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Federal Rules of Civil Procedure -- Commencement of an Action for Purposes of the Statute of Limitations -- Amendment of Complaints

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due at the time of the life tenant's death; but, where the life estate terminates before the rent is due, an apportionment is in order.³⁰

The Virginia statute allows the lessee to remain on the land until the end of the year and apportions the rent to the representative of the life tenant and the remainderman. If the rent is payable in kind, however, it is to be paid to the personal representative; and he, in turn, is required to pay a reasonable money rent to the remainderman for the period between the death of the life tenant and the end of the current year. This sum is a preferred charge on the rent in kind received from the lessee by the personal representative.³¹ The provision concerning the payment of a reasonable rent to the remainderman affirms the holding of the Virginia court in an early case, decided under the common law, that such a sum could be recovered by the remainderman.³²

Generally, it may be said that these statutes effectively take care of the situation here presented. The injustices of the common law have been eradicated, and the rights of the parties marked out and clarified. Perhaps the term "emblems," when used in these laws, should be given a more definite and positive definition. Nothing so important as the principle of apportionment should be left to judicial interpretation, as was done by the Georgia legislators. All states which do not have such statutes should be urged to adopt laws similar to those discussed herein and draft them with a view to clarity and effectiveness.

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Federal Rules of Civil Procedure—Commencement of an Action for Purposes of the Statute of Limitations—Amendment of Complaints

In a recent case¹ before the Circuit Court of Appeals the executor of a deceased partner sued the surviving members of the partnership for an accounting of the deceased's interest in proceeds from the sale of certain jointly owned cattle, the alleged conversion occurring April 1, 1938. The original petition was filed March 8, 1940, but both summons and alias summons were returned unserved because plaintiff's counsel failed to advance the marshal's fees. Upon issue of another alias summons defendant was served more than sixty days after the four-year statute of limitations had run out. On August 3 and December 11, 1942, amended petitions were filed centering around the same transaction alleged in the original petition, but differing from the original in that plaintiff sought accounting of a single defendant. The court

³⁰ ALA. CODE (1940) tit. 31 §14. The Arkansas and Mississippi statutes resemble the Alabama law closely. See ARK. DIG. STAT. (Pope, 1937) §§8579 and MISS. CODE ANN. (1942) §§2179-80.

³¹ VA. CODE ANN. (Michie, Sublett, & Stedman, 1942) §5543.

³² Thompson v. Thompson, 6 Munf. 514 (Va. 1820).

¹ Isaacks v. Jeffers, 144 F. (2d) 26 (C. C. A. 10th, 1944).

held: (1) the running of the statute was interrupted by the filing of the petition,^{2*} and (2) the amended petitions related back to the filing of the original.^{3*} The dissenting judge argued that the mere filing of the petition within the four year period without diligent service of process was not sufficient.

Before the adoption of the new Federal Rules of Civil Procedure,⁴ an action was deemed to be commenced in a Federal equity court by the filing of a bill with a *bona fide* intent to prosecute the suit *diligently*, provided there was no detrimental or unreasonable delay in the issuance or service of process.⁵ To stay the statute of limitations there must also have been a *bona fide* attempt to serve the process after it had come into the hands of the serving officer,⁶ which, if unsuccessful, was required to be followed by timely proceedings or reasonable diligence to procure service through further or additional process.⁷ As late as January, 1938, the above proposition was expounded as the rule applied by the federal courts in determining when a civil action was deemed to be commenced.^{8*} However, the *bona fide* attempt to serve did not require that every means by which service might be accomplished should have been exhausted; thus it was held sufficient if the officer in good faith, or with a real intent to serve, made reasonable effort to accomplish his purpose.^{9*} But the *bona fides* require the effort to proceed according to law, and that the means prescribed thereby be employed.^{10*}

Since the new Federal Rules have become effective—September

^{2*} 28 U. S. C. A. §723c (1941), Rule 3: "A civil action is commenced by filing a complaint with the court."

^{3*} *Id.* Rule 15(c): "Whenever the claim or defense asserted in the amended pleading arise out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading."

⁴ 28 U. S. C. A. §723c (1941).

⁵ *Linn & Lane Timber Co. v. U. S.*, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. ed. 725 (1915); *U. S. v. Hardy et al.*, 74 F. (2d) 841 (C. C. A. 4th, 1935); *Ben C. Jones & Co. v. West Pub. Co.*, 270 Fed. 563 (C. C. A. 5th, 1921), *writ dismissed*, *Ben C. Jones & Co. v. West Pub. Co.*, 270 U. S. 665, 46 Sup. Ct. 208, 70 L. ed. 789 (1925) (There must be a bona fide intention that the process be served at once.); *Armstrong Cork Co. v. Merchants Refrigerating Co.*, 184 Fed. 199 (C. C. A. 8th, 1910).

