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APPEAL AND ERROR — REVIEW — SCOPE AND EXTENT IN OHIO — QUESTIONS OF LAW AND FACT

Hawkins v. Hawkins, 176 Ohio St. 469, 200 N.E.2d 300 (1964)

The situations in which Ohio appellate courts may hear appeals on questions of law and fact[1] have varied significantly in the last century. The struggle to enunciate a workable test by which to determine when such appeals should be allowed has been manifested by a seemingly endless stream of constitutional amendments, legislative enactments and judicial decisions; few of these efforts have met with any success. The underlying problem centers around the inability of the legislature and the courts to specifically designate the types of cases in which law and fact appeals can be made to the appellate courts. The recent decision in *Hawkins v Hawkins*[2] removes some of the doubt surrounding this question. It is significant in three respects: (1) the new statutory test for determining when an appeal on questions of law and fact may be brought was recognized;[3] (2) the constitutionality of section 2501.02 of the Ohio Revised Code, which enunciates the new test, was suggested; and (3) the shortcomings of the statute were effectively, if not intentionally, emphasized. However, many problems were left unresolved by *Hawkins*, leaving an unmistakable cloud of uncertainty hovering over the entire subject of appeals on questions of law and fact. A necessary preliminary to a discussion of these problems, however, is a brief examination of the origin of appellate jurisdiction in Ohio.

The jurisdiction of the courts of appeal in Ohio was first prescribed by article IV, section 6 of the Ohio Constitution. Originally, section 6 granted these intermediate courts "appellate jurisdiction as may be pro-

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1. OHIO REV. CODE § 2505.01 distinguishes types of appeal as follows:
   (A) "Appeal" means all proceedings whereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission.
   (B) "Appeal on questions of law" means a review of a cause upon questions including the weight and sufficiency of the evidence.
   (C) "Appeal on questions of law and fact" means a rehearing and retrial of a cause upon the law and the facts and is the same as an "appeal on questions of fact."

2. 176 Ohio St. 469, 200 N.E.2d 300 (1964)

3. OHIO REV. CODE § 2501.02. This section allows an appeal on questions of law and fact when the plaintiff seeks as "primary and paramount relief" one of the following:
   (1) The construction or enforcement of a trust, including the enforcement or establishment of constructive or resulting trusts; (2) The establishment or enforcement of equitable estates arising from the conversion of property; (3) The foreclosure of mortgages and marshalling of liens, including statutory liens; (4) The appointment, removal, and control of trustees and receivers; (5) The restraint of commission of torts; (6) The reformation and cancellation of instruments in writing; (7) The restraint of actions or judgments at law; (8) The quieting of title to property, the partition of property, and the registration of land titles; (9) The specific performance of contracts, or the restraint of the breach thereof; (10) Injunction, accounting, subrogation, or interpleader.

vided by law."[4] Acting upon this grant of authority, the Ohio legislature in 1852 gave the courts of appeal, then called district courts, jurisdiction to hear trials de novo in appeals on questions of law and fact and jurisdiction to "reverse, vacate, or modify" judgments where the appeal was made only on questions of law.[5] This broad grant of power eventually resulted in a hopeless backlog of cases awaiting disposition at the appellate level. Section 6 remained substantially unchanged until 1912,[6] when the overcrowded appellate dockets finally necessitated an amendment to this section.[7] The new amendment removed from the legislature the power to further regulate the jurisdiction of the courts of appeal by expressly limiting appeals on law and fact to chancery cases. Thus the General Assembly could regulate only those appeals which were concerned exclusively with questions of law.

The desire for judicial economy that prompted the 1912 amendment appeared again in 1944 with another alteration of article IV, section 6.[8] In this amendment, the clause expressly restricting law and fact appeals to chancery cases was eliminated; however, the drafters of this second amendment failed to provide any guidelines upon which the legislature could rely in devising future jurisdictional statutes. The resulting void provoked a controversy among the courts and legal writers as to the actual effect of the amendment.[9] Generally, the disagreement centered around two questions: (1) whether the legislature actually had any power under the 1944 amendment to regulate the situations in which law and fact appeals could be heard in the courts of appeal; and (2) if so, in what situations could such appeals be heard in the absence of legislation in this area.

