Case Western Reserve Law Review

Volume 5 | Issue 3 Article 8

1954

Appellate Procedure

Clare D. Russell

circumstances, bearing in mind the dangers of the business. Third, it is erroneous to charge that the care in such a case would be the care exercised by those persons who are engaged in the business of operating such special machinery for the same or similar purposes.

In *Wellman v. East Ohio Gas Co.*[11] the supreme court was concerned with the liability of an owner of the premises to the employees of an independent contractor who was engaged to perform services upon such premises. While recognizing that the owner may be chargeable with actionable negligence in failing to remove a dangerous condition or give notice or warning of its existence where they are created by or within his knowledge and the independent contractor and his employees enter upon the premises unaware and uninformed,[12] the court states that this rule does not apply to work the very doing of which involves elements of real or potential danger.

Another case involved a question as to how far consent or acquiescence or requests of manual laborers hired by the plaintiff could be chargeable to their employer. Under the facts the laborers were engaged in spreading ready-mix concrete delivered by the defendant, and it was they who directed the defendant's driver to run his heavy truck upon freshly constructed concrete runways, thereby destroying them. It was held that their implied authority did not extend to permitting the destruction of the driveway. Even if the manual laborers had authority to direct delivery if it could be done without damage to the property, there could be no reliance on their directions because the defendant, knowing that the driveway probably would be damaged by his conduct, could not have relied on such apparent authority.[13]

MAURICE S. CULP

APPELLATE PROCEDURE

The new Ohio Revised Code, which became effective October 1, 1953, contains the following new or amended sections affecting appellate practice, all of which apply to pending cases:

Section 2321.17 (Ohio General Code Section 11575) now defines a new trial as a re-examination of the issues instead of a re-examination of an issue of fact. Section 2321.01 (Ohio General Code Section 11576-1 as

---

[11] 160 Ohio St. 103, 113 N.E.2d 629 (1953)

[12] The existence of such a duty has been recognized in many Ohio cases, including the following: Bosjnak v. Superior Sheet Steel Co., 145 Ohio St. 538, 62 N.E.2d 305 (1945); Davis v. Charles Shutrump & Sons Co., 140 Ohio St. 89, 42 N.E.2d 663 (1942); Hozian v. The Crucible Steel Casting Co., 132 Ohio St. 453, 9 N.E.2d 143 (1937).

[13] Kirschner v. Richter Concrete Corp., 93 Ohio App. 422, 113 N.E.2d 649 (1952)

amended) provides that a motion for a new trial is not necessary as a prerequisite to obtain appellate review of weight of evidence where such evidence appears as a part of the record in the appellate court.

Section 2323.19 (Ohio General Code Section 11601-1 as amended) provides for the same stay of execution for a motion notwithstanding the verdict as for a motion for new trial.

Section 2323.181 outlines procedure to be followed if both a motion for new trial and a motion for judgment notwithstanding the verdict are filed following entry of a jury verdict or an entry discharging the jury in the event of disagreement.

Section 2323.18 amends Ohio General Code Section 11601 and provides for the filing of a motion for judgment notwithstanding the verdict in cases where the jury has failed to reach a verdict, as well as in the cases where a verdict has been reached.

Section 2323.15 amends Ohio General Code Section 11599 and removes the provision that the filing of a motion for judgment notwithstanding the verdict holds up the filing of the judgment entry upon the return of the verdict. This motion is now filed after the filing of the judgment entry instead of prior to such filing.

Section 2505.07 amends Ohio General Code Section 12223-7 to provide that when a motion for judgment notwithstanding the verdict or a motion for new trial is filed within the time provided by Sections 2323.181 and 2321.19 the time for perfecting the appeal shall not begin to run, and no appeal shall be taken, until the entry of the order on the motion, and if both motions are filed, then, not until the entry of the order on the last of such motions decided.

Section 2945.65 (Ohio General Code Section 13445-1) referring to criminal cases, has been amended to provide that in case a defendant is granted leave to appeal, the court shall fix the time within which a bill of exceptions shall be filed, not to exceed thirty days from the order granting such leave.

Apparently inspired by the holding of the supreme court in the case of *Corn v. Board of Liquor Control*,[1] the General Assembly, late in its last session, amended the Administrative Procedure Act by making provision in Ohio Revised Code, Section 119.21, for the allowance of appeal to those agencies covered by the Act. However, this section does not affect zoning boards, and, in the absence of further legislation, such boards must continue without benefit of review from judicial decisions unfavorable to them.

A number of definitive cases affecting Ohio Appellate Procedure were reported during 1953. Space limitations confine comment to only a few of the more outstanding.

[1] 160 Ohio St. 9, 113 N.E.2d 360 (1953).

