

## Tort Liability of Public Officers and Employees in Ohio

No area of government liability in tort is more studded with subtle distinctions than the individual liability of public officers who cause injuries in performing their official duties. That liability of the officers should exist at all might be explained as resulting from the old idea of sovereign immunity taken in conjunction with the maxim of common law jurisprudence that "For every wrong there is a remedy." A no less compelling basis for this liability is the belief that no one should be above the law and so be in a position to deal irresponsibly with the citizenry. The elimination of sovereign immunity seems to be a first essential to a complete solution of the problem,<sup>1</sup> but such renovation of concepts has not been forthcoming. A rising tide of exceptions has waived the immunity of the sovereign in tort in particular instances but exceptions they are and the rule remains.<sup>2</sup>

The immunity of judges, legislators, and top personnel of the executive branch, assures them an almost absolute privilege against suit, and the generally privileged character of discretionary action on the part of other administrative officers permits many torts to be committed without civil liability.

The judiciary has preserved its immunity to protect itself from liability even when the acts are dictated by malice.<sup>3</sup> Many reasons for such a rule have been suggested<sup>4</sup> but at the core of them all is the "necessity of having judges who are not deterred by the fear of vexatious suits or personal liability, and the manifest unfairness of placing any man in a position where his judgment is required, and holding him, at the same time, responsible according to the judgment of others."<sup>5</sup> Ohio follows the rule that judges acting within the scope of their authority are not answerable in a private action for erroneous exercise of their judicial discretion,<sup>6</sup> but if they trans-

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<sup>1</sup> Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 264 (1937).

<sup>2</sup> Federal Tort Claims Act, 28 U.S.C.A. §§1291, 1346, 1402, 1504, 2110 2401, 2411, 2412, 2617-2680; 60 STAT. 842 *et seq.* (1946); 61 STAT. 722 *et seq.* (1947); 28 U.S.C.A. §921 *et seq.* (1946); OHIO GEN. CODE §§2408, 3714-1 (1937).

<sup>3</sup> *Bradley v. Fisher*, 13 Wall. 335 (U.S. 1871).

<sup>4</sup> Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271 (1937); 2 COOLEY, LAW OF TORTS 424 (4th ed. 1932).

<sup>5</sup> PROSSER, TORTS 151 (1941).

<sup>6</sup> *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 119 N.E. 451 (1918); *Truesdell v. Combs*, 33 Ohio St. 186 (1877).

ceed the limits of their authority they are answerable to any person whose rights are invaded.<sup>7</sup> The exception affords little protection since a judge transcends the limit of his authority only when he acts totally without his jurisdiction as prescribed by law. It has been said that a judge acts only in excess of jurisdiction, and not without jurisdiction, where, having jurisdiction of the subject matter generally, he erroneously decides that the facts of the particular case bring it within his jurisdiction. Thus the erroneous finding of a judge in a divorce proceeding that the petitioner had been a resident of Ohio for one year, was held to be only in excess of jurisdiction and therefore privileged, since the court had jurisdiction of divorce generally.<sup>8</sup> Such a distinction between "without" and "in excess of" jurisdiction seems to destroy any semblance of an objective standard and makes official liability for jurisdictional determination depend upon reasonableness under the circumstances. If such is the test, a more forthright statement of the law by the courts would afford a better basis for prediction. The judge of a court of general jurisdiction in Ohio is presumed to have acted within the scope of his authority;<sup>9</sup> the judges of the inferior courts, such as magistrates' and mayors' courts, enjoy no such presumption.<sup>10</sup> It has been suggested that judges of the inferior courts should be granted a greater immunity where they act in good faith and without malice since they are not as learned in the law and are more likely to err.<sup>11</sup> The suggestion has not been followed by the Ohio courts.

The immunity extended the judiciary has likewise been bestowed upon the legislative branch of our government. The Ohio Constitution confers absolute immunity upon the members of the legislature for any speech or debate carried on in either house.<sup>12</sup> As a general rule, the members of legislative bodies are not held responsible in civil actions, in the absence of corruption, for voting either for or against any particular legislation.<sup>13</sup> This is true of members of local legislative bodies as well as representatives in a state legislature. In *Hicksville v. Blakeslee*<sup>14</sup> an effort to hold members of a village council individually liable for voting the sale of bonds in a manner prohibited by law failed because the court found

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<sup>7</sup> Truesdell v. Combs, *supra* note 6.

<sup>8</sup> MacBride v. Giuld, 3 Ohio N.P. (N.S.) 469 (1905).

<sup>9</sup> Truman v. Walton, 59 Ohio St. 517, 529, 53 N.E. 57, 59 (1899).

<sup>10</sup> Truman v. Walton, *supra* note 9; Truesdell v. Combs, 33 Ohio St. 186 (1877).

