Case Western Reserve Law Review

Volume 9 | Issue 3 Article 7

1958

Civil Procedure

Samuel Sonenfield

The older cases held Doe personally liable and refused to admit parol evidence of the intent not to hold him. Most of the recent decisions construe the signature as ambiguous, admit parol evidence and presume that the agent is not personally liable.[9]

The instant case involves a signature "in between" the two cases listed above, and represents a case of first impression in Ohio. The negotiable note read:

> "We promise to pay . . .
> The X Company
> John Doe, Vice President
> Richard Roe"

The court held that parol evidence would be admissible to show that Roe was in fact the president of the corporation and that the parties intended that he would not be liable. The court added that since Roe could have easily signed in a representative capacity, the burden is on him to show by clear and convincing evidence that he was not intended to be a party. Since there was no evidence as to whether the payee of the note understood the effect of Roe's signature, the court held that Roe had failed to sustain the burden and was personally liable as a co-maker.[10]

HUGH ALAN ROSS

CIVIL PROCEDURE

Pleading "Negligence" and "Carelessness"

It has not been the practice of the author of this portion of the survey to report decisions of courts of common pleas, since they are, no matter how well-reasoned and logical, not usually final. But, by the same token, decisions on purely pleading matters are seldom found at a higher level. It therefore seems desirable to report a late decision of Judge McBride, of the Common Pleas Court of Montgomery County, on a pleading issue of considerable importance.

Judge McBride, in *Mays v. Morgan*,[1] sustained the motion of defendant to strike from the plaintiff's petition the words, "negligently and carelessly," wherever they appeared in the following paragraph thereof:

> Plaintiff further says that at the time of plaintiff's injury. . . the defendant was *negligent and careless* of the safety of the plaintiff and others lawfully passing upon and along said dedicated public alley way, in that she

[9] See cases cited in MECHEM, OUTLINES OF AGENCY §§ 314-17 (4th ed. 1952); and Cannon v. Miller Rubber Co., 128 Ohio St. 72, 190 N.E. 210 (1934).

[10] Johnstone Machinery Co. v. Owens Screw Products, 145 N.E. 2d 559 (Ohio Munic. Ct. 1957).

> did *negligently and carelessly* maintain said garage in a rotten and decayed and unsafe condition; that defendant *negligently and carelessly* failed and omitted to replace said rotten and decayed garage with sound material of sufficient strength to support said garage, but did *negligently and carelessly* permit said rotten and decayed garage to remain in an unsafe condition in close proximity to said public thoroughfare, as aforesaid, all of which facts defendant well knew, or, in the exercise of reasonable or proper diligence, should have known but which were not known to the plaintiff.[2]

The decision appears clearly right to this writer. If what was done by defendant was negligent under all the circumstances, the trial court will so inform the jury. If it was not, nothing (except prejudicial epithets) has been added to the pleading by the use of the dirty words. They are mere conclusions of law, regardless of the way they are viewed.

The case is in line with a slow reform which has been taking place in Ohio pleading fostered by a few courageous and clear-thinking judges, at both the trial and higher appellate levels.[3]

Service by Publication — Strict Compliance With Statute Required

The careful attention which counsel must devote to detail in obtaining jurisdiction quasi-in-rem over absent defendants in such proceedings as attachments is indicated in *Corbet v. Fowble.*[4] Plaintiff filed suit against a non-resident defendant, the residence address of said defendant being known at all times to plaintiff. He attached certain real estate belonging to defendant and filed a proper affidavit for constructive service. He failed, however, for three weeks after commencement of action and the first publication, to instruct the clerk to mail a copy of the publication to the defendant, despite the wording of the statute pertaining thereto[5] which requires the party making service to deliver copies of the published notice *immediately after the first publication.* The court, relying correctly, I think, on the second and third syllabi of *Lincoln Tavern, Inc. v. Snader*[6] held that the mailing of the copy 20 days after first publication did not meet the intendment of the statute and dissolved the attachment.