⁶ *U. S. v. Amer. Lum. Co.*, 85 Fed. 827 (C. C. A. 9th, 1898).

⁷ *U. S. v. Miller et al.*, 164 Fed. 444 (C. C. D. Ore. 1908).

^{8*} *U. S. v. Adams et al.*, 92 F. (2d) 395 (C. C. A. 5th, 1938) (The filing of the complaint to be effectual as the commencement of suit must have been with good faith intent to prosecute it, and must have been followed reasonably with the issuance and service of process.); *accord*, *N. Y., N. H., & H. R. Co. v. Pascucci*, 46 F. (2d) 969 (C. C. A. 1st, 1931) (Rule denoted to be uniform practice of federal courts.).

^{9*} *U. S. v. Miller et al.*, 164 Fed. 444 (C. C. D. Ore. 1908) (That the marshal used the telephone in attempt to locate defendant, rather than going in person to make direct inquiry, cannot be assigned as a lack of diligence.).

^{10*} *U. S. v. Amer. Lum. Co.*, 85 Fed. 827 (C. C. A. 9th, 1898) (It does not aid the *bona fides* of the attempt to serve that the plaintiff's counsel erroneously thought that the subpoenas could be served by the persons to whom they were sent.).

16, 1938—the courts, in applying them, have almost entirely ignored the above stated principles. The requirement that the suit be diligently prosecuted after the filing of the complaint seems to have been side-tracked by the simple statement of Rule 3: "A civil action is commenced by filing a complaint with the court."^{11*} As a consequence, the following questions have presented themselves: Since the adoption of the rules, may a suit be deemed commenced by the mere filing of a complaint with the court for purposes of the statute of limitations? Must there not be a *bona fide* effort, on the part of the plaintiff, to have service on the defendant and to prosecute the suit diligently?

Similar questions, of the same import, were presented to the Advisory Committee, but were left unanswered, the committee being of the opinion that the ". . . requirement of Rule 4(a) that the clerk shall *forthwith* issue the summons and deliver it to the marshal for service . . . (would) reduce the chances of such a question arising."¹² (*Italics ours.*) Upon a consideration of the committee's statement, it has been suggested ". . . that the filing of the complaint conditionally suspends the running of the statute of limitations, provided the summons is issued *forthwith* and served within a *reasonable* time thereafter."¹³ (*Italics ours.*) Likewise, it has recently been held by a United States District Court, while recognizing and applying the Federal Rules, that the ". . . modern Federal rule is that an action in equity is commenced by the filing of a complaint with a *bona fide* intent to prosecute the suit diligently, provided there is no unreasonable delay in the issuance or service of the subpoena."¹⁴ This proposition would seem to be impliedly recognized in the principal case, for it was there said: "There is nothing in the record from which a legal conclusion of lack of good faith in the prosecution of the action . . . can be inferred," and that the plaintiff's action, or non-action, ". . . does not in itself constitute lack of due diligence. . . ."¹⁵ It is submitted by the writer that in determining when a civil action is commenced, for purposes of the statute of limitations, Rule 3 should be construed in the light of the rules propounded by the earlier decisions, *i.e.*, that the filing of the complaint

^{11*} *Reynolds v. Needle*, 132 F. (2d) 161 (App. D. C. 1942); *O'Leary v. Loftin*, 3 F. R. D. 36 (E. D. N. Y. 1942) (No longer is a suit commenced by service of a summons and complaint.); *Schram v. Costello et al.*, 36 F. Supp. 525 (E. D. Mich. 1940) (Filing a complaint with the court, the issuance of summons and delivery thereof to the marshal, tolls the statute of limitations.); *Gallagher et al. v. Carroll et al.*, 27 F. Supp. 568 (E. D. N. Y. 1939) (Issuance of summons is the required *ministerial act.*); *C. F. Simonin's Sons, Inc., v. Amer. Can Co.*, 26 F. Supp. 420 (E. D. Pa. 1939) (Until the complaint has been filed, no action has been commenced.).

¹² *Notes to the Rules of Civil Procedure for the District Courts of the United States*, 75th Cong., 3d Session, House Document No. 588 (1938).

¹³ *Rotwein, Pleading and Practice Under the New Federal Rules—A Survey and Comparison* (1939) 8 Brooklyn L. Rev. 188, 193.

