

1956

## Equity

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that consent can be revoked up to the time of the decree.<sup>9</sup> An alternative procedure for placing a child with an agency for adoption is for the mother to surrender the child to an officially approved welfare agency. The surrender agreement includes a grant of authority to the agency to consent to adoption. The statute authorizing this practice is silent on whether or not the agreement is revocable. In *Kozak v. Lutheran Children's Aid Society*<sup>10</sup> the Ohio Supreme Court held that such an agreement could not be revoked by the natural parent. While the decision may be advisable as a policy matter, it seems clear that there is also a policy argument in favor of interpreting the surrender of custody statute in such a way as to make it consistent with the adoption statute.

HUGH A. ROSS

## EQUITY

In 1955 the appellate courts of Ohio in considering matters of an equitable nature were most active in problems concerning contempt of court.

In *North American Aviation v. United Automobile, Aircraft & Agricultural Implement Workers of America*,<sup>1</sup> a temporary restraining order was in effect. One order had been had against defendants to show cause why they should not be punished for contempt. On the morning of the day that the defendants were to show cause further disturbances occurred at plaintiff's plant where the strike, which had given rise to the restraining order and the show cause order, was in progress. When the hearing opened the plaintiff called the court's attention to these disturbances and with consent of the court, but over the objection of defendants, presented evidence tending to establish that a second violation of the restraining order had occurred. The basis of the defendant's objection was the failure to comply with Ohio Revised Code section 2705.03, which provides that "a charge in writing shall be filed with the clerk of the court" before a showing of contempt which occurs out of the presence of the court may be made. On the morning of the following day the plaintiff did file such a charge relating back to the evidence received the previous day. In a court of appeals decision a majority of the court held that "the reception of the testimony . . . prior to the actual filing of written charges, was within the sound discretion of the trial court and was not prejudicial to the defendants."<sup>2</sup> It is difficult to see how this procedure can be reconciled with

<sup>9</sup> OHIO REV. CODE § 3107.06.

<sup>10</sup> 164 Ohio St. 335, 130 N.E.2d 796 (1955), reversing the Cuyahoga County Court of Appeals decision reported in 124 N.E.2d 168 (1955).

the express language of the statute. The majority opinion makes no attempt other than the above quoted statement to do so.

*In re Wright's Estate*<sup>3</sup> brought to the court of appeals the question whether a direct contempt of court had been committed. In an action to reopen a supposedly completed probate proceeding of a deceased's estate it was called to the attention of the probate court that the administrator-attorney for the estate had also served as attorney for one of the claimants against the estate. The motion to reopen the estate had alleged this serving in a dual capacity and stated that movants believed that a contempt had been committed. It was held that the motion as stated did not constitute a charge of contempt of court such as would be necessary before punishment could be imposed for acts committed out of the presence of the court. It, therefore, constituted error for the probate court to impose punishment for contempt.

*State v. Compton*<sup>4</sup> considered the assessment of penalties for violation of an injunction issued in a labor dispute. The appellate court held that it was proper for the trial court to assess costs against defendants who were found guilty of violating the injunction in addition to assessing the maximum penalties allowable by statute. "Sections 11887 and 11888,<sup>5</sup> prescribing the penalty for disobeying an order of injunction, are not exclusive, but are cumulative with Sections 12137, 12142 and 12147, General Code,<sup>6</sup> relating to contempt and the punishment therefor." The court did, however, find that it was error to remand the defendants to jail until their fines were paid in addition to sentencing them to the maximum jail term allowable by statute.

In *Fidelity Finance Co. v. Harris*<sup>7</sup> an attorney filed certain papers which contained affidavits required by law. The attorney signed the affidavits, or caused them to be signed, with a name of a non-existent person and acknowledged them as a notary public knowing of the manner of signing. This was held to be an act within the presence of the court so that the attorney was subject to summary punishment for contempt under Ohio Revised Code section 2705.01.

The word "court" in the field of law is a comprehensive term. It represents the judicial department of government which operates by the method of establishing a tribunal composed of one or more judges at-

<sup>1</sup> 124 N.E.2d 822 (Ohio App. 1954).

<sup>2</sup> *Id.* at 825.

<sup>3</sup> 123 N.E.2d 52 (Ohio App. 1954).

<sup>4</sup> 96 Ohio App. 541, 123 N.E.2d 43 (1953).

<sup>5</sup> Now OHIO REV. CODE §§ 2727.11 and 2727.12.

<sup>6</sup> Now OHIO REV. CODE §§ 2705.02, 2705.05 and 2705.10.

