Pretrial Motions

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DEFINITION AND PURPOSE

Our Ohio Code for Procedure in Common Pleas Court in Civil Actions specifically provides for the following pleadings: petition; demurrer to petition; answer, which, if it demands affirmative relief, may be styled a cross-petition; demurrer to answer; reply; and demurrer to reply.[1] It will be observed that a motion is not therein named, or, in other words, is not an allowable pleading, yet it is often erroneously spoken of as a pleading, perhaps because it is frequently directed to a pleading. At the time of the adoption of our first code of civil procedure in 1853, and as a part thereof, a motion was therein defined as follows:

> A motion is an application for an order, addressed to a court or judge in vacation, by any party to a suit or proceeding, or one interested therein.[2]

Present General Code Section 11370, now defines a motion as follows:

> A motion is an application for an order, addressed to a court or judge, by a party to a suit or proceeding, or one interested therein.

As early as 1860, in the case of *Callender v. Painesville & Hudson R. R. Company*,[3] it was said that the office of a motion and its extent was well established by usage in the courts, and it was the practice to entertain and hear motions made by persons in interest, though strangers to the record. Over the years a motion has been an integral part of our civil procedure and, because of its prevalent use, it has been chosen as the subject of this article.

The filing or making of a motion (an application) is the method or way whereby a matter is brought to the formal attention of a court or judge, for an order — an order being "a direction of a court or judge, made or entered in writing, and not included in a judgment".[4]

Motions are for various and multiple purposes, and are permissible during the pendency of an action, and even after judgment

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1 OHIO GEN. CODE § 11303.

2 51 Ohio Laws 57, 144, 503.

3 11 Ohio St. 516 (1860).

4 OHIO GEN. CODE § 11582.

for certain purposes. They vary in nature, use, scope and purpose. This discussion is confined to pretrial motions, or motions which may be filed between the time of commencement of civil action in the common pleas court and the time of trial of such action. It is intended to be instructive and informative; in the nature of an outline for the purpose of directing attention to the various permissible motions, and the use that may be made thereof. It is not an erudite dissertion on a legal concept, nor a digest of cases, although there are references to some of the Ohio cases.

Motions may be classified special, as distinguished from general, and also litigated as distinguished from ex parte. It is not believed that any special purpose will be served by attempting herein to make a classification thereof. It is believed that a better understanding of pretrial motions may be had by following a pattern of a chronological nature; that is, to direct attention to the various kinds of motions that are permissible in a civil action from the time of its commencement up to the time of trial, and, with that in mind, the following is submitted:

Motions To Jurisdiction and Motions of Appearance

A civil action is commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon, General Code Section 11279, but, under General Code Section 11287, the acknowledgment on the back of the summons or petition, by the party sued, *or the voluntary appearance of a defendant,* is equivalent to service.

What do these statutes have to do with motions? The answer is simple. An appearance may be made by a motion, which is equivalent of formal service, as if served by the sheriff or some other authorized person. There may be occasions, ordinarily under agreement between counsel, when you desire to enter an appearance voluntarily by this method. All you need to do is to file any kind of a permissible motion, other than one raising a jurisdictional question, and this constitutes an appearance, as will be hereinafter more fully pointed out. This situation presents no problem, but often an involuntary and unintentional appearance is made by filing a motion. Therefore, it is good practice, before the filing of any kind of a motion, to ascertain first whether the court has jurisdiction over the person of the defendant, as well as the subject matter of the action. If there is no question about the jurisdiction of the court over the person of the defendant, or, if there be such question, but you do not care to raise it, then you may file any permissible motion without consideration to such jurisdiction. On the other hand, if there be any question as to the jurisdiction of the court over the person, and you desire to raise this question, then such question

may be raised by a proper motion — usually a motion to quash or to set aside the writ or service of process. This same question may be raised by a demurrer to the petition, if the lack of jurisdiction appears on the face of the petition.[5]

Service of summons may be set aside upon motion if the writ or service is invalid or defective. There are many grounds which may be the subject of such a motion.[6]

An appearance may be entered:

(a) By the filing of a motion to strike a case from the docket for want of service, and the filing of a demurrer to the petition, although the demurrer is previously withdrawn by leave of court, before the motion is decided.[7]

(b) By filing a motion for leave to answer.[8]

(c) By filing a motion to strike all the papers filed in the action for irregularities and defects.[9]

(d) By filing a motion raising questions as to the sufficiency of the petition.[10]

(e) By filing a motion to dismiss the action on the ground that the court did not have jurisdiction of the subject matter of the action.[11]

(f) By filing a motion to strike from the petition certain averments deemed to be objectionable.[12]

There are other Ohio cases relating to this same subject, and the footnotes to the foregoing are not intended to be inclusive.

The necessity for care in the form and type of a motion where you do not desire to enter an appearance is important. This is shown not only by the cases footnoted above, but there are other cases which should command your attention in the drafting of this type of a motion, and particular attention is directed to the following cases:

In *Smith v. Hoover*,[13] the court said:

3. The appearance of a defendant in court for the sole purpose of objecting, by motion, to the jurisdiction of the court over his person, is not an appearance in the action or a waiver of any defect in the mode or manner by which such jurisdiction is obtained;

In *Elliott v. Lowhead*:[14]

5. The appearance of defendant in court for the sole purpose of objecting, by motion to the jurisdiction of the court over his person, is not an appearance in the action,

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[5] OHIO GEN. CODE § 11309.

[6] In that connection, see 32 Ohio Jur. 504, Section 107.

[7] Evans v. Iles, 7 Ohio St. 234 (1857).

[8] Brundage v. Biggs, 25 Ohio St. 652 (1874).

[9] Maholm v. Marshall 29 Ohio St. 611 (1876).

[10] O'Neal v. Blessing, 34 Ohio St. 33 (1877).

[11] Handy v. Insurance Co., 37 Ohio St. 366 (1881).

[12] Railroad Co. v. Morey, 47 Ohio St. 207, 24 N.E. 269 (1890).

[13] 39 Ohio St. 249 (1883).

[14] 43 Ohio St. 171, 1 N.E. 577 (1885).

> but where such motion also asks to have the cause dismissed on the ground that the court has no jurisdiction over the subject matter of the action, which motion is not well founded, it is a voluntary appearance which is equivalent to service of summons;

And in *Long v. Newhouse:*[15]

> 2. In order to enable a defendant to object to the jurisdiction of the court over his person, the objection must be made at the earliest opportunity of the party. If before making such objection, the party appears and makes a motion that the plaintiff be required to attach an account of the items of his claim to his petition, or, that he be required to separately state and number his causes of action, or that he be required to strike certain matter from his petition, in either of these cases, the party voluntarily submits himself to the jurisdiction of the court, and he cannot afterwards be heard to object thereto.

It is obvious that such a motion should particularly specify the objection and its purpose, and should be drawn in such a manner as to show on its face that, by the filing of such motion, the party does not intend to enter appearance and is objecting to the jurisdiction of the court over the person, and that the motion is for the sole and only purpose of raising the question of the jurisdiction of the court over the person of the party.[16]

MOTIONS TO SUBJECT MATTER OF A PLEADING

Our code does not specifically provide for a motion to dismiss a pleading due to its legal insufficiency, yet a motion of the defendant to strike a petition because of its legal insufficiency, as well as motion of the plaintiff to strike a counter claim, set off, or an answer of the defendant on the ground that on its face it is insufficient in law, is occasionally used. The legal sufficiency of a pleading, insofar as to confer jurisdiction on a court of its subject matter, is ordinarily raised by a demurrer, yet in more recent years, as will be seen, a motion to strike or dismiss has been treated as a demurrer.

Whether to file a motion to dismiss, or a demurrer, to raise the question of legal sufficiency of a pleading, becomes largely a matter of choice, but it is believed to be better practice to use a demurrer, especially since it is specifically provided for by General Code Sections 11309, 11323 and 11324. Since such a motion is permissible, although not recommended, it is discussed herein. If you resort to the use of a motion for this purpose, then the form of the motion should be one to strike the pleading from the file.

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[15] 57 Ohio St. 348, 49 N.E. 79 (1897).