¹⁴ *U. S. v. Spreckels et al.*, 50 F. Supp. 789, 790 (N. D. Cal. 1943).

¹⁵ *Isaacks v. Jeffers*, 144 F. (2d) 26, 28 (C. C. A. 10th, 1944).

should be followed by a *bona fide* attempt to have service on the defendant and to prosecute the suit with due diligence.

In *Maier v. Independent Taxi Owner's Assn.*¹⁶ the statute was held to be tolled where the complaint was filed within time, but service was not had on defendant until after the statute had run because plaintiff's counsel failed to advance marshal's fees. The court there stated that ". . . upon a proper showing that the circumstances which could not have been reasonably foreseen delayed payment, proof of reasonable diligence thereafter is sufficient to prevent operation of the statute."^{17*} It is interesting to note that in the *Maier* case the court suggested that the obligation of delivering the summons to the marshal included prepayment of the marshal's fees.¹⁸ It was later held in *Schram v. Koppin*,¹⁹ where the complaint was filed before the statute of limitations expired, but service on defendant was delayed until fifteen months thereafter because the latter avoided servers, that the filing of the complaint and the issuance of the original writ started the suit. But the court decided, impliedly recognizing the doctrine of the *Maier* case, that the equities on the question of due diligence were in favor of the plaintiff.²⁰ However, where the marshal's fees were not prepaid, resulting in service after the statute had expired because plaintiff had difficulty in finding security for such fees, it has been held that an honest effort was made under the circumstances to procure the service in due time.^{21*}

By application of the above decisions to the case under consideration, it would seem that plaintiff made no diligent or *bona fide* effort to prosecute the suit. The court merely stated on this point that the ". . . trial court evidently failed to find such conduct (lack of due diligence), because it concluded that the statute of limitations was no bar to the prosecution of the action."²² Indeed, not only did plaintiff's counsel fail on two occasions to provide marshal's fees, although requested, but service was not had on defendant until more than two

¹⁶ 96 F. (2d) 579 (App. D. C. 1938).

^{17*} *Id.* at 582 (Plaintiff's counsel was unexpectedly called out of town, but paid fees immediately upon his return when he found his assistant had failed to do so, in violation of his orders.).

¹⁸ *Ibid.*

¹⁹ 35 F. Supp. 313 (E. D. Mich. 1940).

²⁰ *Id.* at 314; *cf.* *Farbwerke Vormals Meister L. & B. v. Diarsenal Co., Inc.*, et al., 21 F. (2d) 588 (W. D. N. Y. 1927); *Comen v. Miller*, 41 F. (2d) 292 (M. D. Pa. 1930) (It was held that there was nothing to show the contrary of a *bona fide* intention).

^{21*} *Cisco et al. v. Looper*, 236 Fed. 336 (C. C. A. 8th, 1916); *cf.* *Ben C. Jones v. West Pub. Co.*, 270 Fed. 563 (C. C. A. 5th, 1921), *writ dismissed*, *Ben C. Jones v. West Pub. Co.*, 270 U. S. 665, 46 Sup. Ct. 208, 70 L. ed. 789 (1925), (Where a delay of five years six months in service supervenes, the running of the statute is not stopped by the filing of the complaint.).

²² *Isaacks v. Jeffers*, 144 F. (2d) 26, 28 (C. C. A. 10th, 1944).

years after the filing of the original complaint and more than four years after the cause of action accrued.

From the second proposition expounded by the court in the principal case, the further question is presented as to when the amended complaint will relate back to the time of original filing. It is generally held that where an amendment introduces a new or different cause of action and makes a new or different demand, not before introduced or made in the pending suit, it does not relate back to the original filing so as to stop the running of the statute; but where the amended complaint merely varies or expands the allegations in the cause of action already propounded, it will relate back to the commencement of the action, and the running of the statute of limitations is arrested at that point.^{23*} To determine whether a new cause of action is stated in the amendment it has been stated that a ". . . fair test . . . is whether evidence tending to support the facts alleged (in the amended complaint) could have been introduced under the former pleadings."²⁴ Thus an original complaint, alleging that the injury was caused due to defendant's manhole not being "flush" with the sidewalk, was not allowed to be amended by the allegation that the accident was caused by negligently constructed corrugations on the manhole.²⁵ Although other strikingly similar tests have been propounded,^{26*} it would seem that the one above stated is of greater value, since it is easier to apply to

