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Appellate Procedure

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In a well-reasoned opinion the Ohio Supreme Court reversed, indicating that the driver was an employee of the service station, an independent contractor.[2] The decision is clearly in accord with accepted principles of agency law. The only unusual feature of the case is that both the common pleas court and the court of appeals felt otherwise.

The owner of a truck leased his truck to a common carrier in return for a percentage of freight charges. The contract called for the owner to drive and maintain the truck and specified that he was an independent contractor. The plaintiff was injured by the negligence of the owner-driver and sued both the owner and the carrier. The common pleas court and the court of appeals treated the relation between owner and carrier as a joint adventure and held them jointly liable. In *Shaver v. Shirks Motor Express*[3] the Supreme Court reversed, pointing out that there was no co-ownership of the business and no sharing of profits. The parties were either master and servant or employer and independent contractor. It makes no difference which relationship existed because clearly both are liable. The owner is liable for his own negligence and the carrier is liable by virtue of an I.C.C. Rule making the carrier liable for the operations of all leased vehicles.[4] The point of the case is that they were not jointly liable, and therefore the motion of the defendants to require the plaintiff to elect to proceed against one or the other should have been granted.[5]

HUGH A. ROSS

APPELLATE PROCEDURE

Although a considerable number of cases dealing with appellate procedure were reported among the Ohio cases in the Northeastern series during the year 1955, comparatively few offer distinctive features of new or special interest which make them worthy of comment. A few cases clarify the view of Ohio courts expressed in earlier cases and are, therefore, briefly discussed.

In the case of *Rice v. Wheeling Dollar Savings & Trust Co.*,[1] a shareholders' derivative suit, the Supreme Court found in favor of the defendants

[1] 129 N.E.2d 865 (Ohio App. 1954).

[2] Councell v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955).

[3] 163 Ohio St. 484, 127 N.E.2d 355 (1955).

[4] The Ohio courts have held that similar state and federal regulations not only affect the carrier's liability to a shipper, but also make the carrier liable in tort. Duncan v. Evans, 134 Ohio St. 486, 17 N.E.2d 913 (1938).

[5] The rule is well-settled in Ohio that a plaintiff will be required to elect to sue either master or servant and cannot sue them jointly. For a discussion of the Ohio cases see Note, *Joinder of Tort-Feasors in Ohio*, 5 WEST. RES. L. REV. 417 (1954).

and entered an order with respect to its judgment, discharging an attachment and releasing a garnishee on the ground that the plantiffs had no right or capacity to bring the action, but ordering that such judgment be stayed pending appeal, upon condition that a motion for new trial and notices of appeal be seasonably filed, and that a supersedeas bond be filed upon appeal in an amount determined by the court in its order. The Supreme Court, in a well-reasoned opinion, held that the order was one incidental to final judgment, was not merely an order sustaining a motion to discharge an attachment before judgment, and was, therefore, an appealable order.

Another case of some interest upon the question of final order is *City of Cleveland v. Forkapa*,[2] an eminent domain proceeding in which the court of common pleas had entered an order requiring a condemnee to vacate the premises at an earlier date than originally ordered because of changed conditions growing out of requirements in the construction of the Cleveland Transit System. After a motion by the defendants to stay the order had been dismissed by the trial court, the court of appeals held that, in the absence of abuse of discretion on the part of the trial court, this order was not a final order from which an appeal might be taken.

The nature of prejudicial error was considered in several cases, in one of which, *Potter v. Baker*,[3] the Supreme Court points out that the trial judge, in determining whether a spontaneous exclamation is admissible as an exception to the hearsay rule, must decide certain questions of fact, and that, if a decision in this regard is a reasonable one, an appellate court may not disturb it, even though the reviewing court, if sitting as a trial court, would have made a different decision.

In *Centrello v. Basky*,[4] a personal injury case, the Supreme Court held that, although contributory negligence based upon carelessness and assumption of risk, the essence of which is adventurous conduct, are not identical, nevertheless, they are related, and that where in returning a general verdict for the defendants on evidence upon which the jury might have found either that the defendant was negligent, or that the plaintiff was contributorily negligent, or had heedlessly exposed himself to danger, the court might properly charge on both contributory negligence and assumption of risk.

In this case the court also discussed a rule of long standing in Ohio, the two-issue rule, pointing out that when a general verdict is returned in the absence of interrogatories the answers to which might indicate which of two issues were determinative in the case, it will be presumed that all

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[1] 163 Ohio St. 606, 128 N.E.2d 16 (1955).
[2] 126 N.E.2d 147 (Ohio App. 1952).
[3] 160 Ohio St. 488, 124 N.E.2d 140 (1955).
[4] 164 Ohio St. 41, 128 N.E.2d 80 (1955).

issues were resolved in favor of the prevailing party where one of the two issues had been presented free of error.

In the case of *Hurt v. Transportation Company*,[5] the court held that no abuse of discretion on the part of the trial judge was present in the granting of a motion for a new trial as to one of the defendants when the plaintiff had refused to accept a remittitur, such action not constituting a final order from which an appeal might be taken.

An interesting question was presented in the case of *Maus v. N.Y.C & St. L. R. Co.*[6] In this personal injury case the trial judge refused to give a requested written charge before argument that by virtue of the Internal Revenue Act of 1954 any amount received by the plaintiff as compensation for personal injuries would be exempt from federal income tax and that this situation must be taken into consideration by the jury in arriving at a verdict. The court of appeals confirmed the trial court, citing several cases in point decided by the courts of other states. This is probably the first time this question has been considered in Ohio.

The elements of a chancery case were again considered by the Supreme Court in *Sessions v. Skelton*,[7] in which a testamentary trustee, also acting individually, asked construction of the provisions of a will authorizing certain substitutions in a trust. An appeal from probate court upon questions of law and fact had been perfected to the court of appeals which, on motion, had dismissed the appeal, retaining the cause for determination of questions of law only. The court held that, although an action for declaratory judgment is neither one strictly in equity or at law, but is clearly a procedural remedy, this action involved a testamentary trust affecting charitable organizations, and was, therefore, of an equitable nature.

Another action for declaratory judgment, based upon facts which make it easily distinguishable from the above Supreme Court case, in that it did not involve a charitable trust, was considered by the Court of Appeals for Montgomery County in *Fletcher v. Stanton*,[8] the court in this case holding that the action was based upon statute, had never, therefore, been cognizable in chancery, and hence was not appealable on questions of law and fact.

The sufficiency of a notice of appeal under the provisions of Revised Code section 2505.04 was considered by the Supreme Court in *Richards v. Industrial Commission*,[9] in which the court, basing its view on this point upon a number of earlier opinions, held that the filing of a notice of appeal

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[5] 123 N.E.2d 39 (Ohio App. 1954).
[6] 128 N.E.2d 166 (Ohio App. 1955).
[7] 163 Ohio St. 409, 127 N.E.2d 378 (1955).
[8] 124 N.E.2d 493 (Ohio App. 1953).
[9] 163 Ohio St. 439, 127 N.E.2d 402 (1955).