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Civil Procedure

Samuel Sonenfield

attorneys and judges. The court, relying on the Legislature as well as its own inherent power, referred to the statutes making admittance to practice and a certain period of active practice as a prerequisite to service as a judge in the various courts of Ohio,[11] and concluded that:

> . . . An attorney at law does not, upon assuming a judicial position, cease to be a member of the legal profession, but becomes such a member who has assumed a position of public trust which demands of him an even greater degree of responsibility and an even higher and more specialized standard of conduct than that demanded of a practicing attorney. . . .[12]

It suspended respondent indefinitely from practicing as an attorney, ordered his name be stricken from the Journal and Roll of Attorneys maintained by the Clerk of the Supreme Court and restrained him from the practice of Law in Ohio in any way or form whatsoever. Its action in this case did not, of course, specifically oust him from the judicial office.

Contempt for Failure to Fully Report Full Fee In Wrongful Death Case

In a case[13] arising not out of disciplinary procedures as now set forth in Rules XXVII and XXVIII, but rather on appeal from a conviction of contempt charges filed against the offending attorney by the judge of a probate court in which the incident occurred, the Supreme Court held that it is an act of contempt for an attorney to file with the court a statement that he had received from the distributees of the proceeds of a wrongful death claim an attorney fee of $525.00, when he had in fact received from such beneficiaries an additional sum of $450.00. The court did not find it necessary to consider the alleged invalidity of a rule of the particular probate court limiting the amount of such fees, since the attorney had not seasonably raised that point.

SAMUEL SONENFIELD

CIVIL PROCEDURE

Jurisdiction in Prohibition

The action of prohibition is an ancient and useful common law remedy whereby a superior court prevents an inferior court or judge from exercising jurisdiction over subject matter when the inferior lacks the

11. OHIO REV. CODE §§ 2503.01, 2501.02, 2301.01, 2101.02, 1901.06, 1907.051.

12. Mahoning County Bar Ass'n v. Franko, 168 Ohio St. 17, 24, 151 N.E.2d 17, 23 (1958).

13. *In re* La Penta's Estate, 167 Ohio St. 536, 150 N.E.2d 404 (1958).

jurisdiction which it is about to assume or has assumed.[1] While the Ohio Constitution specifically confers upon the Ohio Supreme Court and the courts of appeals original jurisdiction in prohibition, it does not do so specifically to courts of common pleas.[2] It is undisputed that these courts are merely given the "capacity to receive jurisdiction" in civil and criminal cases, when the legislature acts to bestow it.[3]

The question whether the legislature has ever acted was before the Supreme Court in *State ex rel. Miller v. Keefe, Judge*,[4] in which the Common Pleas Court of Hamilton County had purported to issue such a writ to the Municipal Court of Cincinnati. The Supreme Court pointed out that while the legislature has specifically granted original jurisdiction to common pleas in habeas corpus and mandamus,[5] it has not done so in prohibtion, quo warranto or procedendo. Likewise, it pointed out that the section of the Revised Code[6] which confers on the court of common pleas "original jurisdiction in all civil cases where the sum or matter in dispute exceeds the original jurisdiction of justices of peace" has not been in the past construed to include proceedings in mandamus, and concluded that it does not embrace proceedings in prohibition.[7]

Chief Judge Weygandt dissented, pointing out that the court had in past decisions[8] tacitly assumed that common pleas had a general jurisdiction over all matters of law and equity which are not denied to it.

The majority opinion specifically did not pass upon the question whether a common pleas court might have jurisdiction in a case in which jurisdiction had already been conferred on it and an attempt was being made by an inferior tribunal to interfere with that jurisdiction.

Such power seems inferentially to have been established by the Court of Appeals for Summit County in *Parkison v. Victor, Judge*,[9] although the majority of the court in that case likewise specifically refrained from so deciding, while Judge Hunsicker, concurring in the specific result reached, held that a common pleas court could not have such power.