---

[1] 145 N.E.2d 159 (Ohio C.P. 1957).

[2] *Ibid.*

[3] See Dansby v. Dansby, 165 Ohio St. 112, 133 N.E.2d 358 (1956); commented on, 1956 Survey, 8 WEST. RES. L. REV. 261 (1957). See also Brown v. Pollard, 112 N.E.2d 692 (1953) and other cases cited in Judge McBride's opinion.

[4] 145 N.E.2d 466 (1956).

[5] OHIO REV. CODE § 2703.16.

[6] 165 Ohio St. 61, 133 N.E.2d 606; 1956 Survey, 8 WEST. RES. L. REV. 263 (1957).

Service of Process on Non-Resident Operators of Motor Vehicles

Since the landmark case of *Hess v. Pawloski*,[7] the constitutionality of service of process upon and exercise of personal jurisdiction over non-resident motorists has been recognized. It is probably safe to say that every state now has legislation permitting such service.[8]

Once established the idea grew and the concept of amenability to personal jurisdiction has now been extended far beyond the original concept of service upon a person whose driving activities upon the state's highways gave rise to a cause of action. For example, in the recent case of *Paduchik v. Mikoff*,[9] the Supreme Court allowed the application of the statute to a situation in which the injury occurred on private property. There remained the situation in which a non-moving vehicle would be the injury-producing instrumentality. This occurred in *Taylor v. Hall*,[10] in which plaintiff was injured as a result of the unexpected opening of the cab door of a visiting truck, across a sidewalk on which plaintiff was walking. The court built upon the logic of previously decided cases, in Ohio, and elsewhere and pointed out that the Ohio statute is not restricted to accidents or collisions occurring while operating a motor vehicle on a public highway, and denied defendant's motion to quash service of summons upon him.

Transfer of Interest in Action

The Revised Code provides[11] for the transfer of a party's interest in an action pending the litigation thereof. It has long been established that the assignment by a plaintiff of his interest in a controversy during pendency of a suit thereon is not a defense to the action, but that the cause may proceed in his name.[12]

The Court of Appeals for Summit County held[13] in the period covered by this survey, that the same principles and statute apply when only a part of the interest is transferred by plaintiff. Plaintiff was the beneficiary of a negative covenant. Plaintiff sold that part of its business to which the covenant related. The court held that the action might

[7] 274 U.S. 352 (1927).

[8] OHIO REV. CODE §§ 2703.20-.22.

[9] 158 Ohio St. 533, 110 N.E.2d 562 (1953).

[10] 103 Ohio App. 283, 145 N.E.2d 241 (1956).

[11] OHIO REV. CODE § 2307.25: ". . . on any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him."

[12] Cullen & Vaughn Co. v. Bender Co., 122 Ohio St. 82, 179 N.E. 633 (1930).

[13] Akron Ambulance Service, Inc. v. Cox, 101 Ohio App. 347, 140 N.E.2d 7 (1956).

continue in the name of the original plaintiff for the benefit of the assignee or transferee, or that the person to whom the transfer was made might be substituted for him.

Habeas Corpus Not Available To Test Revocation of Convict's Parole

Habeas corpus is an ancient common law writ of an extraordinary civil nature, used primarily to secure the liberty of a person who is being restrained of his liberty by a person or under an order of a judicial officer without *jurisdiction* to do so. It does not lie to test mere errors or irregularities in trial which do not oust the trial court of its jurisdiction.[14] It will not lie as a mere substitute for appeal or a motion for new trial.