[16] In this connection attention is also directed to: Handy v. Ins. Co., 37 Ohio St. 366 (1881); Klein v. Lust, 110 Ohio St. 197, 143 N.E. 527 (1924); Adams v. Trepainer Lumber Co., 117 Ohio St. 298, 158 N.E. 541 (1927); The Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935).

As early as 1860 this type of motion was given critical recognition in the case of *Finch v. Finch*,[17] where there was a motion to strike an answer from the files on the ground that it constituted no defense to the petition. The court there said:

> The practice thus adopted was irregular and ought not to be drawn into precedent. The motion being based, not on any alleged irregularity connected with the filing of the answer, nor any matter pertaining to its form merely, but on its alleged insufficiency in matter of substance, the objection ought to have been taken by demurrer; but, as the course adopted was taken by the consent of all parties, and by leave of the court, obviously for the purpose of bringing the case directly before this court for decision, we will proceed to dispose of the questions made, upon their merits.

Again, in *Robinson v. Fitch*,[18] such a motion was again recognized, apparently with tongue in cheek, because the court there said:

> Counsel, in argument, treat this motion as having the effect of a general demurrer; and, assuming that the courts below took this view of it, we will so regard it in determining the sufficiency of the amended petition, as neither party will be thereby prejudiced in this instance; but, at the same time, we do not wish to be understood as approving the practice here resorted to, of making a motion to strike from the files subserve the purposes of a general demurrer.

It is interesting to note that in 1921 the Hamilton County Court of Appeals took what appears to be a sound view on this subject in two of its cases. In *Rogers v. Metropolitan Life Ins. Co.*,[19] it held:

> It is error for the trial court to grant a motion to strike a petition from the files where the motion is made on the ground that the petition is 'frivolous and a sham, and on its face shows that it is insufficient, and that plaintiff has no cause of action.' Such motion will not take the place of a demurrer.

And in *Schottenfels v. Massman*:[20]

> The office of a motion to strike a pleading from the files is not to inquire into the merits of the case, but goes only to the regularity of the filing or to the form of the pleading.
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> It is error for a trial court, upon affidavit furnished by defendant, to grant a motion to strike the petition from the files on the ground that 'said petition is a sham and the allegations of the petition are untrue.'

On the other hand, we have the case of *Zajachuch v. Battery*

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[17] 10 Ohio St. 501 (1860).

[18] 26 Ohio St. 659 (1875).

[19] 15 Ohio App. 333 (1921).

[20] 16 Ohio App. 78 (1921).

Co.,[21] in which a motion of the defendant to strike an amended petition from the files was held to be an equivalent to a demurrer to the pleadings. A similar position was taken in *Halliday v. Public Utilities Commission*,[22] when at the close of petitioner's case defendant moved to dismiss the complaint upon the ground that the Commission was without jurisdiction to hear and determine the cause. Here the supreme court treated the motion to dismiss as a demurrer, not only to the petition but to the evidence adduced in its support.[23]

In support of the view that the practice is questionable, and is not to be recommended, attention is directed to the case of *Smetzer v. Crammer*,[24] by the Cuyahoga County Court of Appeals, in which it was held:

> The action of a trial court in granting defendants' motion to strike plaintiff's amended petition and dismissing the action cannot be sustained on appeal on the theory that such motion was tantamount to a demurrer and raised the question of a misjoinder of parties, the practice of treating a motion to strike as a demurrer not being one to be commended particularly where the record does not disclose that the trial court actually treated the motion as a demurrer.

The motions heretofore discussed might be termed jurisdictional motions and, for that reason, careful consideration should be given thereto. They raise questions of law, as well as procedure, and their importance should not be overlooked. Seldom is a ruling on a motion determinative of the action on the merits, yet motions which raise jurisdictional questions may well be the foundation for establishing law questions determinative of ultimate liability. An illustration of this is the case of *The Canton Provision Co. v. Gauder*.[25] This was an action against two defendants to recover damages for the sale of food which was unwholesome, one of the defendants residing in Stark County, Ohio, and the other in Summit County, Ohio. The action was commenced in Summit County, and the Stark County defendant filed a motion to quash the service of summons for the reason that it was a resident of Stark County, and that the action was not properly brought in Summit County against it. This motion was sustained by the common pleas court, but reversed by the court of appeals. Upon review by the supreme court, the court of appeals was reversed, and the common pleas court affirmed. It is interesting to note that, in this case, the question of misjoinder of parties de-

[21] 106 Ohio St. 538, 140 N.E. 405 (1922).