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1. BOUVIER'S LAW DICTIONARY, 2739 (Rawle's Third Revision).
2. OHIO CONST., art. IV §§ 2, 6.
3. *Id.* § 4.
4. 168 Ohio St. 234, 152 N.E.2d 113 (1958).
5. OHIO REV. CODE §§ 2725.02, 2731.02. In fact, there seems to be only one place in the entire Revised Code at which the action of prohibition is even mentioned. See § 2329.70.
6. OHIO REV. CODE § 2305.01.
7. Chin v. Trustees, 32 Ohio St. 236 (1877).
8. Saxton v. Seiberling, 48 Ohio St. 554 (1891), State v. King, 166 Ohio St. 293, 142 N.E.2d 222 (1957).
9. 105 Ohio App. 200, 152 N.E.2d 275 (1957).

SIMULTANEOUS INJURY TO PERSON AND PROPERTY — ONE CAUSE OF ACTION

Problems of Joinder of Parties

A pleading problem with substantive overtones which has long remained unsettled in Ohio came much closer to final solution by the Supreme Court in 1958.[10] The various states have split on the question whether the injury by one act to rights in person and in property produces one or two causes of action. The majority seem to favor the rule that one cause of action results; a respectable minority believe it to result in two causes. In those which adhere to the majority rule an exception is made in those instances in which an insurer is subrogated to the injured person's claim for damage to his personality.

Decision of the question is important. If the result is one cause of action and plaintiff is not insured he must sue defendant for both the injury to his person and his property in one action or he will by recovery for the usually much smaller damage to his automobile bar himself from a recovery for his personal injuries. If the result is two causes of action, plaintiff and defendant both face dangers. Loss by plaintiff of his small claim for damage to personal property may nevertheless bar him from recovery for his personal injuries, while loss of the smaller lawsuit by defendant may put him in the position in the large one of being able to go to the jury only on the questions of whether in fact the plaintiff received injuries and if so, what the amount of recovery shall be.

The Ohio Supreme Court had previously strongly intimated that the decision in Ohio would be in accord with the majority.[11] Two other cases which raised the question were qualified by the fact that a subrogated insurer was in the picture.[12] In *Rush v. Maple Heights,* the fact situation being uncomplicated by any subrogated insurer, the court had squarely before it whether a previous $100.00 recovery by plaintiff for injuries to personal property as a result of defendant's negligence barred her from recovering judgment from that defendant on a jury verdict for $12,000.00 for injuries to her person.

The Supreme Court held her barred. She had already reduced her one cause of action to a judgment in the earlier case.

Still left unsettled are the questions whether the existence of insurance on *a part* of plaintiff's property damages results in the existence of

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10. Rush v. City of Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599 (1958); *cert. denied* 79 S.Ct.21 (1958). The Ohio Supreme Court's opinion cites numerous authorities on both sides of this question.

11. Markota v. East Ohio Gas Company, 154 Ohio St. 546, 97 N.E.2d 13 (1951).

12. Mansker v. Dealers' Transport Co., 160 Ohio St. 255, 116 N.E.2d 3 (1953) and Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707 (1945).

a separate cause of action for that, or merely a permissive splitting of the one cause, and some troublesome problems of permissive joinder.

One of these was dealt with in *Holibaugh v. Cox.*[13] Plaintiff sued defendant in tort for the full amount of damages done by reason of defendant's negligence to plaintiff's automobile. At trial, which took place after the statute of limitations had run on the claim, plaintiff was permitted to amend her petition by adding to the caption, after her own name, the conjunctive "and" and the name of her insurer, and in the body thereof a factual allegation of the subrogation and the extent thereof.

The Supreme Court upheld the trial court in granting permission of the insurer to join as plaintiff after the statute of limitations had run. Analyzing correctly, we think, the earlier cases of *Cleveland Paint & Color Co. v. Bauer Manufacturing Co.*[14] and *National Retailers Mutual Insurance Co. v. Gross,*[15] the court held (1) that the insurer was not barred by the statute of limitations from joining the insured after the statute had run in the action against the tort feasor; (2) that the assignor and assignee may be compelled by the defendant to join if defendant makes timely request for such protection; (3) that the claim for the damage is one "indivisible chose in action" and that *if the injured plaintiff wishes, and neither his assignee nor the defendant objects,* he may sue in his own name for the full amount of damage, even despite the "partial assignment." The "cause of action" was therefore the whole damage to the automobile. The insurer's cause of action (for his interest in the damage) had been brought *for* him by his assignor within the statutory period, therefore there was no *laches* on the part of the insurer.

