NOTES AND COMMENTS

ATTACHMENT

ATTACHMENT — VALIDITY OF ORDER ISSUED PRIOR TO SERVICE

The plaintiff filed his petition in the Common Pleas Court of Lucas County, Ohio, against the defendant, a non-resident corporation. Summons was issued immediately, but no personal service was had. With his petition the plaintiff filed an affidavit in attachment and garnishment, by virtue of which certain funds were garnished. Thereafter service by publication was completed, but before judgment the defendant removed the case to the federal District Court. Subsequently the plaintiff filed a supplemental petition and affidavit in garnishment, thereby reaching additional funds in the hands of the garnishees. Ruling on a motion by the defendant, the District Court discharged the attachments and struck the petitions from the files, on the grounds that the affidavit filed in the state court was defective because acknowledged before a notary who was in the employ of a corporation, of which the plaintiff was president; and that the supplemental affidavit was void for want of personal service. On appeal, the Circuit Court of Appeals affirmed the judgment on the ground that the attachment or garnishment in the state court was premature and void because secured before publication of notice; and that an attachment could not be secured in a federal District Court without personal service.[1] The Supreme Court of the United States reversed the decision and remanded the cause for further proceedings.[2]

Of particular interest to Ohio lawyers is the decision of the Supreme Court on the question of whether an order of attachment issued after the filing of a petition and the issuance of summons, but prior to the first publication of notice is premature and void. In Ohio before the case of *Doherty* v *Cremering*,[3] there is little doubt but that this question would have been answered in the negative.[4] That case cast the first shadow

[1] *Rorick* v. *Devon Syndicate*, 100 F. (2d) 844 (1939).
[2] *Rorick* v. *Devon Syndicate*, 207 U.S. 299, 83 L. Ed. 831 (1939).
[3] 83 F. (2d) 388 (1936).
[4] *Bacher* v. *Shawan*, 41 Ohio St. 271 (1884); *Seibert* v. *Switzer*, 35 Ohio St. 661 (1880); *St. Johns* v. *Parsons*, 54 Ohio App. 420, 8 Ohio Op. 169, 23 Ohio L. Abs. 432 (1936); *Citizens National Bank* v. *Union Central Ins. Co.*, 12 Ohio C.C. (N.S.) 401 (1909); 4 Ohio Jur. 68, sec. 44.

of uncertainty on what theretofore had been considered settled law; and while not controlling, the influence of this case was mischievous as witness the decision of the Circuit Court of Appeals in the principal case. The order of events in the *Doherty* case was the same as in the principal case, and yet the court there relied upon *Seibert* v. *Switzer*,[5] where no petition had been filed nor any summons issued, and where it was definitely stated that an attachment may be secured at any time after the filing of a petition and issuance of summons.

Sec. 11879 of the Ohio General Code provides that "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant . . . " Sec. 11279 provides that "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." Notwithstanding the plain language of these statutes, the court in the *Doherty* case felt that sec. 11230 was controlling. This section reads: "An action shall be deemed to be commenced *within the meaning of this chapter*, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made." (Italics inserted.) The Supreme Court quite rightly accepted the contention of the plaintiff in the principal case and held that sec. 11230 applied only to matters within the chapter in which it is found (the chapter on "Limitations of Actions"), and that the Circuit Court of Appeals erred in adopting the view expressed in the *Doherty* case.

In reaching the conclusion which it did, the Supreme Court removed the disturbing influence of the decisions in the Circuit Court of Appeals and once again established that certainty which is so desirable in this phase of the law.

W. L. A.

CORPORATIONS

Corporations — Directors Fixing Own Salaries as Officers — Ratification by Stockholders

Five directors of a corporation owned a large majority of the stock. In successive years, by resolutions adopted by the board of directors, the officer-directors voted themselves "salaries" for their services as officers during the year. Such "salaries," although never actually paid, were

[5] See Note 4, *supra*.