In *Fielder v. Edison Co.*,[2] the Ohio Supreme Court, with three members dissenting in part, held that where an administrator's cause of action for pain and suffering of a decedent, improperly joined with a cause of action for decedent's wrongful death, resulted in a judgment for defendant on the first cause but against the defendant on the second cause, the misjoinder of causes of action tainted the entire verdict and judgment and required the reversal of the entire judgment.

Several bothersome questions growing out of the application of Ohio Revised Code Section 2703.04 (Ohio General Code Section 11282) were decided by a unanimous court in *Glass v. Transfer Co.*,[3] upon the basis that where a trial court, pursuant to motion by a defendant, has dismissed an action against such defendant for want of jurisdiction of such defendant's person, the trial court having already directed a verdict as to other defendants joined as alleged tort-feasors, it is error for the court of appeals to further consider the merits of the action and render final judgment in favor of such defendant, since that court should have merely dismissed for want of jurisdiction.

In *State v. Nickles*,[4] the supreme court held that Ohio Revised Code Section 2505.04 (Ohio General Code Section 12223-4) being a section of the procedural statutes governing appeal, is applicable to criminal as well as civil cases and that, therefore, Ohio Revised Code Section 2953.04 (Ohio General Code Section 13459-3) providing for the filing of the brief of appellant in a criminal case, is merely directory, and that the extension of time for filing briefs is within the sound discretion of the court. It is submitted that the discussion in this opinion is another step in the right direction toward following the intent of the General Assembly in its legislative attempts to achieve orderly appellate review.

The situation presented in the two companion cases reported as *Corn v. Board of Liquor Control*[5] grew out of two orders by the Board, including one made in an appeal from the finding of the Director of Liquor Control which rejected the plaintiff's applications for renewal of permits under the provisions of applicable sections of the Administrative Procedure Act. The permit-holder appealed the orders to the Court of Common Pleas of Franklin County, which reversed the Board's orders, the Director thereafter appealing to the court of appeals for that county, which court in turn reversed the judgments of the common pleas court. The supreme court held that neither the Board, the Department, nor the Director has authority to appeal from the judgment of the court of common pleas in this situation, and that,

[2] 158 Ohio St. 375, 109 N.E.2d 855 (1952).
[3] 159 Ohio St. 505, 112 N.E.2d 823 (1953)
[4] 159 Ohio St. 353, 112 N.E.2d 531 (1953)
[5] 160 Ohio St. 9, 113 N.E.2d 360 (1953)

although a person has an inherent and inalienable right to fair and impartial hearing with reference to any infringement of his statutory or constitutional rights, the right of appeal from the result of such trial is not an inherent or inalienable right, but must be conferred by constitutional provision or statute, and that, therefore, the right of appeal from an adverse ruling of the Board to the court of common pleas is limited to those persons whose interests are subject to adjudication by the Board.

Two defendants in a personal injury case, which finally concluded as *Hurt v. Transp. Co.*,[6] had filed motions for judgment notwithstanding the verdict following a verdict rendered jointly against them in the trial court. One motion having been granted and one overruled, the unsuccessful defendant also filed a motion for new trial. Prior to action upon this motion, the unsuccessful defendant appealed, the cause coming to the supreme court after the court of appeals dismissed the appeal *sua sponte*. The supreme court, basing its decision upon procedural statutes then effective, held that, where a motion for new trial had been filed, an appeal from a motion for judgment notwithstanding a verdict before the disposition of the motion for new trial is premature and the court of appeals may dismiss it either *sua sponte* or upon motion. This situation has now been remedied by the provisions of Ohio Revised Code Section 2323.181.

In *Sorge v. Sutton* and its companion case,[7] which grew out of the dismissal of two police officers after hearing before the Cleveland Municipal Civil Service Commission, the supreme court held that where a statute provides for appeal from such Commission to a court of common pleas, the word "appeal" in such statute must be interpreted to mean only a review of the proceedings before the Commission as to their legality and regularity and not a trial *de novo*.

In *Schenley v. Kauth*,[8] the court held that under Ohio Revised Code Section 2505.07 (Ohio General Code Section 12223-7), relating to appeals from the court of common pleas to the court of appeals, after a ruling on a motion for new trial, the filing of the entry of the order overruling or sustaining the motion starts the running of the appeal time, and it is not the "order" but the "entry" of the order which initiates the period within which an appeal may be taken.

Procedure in the taking of depositions was considered in *Gates v. Big Boy Beverages*.[9] In the course of the taking of depositions the plaintiff refused to answer questions on cross examination; he also refused to conform with the order of the court of common pleas to do so; and he appealed

[6] 160 Ohio St. 70, 113 N.E.2d 489 (1953).
[7] 159 Ohio St. 574, 113 N.E.2d 10 (1953)
[8] 160 Ohio St. 109, 113 N.E.2d 625 (1953).
[9] 113 N.E.2nd 749 (Ohio App. 1952).