To this writer the unanswered question in *Rush v. Maple Heights* begins to have an answer. If a claim for portions of damage to property constitutes one indivisible cause of action, and if a claim for both personal injury and property damage constitutes one indivisible cause of action, then these cases boil down to a rule that whatever the insurer's portion may be, he is merely the beneficiary of a rule that he may sue separately for *his portion* and the insured may sue separately for his portion, without violating the general rule against splitting causes of action and thus harassing the defendant. Any portion of the total claim left over after the insurer has sued for his part is still indivisible in the hands of the unreimbursed insured and he must sue for all of it or be barred of the rest by any partial recovery by him.

This poses one further question to the writer: if the insurer sues separately for his portion of the damage to property, may the defendant

13. Holibaugh v. Cox, 167 Ohio St. 340, 148 N.E.2d 677 (1958).
14. 155 Ohio St. 17, 97 N.E.2d 545 (1951).
15. 142 Ohio St. 132, 50 N.E.2d 258 (1943).

insist that the insured join for *his* portion of the property damage *and* the personal injury?

Other Problems of Parties

A somewhat different situation exists in the specialized field of the will contest case. The statute[16] requires that all the devisees, legatees and heirs at law of the testator, as well as all other interested persons, including the executor or administrator, be made parties. Failure to do so is a jurisdictional defect, not subject to correction after the running of the statute.[17] The question usually before the courts is whether all such parties have been named and joined, and in their correct capacities.[18]

During the period covered by this survey two cases involving this often complicated problem were decided by the Supreme Court. In *Abbott v. Dawson,*[19] all heirs at law, as well as the devisees and legatees named in the will, and the executor, Dawson, were named defendants. Dawson was named only as executor in the caption and body of the petition. In the *precipe* he was named, but not designated at all as to his capacity, and in the *summons* he was again designated executor.

The Supreme Court distinguished *Peters, Bynner* and *Mangan,* in which one or more parties had been interested in the case in more than one capacity, but had been designated in only one, or had been named individually, but not in the fiduciary capacities which they actually bore to the case. It determined that the action to contest had properly been brought within the time limited.

In *Fletcher v. First National Bank*[20] the Supreme Court followed *Peters* and *Gravier v. Gluth.*[21] One heir at law was neither named nor served within the six-months period, although it appears that others in his class had been. No service by publication on decedent's "unknown heirs" had been made.[22] The majority held that the mandatory requirements had therefore not been met and the court had no jurisdiction to proceed.

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16. OHIO REV. CODE § 2741.02.

17. OHIO REV. CODE § 2741.09; Peters v. Moore, 154 Ohio St. 177, 93 N.E.2d 683 (1950). Bynner v. Jones, 154 Ohio St. 184, 93 N.E.2d 687 (1950).

18. See cases cited note 17 and Mangan v. Hopkins, 166 Ohio St. 41, 138 N.E.2d 872 (1957).

19. 167 Ohio St. 238, 147 N.E.2d 609 (1958).

20. 167 Ohio St. 211, 147 N.E.2d 621 (1958).

21. 163 Ohio St. 232, 126 N.E.2d 332 (1955).

22. OHIO REV. CODE § 2703.24.

Stewart and Herbert dissented, relying on the doctrine of *Draher v. Walters*,[23] *viz.*, that timely service of summons on one legatee-defendant is deemed commencement of the action as to those defendants of his class.

Mandamus — "Self-Help"

The extraordinary common law writ of mandamus lies to compel a public official to perform a non-discretionary duty. Public bodies such as municipal councils and boards of education frequently find it useful to determine in a summary fashion the legality of acts proposed by them to be undertaken, particularly with respect to bond and note issues. The fiscal officer of the body refuses to sign and issue the securities, thus presenting the question of their legal validity, which is then determined by an action in mandamus brought by the board against its fiscal officer. While admittedly contrived, such suits do present a justiciable controversy, and a quick and efficient determination of a question of general public importance is achieved.

