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Attorneys at Law

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is the only jurisdictional step in an appeal from the court of common pleas to the court of appeals. Consequently, the fact that Revised Code section 2505.05, which sets forth requirements of the notice, provides for amendment of the notice after the filing of the notice in only one situation, does not preclude amendment in another situation, the statute being remedial in nature and, therefore, of a type which should be liberally construed.

Several minor amendments to Revised Code sections 2321.05, 2505.08, 2505.21, and 2505.36, all of which have to do with various steps in appellate procedure, were adopted by the General Assembly and became effective during the year 1955. Revised Code section 2505.30 was also amended to provide specifically that a court of appeals shall state on the record conclusions of fact found separately from conclusions of law, if a party makes application for such finding prior to the filing for journalization of a final order, judgment or decree.

In a timely and thoughtful address to the Toledo Bar Association on December 15, 1955, published in January, 1956,[10] Mr. Ross W. Shumaker of the Toledo Bar, discussed the subject of the adoption in Ohio, either in whole or in part, of the Federal Rules of Civil Procedure. Mr. Shumaker submits that a considerable number of the federal rules probably provide more efficient and effective background for practice than do similar rules of practice under the appropriate Ohio Revised Code sections, but he points out that Ohio lawyers will differ sharply with respect to the desirability of adopting all of the federal rules in lieu of the codified sections of the Revised Code which govern trial and appellate procedures. He suggests that possibly the solution of the problem may lie in restoring to the courts the right and power to make their own rules, and urges Ohio lawyers to study the methods used and work done by the committees of the American Bar Association which resulted in enactment by the Congress of the United States of a statute which returned the rule-making power to the courts, under the provisions of which legislation the federal rules of procedure, both civil and criminal, have been formulated.

CLARE D. RUSSELL

ATTORNEYS AT LAW

Several decisions appearing in print during the period covered by this survey dealt with the practice of law itself, which have led the editors of this survey for the first time in its history to include a separate section dealing with them.

[10] XXIX OHIO BAR 43 (1956).

The Active Practice of Law

Section 1901.06 of the Revised Code provides in part that a municipal judge " . . . shall have been admitted to the practice of law in the state and shall have been *actively engaged in the practice of law as his principal occupation* for at least five years" prior to taking office. In *State ex rel. Flynn v. Board of Elections of Cuyahoga County*[1] it was held that a candidate for the office of municipal judge who was admitted to the practice of law in 1925 and was employed on a full-time basis as a referee of the Cleveland Municipal Court from 1927 until 1954, and whose duties as such referee consisted of hearing proceedings after judgment such as executions and garnishments, settlement matters, motions and demurrers, and whose decisions in all of these were technically, although in most instances not actually, approved by a judge, for which he was at all times paid a stated salary and in which employment he had civil service status, did not meet both of these statutory requirements and was not entitled to have his name on the ballot at a non-partisan election for a full term on the municipal bench. This was despite the relator's contention that he had also undertaken and completed legal consultations, drafted papers and advocated causes before the probate and common pleas courts insofar as was not in conflict with his duties in or the rules of the court in which he had been referee.

It seems to the author that the Supreme Court's application of the statute was unnecessarily strict. The purpose of the statute, it may be suggested, is to insure the election of a qualified and experienced judge, rather than an untrained layman or a recently admitted lawyer. If legal experience *is* the criterion for eligibility, then relator seems to have it to a high degree. Apart from the technical prohibition of the statute, one is moved to ask whether quo warranto proceedings would lie if such an experienced referee were appointed by the Governor to fill out an unexpired term of office.

The case is also of interest in its treatment of another question, *viz.*, whether the Board of Elections, in determining whether the candidate had the statutory qualifications, was exceeding the powers conferred by law upon it, and whether the Legislature in prescribing conditions of eligibility for the office was attempting to exercise any judicial power.[2] Both questions were of course answered in the negative.

