

1953

Appellate Procedure

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Recommended Citation

Clare DeWitt Russell, *Appellate Procedure*, 4 W. Rsrv. L. Rev. 201 (1953)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol4/iss3/7>

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action, the opinion in *Longo v. Tobasso*⁶ discussed the rule that a master is responsible for his negligence in keeping and maintaining a servant with dangerous propensities, and that he has a duty to exercise care to protect third persons from the unlawful conduct of such a dangerous servant.⁷ While the proposition seems to be one of first impression in Ohio, the court did not question whether the rule exists in this state, for, by stating that the cause of action was not sustained by the evidence, the court implied that the pleading stated a good cause of action.

MAURICE S. CULP

APPELLATE PROCEDURE

An examination of several hundred cases reported by the supreme court and the courts of appeals of Ohio during the year 1952 fails to disclose any particularly novel departure from precedent already established in the field of appellate procedure, which phrase may also be taken to include the familiar digest topic, "Appeal and Error." This is true despite the excellent precedent provided by the federal courts' adoption of the Federal Rules of Civil Procedure¹ and Federal Rules of Criminal Procedure,² together with a number of amendments to both categories of rules since 1946, the adoption in 1948 of new procedural rules by the courts of New Jersey which are patterned after the federal rules, and progress in a number of other states toward similar procedural improvement.³

Perhaps a reason for the lack of procedural change is similar to that stated by Judge Charles E. Clark of the Second Circuit of the United States Court of Appeals:

Judicial inertia, precedent mindedness, love of technical niceties—all play their part in halting procedural improvement. So does, even more, a professional attitude which looks down on the subject of procedure, save for an occasional broadside for its hasty reform. So does its lengthy history, some portions of which are wearily technical, though often not to the extent now assumed. So does the nature of the subject matter, dealing as it does with routine which tends to progress only from mere habit into ironbound routine.⁴

¹ 28 U.S.C. § 2072 (1950).

² 18 U.S.C. § 3771 (1951).

³ In addition to the precedent of the courts and the legislatures, there is an excellent recent text on procedure and judicial administration by the Chief Justice of the New Jersey Supreme Court: *CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION*. By Arthur T. Vanderbilt. New York: Washington Square Publishing Corp. 1951. Pp. xx, 1390. \$8.50. For a review of this new book, see 4 WEST. RES. L. REV. 188 (1952).

⁴ Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493 (1950).

Separate Appeals

A very recently decided case is *Jolley v. Martin Brothers Box Co.*⁵ The supreme court held that the court of appeals, after reviewing an order of the trial court overruling the defendant's motion for judgment notwithstanding the verdict and entering judgment thereon for the plaintiff, committed error in dismissing, upon motion of the plaintiff, the defendant's assignments of errors on a second appeal. The second appeal was brought upon the record through the overruling of the defendant's motion for a new trial and directed to a judgment on the verdict. It was dismissed by the court of appeals on the ground that the validity of such assigned errors had already been determined adversely to the defendant on the first appeal and that such determination thereafter had become, as to such claimed errors, res judicata.

In the face of the argument that the defendant was entitled to but one appeal in the course of which all questions of error could have been determined, the supreme court held that these two procedures were independent of each other because there were two independent judgments involved, and that the defendant could not predicate errors on the judgment on the verdict in the second appeal until the motion for a new trial had been overruled. The majority opinion pointed out that such action had not been taken until defendant's first appeal upon its motion for judgment notwithstanding the verdict had been disposed of. It is of interest to note that Judge Hart, who wrote the majority opinion, also wrote one of the dissenting opinions in the case of *Green v. Acacia Mutual Life Insurance Co.*⁶ upon the question of a final order subject to review, the majority opinion in which case has caused considerable comment during the past year.⁷

Amendment of the Petition

In the case of *Cohen v. Bucey*,⁸ the sole question was whether an amendment to a petition in a negligence case adding allegations of willful and wanton misconduct introduced a new and different cause of action so as to bar the action because of the running of the statute of limitations. The court held that the additional allegations of the amended petition did not have the effect of stating an additional cause of action since the amendment related back to the date upon which the action was commenced.

Modification of a Custody Order

In *Trickey v. Trickey*,⁹ a divorce action involving the custody of a minor child, the court held that the trial court had continuing jurisdiction respecting custody and discriminatory power to modify its original awarding order to the extent determined by it to be for the best interest of the

minor child. Thus if there is an appeal on questions of law only, the court of appeals may not substitute its judgment for that of the trial court. The court cited its opinion in the case of *Henry v. Henry*,¹⁰ also decided in 1952, where it held that if the judgment of a trial court depended upon evidence and inferences to be drawn therefrom, the court of appeals on appeal on questions of law only is ordinarily authorized to modify the judgment only where the evidence is such as to require modification as a matter of law.