The Supreme Court, in *State ex rel. Underground Parking Commission v. Alexander, Secretary-Treasurer*,[24] quietly threw a high-explosive bomb into this procedure. The legislature created an Underground Parking Commission for the purpose of constructing an underground parking lot beneath the State Capitol grounds.[25] The secretary-treasurer of this commission is appointed by the commission and presumably may be removed by it at will. The commission, pursuant to statute, proposed the issuance of mortgage revenue bonds, and in order to establish beforehand the validity thereof, to make such bonds readily marketable, to protect prospective purchasers thereof and, incidentally, himself, the secretary-treasurer refused to perform certain ministerial duties of a preliminary but necessary nature looking to the issuance and sale thereof.

Sua sponte raising the question, the Supreme Court denied a petition for a writ of mandamus against him, basing its decision solely on the ground that "if respondent will not perform those ministerial duties, the commission can appoint a secretary-treasurer who will," and that "relator has an adequate remedy by way of self-help."

The court, about five months later, in *State ex rel. Board of Education v. Thompson, Clerk*,[26] adhered to its decision in the underground park-

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23. 130 Ohio St. 92, 196 N.E. 884 (1935).
24. 167 Ohio St. 359, 148 N.E.2d 500 (1958).
25. OHIO REV. CODE § 5538.02.
26. 168 Ohio St. 93, 151 N.E.2d 359 (1958).

ing case. It was pointed out to the court that it had in the interim between its two decisions decided another case involving an appointed and removable fiscal officer without choosing to raise this particular issue,[27] but the court refused to change its course, pointing out in its turn that in the second case the petition in mandamus had failed for another and different reason to state a cause of action, upon which it had been possible for the court to base its refusal to issue the writ.

There is no doubt that in an extremely technical sense the court is correct. To this writer it seems, in all due respect, that the court is, as Professor Bohlen once said in another situation, carrying a good joke too far. First of all, the court has been deciding such cases for years without ever raising the issue of the disposable fiscal officer. Second, the court overlooks the fact that the questions posed in such actions are real issues, not the least bit feigned, and they are of vital importance to the development of communities and the construction of needed improvements, requiring quick solutions. Third, while technically subject to being answered in other kinds of judicial proceedings, such as actions for declaratory judgments commenced in courts of first instance and appealed ultimately to the Supreme Court, these other solutions are not in fact adequate, in view of the length of time involved, while the taxpayer's suit to restrain the issuance of the securities is equally protracted. The legislature could, of course, amend the statutes so as to make the fiscal officer of such bodies as boards of education not removable at the pleasure of the body, but whether this is otherwise desirable is at least doubtful. The result is that the court has in effect dictated legislative policy.

It is submitted that the possibility of self-help and the adequacy of the remedy here are illusory. It is also submitted that perhaps the legislature should provide parking spaces for the automobiles of Supreme Court members somewhere up off North High Street — say up around the Union Station, and then have the Underground Parking Commission refile the action.

Appointment of Guardian Ad Litem for Minor Defendant

The law presumes that minors do not have the capacity to prosecute and defend civil actions, and requires, for the former, the bringing of such suits by the father or next friend and for the latter, the defense thereof by a guardian *ad litem*.[28] Appearances are often deceiving, and

27. State *ex rel.*, Board of Education v. Crandall, 167 Ohio St. 399, 149 N.E.2d 163 (1958).

28. OHIO REV. CODE §§ 2307.11, 2307.16.

a plaintiff may have no knowledge of the fact that the person whom he makes a defendant is not of full age. In fact, it occasionally happens that a plaintiff does not disclose to his attorney the fact of his minority. In *Canterbury v. Pennsylvania R.R. Co.*[29] the minority of the plaintiff apparently remained unknown to counsel and the court until after the impaneling and swearing of the jury and the presentation of testimony by witnesses, including part of her own testimony. The Supreme Court held that no prejudice to any substantial right of defendant occurred when at that point the trial court granted plaintiff leave to amend her petition by interlineation by inserting the name of her husband as next friend, to allow him to verify and refile the petition and to proceed as though the case had been commenced by the next friend.