[22] 118 Ohio St. 269, 160 N.E. 713 (1928).

[23] Other cases to the same effect are: The Detroit & Ironton Rd. Co. v Vogeley, 21 Ohio App. 88, 153 N.E. 86 (1925); Karns v. Trostel, 44 Ohio App. 498, 186 N.E. 405 (1932); Berger v. Baker, 13 Ohio L. Abs. 611 (1933).

[24] 42 Ohio L. Abs. 220, 59 N.E. 2d 747 (1944).

[25] 130 Ohio St. 43, 196 N.E. 634 (1935).

fendant appeared on the face of the petition and was a situation in which the question of the right of jurisdiction over the non-resident defendant could be raised by a motion to quash, which the common pleas court and the supreme court held was properly sustained. Judge Williams, in his opinion, said:

> It is maintained, however, that the defendant, The Canton Provision Company, entered its appearance in the action by filing the motion to quash. If by the motion the defendant company appeared for the sole purpose of objecting to jurisdiction of the person and raised that question only there would be no entry of appearance upon the merits. Smith v. Hoover, 39 Ohio St. 249; Klein v. Lust, 110 Ohio St. 197, 205; 143 N. E. 527.
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> The defendant company in its motion recited that it disclaimed any intention of entering its appearance save for the purpose of the motion, and asked for an order to quash service of summons for the reason that it was a resident of Stark County and the action was not properly brought in Summit County against it. This recital was but one way of saying that the court did not have jurisdiction over the person.[26]

Motions To The Form Of Pleadings

If you are satisfied that the court has jurisdiction of the parties to the action and that a pleading is legally sufficient as to stating a cause of action or defense, then you may desire to give consideration to its form. You may be content to let the case go to trial upon the pleading as framed, or, on the other hand, you may wish to raise some objection as to its form. Under our procedure, objections to defects in pleadings, extending only to the mode of statement, must be taken by motions. Every lawyer who is actively engaged in the trial of civil cases is frequently confronted with the question of "to motion" or "not to motion". Little assistance can be given on this subject. When or when not to use a motion is not prescribed by statute or rule. Its use involves many factors and varies with the individual needs of a given situation. No all-inclusive rule can be laid down for such use. While the right to a motion may exist, still it is largely a matter of judgment on the part of the individual lawyer as to whether to resort to a motion. Many skilled, experienced trial lawyers prefer not to file a motion, particularly where such motion may educate his opponent.

On the other hand, there are lawyers who believe it better practice to file a motion at every opportunity, prompted either by a desire to have the issues properly drawn and all legal questions preserved, or to harass and annoy an opponent. Ordinarily, as previously stated, a motion is not determinative of an action on its merits, yet it may be of great value in the final outcome of the

[26] *Ibid.*

action. At the outset you should carefully consider the pleading or subject matter to which a motion may be directed, and conclude, as far as possible, whether the use of a motion will be of any particular benefit to you. The importance of every motion should be gauged before its use. If nothing can be gained by its use, do not use it — if any particular advantage can be gained, use it. A motion may be a good weapon to destroy or weaken an opponent, and, at the same time, be of infinite benefit to you.

The use of a motion may sometimes be influenced by your knowledge of the attitude of the judge in his prior rulings on motions of similar character. Ordinarily a court, in ruling on a motion, has a wide latitude of discretion. Some courts are prone to sustain pretrial motions, while others are inclined to overrule such motions, although meritorious, especially where such motions are procedural in character. It must be recognized that the same pretrial motion may appeal to one judge and not to another. Even though such a motion may not be sustained, at least it will challenge the court's attention and may be of some ultimate benefit. In the final analysis one must depend on his own experience and skill, coupled with his knowledge of procedural law and perhaps his acquaintance with or knowledge of the attitude of the judge.