<sup>11</sup> Truman v. Walton, *supra* note 9.

<sup>12</sup> OHIO CONST. Art. II, §12.

<sup>13</sup> Kilbourn v. Thompson, 103 U.S. 168 (1881); See note, 22 A.L.R. 119, 125 (1922).

<sup>14</sup> 103 Ohio St. 508, 134 N.E. 445 (1921).

that the councilmen were acting in good faith; it being said obiter that the motives of the legislator in the exercise of his discretion cannot be questioned.<sup>15</sup> This case has solidified the law in Ohio and has been considered controlling in several recent opinions of the Attorney General.<sup>16</sup> Other courts have imposed liability upon legislators where they voted an appropriation for their own benefit and have made each of them liable as for a conversion of trust funds.<sup>17</sup>

The privilege extended members of the judiciary and legislatures is also enjoyed by the highest executive officers in the federal and state governments.<sup>18</sup> This protection is afforded so long as they do not exceed the discretion vested in them by law and clear proof of abuse of such discretion must be shown to justify judicial interference.<sup>19</sup>

The individual liability of public officials in the above three categories is moderately well defined. It is only when we arrive at the fourth group, those officers whose duties are not regarded as distinctly legislative, executive or judicial, that confusion appears. This group comprises the great body of lesser public officials and includes all administrative personnel. It is from these officials that most of the injuries result but it is here that our jural relations are the least well defined and most unpredictable due to the distinctions built up by the courts. Thus even in this area many injuries go unredressed.

If the duty is owed to the public, a failure to perform, or an inadequate or erroneous performance, is a public and not an individual injury and must be redressed, if at all, in some form of public prosecution. On the other hand if the duty is owed to an individual then a failure to perform it properly is an individual wrong and may support an individual action for damages.<sup>20</sup> In the former the duty exists for the benefit of all members of the public and ordinarily no one member can maintain an action for damages against the officer for failure to perform such duties since an individual member of the public can recover only such damages as inure to him over and above the damage that is sustained by all members of the body politic. To perfect a cause of action against an officer the petitioner must establish, in addition to the other requirements nec-

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<sup>15</sup> *Id.* at 519, 134 N.E. at 449.

<sup>16</sup> 1939 OPS. ATT'Y GEN. (Ohio) No. 1330; 1937 OPS. ATT'Y GEN. (Ohio) No. 1464.

<sup>17</sup> *Russell v. Tate*, 52 Ark. 541, 13 S.W. 130 (1890).

<sup>18</sup> *Moyer v. Peabody*, 212 U.S. 78 (1909); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Kendall v. Stokes*, 3 How. 87 (U.S. 1845).

<sup>19</sup> *Sterling v. Constantin*, 287 U.S. 378 (1932); *Powers Co. v. Olson*, 7 F. Supp. 865 (D.C. Minn. 1934).

<sup>20</sup> *Rose v. Ritter*, 1 Ohio C.C. (N.S.) 321 (1903).

essary for tort, a duty owing to himself and a breach of that duty. In *Rose v. Ritter*<sup>21</sup> the petitioner sought damages for injuries occasioned by his being imprisoned in an unsanitary dungeon at the order of the defendant, the superintendent of the workhouse. The court held that the defendant was not civilly liable to the plaintiff since the duty of the superintendent to take corrective and disciplinary action was not owed to the individual inmates but to the public in general, and any breach of that duty must be redressed by public prosecution.

The courts have categorized the duties of administrative officers as either discretionary or nondiscretionary or, as otherwise phrased, quasi-judicial or ministerial. A discretionary or quasi-judicial duty has been defined as one involving the investigation and determination of a state of facts, with the resultant exercise of discretion or judgment as to the propriety of the action to be taken with reference to the facts ascertained.<sup>22</sup> Conversely, a nondiscretionary or ministerial duty is said to be one which is to be performed in obedience to law without the exercise of judgment as to the propriety of the duty or to the expediency of performing it.<sup>23</sup> An act which is classed as discretionary is privileged and an officer will not be held civilly liable for damages resulting from his ill-exercised discretion as long as he acted honestly and in good faith.<sup>24</sup> On the other hand a ministerial act improperly done frequently results in the civil liability of the officer regardless of sincere motives.<sup>25</sup> Ohio assumedly adheres to the ministerial classification<sup>26</sup> but cases are lacking that establish personal liability upon such a basis. Rather than make the officers' civil liability turn upon such a neat distinction the Ohio cases seem to have adopted a test similar to that suggested in the latter part of this article, *i.e.* unreasonable conduct under the circumstances. Ohio has adopted the ministerial classification in other actions<sup>27</sup> but apparently has succeeded in escaping the classification in the field of civil liability. Were the activities of a particular office to be classified in their entirety as involving either ministerial or discretionary duties the problem would be simplified but under the present state of the law each office includes both

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<sup>21</sup> See note 20 *supra*.

