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Constitutional History of Ohio Appellate Courts

Judge Lee E. Skeel*

[*Editor's Note:* This article is printed by permission of William Edward Baldwin, D.C.L., and Banks Baldwin Co., who are about to publish a Practice Manual On Appellate Procedure by Judge Lee E. Skeel, of which this is the introductory chapter.]

THE RIGHT OF APPEAL, using the word *appeal* in the broad sense now given it in the Appellate Procedure Act of Ohio, contemplates the removal of a case after judgment or final order, from a court of inferior jurisdiction to a court of higher jurisdiction, in the judicial process for retrial or review. This right is one that can be created only by the Constitution, or by statute within constitutional limitations. Such a right contemplates a retrial of the issues in some cases and, in other cases, a review of the record of the proceedings of the trial court or of the reviewing court of lesser jurisdiction. The right to seek a second trial, or a review of the trial, today is recognized as a desirable part of the judicial process. It can be misused, and in the past sometimes has been overextended. An editorial in the London Law Journal in the early 1930's said:

"Shall we see something done to check the burden of appeals which has been heavier under the Judicature Acts than ever before. The modern practice of successive appeals, it has been said, introduces the gambling element, and debars prudent men from embarking in litigation. What a suitor wants is to get a decision of the court, not to be the 'corpus vile' for the judicial making of law."

At the outset, let it be said that appeal, particularly on questions of law, is not the procedure intended to be depended on in the first instance to win a lawsuit. Appellate courts were provided in order to protect against trial court mistakes which result in substantial prejudice, or in the denial of justice to one seeking to enforce his legal rights in the courts. Nor should appeals be used to delay the promptness of justice which is legally due to another.

The case law of Ohio, on the subject of appeals, can only be understood by first giving consideration to the historical background of the several court systems of the State.

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The first Constitution of Ohio was adopted in 1802. This was just before Ohio was admitted to statehood. By this Constitution, the judicial powers of the State, "both as to matters of law and equity," were vested in the Supreme Court, Courts of Common Pleas, Justices of the Peace, and such other courts as the legislature might establish. The Supreme Court, then consisting of three judges, two of whom constituted a quorum, had original and appellate jurisdiction both "in common law and in chancery," and exclusive jurisdiction in the trial of divorce, alimony and capital cases. It was obliged to hold one term in each county of the State. The Court of Common Pleas was a court of general jurisdiction in law and equity (including the trial of criminal cases, probate and guardianship matters). It was limited only by matters within the exclusive jurisdiction of the Supreme Court and also such as were within the exclusive limited jurisdiction of justices of the peace. It held court in the several counties within defined subdivisions bounded by county lines. The judges (three in number in each county) were laymen, except for the president of the district or subdivision. The only retrial or review provided for was to the Supreme Court of the county. Under such a system of court organization, conflicts in legal principles announced in the trial of cases in the several counties were not subject to review by a court of general superior jurisdiction. And there being no requirement for the filing of opinions by the reviewing court, the progress and development of the common law of Ohio were slow and difficult.

In 1808, a fourth judge was added to the Supreme Court, the State was divided into two districts, and two judges were assigned to travel the circuit in each district; that is, to hold a session of court in each county within the district at least once a year.

In 1823 an Act was passed requiring the Supreme Court (then composed, as above stated, of four members) to meet once a year in Columbus after the close of their tour of the circuits, and to consult together upon, and decide, conflicts and questions of law reserved to the Supreme Court from the counties. The Supreme Court was then required to appoint a reporter to report all such decisions. This was the beginning of the twenty volumes of "Ohio Reports," which contain the decisions of the Supreme Court "in banc" from 1823 to 1851. In 1851 the court system of Ohio was changed by the adoption of the Constitution of 1851.

During the period 1831 to 1836, some of the decisions of the Supreme Court, while on circuit, were reported in "Wright's Report." With that exception, and with the exception of a few such cases in Volume 1 of the Ohio Reports, the decisions of the Supreme Court, while on circuit, have never been reported.

The Constitution of 1851 (adopted effective September 1, 1851), vested the judicial powers of the State in the Supreme Court, District Courts, Common Pleas Courts, Probate Courts, and in Justices of the Peace and such other courts inferior to the Supreme Court as might be established from time to time by the legislature. Under this last provision, the legislature, at different times, created the Superior Court of Cincinnati and like courts in Dayton and Cleveland, with jurisdictions comparable (as trial courts) with that of the Court of Common Pleas. The Cincinnati Superior Court, established after the adoption of the Constitution of 1851, was composed of three judges, any one of whom could try a case at special term and whose decisions could be reviewed at general term by the judges in banc.

The Constitution of 1851 constituted a Supreme Court of five judges and took away most of its original jurisdiction, except for the special writs. It then became, in reality, the reviewing court of last resort for the trial of cases on error and appeal. Its opinions were required to be reported, and are now to be found beginning with Vol. 1 of the official reports of the court, designated "Ohio State Reports."