One of the most common and frequent uses of a motion is for an order requiring a party to strike redundant, irrelevant, or scurrilous matter or obscene words from a pleading. This is especially provided for by General Code Section 11335, which reads:

> If redundant, irrelevant or scurrilous matter be inserted in a pleading, it may be stricken out on motion of the party prejudiced thereby. Obscene words may be stricken from a pleading on the motion of a party or by the court on its own motion.

In considering the use of a motion under this statute, it should be noted that such a motion, under the first part of this statute, is not well taken, even though the pleading does contain redundant, irrelevant or scurrilous matter, unless the party is prejudiced thereby. Frequently pleadings may contain redundant, irrelevant or scurrilous matter, yet its inclusion cannot prejudice a party, and a court may with due propriety overrule such motion.

In *Latham v. Col. R. & L. Co.*,[27] it was held:

> Section 5087 authorizing redundant and irrelevant matter to be stricken out on motion of the party prejudiced thereby, shows that questions of prejudice or unfair advantage to one side or the other are to be considered upon motions to strike out immaterial allegations in a pleading.

Obscene words, because of public policy or morals, may be stricken

[27] 8 Ohio N.P. (n.s.) 185 (1909).

on motion, even though not prejudicial to either party.

A motion under this statute should state definitely and specifically the objectionable matter. This is pointed out in *Osseforth v. Schroder.*[28]

General Code Section 11336 provides that:

> When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

The proper way to obtain the benefit of this section is by the use of a motion. The value of a motion under this section should not be overlooked, for the reason that, from a defense standpoint, it is a means whereby pleadings can be drawn in such a manner as to clearly define and to narrow the issues. On the other hand, such a motion may have the effect of curing a defective pleading, which defect may be of some advantage to the adverse party at the time of trial, particularly if the pleading is so defective as not to state a cause of action or defense.[29]

Swanson v. Commissioner,[30] points out that the sufficiency of pleadings as to certainty, precision, definiteness, and consistency of allegations and in respect of every other variety of defect of allegations which do not amount to such an absolute omission of fact as to constitute no ground of action or defense, must be taken advantage of or objected to by motion and can afford no ground for demurrer. In *Heil v. Proctor,*[31] the Hamilton County Court of Appeals held:

> Indefiniteness and uncertainty in a petition are waived by answer, and in such event cannot be the basis for directing a verdict for the defendant at the close of the evidence for the plaintiff.

In *State Automobile Mutual Insurance Co. v. Robinett,*[32] the Butler County Court of Appeals held:

> Petition which defendant has failed to attack by motion, demurrer, or objection to evidence, must stand unless, under favorable construction, it wholly fails to state a cause of action (sections 11336 and 11345, General Code).

A case often cited as one of the Ohio landmarks on this subject is that of *Railroad Co. v. Kistler,*[33] in which it was held:

> 1. When the allegations of a pleading are so indefinite and uncertain that precise nature of the charge or de-

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[28] 6 Ohio Dec. (N.P.) 447 (1897).

[29] Formoff v. Nash, 23 Ohio St. 335 (1872), and Schrock and Schneider v. Cleveland, 29 Ohio St. 499 (1876) are cases involving motions under this statute.

[30] 4 Ohio App. 437 (1915).

[31] 12 Ohio App. 35 (1919).

[32] 47 Ohio App. 22, 189 N.E. 857 (1933).

[33] 66 Ohio St. 326, 64 N.E. 130 (1902).

> fense is not apparent, and a motion is made to require such pleading to be made definite and certain, it is error to overrule such motion.

In this case the court, in commenting on revised statute 5088, now General Code Section 11336, said:

> This means that the court shall in a proper case require the pleading to be made definite and certain. It is not a mere matter of expression. It is a substantial right to a party to have the pleading against him so definite and certain as to enable him to know what he has to meet and to prepare his evidence accordingly.