The difficult problem arises with respect to the convict on parole.[15] He is not restrained of his liberty in the strict sense and it is usually held that the writ is not available to him. In *In Re Varner*,[16] the parole problem was compounded by the additional fact that the Pardon and Parole Commission had revoked petitioner's parole and ordered his return to the Ohio State Reformatory. He sought habeas corpus on the ground that the determination of the commission that he had violated the conditions of his parole was "arbitrary, fraudulent, false, capricious and an abuse of discretion, . . . beyond its statutory powers and an unlawful denial of [his] legal and constitutional rights. . . ."[17]

The Supreme Court held that such action of the commission is not reviewable in a habeas corpus proceeding, even though the convict is returned to confinement because of such action. The authorities outside of Ohio are in conflict on this question. The Court held that only by "a strained construction of some of the language of our statutes"[18] could there be found a legislative intent that there is to be a hearing before a prisoner on parole is declared to be a parole violator and that since a prisoner confined in the penitentiary has no right to parole,[19] he has no *right* to contest a revocation of parole by the commission's determination

---

[14] For a good résumé of the subject, see Kramer v. Alvis, 103 Ohio App. 324, 141 N.E.2d 489 (1956); PERKINS, CASES AND MATERIALS ON CRIMINAL PROCEDURE pp. 738-45 (2d ed. 1952).

[15] *Cf.* PERKINS, note 14, *supra.*

[16] 166 Ohio St. 340, 142 N.E.2d 846 (1957).

[17] *Id.* at 341.

[18] OHIO REV. CODE §§ 2965.01-.34.

[19] *Ex Parte* Tischler, 127 Ohio St. 404, 188 N.E. 730 (1933).

that he is a parole violator without a clear statutory expression of an intent to confer such right upon him.[20]

When Is An Action "Pending"?

The question of when an action is pending may become an important one in the course of procedure. For example, one ground of demurrer to a petition is that it shows on its face that there is another action pending between the same parties on the same subject matter.[21] The courts of Ohio appear never to have defined the term clearly. An early case[22] has said that a common-law action cannot be said to be pending before mesne process is issued.

In *Doty v. West*,[23] the Court of Appeals for Franklin County had occasion to consider the problem. Boyd sued Doty in the Common Pleas Court of Montgomery County to recover a real estate broker's commission. Residence service was purported to have been made and a default judgment was entered. Subsequently, defendant moved to quash service of summons. After hearing, the motion was granted and the default judgment was set aside. No further action was taken for almost three years, but the action remained pending at the petition level.

Meanwhile, plaintiff filed a similar action against defendant in Franklin County Common Pleas. Defendant answered, claiming, among other defenses, that an action was pending between him and plaintiff involving the same cause of action.

Relying on the provisions of Ohio Revised Code Section 2305.17,[24] the appeals court held that since there had been no praecipe for service filed the action in Montgomery County had not been commenced and was therefore not pending. The result appears to be fully in accord with the statutes and logic.[25]

---

[20] The reader is also invited to examine State of Ohio, *ex rel.* Chapman v. Lowery, Ohio Pardon and Parole Commission, 140 N.E.2d 815 (Ohio Ct. App. 1956) in which the Court granted a petition in mandamus to compel the Commission to perform its statutory duties of making, adopting, and publishing the necessary rules for its organization and procedure, as required by OHIO REV. CODE § 2965.05, holding also that no prior demand is necessary for performance of a public duty.

[21] OHIO REV. CODE § 2309.08(D).

[22] Bowry v. Odell, 4 Ohio St. 623, 627 (1855).

[23] 144 N.E.2d 469 (Ohio Ct. App. 1956).

[24] "An action is commenced . . . , as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor or otherwise united in interest with him. . . ."

[25] Gehelo v. Gehelo, 160 Ohio St. 243, 116 N.E.2d 7 (1953).

Jurisdiction of Courts — Service by Publication to Impose Constructive Trust on Shares of Domestic Corporation

In the 1954 Survey, we discussed the question of the jurisdiction of an Ohio court to adjudicate with respect to shares of stock, not themselves before the court.[26] In the case of *Silberman v. Silberman*,[27] the Cuyahoga County Court of Appeals had held that an Ohio court could impose a constructive trust upon shares of stock in an Ohio corporation by personal service upon the corporation and some individual defendants and by service by publication upon certain non-residents. The court held that the stock was actually personal property in Ohio, the habitation or domicile of the company, which is the creature of the state which created it, and that the certificates of stock in the hands of absent defendants were only evidence of the ownership of the shares.

