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Appellate Procedure

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and then leave the car at a garage for repairs. On the way to the garage the friend deviated from the direct route for his own purposes, and while returning to the direct route negligently injured the plaintiff. A judgment in favor of the plaintiff was reversed by the court of appeals. The court said that even if the son were the agent of his mother in having the car repaired, so as to charge her with liability on the repair contract, he did not have authority to delegate the driving of the car. The court also held that the driver's deviation was great enough so that as a matter of law the owner was not liable.[11]

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APPELLATE PROCEDURE

A number of cases reported during the year 1954, having to do with various phases of appellate procedure indicate that Ohio courts are continuing to regard problems of procedure as important, but, nevertheless, as providing an adjective function only, as a kind of super-structure for the substantive law of the cases. None of the cases reviewed, with one possible exception, announce any novel development in the attitude of the courts with regard to procedure, but a number of cases clarify and accent the views of the Ohio courts set forth in earlier opinions.

The supreme court, in *Connelly v. Balkwill*,[1] reconsidered the bothersome question of whether an action is legal and, therefore, appealable on questions of law only, or equitable and appealable on questions of law and fact, and clarified at least one rule with regard to such determination. In this case, a shareholders' action against several defendants, a unanimous court held that a money judgment in favor of the plaintiffs could result only (1) after establishment of a fiduciary relationship between them and the director of the corporation and a breach of duties on his part arising from that relationship, and (2) an accounting. The court reasoned that the action against the director in such a situation, despite the fact that a money judgment was sought, was equitable in nature and, therefore, appealable on questions of law and fact. It was further pointed out that the question as to whether or not such a case should properly be appealed on questions of law and fact must be determined from the pleadings and the issues made thereby, and that such determination could not be inferred by evidence introduced in the trial of the case.

In considering the appeal of a chancery proceeding, the court of appeals for Montgomery County, in the case of *Toulmin v. Becker*,[2] ruling

[11] Ohio law on the "frolic and detour" problem is summarized in Note, 21 U. OF CIN. L. REV. 156 (1952).

upon plaintiffs' motion to refer the cause to a a referee, held that the question of reference is not jurisdictional but is procedural, that the plaintiff was entitled to a de novo hearing. It was further held that the court of appeals has the inherent right to order the matter referred, and that, in such a situation, the trial of the case is controlled by the Code of Civil Procedure applicable to the court of common pleas.

In the case of *Brent v. Scale Mfg .Co.*[3] the common pleas court in a receivership case had found a chattel mortgage to be invalid and ordered the receiver to allow the claim of the appellant only as a general claim, from which order the appellant appealed. The court of appeals in its opinion distinguished the facts in this situation from those presented in a number of earlier cases which have established that ancillary orders in a receivership, if appealable, are appealable only on questions of law. The court pointed out that since in the instant case an equity question was involved, neither party had the right to demand a jury.

A distinction was drawn by the court of appeals for Franklin County between the facts in *LeMaistre v. Clark*[4] and those in the case under consideration, *Fleming v. Optical Co.*,[5] the court holding that the overruling by the common pleas court of a demurrer to the defendants' pleas of laches set up in their answer, was a determination of a question of fact and that, therefore, an appeal on questions of law and fact based thereon would not be dismissed.

In two cases argued together as *State* ex rel. *Raydel v. Raible,*[6] the court of appeals for Cuyahoga County considered a case which was before that court on questions of law only and held that in this situation the question of what the court would or would not do if it were sitting as the trial judge was not present. The only questions for the court to decide are whether the judgment of the trial court was manifestly against the weight of the evidence, whether that court committed an abuse of discretion, or whether it committed prejudicial error in the application of the law. Therefore, the case might not be tried de novo, as contended by the appellant.

In several cases reported during the year, the courts again considered the elements of an appealable order. In *Gray v. Youngstown Municipal Railway Company,*[7] the supreme court refers to its previous holdings that,

[1] 160 Ohio St. 430, 116 N.E.2d 701 (1954).
[2] 94 Ohio App. 524, 115 N.E.2d 705 (1953).
[3] 66 Ohio L. Abs. 259, 116 N.E.2d 761 (Ohio App. 1952).
[4] 142 Ohio St. 1, 50 N.E.2d 331 (1943).
[5] 67 Ohio L. Abs. 126, 118 N.E.2d 920 (Ohio App. 1951).
[6] 117 N.E.2d 480 (Ohio App. 1954), *appeal dism'd,* 162 Ohio St. 74, 120 N.E.2d 590 (1954).
[7] 160 N.E.2d 511, 117 N.E.2d 27 (1954).

where in the course of the trial of a case a defendant appropriately moves for a directed verdict, which is overruled with a verdict later being rendered for the defendant, and plaintiff's motion for a new trial is thereafter sustained, there emerges from such sequence of events a final appealable order. In the instant case this sequence had also occurred, but in addition the defendant had moved for a judgment on the evidence following the granting of the plaintiff's motion for a new trial, defendant's motion being overruled. The court held that in this situation the defendant's motion in effect constituted merely a renewal of the motions for a directed verdict made during the trial, and that, when the plaintiff's motion for a new trial was sustained, the resulting order was final and appealable.

In a nuisance and negligence action by land owners for damage caused by gasoline leakage,[8] defendant's demurrer on several grounds was sustained and plaintiffs appealed. The court of appeals overruled a motion to dismiss the appeal for the reason that the order appealed from was not a final order, and then certified the record for review and final judgment because of conflict, an appeal as a matter of right being taken as well. The supreme court found that the order of the court of appeals, which overruled the motion to dismiss the appeal, did not determine the question and it was not, therefore, a final order from which an appeal might be taken.

The so-called two-issue rule is again discussed from the standpoint of the consideration of a jury charge in two cases: *Investment & Discount, Inc. v. Younkin*[9] and *Asteri v. City of Youngstown.*[10] In the latter case the court defined the rule quite acceptably as follows:

> The two-issue rule is, that error in the charge of the court, dealing exclusively with one of two or more complete and independent issues required to be presented to a jury in a civil action will be disregarded, if the charge in respect to another independent issue which will support the verdict of the jury is free from prejudicial error, unless it is disclosed by interrogatories or otherwise that the verdict is in fact based upon the issue to which the erroneous instruction related.

Strict conformance with statutory procedure was enjoined by the court of appeals for Hamilton County in the case of *Greenberg v. Snodgrass Co.*[11] The court held that no right exists under the statutes or the rules of courts of appeal to file a "cross appeal," each party being responsible for perfecting his own appeal, and the time for filing notices of appeal was not extended or curtailed by the time consumed by any other party in the filing of notice of appeal.

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[8] Schindler v. Standard Oil Company, 162 Ohio St. 96, 120 N.E.2d 590 (1954).
[9] 66 Ohio L. Abs. 514, 118 N.E.2d 183 (Ohio App. 1954).
[10] 67 Ohio L. Abs. 605, 121 N.E.2d 143 (Ohio App. 1954).
[11] 95 Ohio App. 307, 119 N.E.2d 114 (1954).