In this connection it may be stated that the failure to file a motion to any defective pleading, because of indefiniteness or uncertainty, unless it wholly fails to state a cause of action, is a waiver of such objection.[34]

Our statutes on the subject of mistakes and amendments of pleadings, are silent as to the necessity of a motion to correct a pleading, yet it is common practice to file a motion for leave to amend a pleading before trial. If the amendment is before trial and one which requires leave, then the proper method is to file a motion for leave to amend.[35] A recent case of interest dealing with this subject is *Davies v. Columbia Gas and Electric Company*.[36]

A motion is the proper way to require compliance with General Code Sections 11308 and 11316, that each cause of action or defense, counter-claim or set-off be separately stated and consecutively numbered. In *Township of Hartford v. Bennet*,[37] it was held:

> 1. A pleading under the Code, which sets up two or more causes of action, or two or more defenses, but omits to separately state and number them, is not, for that reason, demurrable. The irregularity can be reached only by motion.

Another case to like effect is *Lancaster, Ohio, Manufacturing Company v. Colgate*,[38] in which it was held:

> 1. In a suit upon a contract, certain state of facts may, at the same time constitute a defense to the action, and be a proper ground of counter-claim. And, if pleaded by the defendant, in this double aspect, upon a single statement of facts, and without formally separating the defense from the counter-claim, the defect, if it be one, is merely formal, and objection thereto can only be made thereto by motion.

A motion is proper for an order to strike a sham pleading. This was held in *Thomas v. Kalbfus, Receiver*.[39]

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[34] See Tuttle v. Furi, 22 Ohio C.C. (n.s.) 388 (1908), and State Automobile Ins. Co. v. Robinette, 47 Ohio App. 22, 189 N.E. 857 (1933).

[35] A case dealing with this subject is Johnson v. Johnson, 31 Ohio St. 131 (1876).

[36] 51 Ohio L. Abs. 372, 79 N.E. 2d 327 (1948).

[37] 10 Ohio St. 441 (1859).

[38] 12 Ohio St. 344 (1861).

[39] 97 Ohio St. 232, 119 N.E. 412 (1918).

Motions For Judgment

In Ohio there is no specific authority for a motion for summary judgment. In fact, strictly speaking, there is no such thing as a summary judgment in Ohio, but there is no good reason why a motion should not be the method to obtain a judgment "when, upon the statements and the pleadings * * *, a party is entitled by law to judgment in his favor * * *," as provided for under General Code Section 11601. The right to use a motion for this purpose may be questioned in the light of *Jones v. Proctor*,[40] wherein it was held: "A motion for judgment on the pleadings is not available to settle important questions of law, or to dispose of the merits of the case; under such circumstances resort must be had to demurrer."

However, since a motion for judgment raises a question of law, why should not this be a proper method for raising the question? Some basis for an affirmative answer on this may be found in *Rheinheimer v. The Aetna Life Insurance Co.*, and the other cases in the note below.[41]

If you have a situation where, on the pleadings, you are entitled to judgment, then, ordinarily, there is no need to wait until time of trial to raise this question. It may be to your distinct advantage to forthwith file a motion for final judgment. It may be stated that courts are reluctant to enter a final judgment on the pleadings, but a motion to this effect may occasionally be sustained. If not, it will in all probability give an opponent some concern; also, it may possibly give you some advantage at time of trial.

Motions For Discovery

Under General Code Section 11551:

> *Upon motion,* and reasonable notice thereof, the court, in which an action is pending, may order the parties to produce books and writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore have been compelled to produce them by the ordinary rules of chancery. If the plaintiff fails to comply with such order on motion, the court may give judgment for the defendant as in case of nonsuit; if a defendant fails to comply with such order, on motion, the court may give judgment against him by default. [Emphasis added.]

Likewise, under General Code Section 11552:

> Either party, or his attorney, in writing, may demand of the adverse party an inspection and copy, or permission

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[40] 3 Ohio C.C. (n.s.) 649 (1902).

[41] 77 Ohio St. 360, 83 N.E. 491 (1907); Cook v. Mozer, 108 Ohio St. 30, 140 N.E. 590 (1923); Works v. Suddeth, 1 Ohio Supp. 27 (1936); Fee v. Linthicum, 2 Ohio Supp. 393 (1938); and Slattery v. Wallingford, 4 Ohio Supp. 311 (1935).

