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Civil Procedure

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last year. The court of appeals sustained the lower court which had ruled in favor of the Legal Aid Society. The court of appeals held that the payment of fees for the defense of indigent criminals into a trust fund from which the Legal Aid defender's salary is paid is not tantamount to the unauthorized practice of law. The court found, further, that the furnishing of legal services in civil matters to those who are unable to pay is a public service. Thus, the Legal Aid Society is not acting as an intermediary between lawyer and client and is not engaging in the unauthorized practice of law.

WILLIAM W. FALSGRAF

CIVIL PROCEDURE

A reading of Ohio cases decided during the past year reveals nothing especially startling. Generally the cases reiterate existing law, some recite poetry,[1] others "obfuscate." The cases discussed in this brief article were selected as the most interesting. They are hardly coruscating.

SPECIAL APPEARANCE

Scott v. Davis[2] involved an action for damages for breach of contract brought against Fred Davis, a resident of Miami County, where the action was brought, and Central Plumbing Company, a resident of Montgomery County, served with summons in Montgomery County.[3] Defendant Central Plumbing Company filed a demurrer, alleging that "the petition does not state facts that show a cause of action against this defendant; that the action was not brought within the time limited for the commencement of such action; and that there is a misjoinder of parties defendant."[4] The court overruled the demurrer and defendant Central Plumbing Company filed an answer containing a general denial and in addition repeating the allegations of the demurrer. Subsequently, the court dismissed as to Davis. At this juncture Central Plumbing Company (hereinafter referred to as defendant) moved for dismissal contending that when Davis was dismissed the court lost jurisdiction over the defendant.

The case suggests that there are three methods by which one can challenge the court's jurisdiction over the person:[5] (1) a special appearance

1. Columbus v. Becher, 173 Ohio St. 197, 200, 180 N.E.2d 836, 838 (1962).

2. 173 Ohio St. 252, 181 N.E.2d 470 (1962).

3. OHIO REV. CODE § 2703.04 provides for service of summons in certain circumstances in another county other than the one in which the action was brought.

4. Scott v. Davis, 173 Ohio St. 252, 253, 181 N.E.2d 470, 471 (1962).

5. *Id.* at 254, 181 N.E.2d at 472. As *Scott v. Davis* was decided in March, it is surprising that the court failed to mention a fourth means of challenge sanctioned the preceding month in

to move to quash the service of the summons or solely to challenge personal jurisdiction; (2) a demurrer to the petition alleging that it appears from the face of the petition that the court lacks personal jurisdiction;[6] and (3) an objection to personal jurisdiction in the answer if the alleged defect does not appear on the face of the petition.[7] In the last situation, where the objection is permitted in the answer, the challenge to jurisdiction over the person may be joined with an attack on the merits. This is the only situation in Ohio where such a joinder does not constitute a general appearance. In any case the challenge to jurisdiction over the person must be made "at the first opportunity."[8]

Filing a demurrer which relates to the merits of the case in any part will be equated with a general appearance.[9] Thus, in this case the de-

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State *ex rel.* Tempero v. Colopy, 173 Ohio St. 122, 180 N.E.2d 273 (1962). *Colopy* and its relationship to *Scott* is discussed at 396 *infra.* Note that the three methods of challenging jurisdiction over the person constitute exceptions to the statutory provision that "the voluntary appearance of a defendant is equivalent to service." OHIO REV. CODE § 2703.09.

6. "The defendant may demur to the petition only when it appears on its face that:
(A) The court has not [no] jurisdiction of the person of the defendant;
(B) The court has no jurisdiction of the subject of the action;
(C) The plaintiff has not legal capacity to sue;
(D) There is another action pending between the same parties for the same cause;
(E) There is a misjoinder of parties plaintiff or defendant;
(F) There is a defect of parties plaintiff or defendant;
(G) Several causes of action are improperly joined;
(H) Separate causes of action against several defendants are improperly joined;
(I) The action was not brought within the time limited for the commencement of such actions;
(J) The petition does not state facts which show a cause of action." OHIO REV. CODE § 2309.08.