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4. OHIO CONST. art. IV, § 6 (1851).

5. 50 Ohio Laws 93 (1852).

6. The form of art. IV, § 6 was altered by an 1883 amendment to the section which changed the title of the appellate courts from "district courts" to "circuit courts."

7. After extensive debate at the Constitutional Convention, the delegates drafted the amendment so as to grant the courts of appeal "appellate jurisdiction in the trial of chancery cases [and the jurisdiction] to review, affirm, modify, or reverse the judgments of the Courts of Common Pleas, Superior Courts, and other courts of record within the district as may be provided by law " OHIO CONST. art. IV, § 6 (1912). For an extensive treatment of the historical aspects of appeals on questions of law and fact, see Weiss v. Kearns, 117 Ohio App. 393, 191 N.E.2d 552 (1963).

8. The new language gave the courts of appeal "such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and courts of record inferior to the court of appeals within the district." OHIO CONST. art. IV, § 6 (1944). At the time of passage, the amendment also provided that "all laws now in force not inconsistent herewith shall continue in force until amended or repealed " This clause was specifically omitted by a 1959 amendment to art. IV, § 6.

9. *Compare* Weiss v. Kearns, 117 Ohio App. 393, 191 N.E.2d 552 (1963), *with* Buckeye Union Cas. Co. v. Braden, 116 Ohio App. 348, 188 N.E.2d 300 (1962); see Ross, *Some Comments on Changes in Ohio Procedure*, 31 OHIO OP. 358 (1945); Gardner, *What did the 1944 Amendment to the Constitution Do to the Jurisdiction of the Court of Appeals?*, 31 OHIO OP. 561 (1945) (opposing Ross' view).

The Ohio Supreme Court partially resolved both questions in *Youngstown Municipal Ry. v Youngstown.*[10] There it was held that the General Assembly *could* change the appellate jurisdiction of the courts of appeal, but that if it chose not to do so the "chancery case" test which was used before the 1944 amendment remained in force. The continued application of this test by the courts, however, resulted in a considerable amount of time spent in determining what constituted a chancery case. Such a determination diverted the court's attention from the substantive issues being litigated.[11] However, those who claimed that the 1944 amendment had abolished law and fact appeals denied that the *Youngstown* decision recognized the legislature's power to correct the situation; it was argued that the right to change the appellate jurisdiction of the courts of appeal did not necessarily include the power to regulate cases in which law and fact appeals could be made.[12] Thus the *Youngstown* decision failed to terminate the controversy concerning the legislature's power under the 1944 amendment. In fact, even the subsequent enactment of section 2501.02,[13] wherein the General Assembly attempted to enumerate the instances in which appeals on law and fact could be brought, did not quiet the claims that such attempts were unconstitutional under the 1944 amendment.[14]

Whether the supreme court would pay mere lip service to the new test for allowing appeals on law and fact questions, or more importantly whether it would even recognize the constitutionality of the statute which enunciates the new test was not known until the court's decision in the *Hawkins*[15] case. There, the plaintiff filed an action in the probate court praying that the court enter a declaratory judgment holding invalid and void a purported ante-nuptial agreement and give the plaintiff her intestate share of her deceased husband's estate. The probate court found the agreement valid and ruled for the defendants.[16] The court of appeals dismissed plaintiff's appeal on questions of law and fact and affirmed the judgment of the probate court on questions of law.[17] The

10. 147 Ohio St. 221, 70 N.E.2d 649 (1946).

11. Westerhaus Co. v. Cincinnati, 165 Ohio St. 327, 333, 135 N.E.2d 318, 323 (1956) In this decision, the court expressly denounced the time-consuming deliberations which were required in determining procedural issues and recognized § 2501.02 as a possible solution to the problem.