> to take a copy, of a book, paper, or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it. If compliance with the demand within four days be refused, on *motion and notice* to the adverse party, the court or judge may order the adverse party to give the other, within the time specified, an inspection and copy, or permission to take a copy, of such book, paper, or document. [Emphasis added.]

It is thus apparent that, under these two sections, a proceeding for the production of books, writings, etc., must be by motion and notice. The same thing is true if a private examination is to be made by a master, under order of the court, as provided for by General Code Section 11553.

Miscellaneous Motions

A motion is also the method to effect a revivor of an action by either the representative or successor in interest of a party under General Code Section 11402, or by the adverse party or of the representative or successor, of the party who died or whose powers ceased, under General Code Section 11404. These are ex parte motions and do not require notice.

Under General Code Section 11337, a motion of the defendant is the method to secure an order allowing a counter-claim or set-off to be withdrawn and, likewise, to cause such counter-claim or set-off to be docketed and proceeded in without process.

Where there has been an attachment of property, defendant, after reasonable notice to plaintiff, may move the court for additional security on the part of the plaintiff. The question of priority of several attachments on the same property may be referred on the motion of any of the plaintiffs.[42]

Likewise, a motion is a proper method to discharge an attachment. This motion is an important one, and is frequently used. Before filing any motion, questioning an attachment, careful attention should be given to the attachment statutes. For the purpose of our discussion, particular attention should be given to General Code Section 11862, which provides:

> Before judgment, upon reasonable notice to the plaintiff, the defendant may move to discharge an attachment as to the whole or any of the property attached. The motion may be heard and decided by the court at any term or regular session, or it may be made, heard, and decided by any judge thereof in vacation.

In *Harrison & Wiley v. King*,[43] it was held:

> The proper mode for the defendant to meet the charge

[42] Ohio Gen. Code § 11859.

[43] 9 Ohio St. 388 (1859).

made in an affidavit for an attachment is by motion. In a like mode a subsequent attaching creditor should be held as to any question of priority between him and the plaintiff.

In *Wm. Edwards Co. v. Goldstein*,[44] it was held:

A defendant may at any time before judgment, under Section 6522, Revised Statutes, move for the discharge of an attachment under which his property has been taken, although he has previously given a bond for its discharge under Section 6513, Revised Statutes.

It is also to be noted that this is a motion under which, by statute, evidence may be offered. This is provided for by Section 11863:

When, on the part of the defendant, the motion is made on affidavits or papers and evidence in the case, but not otherwise, the plaintiff may oppose it by affidavits or other evidence, in addition to that on which the order of attachment was made.

A motion is also the proper method to obtain a vacation or modification of an injunction. This is expressly provided for by General Code Section 11891:

When, before the trial, an injunction has been granted a party may apply to the court in which the action is pending, or a judge thereof, to vacate or modify it. The party applying for such vacation or modification shall give to the adverse party such notice of the time and place at which the motion will be heard as the court or judge deem reasonable. The application may be made upon the petition and affidavits on which the injunction was granted, or upon affidavits on the part of the party enjoined, with or without answer.[45]

General Code Section 11892 specifically provides for the use of affidavits on the hearing of a motion to dissolve an injunction.

A motion is also the proper way to require an increased deposit for costs, as provided for by General Code Section 11615.[46]

Under General Code Section 11369 a motion and notice thereof to the adverse party is a way for the defendant to obtain an order for the consolidation of two or more pending actions in the same court.[47]

General Comments

No particular form of motion is prescribed in Ohio, and thus they may be either oral or written. In many instances motions are made orally, but, any motion of importance should be in writing, so

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[44] 80 Ohio St. 303, 88 N.E. 877 (1909).

[45] A case on this subject is Trustees v. McClanahan, 53 Ohio St. 403, 42 N.E. 34 (1895).

[46] Devine v. Detroit Trust Co., 52 Ohio App. 446, 3 N.E. 2d 1001 (1935); Jacoby v. Dotson, 5 Ohio N.P. 282 (1898); and Morrison v. Baker, 41 Ohio L. Abs. 395, 58 N.E. 2d 708 (1943).