7. See Bucurenciu v. Ramba, 117 Ohio St. 546, 159 N.E. 565 (1927); OHIO REV. CODE § 2309.10.

8. Scott v. Davis, 173 Ohio St. 252, 254, 181 N.E.2d 470, 472 (1962).

9. This is not the case in a federal district court. See Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); FED. R. CIV. P. 12(b).

Why the defense available under OHIO REV. CODE § 2309.08(A) is waived when joined with defenses (B)-(J) is not apparent from the related statutes. OHIO REV. CODE § 2309.09 provides that, if the objections in a demurrer are not specific, it is to be "regarded as objecting only that the court has no jurisdiction of the subject matter of the action or that the petition does not state facts which show a cause of action." OHIO REV. CODE § 2309.10 treats defenses presented by demurrer precisely the same as those presented in the answer.

Justice Taft in his concurring opinion, after citing the above sections of the code, concludes: "In view of these statutes, I have considerable doubt about paragraph two of the syllabus." Scott v. Davis, 173 Ohio St. 252, 257, 181 N.E.2d 470, 474 (concurring opinion). Paragraph two of the syllabus encompasses the dictum expressed by the majority: "Although the filing of a demurrer which attacks solely the jurisdiction of the person does not constitute a general entry of appearance, *where such demurrer as to jurisdiction of the person is coupled with an attack on the petition* on the basis that it does not state a cause of action, such demurrer relates to the merits of the cause and constitutes a general entry of appearance." *Id.* at 255-56, 181 N.E.2d at 473 (Emphasis added.) This statement is dictum because in *Scott* the defendant's demurrer did not include an objection to jurisdiction of its person. Thus the statement does not coincide with the facts of the case, but paragraph two of the syllabus extends the scope of the statement to include those facts.

Professor Moore persuasively argues that "the theory of the [federal] Rule is that the quick presentation of defenses and objections should be encouraged, and that successive motions which prolong such presentation should be carefully limited. Accordingly a party is protected

murrer of defendant raising defenses (E), (I), and (J)[10] was equivalent to a general appearance. Further, by failing to raise the defense specified in Ohio Revised Code section 2309.08(A) in the demurrer, defendant waived that defense under Ohio Revised Code sections 2309.09 and 2309.10.

REVIEW BY PROHIBITION OR MANDAMUS

State ex rel. Tempero v. Colopy[11] was ignored by the court in *Scott v. Davis,* although the basic issue in the case was the manner in which a defendant can challenge jurisdiction of the person. Colopy, who had neither received service of process nor entered an appearance, found himself a defendant in an in personam action in the court of common pleas. Rather than take advantage of one of the three conventional methods of attack on personal jurisdiction available in the court of common pleas, Colopy filed a petition in the court of appeals asking that a writ of prohibition[12] issue against the judges of the court of common pleas to arrest the in personam action. The court of appeals issued the writ, and the plaintiff in the in personam action, Moreland, appealed to the supreme court, which affirmed the judgment of the court of appeals.

Undoubtedly there are unusual cases in which a proper exercise of discretion would require the court of appeals to issue a writ of prohibition,[13] since the remedy in the ordinary course of the law is inadequate. But the supreme court was unable to determine whether this was such a situation since no bill of exceptions had been filed in the supreme court.

> [I]t is contended that relator has an adequate remedy in the ordinary course of the law, and that, therefore, the Court of Appeals should have refused to allow the writ. We believe it unnecessary to decide in the instant case whether relator has such a remedy.
>
> This court in the exercise of its discretion will usually refuse to allow a writ of prohibition or of mandamus where the relator has an adequate remedy in the ordinary course of the law. However, it has the power to, and may in the exercise of its discretion, issue such a writ in such an instance.
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> . . . .
>
> A Court of Appeals has this same discretion . . . . Therefore, the judgment of a Court of Appeals, granting a writ of prohibition or of

against waiver merely because he has joined certain defenses or objections together; but he may waive defenses if he makes a motion and fails to assert all the grounds available to him." 2 MOORE, FEDERAL PRACTICE § 12.12, at 2260 (2d ed. 1962).

10. See note 6 *supra.*

11. 173 Ohio St. 122, 180 N.E.2d 273 (1962).