Contempt in the Presence of the Court

A certain lawyer had a substantial practice making collections for small-loan and finance companies and merchants who sold on credit and

[1] 164 Ohio St. 193, 129 N.E.2d 623 (1955).
[2] OHIO CONST. Art. II, § 16; Art. IV, § 1.

took promissory notes from their customers as security. He therefore frequently had occasion to secure judgments on cognovit notes and to resort to garnishment proceedings to collect his clients' judgments. For some reason which is not clear, and for none which any reasonable person can justify, he resorted to signing the name of fictitious "John Charleston" to various pleadings filed by himself, such as, for example, upon affidavits as to military service of defendants, service of statutory demands on debtors, and aids in execution. The attorney seems also then to have signed his own name as a Notary Public, asserting that the said affidavits were in fact sworn to before him by the fictitious "Charleston." It was admitted by the attorney that there was no such person as "John Charleston" and that the attorney was responsible for the signatures, made either by himself or by personnel in his office or by his clients at his instance.

Section 2705.01 of the Revised Code provides that a court or a judge in chambers may summarily punish any person guilty of misbehavior *in the presence of or so near the court or judge* as to obstruct the administration of justice.

In the principal case[3] it was held that such a filing of papers with affidavits signed with a fictitious name is a fraud on the court, constitutes misconduct *in the court's presence,* obstructs the due administration of justice and may properly be punished *summarily* and without citation of the attorney responsible or the filing of charges against him.

The court could hardly have reached any other conclusion than it did. Its opinion is also valuable for the court's citation of other similar cases in Ohio and elsewhere.

Champerty and Maintenance

In addition to the Ten Commandments there are three other ancient "Thou Shalt Nots" for lawyers. Thou shalt not stir up litigation, thou shalt not purchase an interest in thy client's law suit, and thou shalt not maintain thy client. Barratry,[4] champerty[5] and maintenance[6] are all recognized and forbidden by the Canons of Legal Ethics. All three of these offenses were indictable at common law.[7]

The court of appeals had before it in *LoGuidice v. Harris*[8] a most interesting problem involving what appear to have been unintentional

[3] Fidelity Finance Company v. Emory Harris and Delbert S. Cohon, and nine other cases, all at 71 Ohio L. Abs. 309, 126 N.E.2d 812 (1955).

[4] CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION § 28.

[5] *Id.* at § 10.

[6] *Id.* at § 42.

[7] See 11 A.B.A.J. 735 (1925).

[8] 98 Ohio App. 230, 128 N.E.2d 842 (1954).

violations of these prohibitions. One Harris was employed by LoGuidice and others, partners. He sustained injuries, allegedly in the course of his employment and filed a claim with the Industrial Commission for compensation. His employers were noncomplying employers under the Workmen's Compensation Act.[9]

The Industrial Commission found that Harris was not an employee of the partnership within the meaning of the act and disallowed his claim. Harris then filed a "petition in the nature of an appeal" in the common pleas court. The partners answered this petition, raising several defenses to liability.

Prior to the trial of the case in common pleas, Harris' attorneys executed an agreement with the partnership defendants that in consideration of the court's entering a decree to the effect that Harris, the employee, *was* entitled to participate in the benfits of the Workmen's Compensation Act, his attorneys would save the employer partnership harmless from all liability which might arise by reason of any award to their client by the Industrial Commission and which might be charged to defendant employers. Harris then signed a release to his employers. The court then signed a consent decree in favor of Harris and found him to be entitled to participate in the benefits of the Workmen's Compensation Act, also awarding attorney's fees to his attorneys. Subsequently, pursuant to this decree, the Industrial Commission made an award and payment to Harris.

Since Harris' employers were noncompliers, the Industrial Commission then sued them for the amount of the award paid to Harris and the fee paid to his attorneys. This turn of events, it may be hazarded, was probably not contemplated at the time when the employers suffered judgment to go against them. The Commission recovered judgment, which the employers were compelled to pay. They thereupon sued Harris' lawyers on the indemnity agreement which had been entered into at the time of the consent decree in common pleas court.

The trial court directed a verdict in favor of the unhappy employers against the now unhappy lawyers. The court of appeals unanimously reversed and entered final judgment for the lawyers. It based its decision on two grounds, with the first of which we are concerned in our professional relations and conduct as lawyers. This, said the court, is a champertous contract. It avoids the evil of maintenance, in that the lawyers apparently did not bear the cost and expenses of Harris' suit, but, by agreeing *with the other side* that it should not ultimately suffer for defaulting to their client, the attorneys were in effect receiving a part of the proceeds in the event of a favorable determination of the lawsuit. "Champerty" is from

[9] OHIO REV. CODE § 4123.01 et seq.