^{23*} *Kan. Gas & Elec. Co. v. Evans*, 100 F. (2d) 549 (C. C. A. 10th, 1938), *cert. den.*, 306 U. S. 665, 59 Sup. Ct. 790, 83 L. ed. 1061 (1938); *Wabash Ry. Co. v. Bridal*, 94 F. (2d) 117, 121 (C. C. A. 8th, 1938), *cert. den.*, 305 U. S. 602, 59 Sup. Ct. 63, 83 L. ed. 382 (1938), ("It is now the generally accepted rule, 'when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and * * * that a liberal rule should be applied.'"); *S. H. Kress & Co., Inc., v. Reaves*, 85 F. (2d) 915, 916 (C. C. A. 4th, 1936), *cert. den.*, 299 U. S. 616, 57 Sup. Ct. 322, 81 L. ed. 454 (1937), (Amended complaint held merely to amplify the original, where the original claimed damages caused by defendant's excavations and amended complaint alleged further that the excavations were done without ascertaining in advance the nature and character of the ground); *Factors & Finance Co., Inc., v. U. S.* 56 F. (2d) 902 (Ct. Cl. 1932), *cert. granted*, 287 U. S. 582, 53 Sup. Ct. 16, 77 L. ed. 509 (1932), *aff'd.*, 288 U. S. 89, 53 Sup. Ct. 287, 77 L. ed. 633 (1933); *Hovland v. Farmers' State Bk. of Christine, N. D.*, et al., 10 F. (2d) 478 (C. C. A. 8th, 1926) (The allegations of the original pleading must be sufficiently specific to enable the court to identify the cause of action therein sought to be set up and to determine whether or not the original and amended pleadings refer to the same cause of action.); *Saylers et al. v. U. S.*, 257 Fed. 255 (C. C. A. 8th, 1919) (Where the plaintiff, having two causes of action, has stated but one of them in his original complaint, although the amount demanded is large enough to cover both, an amendment setting up the second cause of action will not relate back to the date of the original petition); *Dittgen v. Racine Paper Goods Co.*, 164 Fed. 85 (C. C. E. D. Wis. 1908).

²⁴ *Kan. Gas & Elec. Co. v. Evans*, 100 F. (2d) 549, 552 (C. C. A. 10th, 1938), *cert. den.*, 306 U. S. 665, 59 Sup. Ct. 790, 83 L. ed. 1061 (1939).

²⁵ *Ibid.*

^{26*} *Saylers et al. v. U. S.*, 257 Fed. 225 (C. C. A. 8th, 1919) (Whether the same evidence will support both; and whether a judgment against one will bar the other.); *Hall v. Louisville & N. R. Co.*, 157 Fed. 464 (C. C. N. D. Fla. 1907) (Does the amendment introduce a new right or new matter?); *Overfield v. Penn-*

each case as it arises. Thus it has been held that the cause of action is not changed where the amended complaint alleges that the plaintiff sues under the authority and for the benefit of a third person, instead of for his own benefit as evidenced by the original complaint.^{27*} Then, too, where the amended complaint changes the allegation of the capacity in which the defendant is sued, and seeks application of different principles of law to the same facts upon which the former declaration was based, it does not introduce a new cause of action.^{28*} It is also generally recognized by the Federal courts, that a new cause of action is not stated where the amendment sets forth the statute applicable to the situation in replacement of an inapplicable statute pleaded in the original complaint.^{29*}

Accordingly, by the process of "evolution," the ". . . emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim."^{30*} Thus by the application of Rule 15(c),^{31*}

road Corp. et al., 39 F. Supp. 482, 485 (E. D. Pa. 1941) ("The important question is whether or not the allowance of the amendments would work an injustice upon any of the parties.").

^{27*} *Middlesex Banking Co. v. Smith*, 83 Fed. 133 (C. C. A. 5th, 1897). *But cf.* *Hall v. Louisville & N. R. Co.*, 157 Fed. 464 (C. C. N. D. Fla. 1907) (An amended declaration changing the beneficiary of the action is in effect the bringing of a new suit.).

^{28*} *Clinchfield Ry. Co. v. Dunn, Admr.*, 40 F. (2d) 586 (C. C. A. 6th, 1930), *cert. den.*, 282 U. S. 860, 51 Sup. Ct. 34, 75 L. ed. 761 (1930), (Original complaint alleged against defendant as corporate successor of Car., Clinchfield & Ohio Ry. Co., whereas the amended complaint alleged defendant as "lessee" of said company.).