12. OHIO CONST. art. IV, § 6 provides that the courts of appeals shall have original jurisdiction to issue writs of prohibition.

13. For such a situation see State *ex rel.* Gelman v. Common Pleas Court, 172 Ohio St. 70, 173 N.E.2d 343 (1961).

> mandamus, will not be reversed merely because the relator has an adequate remedy in the ordinary course of the law.[14]

Colopy, with its cavalier language, disregards the longstanding rule in Ohio that the extraordinary writ of prohibition is not to be employed as a device to circumvent the ordinary appellate process. This rule was propounded in 1960 in *State ex rel. Schumacher v. Victor*[15] by the supreme court, which ignored the rule in 1962. The only decision involving the writ of prohibition relied on by the court is *State ex rel. Gelman v. Common Pleas Court.*[16] The case is readily distinguished since it involved the filing of a divorce petition by a husband in the Court of Common Pleas of Lorain County and a subsequent filing of a divorce petition by his wife in the Common Pleas Court of Cuyahoga County. The court of appeals granted the husband's petition for a writ of prohibition and the supreme court affirmed. The court simply applied the general rule that

> the remedy of prohibition is available to restrain a court from exercising jurisdiction where an identical cause of action between the same parties has previously been lodged in another court of concurrent jurisdiction.[17]

The case does not stand for the proposition that mandamus will not be denied because a relator has an adequate remedy in law or equity.

The court in *Colopy* relied on mandamus decisions as well. In general the same rules apply to mandamus and prohibition regarding exhaustion of appellate remedies as a prerequisite to issuance of the writs,[18] since the writs are complementary: one requiring a court to exercise jurisdiction, the other requiring the court to refrain from exercising juristion.

But section 2731.05 of the Revised Code expressly provides: "The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law." This section as construed by the Ohio courts means that where any legal, equitable, or statutory remedy is available, the use of mandamus is prohibited.[19] *State ex rel. Fredrix v.*

14. State *ex rel.* Tempero v. Colopy, 173 Ohio St. 122, 123-24, 180 N.E.2d 273, 274 (1962).

15. 171 Ohio St. 189, 168 N.E.2d 398 (1960). Nor is the writ available as a means of obtaining review of the decisions of administrative agencies unless all administrative remedies have been exhausted. See Culp, *Survey of Ohio Law — Administrative Law and Procedure,* 13 W. RES. L. REV. 425, 434 (1962).

16. 172 Ohio St. 70, 173 N.E.2d 343 (1961).

17. *Id.* at 71-72, 173 N.E.2d at 344 (1961).

18. *Ibid.*

19. State *ex rel.* Ricketts v. Balsly, 112 Ohio App. 555, 171 N.E.2d 538 (1960), *aff'd,* 171 Ohio St. 553, 173 N.E.2d 117 (1961). But since mandamus jurisdiction is conferred on the supreme court and the court of appeals by the OHIO CONST. art. IV, §§ 2, 6, the statute cannot reduce the jurisdiction of these courts to issue writs of mandamus from the common-law jurisdiction existing in 1851 when the constitution was adopted. State *ex rel.* Libbey-Owens-Ford Glass Co. v. Industrial Comm'n, 162 Ohio St. 302, 123 N.E.2d 23 (1954). This does not necessarily hold for the court of common pleas. See OHIO CONST. art. IV, § 18. Mandamus jurisdiction is conferred on the court of common pleas by statute. OHIO REV. CODE § 2731.02.

Village of Beachwood[20] and *State ex rel. Gund Co. v. Village of Solon*[21] both held in effect that, where a relator fails to exhaust his appellate remedies under Ohio Revised Code section 2506.01,[22] he cannot utilize mandamus as a substitute for appeal. These cases naturally led Professor Culp to conclude last year that the use of mandamus to review zoning decisions would be extremely limited.[23] Unfortunately the court in *Colopy* did not discuss these cases, apparently since it felt justified in relying on *State ex rel. Gelman v. Common Pleas Court*[24] and three mandamus cases: *State ex rel. Wesselman v. Board of Elections,*[25] *State ex rel. Feighan v. Green,*[26] and *State ex rel. Lorain County Sav. & Trust Co. v. Board of County Comm'rs.*[27]