The case of *Brownewell v. Columbus Clay Mfg. Co.*[28] came before the Supreme Court on certification from the Court of Appeals of Franklin County as a result of a conflict between the decision of the latter court and that of the Cuyahoga Appeals Court in *Silberman v. Silberman*.[29] Relying on provisions of the Uniform Stock Transfer Act,[30] the Supreme Court held that the effect of that act is to embody the shares in the certificate. When the act is in force in the state of incorporation, the situs of the shares is that of the physical location of the certificate, even though such location is in a foreign state.

While the case could have been decided on the ground that since the shares of stock at the time of suit were in an estate being administered by a California probate court, and therefore the rule of prior invocation of jurisdiction applicable, the effect of the case is undoubtedly to overrule *Silberman* and establish the rule of the Uniform Stock Transfer Act in Ohio.

Going Behind Judgment To Show Non-Dischargeable Character of Claim

Plaintiff had recovered a judgment in an Ohio common pleas court on a cognovit note. The note had been executed and delivered by defendant to plaintiff in part payment of money embezzled by defendant from plaintiff while in plaintiff's employ. No evidence was placed in

---

[26] Commented on, 1954 Survey, 6 WEST. RES. L. REV. 223, 236 (1955).
[27] 99 Ohio App. 340, 121 N.E.2d 838 (1954).
[28] 166 Ohio St. 324, 142, N.E.2d 511 (1957).
[29] 99 Ohio App. 340, 121 N.E.2d 838 (1954).
[30] OHIO REV. CODE §§ 1705.01-.21.

the record at the time of the rendition of the judgment on the note as to the nature of and non-dischargeability of the obligation upon which it was based.

Subsequently defendant was adjudged a bankrupt, one of his scheduled debts being the plaintiff's judgment claim. Plaintiff was duly notified of the bankruptcy proceedings, in which defendant was discharged from all his debts, including plaintiff's judgment claim. It does not appear whether plaintiff objected thereto.

Still later plaintiff sought an order in the state court proceeding in aid of execution and the question was presented whether the court in which such proceedings were instituted ought to permit the introduction of evidence to show the nature of the original indebtedness. The lower courts refused to permit a showing of the nature of the debt and the Supreme Court affirmed.[31] Citing the text of legal encyclopedias, the court held that although it is permitted to go behind the judgment for the purpose of ascertaining the character of the original obligation, the scope of the showing in this respect is limited to the record of the judgment or of the proceedings in which it was obtained. If nothing appears on *that* record showing the original obligation to have been of a character excepted from the operation of the discharge in bankruptcy the judgment will be discharged, and if *that* record discloses the non-dischargeable character of the original obligation, the judgment will not be discharged.

The lesson is obvious to the practicing lawyer. In reducing a non-dischargeable obligation to judgment, he must be very careful in order to protect his client to have the judgment record indicate clearly the nature of the obligation which is thus made a matter of a record debt.

For a somewhat similar case the reader is invited to consider *Carroll v. Jones*[32] which involved the discharge of a judgment obtained by default. The allegations of the plaintiff's petition that the acts of defendant were willful and malicious misconduct were held to be mere statements of conclusions of law.

Jurisdiction of Municipal Courts To Vacate Judgment During Term

A court of general jurisdiction, such as common pleas, has control of its own orders and judgments during the term of court at which they are rendered, which control may be exercised, within the sphere of sound discretion, as an inherent right founded upon common law; nor is this

[31] Jacobs v. Beatty, 165 Ohio St. 596, 138 N.E.2d 657 (1956).
[32] 141 N.E.2d 239 (Ohio C.P. 1956).