provided by law with respect to special statutory proceedings. Similarly, a full transcript of out-of-county disentailment proceedings must be filed in the situs county in accordance with O.R.C. Sec. 5303.21.1, and the venue provisions of this statute also survive the Rules.

* “Ohio Revised Code” will hereinafter be abbreviated as “O.R.C.”
** As used herein, “Probate Court” means the probate division of the common pleas court, and “Common Pleas Court” means the common pleas court excluding the probate division. The probate court was made a “division” of the common pleas court by the Modern Courts Amendment [Ohio Const. art. IV § 4 (C)].
NOTE: In the case of any adversary action brought in probate court affecting title to or possession of real or tangible personal property in another county, the plaintiff must file a certified copy of the complaint (petition) in the county of situs in accordance with Rule 3 (F) if he wishes to charge third parties with notice of the pendency of the action. There is nothing in the probate code*** which would seem to prevent this portion of Rule 3 (F) from having full application to adversary actions in probate court when the circumstances are appropriate.

2. Service of Process. Process (summons) in probate proceedings of an adversary nature should be made up and served in accordance with Rules 4 thru 4.6, except as specified in O.R.C. Sec. 2101.29. The exceptions set forth in O.R.C. Sec. 2101.29 (most of which relate to service on persons under disability) apply because such exceptions constitute specific procedure provided by law for all adversary actions brought in probate court. O.R.C. Sec. 2101.29 has not been repealed by Amend. H. B. 1201. The Rules otherwise control all aspects of service of process in such actions because the pertinent statutes in the probate code are either silent on the questions of service of process or else make general reference to the statutes governing procedures in civil actions or to the procedures applicable in common pleas court, and almost all statutes pertaining to summons and service of process which were applicable both in common pleas court and generally have been repealed and/or superseded by the Rules.

Examples: Action to Construe Will (O.R.C. Secs. 2107.40 and 2107.46); Action to Determine Heirship (O.R.C. Chapter 2123); Action for Cancellation or Alteration of Decedent's Contract to Sell or Buy Land (O.R.C. Secs. 2113.49 and 2113.50); Action by Surviving Spouse to Purchase Property at Appraised Value (O.R.C. Sec. 2113.38); Land Sale Proceeding by an Executor, Administrator or Guardian (O.R.C. Chapter 2127); Disentailment Action by Testamentary Trustee (O.R.C. Secs. 5303.21, et seq.); Declaratory Judgment Action (O.R.C. Chapter 2721); etc.

NOTE: Several of the above types of actions may also be brought in common pleas court. If so brought, the exceptions set forth in O.R.C. Sec. 2101.29 do not, of course, apply.

*** As used herein, the term "probate code" means Ohio Revised Code Chapters 2101-2131, unless the context indicates otherwise.
NOTE: Rule 5 pertaining to "service" of pleadings and motions subsequent to the complaint (petition) would appear to be fully applicable to all adversary proceedings in probate court since it does not run counter to the spirit or letter of any of the pertinent provisions of the probate code. It is clearly inapplicable, however, to ex parte proceedings.

3. *Service of Notice.* O.R.C. Secs. 2101.26-28, and the various special statutory provisions relative to service of notice in ex parte probate proceedings are not affected by the Rules. These pertain to special statutory proceedings for which specific procedure is provided by law either in the statutes cited or elsewhere in the probate code. Also, the Rules by their nature do not deal with the giving of notice in non-adversary cases and are therefore clearly inapplicable to such questions.

*Examples:* Notice to Surviving Spouse and Heirs of Application to Admit Will to Probate (O.R.C. Sec. 2107.13); Notice to Legatees and Devises of Admission of Will to Probate (O.R.C. Sec. 2107.19); Notice of Hearing on Application for Appointment of Guardian (O.R.C. Sec. 2111.04); Notice of Hearing on Application for Authority to Complete Decedent's Contract to Sell or Buy Real Estate (O.R.C. Secs. 2113.48 and 2113.50); Notice to Surviving Spouse Before Making Inventory (O.R.C. Sec. 2115.04); Notice of Hearing on Inventory (O.R.C. Sec. 2115.16); etc.

NOTE: Notice required or permitted to be sent by registered mail may be sent by certified mail. O.R.C. Sec. 1.02 (I).

4. *Pleading.* The rules of pleading contained in Rules 7 through 16 apply fully to all civil actions in probate court except to the extent that conflicting pleading requirements are specifically set forth in the probate code, in which event the specific statutory requirements will control. For example, petitions to determine heirship should conform to the requirements of O.R.C. Sec. 2123.07, petitions for the sale of lands should be drawn so as to comply with O.R.C. Sec. 2127.10, petitions for disentailment should follow all the requirements of O.R.C. Sec. 5303.23, etc., in spite of fact that these statutes are to some extent inconsistent with Rules 8, 9 and 11. Such special pleading statutes represent specific procedure provided by law with respect to special statutory proceedings and should be treated as additions to the pleading requirements of the Civil Rules. It should be noted, among other things, that this means that many petitions filed in probate
court should still be verified. The preferred name for the initial pleading in most cases will continue to be “petition” rather than “complaint,” both because the former designation follows the statutory terminology and because it seems more appropriate to the nature of most probate actions.

5. Judgments, etcetera. The provisions of Rule 25 concerning substitution of parties applies to adversary proceedings in probate court via O.R.C. Sec. 2101.32, since there is no specific procedure prescribed by the probate code on this subject. The provisions of Rule 58 relating to the labeling of judgments apply fully to all adversary probate actions inasmuch as there are no conflicting provisions in the probate code. Because of the definition of a judgment contained in Rule 54 (A), both the order authorizing the sale and the confirmation entry in probate land sale proceedings should be designated as judgments. Rule 58 is clearly inapplicable to most ex parte probate proceedings, however. Even though some types of orders in ex parte proceedings are said to have the status of judgments (e.g., an order settling a fiduciary’s account under O.R.C. Sec. 2109.35) and may be appealable under some circumstances, many such orders are required by the code to be—or routinely are—recorded together with the documents to which they relate in the permanent records of the court other than or in addition to the journal. (See O.R.C. Sec. 2101.12.) Hence, the evils which Rule 58 seem designed to correct are ordinarily not present in such cases. Rule 60 relating to vacation and modification of judgments applies to all probate proceedings by reason of O.R.C. Sec. 2101.32 and 2101.33, except as it may be specifically modified or limited by some particular provision of the probate code (e.g. O.R.C. Sec. 2109.35).

6. A Word of Advice. The foregoing guidelines represent the current thinking of the author only, and they are subject to modification in the light of subsequent judicial decisions, local custom and practice and any amendments that may be later made in the Rules and/or the code. Until the situation is somehow clarified, it is recommended that whenever feasible, the probate practitioner employ those procedures which are capable of being upheld under both the Rules and the probate code, so as to forestall possible title objections. For example, minors under the age of 14 should be served with process in accordance with Rule 4.2 (2) rather than in accordance with O.R.C. Sec. 2101.29 (A). The additional service on the guardian, father or mother, etc. will
comply with the new Rules and will certainly do no harm under the Code. On the other hand, an incompetent should be served with process as specified in O.R.C. Sec. 2101.29 (B) rather than as specified in Rule 4.2 (3) and (5). The additional service that will thus be required upon the incompetent himself (or upon his “custodian” if this should be someone other than the superintendent of a mental hospital) will comply with the code and will merely be surplusage under the Rules. The ingenious lawyer can readily discover many other situations in which the employment of the technique suggested will constitute a highly desirable bit of “preventive maintenance.”