The question raised in *Wesselman* was: Can a relator who has an adequate remedy by way of injunction or declaratory judgment obtain a writ of mandamus? The court answered affirmatively. This case is not strong precedent for the *Colopy* situation.[28] The *Feighan* case raised the same question as *Wesselman* and, in addition, the factor of an emergency need for an immediate decision. It too answered the question in the affirmative. Its authority: *State ex rel. Wesselman v. Board of Elections.* In the last of the trinity, *State ex rel. Lorain County Sav. & Trust Co.,* the court cited section 2731.05 of the Revised Code. It then properly cited *State ex rel. Libbey-Owens-Ford Glass Co. v. Industrial Comm'n*[29] for the following:

> A careful review of the decisions of this court indicates that the following principles are to be applied in considering whether the Supreme Court in the exercise of its discretion should grant the extraordinary writ of mandamus under its constitutional powers.
>
> 1. The relator must be the party beneficially interested.
>
> 2. Before the writ may issue, it must appear affirmatively that there is no plain and adequate remedy in the ordinary course of the law, including equitable remedies.

20. 171 Ohio St. 343, 170 N.E.2d 847 (1960).

21. 171 Ohio St. 318, 170 N.E.2d 487 (1960).

22. This section provides for a review of final orders, adjudications, or decisions of boards of any political subdivision of the state.

23. Culp, *supra* note 15, at 433.

24. 172 Ohio St. 70, 173 N.E.2d 343 (1961).

25. 170 Ohio St. 30, 162 N.E.2d 118 (1959).

26. 171 Ohio St. 263, 169 N.E.2d 551 (1960).

27. 171 Ohio St. 306, 170 N.E.2d 733 (1960).

28. *Wesselman* cites State *ex rel.* Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 478, 127 N.E.2d 371, 376 (1955), for authority that mandamus may lie even though there is an adequate remedy in the ordinary course of the law. The proposition does appear at 163 Ohio St. 478, 127 N.E.2d 376, but it is made by Justice Taft in his dissenting opinion in which he argues against allowing mandamus where another adequate remedy exists. He makes the point that the *power* exists, because of the constitutional grant (See note 19 *supra.*), but OHIO REV. CODE § 2731.05 constrains the court from exercising that power where there is a plain and adequate remedy in the ordinary course of the law.

29. 162 Ohio St. 302, 123 N.E.2d 23 (1954).

> 3. The extraordinary writ of mandamus may not be used as a substitute for a mandatory injunction.
>
> 4. It may not be used where the purpose of the relator is primarily the enforcement or protection of purely private rights.[30]

However the court departed from the second principle citing *Wesselman.*[31]

Thus *Colopy* and the mandamus cases cited therein represent a pernicious proliferation of precedent in an area where an efficient appellate structure requires stringent limitation of the use of the extraordinary writs to circumvent ordinary appellate procedure.

State ex rel. Thomas v. Ludewig[32] exhibits an egregious disregard for the statutory mandate that "the writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of law."[33] Since it was the court of common pleas that issued the writ of mandamus, no argument can be made that, regardless of statutory limitations, the constitution confers on that court the power to issue extraordinary writs to the same extent as at common law in 1851.[34]

In *Ludewig* relator's application for a permit to build a gasoline station on his property was denied by the Commissioner of Inspections, since the property was located in a residential zone. Contending that the ordinance and its application to his situation were arbitrary, unreasonable, and beyond the zoning power, relator obtained a writ of mandamus from the court of common pleas ordering the Commissioner to issue to relator a building permit for construction of a gasoline station. The court of appeals affirmed.

As in *Colopy,* various conventional avenues of appeal from the Commissioner's action were open to relator. He could have applied to the Board of Zoning Appeals for a variance, appealed to the same board from the decision of the Commissioner,[35] or taken an appeal to the court of common pleas under Ohio Revised Code section 2506.01.