[47] See 2 Ohio C.C. (n.s.) 523 (1902).

that it becomes a matter of record. Ordinarily, motions which require notice are in writing.

Under General Code Section 11371: "Several objects may be included in the same motion if they all grow out of, or are connected with, the action or proceeding in which it is made."

The necessity of the giving of the notice of a motion is important and should not be overlooked. A notice of motion is to be distinguished from the motion itself. In Ohio there is no statute which requires the giving of a notice of each and every motion, yet there are certain statutory motions which expressly require notice. Some courts by rule require the giving of a notice of a motion, either as to its filing or hearing, or both. The necessity of a notice, in the absence of statute, depends largely on the purpose thereof and the circumstances under which made. It has been said that the real test of the necessity of giving notice in a case, not specifically provided by law or rules of procedure, is whether the adverse party is affected by the order. In all instances professional courtesy should be observed, which includes the giving to an adversary, notice of a motion of any importance.

In *Gardner v. Cline*,[48] it was said:

> Parties are bound, under the practice in Ohio, to take notice of all motions and orders made in court and during the pendency of an action, but not of motions and orders made out of court, or after an action has been terminated by final judgment.

If you are practicing in a locality which does not have a publication of local court proceedings, then frequent and periodic examinations should be made of the court docket and files to discover the filing of any non-notice motions or orders. If a notice of a motion is required, then under General Code Section 11372:

> . . . . it must be in writing and contain the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day on which it will be heard, and the nature and terms of the order or orders to be applied for. If affidavits are to be used on the hearing, that fact shall be stated. The notice shall be served a reasonable time before the hearing.

Particular attention is directed to General Code Section 11373, which provides: "Notices of motions may be served by a sheriff, coroner, or constable, or by a disinterested person. The return of an officer, or affidavit of such person, shall be proof of service."

You will note that this section says "may be served" and not "shall be served." This poses the question, does "may" mean "shall" and, if a motion is not served by "a sheriff, coroner, constable, or

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[48] 2 Ohio Dec. Rep. 301 (1860).

by a disinterested person", is the party filing the motion entitled to obtain an order thereon?

In *Nye v. Stilwell,* [49] it was held:

> 2. A notice in writing containing the names of the parties to the action, name of court or judge before whom motion is to be made, place and day where and when it will be heard, and the nature and terms of the order to be applied for, must be served either by a sheriff, constable or coroner, or by some disinterested person, upon the party to be affected thereby, to be served before such motion is made. Where such notice is omitted, or where an insufficient notice is made by one of the attorneys in the case, after the filing of such motion, the proceeding is irregular, and confers no jurisdiction on the court to correct such judgment, and such judgment as corrected will be without any force and not binding on the party having no notice or such irregular notice, unless he appeared and entered his appearance in the proceeding.

If you are filing a motion of importance, then extra precaution would dictate that it be served in the manner provided for by General Code Section 11373.

Our Code does not provide for the time of hearing of motions. Under General Code Section 11386, "The court at any time may hear a motion or demurrer, and by rule, prescribe the time of hearing motions and demurers."[50]

Generally speaking, a motion does not require any verification, but there may be occasions when it should be verified. Under General Code Section 11523, a motion may be verified by an affidavit. If a motion is of such character as to require testimony in support thereof, then, under the circumstances as provided by General Code Section 11525, such testimony may be in the form of a deposition. It is also true that a motion may be supported by the oral examination of a witness, although ordinarily it is done by an affidavit.

The above is not a complete discussion or a listing of all the available pretrial motions. It does contain the principal ones which arise in every day practice. The problems of procedural and substantive law are to be determined by the statutes and the common law, as interpreted by the courts. The reported cases and the numerous text books on practice and procedure do not give much of an insight as to why so many pretrial motions are filed. It is well known that courts are required to spend considerable time and study on pretrial motions. Our imperfections in the practice of

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[49] 12 Ohio C.C. 40 (1896).

[50] 1 Ohio Dec. 374 (1894).

law are many, and this may account for the necessity and use of pretrial motions. If our procedure in common pleas court in civil actions remain in its present form, then pretrial motions should be given proper recognition and should be used to the best possible advantage.