Procedure in Negligence

A negligence case which raised procedural questions was *Brown v. Cleveland Baseball Co.*,¹¹ in which an action was brought by an invitee of the Cleveland Rams Football Club, a lessee of defendant's ball park, for injuries sustained when temporary bleachers collapsed at a professional football game. Because the evidence established that the defendant was in substantial occupation and control of the portion of the premises where the plaintiff was injured, the supreme court held that the defendant was not legally injured by the trial court's charge that the defendant as lessor had full control of the premises. Even though the defendant merely retained and exercised "substantial" occupation and control, the duty of care which it owed the plaintiff as its lessee's invitee was the same as if the defendant had had full control.

Abuse of the Court's Discretion

The court, in *Schmotzer v. Sixt*,¹² considered the situation arising as a result of two companion cases on appeal on questions of law which had been tried at the same time to a judge and jury, a verdict being rendered in one case but not in the other, before which omission the jury had been discharged and the jury members had conversed with one of the parties about the case. The following day the trial court directed the jury to consider further the case in which there was no verdict, and a verdict was subsequently returned. The court of appeals held that as to the second case the trial court abused its discretion in overruling a motion for a new trial.

¹⁰ 158 Ohio St. 416, 109 N.E.2d 652 (1952).

¹¹ 156 Ohio St. 1, 16, 100 N.E.2d 211, 218 (1951).

¹² Hart and Hart, *Review of Ohio Case Law For 1951*, 47 Ohio Op. 287, 296 (1952); 12 OHIO ST. L.J. 476 (1951).

¹³ 158 Ohio St. 159, 107 N.E.2d 333 (1952).

¹⁴ 158 Ohio St. 9, 106 N.E.2d 772 (1952).

¹⁵ 157 Ohio St. 319, 105 N.E.2d 406 (1952).

¹⁶ 158 Ohio St. 1, 106 N.E.2d 632 (1952).

¹⁷ 91 Ohio App. 295, 108 N.E.2d 154, *appeal dismissed*, 157 Ohio St. 536, 106 N.E.2d 75 (1952).

Another question as to the extent of a court's discretion arose in the case of *Cook v. Williams*.¹³ The court of appeals held that a trial judge was vested with discretion to decide whether to permit the plaintiff to reopen his case for the introduction of additional evidence after resting the case in chief and that the exercise of such discretion cannot be disturbed by a reviewing court in the absence of a manifest abuse of such discretion.

In *Schaible v. Cincinnati*,¹⁴ the trial court directed a verdict for the defendant but thereafter granted the plaintiff's motion to set it aside and grant a new trial. The court of appeals dismissed the appeal and the supreme court affirmed, holding that since the journal entry of the trial court setting the verdict aside and granting a new trial did not disclose the grounds for such order and no abuse of discretion appeared in the record, the judgment of the court of appeals should be affirmed.¹⁵

An interesting case, *Collins v. Yellow Cab Co.*,¹⁶ raised a procedural question which seemingly had not been previously decided. In a personal injury case the trial court overruled a demurrer to interrogatories attached to the plaintiff's petition and granted the defendant leave to plead before a designated date. The defendant appealed on questions of law to the court of appeals, which dismissed the appeal. The supreme court affirmed and held that since no abuse of discretion on the part of the trial court had been shown, the overruling of the demurrer was not such a final order as to affect a substantial right, determine the action or prevent judgment. It is submitted that the supreme court's views on this question are entirely sound, and it is surprising that there has heretofore apparently been no determination of it in Ohio.

Appeal by an Administrative Board

*A. DiCillo & Sons v. Chester Zoning Board of Appeals*¹⁷ was an action brought to review the ruling of a township board of zoning appeals which had denied the plaintiff a building certificate to enlarge a slaughter house operating as a non-conforming building in a residential district. The common pleas court affirmed the decision of the board, and the plaintiff thereafter appealed to the court of appeals, which reversed the judgment of the lower court. The supreme court, on the plaintiff's motion to dismiss the defendant's appeal based upon a motion to certify the record, held that neither the township board of zoning appeals nor any of its members had

¹³ 92 Ohio App. 277, 108 N.E.2d 232 (1952).

¹⁴ 157 Ohio St. 512, 106 N.E.2d 81 (1952).

¹⁵ *Schwer v. New York, C. & St. L. R.R.*, 156 Ohio St. 115, 100 N.E.2d 197 (1951); *Green v. Acacia Mutual Life Ins. Co.*, 156 Ohio St. 1, 100 N.E.2d 211 (1951).

¹⁶ 157 Ohio St. 311, 105 N.E.2d 395 (1952).

¹⁷ 158 Ohio St. 302, 109 N.E.2d 8 (1952).