<sup>7</sup> 126 N.E.2d 812 (Ohio App. 1955).

tended by proper officers and employees for the public administration of justice. The judge does not constitute the court. The court, in addition to the judge or judges, is composed of the jury, clerks, bailiffs and other attachés, together with the court room and other rooms and halls used for the conduct of the business of the court. When any part of the court is engaged in the prosecution of the business of the court, in accordance with law, the court is there present.<sup>8</sup>

The Supreme Court of Ohio held in *Cleveland Trust Co. v. Bouse*<sup>9</sup> that "where an executory contract for the sale of real property is breached by the vendor, the purchaser is entitled to an equitable lien for the amount he has paid on the purchase price."<sup>10</sup> The purchaser's lien is recognized by some twenty jurisdictions in the United States and is, as the court says, "a salutary rule and one that should be adopted in Ohio." The vendor's lien has long been recognized by the courts of Ohio and is now a matter of statutory enactment.<sup>11</sup> It would seem that there is as much justice in providing the purchaser with the lien device for recovering money which he has invested in a transaction for the sale of real property as there is in providing the vendor with a companion device for the obtaining of money which he has been promised under the contract.

In *Butcher v. Kagey Lumber Co.*<sup>12</sup> it was held that the vendor in a contract for the sale of real estate, before conveyance, retains the legal title and has an interest in the real estate to the extent of the unpaid purchase price. The vendor may assign such contract and this interest which is retained in the real estate to another. If the assignment is for a valuable consideration and bona fide the rights of the assignee in the real estate are superior to the rights of a subsequent judgment creditor of the vendor.

In *Eggers v. Morr*<sup>13</sup> it was held that when persons who were dissatisfied with a zoning ruling concerning their property had by statute a right to take an appeal to the court of common pleas they had an adequate remedy at law and, therefore, could not bring an independent action in equity to enjoin the carrying out of such order. No lack of jurisdiction was alleged in the petition for the injunction but rather that the administrative agency had acted "arbitrarily and capriciously." The court in refusing plaintiff's

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<sup>8</sup> *Id.* at 814. See also, *State v. Compton*, 96 Ohio App. 541, 123 N.E.2d 43, 48 (1953). The deputy sheriffs appointed by virtue of a prior restraining order of the court "were officers of the court. . . . Consequently, it may well be said that violations of the injunction in the presence of these deputies was in the presence of the court and that they would have been justified in making arrests for a violation thereof on the spot."

<sup>9</sup> 163 Ohio St. 392, 127 N.E.2d 7 (1955).

<sup>10</sup> *Id.* at 10.

<sup>11</sup> OHIO REV. CODE § 5301.26.

<sup>12</sup> 164 Ohio St. 85, 128 N.E.2d 54 (1955).

<sup>13</sup> 162 Ohio St. 521, 124 N.E.2d 115 (1955).

action for an injunction considered and rejected the further claim that because numerous parties occupied the same position as the plaintiff and because they resided fifteen miles from the office of their attorney it was an undue hardship for them to prepare and file the direct appeal within the fifteen days allowed by statute. "Mere inconvenience is never an excuse for failure to avail oneself of a legal remedy."

In *Harmon v. Carson*<sup>14</sup> an action brought for rescission of a contract of purchase of a business failed because plaintiffs had not tendered back certain assets obtained under the contract. The court reserved to the plaintiffs their right to proceed in an action at law for damages. Plaintiffs thereupon moved for judgment for damages based on the court's findings of facts. A court of appeals held that the trial court was correct in overruling such motion. "A court of equity will not grant compensatory damages when they are not given as an incident of some other equitable relief. . . . Where the court refuses to grant equitable relief, as in this case, all it can do is reserve the plaintiff the right to bring an action at law for damages."

In *Flynn v. McHugh*<sup>15</sup> plaintiff was the owner of a four apartment dwelling. Being of advanced years plaintiff entered into an agreement with defendants, her nephew and his wife, that she would deed them the property and retain a life estate in herself. The consideration provided by the defendants as stated in the deed was one dollar and other good and valuable consideration. However, it was orally understood that defendants would move into one of the apartments of the building, provide maintenance of the building, pay certain upkeep costs and provide personal services needed by plaintiff due to her age and physical condition. As so often happens in such an understanding the arrangement worked amicably for only a short time. Subsequently, plaintiff brought an action for cancellation of the instrument. A court of appeals affirmed the judgment for defendants entered by the trial court. One allegation by the plaintiff was that she was fraudulently induced to believe that the provisions regarding services were contained in the deed whereas they were not. The court found the evidence insufficient to support this contention saying that to set aside an instrument of solemn character, evidence of a clear and convincing character was needed and that a mere preponderance of evidence was not enough. The court also recognized the principle that cancellation of a deed will not be given for mere breach of contract when failure to perform all or part of the consideration was not expressly made a ground of forfeiture.

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<sup>14</sup> 98 Ohio App. 363, 129 N.E.2d 394 (1954).

<sup>15</sup> 98 Ohio App. 393, 129 N.E.2d 848 (1955).