The same objections that apply to *Colopy* are of equal force in *Ludewig.* The court's conclusion that mandamus may issue even if relator has another adequate remedy rests on the authority of *State ex rel. Killeen Realty Co. v. City of E. Cleveland,*[36] *State ex rel. Wesselman v. Board of Elections,*[37] and *State ex rel. Grant v. Kiefaber.*[38]

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30. State *ex rel.* Lorain County Sav. & Trust Co. v. Board of County Comm'rs, 171 Ohio St. 306, 308, 170 N.E.2d 733, 734-35 (1960).

31. *Id.* at 308-09, 170 N.E.2d at 735.

32. 116 Ohio App. 329, 187 N.E.2d 170 (1962).

33. OHIO REV. CODE § 2731.05.

34. See note 19 *supra.*

35. OHIO REV. CODE § 303.15.

36. 169 Ohio St. 375, 160 N.E.2d 1 (1959). It is significant that the mandamus action in this case originated in the court of appeals.

37. 170 Ohio St. 30, 162 N.E.2d 118 (1959).

38. 171 Ohio St. 326, 170 N.E.2d 848 (1960). In this case the supreme court affirmed

Judge Fess writes a well-reasoned opinion in *Ludewig,* dissenting[39] from the conclusion of the majority that the existence of another remedy in the ordinary course of the law does not preclude the granting of a writ of mandamus. After a careful examination of the relevant authorities, Judge Fess concludes:

> This dissenting member of the court therefore believes, from an analysis of the Killeen, Wesselman and Grant cases, that there was no intention on the part of the Supreme Court to modify the settled principle that mandamus is not available to subserve the purpose of an appeal absent a showing that an appeal is not an adequate remedy under the circumstances of the particular case. It is also to be noted that the Wesselman and Killeen cases relate to injunction or declaratory judgment as an adequate remedy in the ordinary course of the law and did not deal with the availability of appeal as an adequate alternative remedy.[40]

FINAL ORDERS

A continuance of a case appears an unlikely candidate for classification as a final order.[41] In *Aero-Lite Window Co. v. Jackson*[42] the court of appeals notes that a continuance becomes a final appealable order when the order of the trial court is an abuse of discretion.[43] The court discusses the facts of the case and concludes:

> We have read the bill of exceptions in this case and do not find the trial court to be guilty of an abuse of discretion in the instant case. The order appealed from thus does not constitute a final order.[44]

Where granting a continuance "in effect determines the action and prevents a judgment," the right to appeal exists.[45] This occurred in *Leiberg v. Vitangeli*[46] when the defendant's request for a continuance until the end of the war was granted. An appeal was allowed, and the order

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the judgment of the court of appeals (where the mandamus proceedings had originated) which stated that the relator had "available an adequate remedy by way of appeal to the Common Pleas Court as well as by way of declaratory judgment and injunctive relief and that a writ of mandamus should be denied upon such ground." In affirming, the supreme court noted, in dicta, that the court had recognized the *power* in the court to issue a mandamus even where there is a plain and adequate remedy in the ordinary course of the law. For authority the court cited *Wesselman.*

39. State *ex rel.* Thomas v. Ludewig, 116 Ohio App. 329, 342, 187 N.E.2d 170, 178 (1962) (separate opinion).

40. *Id.* at 347-48, 187 N.E.2d at 181-82 (separate opinion).

41. OHIO REV. CODE § 2505.03 provides for review of final orders.

42. 115 Ohio App. 257, 184 N.E.2d 677 (1962).

43. *Id.* at 258, 184 N.E.2d at 678 (1962), citing Norton v. Norton, 11 Ohio St. 262, 266, 145 N.E. 253, 254 (1924).

44. Aero-Lite Window Co. v. Jackson, 115 Ohio App. 257, 258, 184 N.E.2d 677, 679 (1962).

45. See OHIO REV. CODE § 2505.02.

46. 70 Ohio App. 479, 47 N.E.2d 235 (1942).

was reversed on the basis of abuse of discretion by the trial judge, the court noting that England and France once fought a Thirty Years War.

MOTION FOR NEW TRIAL

Nationwide Mut. Ins. Co. v. Ballard[47] is a novel case, construing the requirement that the application for a "new trial must be made within ten days after the journal entry of a final order, judgment, or decree . . . [is] approved by the trial court in writing and filed with the clerk of the court for journalization."[48]

A jury verdict against the plaintiffs was returned on May 9, 1961. The same day a journal entry was filed with the clerk of courts, regarding the trial, presentation of evidence, instructions to the jury, and the like. However, the judgment entry on the verdict was not included in this filing.