Certain other considerations may be present when the situation is reversed by the fact that the defendant is a minor. In *Ritzler v. Eckleberry*[30] this fact seems to have been known to the plaintiff's attorney, for he procured service of process on the defendant as a minor. An answer in the form of a general denial was verified by the defendant but neither party ever procured the appointment of a guardian *ad litem* or the filing of any answer by such party. Plaintiffs adduced their evidence and rested, whereupon defendant testified in his own behalf as to the facts of the case and as to his minority as of the time of trial. Both parties rested, defendant made a motion to discharge the jury on the ground of his minority and the failure to appoint a guardian *ad litem,* and plaintiff moved the court appoint such a guardian and that his answer be filed instanter. Plaintiff's motions were granted, the guardian was appointed and a proper answer filed by him, whereupon the case was submitted to the jury, which rendered a verdict for plaintiff.

The Supreme Court unanimously upheld the trial court's actions. The failure to appoint the guardian is an irregularity, but it was cured in this case in that by the time any binding decree was entered the infant was properly represented. Likewise, the thorough defense by the minor and his own attorneys had prevented any but the most technical prejudice.

Left unanswered is the question whether the result would have been the same if the corrective action had not taken place until after verdict and judgment. Likewise, it probably must be assumed that a different result is possible if no service is had on the infant's guardian or next friend.[31]

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29. 158 Ohio St. 68, 107 N.E.2d 115 (1952).

30. 167 Ohio St. 439, 149 N.E.2d 728 (1958).

31. OHIO REV. CODE § 2703.13; Russell v. Drake, 164 Ohio St. 520, 132 N.E.2d 467 (1956).

Verification of Pleading After Statue of Limitations Had Run

In *Sellers v. Williams*[32] the Court of Appeals from Athens County held that a verification of a petition required by Section 2309.46, Revised Code, may not be supplied by amendment after the statute of limitations has run. The petition on motion will be stricken from the files and the case is then out of court. In so ruling the court followed two old common pleas and district court decisions.[33]

Reference of Divorce Cases

We commented in a previous survey article[34] on the reiteration of the rule that the statutes pertaining to divorce proceedings require the court to try a petition for divorce and forbid reference to a referee.[35] During the period covered by this survey there were published two opinions of different courts of appeals which had before them the question whether ancillary matters such as permanent custody of minor children of the marriage could be referred. The Court of Appeals of Mahoning County held that the words, "hearing any of the causes for divorce" as used in Section 3105.10, Revised Code, includes hearing evidence as to the custody of children.[36] A few weeks later the Court of Appeals for Franklin County, without citing *Rider* held[37] that Section 3105.10 does not require the court to hear the case "in ancillary matters which may arise out of the divorce proceedings" and that a hearing on custody before a referee was proper. In both cases the divorce had already been granted, so that there seems to be an irreconcilable conflict. Motion to certify in the latter case was denied.

Power of Sale Under An Attachment

In 1949 plaintiff filed a petition against defendant seeking a money judgment and costs. While the opinion of the Court of Appeals of Hamilton County[38] does not say so in so many words, it appears that plaintiff's cause of action was purely *in personam.* It is likewise unclear

32. 152 N.E.2d 299 (Ohio Ct. App. 1957); See also Sanger v. Gross, 142 N.E.2d 263 (Ohio Ct. App. 1957).

33. Stevens v. White, 1 W.L.M.394, 2 Ohio Dec. Rep. 107 (1859); Boyles v. Hoyt, 2 W.L.M. 548, 2 Ohio Dec. Rep. 376 (1860).

34. 8 WEST. RES. L. REV. 268 (1957).

35. OHIO REV. CODE § 3105.10.

36. Rider v. Rider, 152 N.E.2d 361 (Ohio Ct. App. 1957).

37. Hebden v. Hebden, 153 N.E.2d 150 (Ohio Ct. App. 1957).

38. Horn v. Lamblin, 106 Ohio App. 215, 150 N.E.2d 316 (1957).