By the Constitution of 1851, the State of Ohio was divided into nine judicial districts. These in turn were divided into smaller subdivisions, for the purpose of election of judges of the Common Pleas courts or such other trial courts of general original jurisdiction as might be created by the legislature.

The District Court of each of the nine districts was comprised of one of the judges of the Supreme Court, and two Common Pleas judges of a district in which sessions were held. As thus constituted, such district court was required to hold stated sessions in at least three places within each of the districts each year. It was an appellate court, its jurisdiction being defined as the same as that of the Supreme Court. But of course its place in the judicial system was inferior to that of the Supreme Court. This was the first attempt in Ohio to create an intermediate reviewing court, albeit its members were taken in part from the court where the trial was had and in part from the court to which the final appeal could be taken.

The Supreme Court, under such a system, where the session in banc in Columbus was followed by a long tour on the circuit, required judges to have not only profound knowledge of the law but also great physical stamina to withstand the hardships of travel of that day. An overcrowded condition of the docket also was being caused by increase in litigation as the State's industry grew, and by the fact that the then-judicial-process was geared to a sparsely-settled rural civilization, out of keeping with the rapid development of the State and its increasing population.

After the 1851 changes, by a constitutional amendment adopted October 12, 1875, it was provided that, by a two-thirds vote of the General Assembly, at the request of the Supreme Court, a Judicial Commission of five members could be appointed by the governor with the advice and consent of the Senate, vested with like jurisdiction as the Supreme Court, to dispose of such part of the docket of the Supreme Court "as the Court shall designate." This provision of the Constitution is still in force as Section 22 of Article IV of the Constitution. Only two such commissions have ever been appointed, one for three years beginning in 1876, and the other appointed in 1883 for a two year period.

The failure of the District Court to meet the needs of intermediate retrial and review, or to relieve the Supreme Court of the heavy burden imposed upon it (in addition to sitting in banc in Columbus) by one of its members being required to attend the trial of cases in each of the district courts when sitting in the several counties, may be, in part, ascribed to the breadth of its jurisdiction. In March, 1852, its jurisdiction was as follows, as defined by statute:

"Appeals may be taken from all final judgments in civil cases at law, decrees in chancery and interlocutory decrees dissolving injunctions rendered by the court of common pleas, the superior and commercial courts of Cincinnati and the superior court of Cleveland, in which said courts have original jurisdiction by any party against whom such judgment or decree shall be rendered or who may be affected thereby, to the district court and, the cause so appealed shall be again tried, heard and decided in the district court in the same manner as though said district court had original jurisdiction of the cause."

Thus retrials of law cases by jury, as well as retrials to the court in equity, were available to dissatisfied litigants until 1853; then, by statute, a retrial of issues of fact was limited to cases

where the parties were not entitled to jury trial. But this was not all. After retrial or review, either party could again appeal to the Supreme Court of the county, with the right in some cases to a hearing before the Supreme Court when sitting in banc in Columbus.

By the constitutional amendment of 1883 the judicial section (Art. IV), dealing with the court systems of the state, was amended, doing away with "District Courts" and establishing a new court to be known as the "Circuit Court" in its place. This was the first time that an intermediate appellate or reviewing court, presided over by judges elected to serve on that court, was authorized by the Constitution of Ohio. The State was to be divided into circuits (at first 7 and then 8), in each of which circuits three judges were to be elected. The Circuit Courts were required by law to hold at least two sessions in each county of the district each year.

The constitutional amendment of 1883 also provided that the Supreme Court should consist of five judges. That court's original jurisdiction thereupon was in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*, and it was to possess such appellate jurisdiction as might be provided by law.

The Circuit Court's jurisdiction was the same as the original jurisdiction of the Supreme Court with regard to the extraordinary writs. It was also given such appellate jurisdiction as might be provided by law. Section 5226 of the Revised Statutes stated that, in addition to special cases providing for appeal (trial *de novo*; one of such special instances being in divorce cases), the Circuit Court's appeals could be taken from those judgments or final orders of the Common Pleas Court of which it had original jurisdiction, where the right to demand a trial of the facts by jury did not exist. Section 6709 of the Revised Statutes provided for error proceedings from final orders or judgments of the Common Pleas Court for errors appearing on the face of the record. This right was obtained by filing a petition in error in the reviewing court. Section 6710 of the Revised Statutes provided for like error proceedings from the Circuit Court of Appeals to the Supreme Court. No limitation on the right to petition the Supreme Court for review was placed on the litigant, other than the need to act within the terms of the Supreme Court's jurisdiction, as thus defined.