the Latin phrase, "campum partire" — to divide the field — and an attorney who buys into his client's lawsuit is dividing the field with his client.[10] Just how the court reached this conclusion is not clear to this writer. The situation is not like that of an agreement with the client that he shall not settle his claim without the consent of the attorney,[11] nor is it like the case of the assignment by the client of his claim, in whole or in part, to the attorney.[12] The situation is complicated by the fact that in the action in common pleas court by the employer on appeal from the Industrial Commission the employer is a nominal defendant. If the employer loses it is the Commission which will have to pay, and it is only when, as in this case, the employer is a noncomplier that the Commission will have an action against him to recover what it has paid on his behalf.

That such an agreement is against public policy is probably the basis of the court's decision. It suggests that perhaps the parties agreed as they did on the theory and in the hope that the Commission would fail to assert its lawful claim against the partners, but that the employers' counsel were unwilling to take this gamble and so procured the indemnity agreement.

The really surprising *denouement,* however, is that since the agreement is against public policy, the court refuses to enforce it in any way, and leaves the parties where it found them. Thus a champertous agreement, illegal as to lawyers, becomes almost a sword in their hands, rather than a shield to the layman. They are permitted to keep their improper gains. This must be on the basis that the parties, laymen, and lawyers, are *in pari delicto.* Usually, in such situations the courts do not hold the layman to be equally *in delicto* with the lawyer.[13, 14]

We are led to ponder and pose this further question: the employers were represented by their own counsel when they accepted the worthless indemnity from Harris' lawyers. May they now sue their counsel for misfeasance? Their advice turned out pretty badly.

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[10] A proper contingent fee excepted, of course, CANONS OF PROFESSIONAL ETHICS OF THE A.B.A. § 13.

[11] Davy v. Fidelity & Casualty Ins. Co., 78 Ohio St. 256, 85 N.E. 504 (1908).

[12] Stewart v. Welch, 41 Ohio St. 483 (1885).

[13] CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION 529-530 (2d ed. 1955).

[14] The court also discusses the provisions of the compensation act and the cases decided under it which forbid an employer, self-insurer or otherwise, from seeking indemnity or insurance against loss or liability for payment of compensation to workmen. OHIO REV. CODE § 4123. Perhaps it would have been better to have placed the decision solely on this point. It certainly affords a clear and unequivocal basis for reaching an identical result.

Degree of Proof Required in Disbarment Proceeding

During the past year the Supreme Court settled the question as to the degree of proof required in a disbarment case, holding that it is only that of a preponderance of the evidence.[15] While the verdict in such a case is "guilty" or "not guilty," the proceeding is civil in character and of a law rather than a chancery nature.

The court further held that evidence of a prior suspension of the attorney is admissible in a subsequent hearing on charges of professional misconduct. Since the purpose of disbarment proceedings is not to punish the offending lawyer, but to protect the public, the courts and the legal profession, a prior suspension may indicate whether discipline of that nature has been effective to afford such protection and to reform the attorney and to enable the court now hearing the charges to determine what will be most effective in the future.

Representation of Adverse Interests
Constructive Contempt

Canon 6 of the Canons of Professional Ethics states in part that " . . . It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts . . . . " A novel situation involving this rule of conduct was presented for decision by the Court of Appeals for Cuyahoga County in *In Re Estate of William A. Wright.*[16]

One P., an attorney, was named by the Probate Court as administrator of the estate of William A. Wright, deceased. While serving as such, prior to completion of administration, without resigning his commission as administrator, and without first informing the court and without obtaining the court's consent, he entered into an oral agreement with one William (no initial) Wright, a first cousin of the decedent, to represent him in establishing the latter's claim to be the sole heir at law to the estate of decedent. This sole heirship was not apparent at the time of the contract, and was not, in fact, established until the conclusion of proceedings to determine heirship, instituted by Attorney P. as administrator, and in which Attorney P. also represented his new client, William (no initial) Wright.

P. submitted no claim for extraordinary compensation for serving both as administrator of the estate and as attorney for the administrator. He did receive the administrator's statutory commission and was paid a fee by the heir whom he successfully represented.

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[15] *In re* Disbarment of Lieberman, 163 Ohio St. 35, 125 N.E.2d 328 (1955).
[16] 123 N.E.2d 52 (Ohio App. 1954).