Ohio Revised Code section 2323.15 provides:

> When a trial by jury has been had and a verdict rendered, unless the court orders the case reserved for future argument or consideration, a journal entry of judgment in conformity to the verdict shall be approved by the court in writing and filed with the clerk for journalization.

Prior to the journal entry of final judgment the plaintiffs filed motions for a new trial and for judgment notwithstanding the verdict.[49]

A rule of the court provided:

> [U]pon the filing of any motion or demurrer, the same shall be assigned for disposition at 9:30 A. M. on the third Wednesday following said filing . . . .[50]

Thus the court by its rule had the case "reserved for future argument or consideration" and could not order a journal entry of judgment pursuant to the verdict. Plaintiffs' motions were heard on May 31, 1961, and overruled as prematurely filed. A journal entry of judgment was then made. On June 13, 1961, more than ten days after the journal entry of judgment, the plaintiffs filed another motion for new trial. Since the delayed filing was not within any of the statutory exceptions to the ten-day filing requirement,[51] the court again overruled the motion.

Thus in Ohio a motion for new trial filed before a journal entry of judgment is premature. After the motion is disposed of and a journal

47. 182 N.E.2d 36 (Ohio C.P. 1961).

48. OHIO REV. CODE § 2321.19.

49. The time for filing a motion for judgment notwithstanding the verdict is the same as that for moving for a new trial, *i.e.*, "within ten days after the journal entry of judgment in conformity to the verdict approved by the court in writing and filed with the clerk for journalization. . . ." OHIO REV. CODE § 2323.181 (Supp. 1962).

50. Nationwide Mut. Ins. Co. v. Ballard, 182 N.E.2d 36, 37-38 (Ohio C.P. 1961).

51. See OHIO REV. CODE § 2321.19.

entry of judgment is entered, a new motion for new trial must be made within the statutory ten-day period, the earlier motion having no validity or legal effect.

DISCOVERY

In *Reis v. Rickard*[52] the plaintiff attached interrogatories to his petition. After the statutory time limit for answering the interrogatories had elapsed, the defendant moved to require the plaintiff to make his petition more definite and certain. Thereupon the plaintiff moved for an order requiring the defendant to answer the interrogatories or, in the alternative, for an order granting a default judgment for the plaintiff and requested that the defendant's motion to make the petition more definite and certain be held in abeyance until the interrogatories were answered.

The trial court sustained the defendant's motion. As for the interrogatories, the court ordered the defendant to respond after the plaintiff had filed his amended petition. The plaintiff failed to comply with the order to amend his petition and approximately two and a half months later the court granted defendant's motion to dismiss the case for want of prosecution.

On appeal the court reversed, holding that the plaintiff was entitled to have the interrogatories answered within the time limited for answer to the petition.

Ohio Revised Code section 2309.44 provides: "When annexed to a petition, the interrogatories . . . shall be answered within the time limited for answer to the petition . . . ." The court concluded that this section evinced a legislative intention that the answers to the interrogatories were to be used in the preparation of a pleading or an amended pleading, such as the amended petition involved in this case. Since the trial court denied to the plaintiff this right, reversal was required.

RES JUDICATA

In *Aubill v. Rowles*[53] the plaintiff filed an action to recover for personal injuries inflicted by the negligence of the defendant in the operation of his automobile. Subsequently the plaintiff and his insurer jointly filed an action against the same defendant to recover for property damages to plaintiff's automobile, resulting from the same accident involved in the first action. After judgment for the plaintiff in the second action, defendant's motion for summary judgment in the first action was granted.

52. 115 Ohio App. 288, 184 N.E.2d 830 (1961).

53. 180 N.E.2d 643 (Ohio C.P. 1961). A good discussion of recent Ohio insurance subrogation cases appears in Davis, *Survey of Ohio Law — Civil Procedure,* 13 W. RES. L. REV. 438, 442 (1962).