12. *E.g.*, Skeel, *Some Aspects of Appellate Procedure in Ohio*, 12 W RES. L. REV. 645, 654 (1961). The author also points out that the *Youngstown* decision relied heavily on the clause of the 1944 amendment, which was omitted by a subsequent amendment in 1959. See note 8 *supra.*

13. See note 3 *supra.*

14. See Buckeye Union Cas. Co. v. Braden, 116 Ohio App. 348, 188 N.E.2d 300 (1962)

15. 176 Ohio St. 469, 200 N.E.2d 300 (1964).

16. Hawkins v. Hawkins, Civil No. 605,719, Cuyahoga County P Ct., Aug. 21, 1962.

17 94 Ohio L. Abs. 19 (Ct. App. 1962).

Ohio Supreme Court affirmed, holding that appeals on questions of law and fact were restricted to cases falling within the classes designated in section 2501.02 of the Ohio Revised Code.[18] In utilizing the tests of this statute, the court held that because plaintiff was seeking as a "primary and paramount relief" her share of decedent's estate, rather than the mere cancellation of an instrument, the appeal did not fall within any of the classes set forth in section 2501.02.[19]

The majority opinion in *Hawkins* failed to comment on the constitutionality of the statute, possibly because neither litigant chose to discuss this question in its brief. However, the court's application of the tests set out in the statute suggests that the constitutionality of section 2501.02 will be upheld should it ever be challenged. This conclusion is strengthened by the court's previous pronouncements in *Youngstown Municipal Ry. v. Youngstown*,[20] and *Westerhaus Co. v. Cincinnati*.[21] In the latter decision, the court expressly recognized section 2501.02 as a *possible* solution to the problem of determining when law and fact appeals could be made. This recognition at least implies that the court believed the statute to be within the permissible scope of the 1944 amendment. Such an interpretation of section 6 seems to be wiser than the contention that the amendment itself abolished *all* appeals on questions of law and fact. The legislature, by retaining the power to regulate such appeals, can adjust the situations in which these proceedings are allowed, thereby providing efficient, up-to-date, appellate jurisdiction in the Ohio Courts of Appeal.

While the *Hawkins* decision may leave something to be desired by its failure to expressly decide the constitutional question, the opinion is emphatically clear on the point that the "chancery case" test has been replaced by the provisions of section 2501.02.[22] But regardless of the im-

18. Hawkins v. Hawkins, 176 Ohio St. 469, 200 N.E.2d 300 (1964). The court also ruled that "a party is prohibited, over objection, from examining an adverse party as if under cross-examination when one of the adverse parties is an administrator or claims or defends as heir, grantee, assignee, devisee or legatee of a deceased person." *Id.* at 472-73, 200 N.E.2d at 303.

19. The plaintiff would have been allowed to appeal on law and fact had she merely sought the cancellation of an instrument; this is one of the tests enumerated in § 2501.02. See note 3 *supra*. But her real objective in the litigation is not clear. In arguing that the probate court had original jurisdiction of the action, the plaintiff had previously claimed that the action was not in equity and therefore not within the jurisdiction of the Common Pleas court; the probate court agreed. Hawkins v. Hawkins, Civil No. 605,719, Cuyahoga County P. Ct., October 30, 1961. And yet, in order to prevail in the supreme court on the question of law and fact appeals, the plaintiff had to claim that she sought the cancellation of the instrument as a "primary and paramount relief." If the supreme court had so found, the earlier jurisdictional ruling by the probate court would clearly have been in error. But the error, since it was induced by the plaintiff, would not have been appealable by her. Brief for Defendant-Appellee, pp. 8-9, Hawkins v. Hawkins, *supra* note 18.

20. 147 Ohio St. 221, 70 N.E.2d 649 (1946).

21. 165 Ohio St. 327, 333, 135 N.E.2d 318, 323 (1956).

22. On this point, the court stated that "it is apparent now that the determination of the question whether an appeal is one on questions of law and fact or on questions of law only is entirely controlled by statute. Section 2501.02 of the Revised Code. Decisions prior to