The Circuit Court, subject to almost complete legislative control, only partly fulfilled the objectives of the legislature and of the constitutional convention in creating it. Instead of reliev-

ing the Supreme Court of at least a part of its heavy docket, it in fact increased the number of cases filed in that court. It did, however, relieve the judges of the Supreme Court from circuit duty. And the Supreme Court Commissions, heretofore spoken of, helped to take care of the accumulation of pending cases.

The 1912 constitutional amendments to Article IV took the respective jurisdictions of the reviewing courts almost completely out of the control of the legislature. The Supreme Court was given original jurisdiction in the special writs as before; also, certain revisory jurisdiction over administrative agencies as provided by law; the obligation to review judgments of the Courts of Appeals, where cases were filed in a Court of Appeals and thus invoked its original jurisdiction; appeals as of right which in fact involve constitutional questions necessary to a decision of the case; appeals in cases certified to it by a Court of Appeals, wherein the judgment of the Court of Appeals was in conflict with the judgment of another Court of Appeals; appeals in felony cases, upon leave being granted by the Supreme Court; and appeals in cases of public or great general interest, where the Supreme Court granted a litigant's motion directing a Court of Appeals to certify its record of the case to the Supreme Court for review on questions of law.

The Court of Appeals, which was created to succeed the Circuit Court, by this amendment was granted original jurisdiction with regard to the same writs in like manner as the Supreme Court; appellate jurisdiction, on questions of law, from final orders or judgments of courts of record; and the duty to try issues of fact in chancery cases in appeals on questions of law and fact. The result of these amendments was to make the Court of Appeals the court of last resort in all cases where the litigants could not appeal as a matter of right to the Supreme Court; for example, where leave was refused in criminal cases and the case was not certified to the Supreme Court for review as a conflict case by the Court of Appeals, and where the Supreme Court overruled a motion to require the Court of Appeals to certify its record as provided by the Constitution.

The last amendment to Article IV, dealing with reviewing courts, occurred in 1944. Under this amendment, the legislature was again given some control over the jurisdiction of the Court of Appeals. The jurisdiction of the Supreme Court was not changed. The Constitution, as amended, provided that in addition to its original jurisdiction in the extraordinary writs, the

Court of Appeals should have "such jurisdiction as provided by law to review, affirm, modify, set aside or reverse judgments or final orders of boards, commissions, officers or tribunals and of courts of record inferior to the court of appeals within the district and judgments of the court of appeals shall be final in all cases, except cases involving questions arising under the Constitution of the United States, or of this State, cases of felony, cases of which it has original jurisdiction and cases of public or great general interest in which the Supreme Court may direct any court of appeals to certify its record to that court."

This amendment left uncertain the jurisdiction of the Courts of Appeal to try cases *de novo*, on both law and facts (i.e., in equity cases). The Supreme Court, however, reaffirmed the Courts of Appeals' prior-existing powers to retry such cases. (*Youngstown Mun. Ry. Co. v. Youngstown*, 147 O. S. 221; Dec. 1946.) Even so, clarifying legislation pursuant to the constitutional amendment was desired, and was enacted a few years later.

The legislature, under the authority of the 1944 amendment, passed Section 2501.02 of the Revised Code (effective October 4, 1955), defining the appellate jurisdiction of the Courts of Appeal. This section provides for review of prejudicial error "committed by such lower court on appeals on questions of law and on appeals on questions of law and fact," the Court of Appeals being authorized to "weigh the evidence" in the retrial of the ten classes of actions enumerated in the section, if "a primary and paramount relief" claimed by the appellant comes within the causes enumerated in such "classes of actions." (The actions enumerated are clearly cases in chancery.)

It is plain to see, from the foregoing history of the constitutional and statutory provisions dealing with retrial and appellate review in judicial proceedings, that a main objective has been to provide for one trial, and for the opportunity of one review, in matters requiring judicial consideration or determination of disputed questions of fact and the law applicable thereto. That this objective has never been attained must be admitted. In fact there seems to be a growing trend in Ohio to create new courts to try cases of so-called "lesser magnitude," in order to deal with the ever-growing number of cases filed in our courts. But there is no such thing as an unimportant judicial determination of a disputed question of fact and law. The faith of the people in their courts depends on the average results of cases

squaring with what is generally considered just and fair. Courts cannot attain the exactitude of the provable sciences. But an honest judgment, fairly and impartially pronounced after an adequate investigation of the facts, in a tribunal presided over by one trained in the law and with adequate provision for a review in order to see to it that the accepted law has been afforded to the parties, is the means by which justice serves the best interests of the people.

A reviewing court likewise is important in order to coordinate divergent legal contentions, and to establish principles and precedents to guide the course of future cases dealing with like subjects.

Appeal thus is seen to be desirable for two principal reasons: first, to test the correctness of the proceeding, when a litigant feels that he has not been afforded justice under the law; and, second, to record and give sanction to correct rules of law as they conform to changing conditions. "Without some central review, the divergent opinions of numerous trial courts would become confusion compounded."