^{29*} *Mo., Kan. & Tex. Ry. Co. v. Wulf*, 226 U. S. 571, 575, 33 Sup. Ct. 135, 137, 57 L. ed. 355 (1913) ("The pleader was not required to refer to the federal act, and the reference actually made to the Kansas Statute no more vitiated the pleading than a reference to any other repealed statute would have done."); *Williams v. Wm. B. Scaife & Sons Co.*, 227 Fed. 922 (D. N. J. 1915) ("The reference in the first complaint to the New Jersey statute was mere surplusage, and no more vitiated that pleading than a reference to any other matter which was surplusage would have done. What has been done . . . is to eliminate . . . mere surplusage. . ."). *But cf.* *De Valle De Costa v. Southern Pac. Co.*, 167 Fed. 654 (C. C. D. Mass. 1909), *cert. den.*, 217 U. S. 606, 30 Sup. Ct. 696, 54 L. ed. 900 (1909) (Where an amended declaration is based on a statute of another state, not counted on in the original declaration, the suit was not commenced until the filing of the amended declaration.); *cf.* *Union Pac. Ry. Co. v. Wyer*, 150 U. S. 285, 15 Sup. Ct. 377, 39 L. ed. 983 (1895) (Since the first petition proceeded under the general law of master-servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas Statute, it was a departure from law to law, and therefore a different cause of action.).

^{30*} *White v. Holland Fur. Co., Inc.*, 31 F. Supp. 32, 34 (S. D. Ohio 1939); *accord*, *Oil Well Supply Co. v. First Nat. Bk. of Winfield, Kan.*, 106 F. (2d) 399 (C. C. A. 10th, 1939) (A departure from law to equity, or vice versa, resulting from amended petition, is not the test as to whether a new cause of action is stated.); *Overfield v. Pennrod Corp. et al.*, 39 F. Supp. 482 (E. D. Pa. 1941) (Controversies should be determined on the merits and not on procedural niceties, if there will be no prejudice to the defendant.); *cf.* *Midland Valley R. Co. v. Jones*, 115 F. (2d) 508 (C. C. A. 10th, 1940).

^{31*} 28 U. S. C. A. §723c (1941), Rule 15(c): "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading."

of the new Federal Rules, it is generally held that an amendment will not state a new cause of action if the facts stated show ". . . substantially the same wrong with respect to the same transaction . . . although the form of liability asserted or the alleged incidents of the transaction may be different."³² By application of this principle to the case at hand, the result reached by the court seems unavoidable. The plaintiff sought no relief against the partnership in his original complaint, but both the original and amended complaints were directed against the conduct of the individual defendant.

JAMES G. HUDSON, JR.

White Slave Traffic Act—Intent and Purpose within the Meaning of the Act

Defendants operated a house of prostitution in Nebraska. They took a vacation trip to Utah, carrying two prostitutes employed in their house. It was undisputed that the trip was planned as a vacation, the respective parties bearing individual expenses. Upon their return with the defendants, the girls re-entered the defendants' employ. The United States Supreme Court held that there was no violation of the "White Slave Traffic Act" by the defendants, for they did not transport the girls with the intent or purpose to facilitate prostitution within the meaning of the Act. Furthermore, the fact that the girls resumed their immoral practice did not operate to inject a retroactive illegal purpose into the trip.¹ This case raises the interesting question: What constitutes "intent and purpose" within the meaning of the "White Slave Traffic Act?"

The "Mann Act," most often called the "White Slave Traffic Act," provides that "Any person who shall knowingly transport or cause to be transported . . . in interstate commerce . . . any woman or girl for the purposes of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce; entice; or compel such woman or girl to become a prostitute or to give herself up to debauchery, or engage in any other immoral practice . . . shall be deemed guilty of a felony. . . ."² Thus, it appears from the reading of the statute that there are two requisites to a conviction: (1) knowingly transporting in interstate commerce (2) for the purpose of prostitution, debauchery, or any other immoral purpose.³ Under the statute there is no distinction between "intent" and "purpose." If the transportation

³² *Brown v. N. Y. Life Ins. Co.*, 32 F. Supp. 443 (D. N. J. 1940); *accord*, *White v. Holland Fur. Co., Inc.*, 31 F. Supp. 32 (S. D. Ohio, 1939).

¹ *Mortensen v. U. S.*, — U. S. —, 64 Sup. Ct. 1037, — L. ed. — (1944).

² 36 STAT. 825 (1910), 18 U. S. C. §398 (1927).

³ *U. S. v. Lewis*, 110 F. (2d) 460 (C. C. A. 7th, 1940), *cert. den.*, 310 U. S. 634, 60 Sup. Ct. 1077, 84 L. ed. 1404 (1940); *Shama v. U. S.*, 94 F. (2d) 1 (C. C. A. 8th, 1938).