<sup>22</sup> *Board of Education v. Commissioners*, 10 Ohio N.P. (N.S.) 505, 510 (1909).

<sup>23</sup> *State v. Donahey*, 110 Ohio St. 494, 144 N.E. 125 (1924); *State v. Nash*, 66 Ohio St. 612, 64 N.E. 558 (1902).

<sup>24</sup> *Gregory v. Small*, 39 Ohio St. 346 (1883); *Stewart v. Southard*, 17 Ohio 402 (1848).

<sup>25</sup> Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 297 (1937); PROSSER, TORTS 152 (1941).

<sup>26</sup> 32 OHIO JUR. 961 (1934).

<sup>27</sup> *State v. Nash*, 66 Ohio St. 612, 64 N.E. 558 (1902); *State v. Chapman*, 67 Ohio St. 1, 65 N.E. 154 (1902).

ministerial and quasi-judicial functions. Thus the real issue is whether the particular act complained of is ministerial or quasi-judicial. The distinction, if one really exists, would appear to be a matter of degree, as it is difficult to conceive of any official act that does not require some discretion in the manner of its performance.<sup>28</sup> Courts have said that an act may be discretionary in character, but once discretion has been exercised and the officer has committed himself on a course of action, then the performance becomes purely ministerial and a wrong committed in the course of administration gives rise to a civil cause of action. Thus it might be said that every duty culminates in a mere ministerial act.

Some courts have further complicated the classification by drawing a distinction between ministerial misfeasance and nonfeasance.<sup>29</sup> A sound basis for this distinction is not evident as it would seem that damages resulting from nonaction should afford a predicate for liability as readily as those due to affirmative action which was taken in error. Ohio has been said to embrace the distinction<sup>30</sup> but the cases do not support that conclusion. In fact the Ohio courts have distinctly held that a public officer and his surety are liable to all persons unlawfully injured by the nonfeasance or misfeasance of such officer in the conduct of his office.<sup>31</sup>

An attempt has been made in the cases to differentiate between the acts of public officers done without jurisdiction and those which are merely "in excess of" jurisdiction.<sup>32</sup> It is said that the conception that "nonexistence can be less than nonexistence" is certainly a fiction,<sup>33</sup> and it is added that the injury to the plaintiff, or the hardship upon an officer who honestly believed that he was acting properly, is the same in either case. Whereas an act without jurisdiction is given no protection,<sup>34</sup> an act that is merely in excess of jurisdiction is privileged to the same extent as a properly authorized function. Although such a distinction is generally applied to all officers, it is most evident in cases involving the judiciary.<sup>35</sup> However, it has been held that a ministerial officer acts without his jurisdiction when he executes any process, upon the face of which it appears that the court which issued it has not jurisdiction of the

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<sup>28</sup> *Ham v. Los Angeles County*, 46 Cal. App. 148, 162; 189 Pac. 462, 468 (1920).

<sup>29</sup> *Smith v. Iowa City*, 213 Iowa 391, 239 N.W. 29 (1931); *Stevens v. North States Motors*, 161 Minn. 345, 201 N.W. 435 (1925).

<sup>30</sup> *Jennings, Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 298 (1937) citing *Thomas v. Wilton*, 40 Ohio St. 516 (1884).

<sup>31</sup> *Commissioners of Knox County v. Blake*, 2 Ohio St. 147 (1853).

<sup>32</sup> PROSSER, TORTS 153 (1941).

<sup>33</sup> *National Surety Co. v. Miller*, 155 Miss. 115, 127; 124 So. 251, 254 (1929).

<sup>34</sup> *Loomis v. Spencer*, 1 Ohio St. 153 (1853).

<sup>35</sup> See page 502.

subject matter, or of the person against whom it is directed. But if the subject matter of a suit is within the jurisdiction of a court, but there is want of jurisdiction as to the person or place, the officer who executes process issued in such suit, is no trespasser unless the want of jurisdiction appears on the face of such process.<sup>36</sup>

The problem of jurisdiction is closely analogous to that of acts done under an unconstitutional statute. An early Ohio case said that an officer acting under an unconstitutional statute was entirely without jurisdiction and liable as a trespasser,<sup>37</sup> but later decisions, not involving personal liability of a public official, repudiated the doctrine and held that the unconstitutional statute confers such color of title as will constitute one a de facto officer and offers protection for acts performed in compliance with the statute.<sup>38</sup>

There is a noticeable absence of the application of the doctrine of respondeat superior in tort liability of public officials. Although one officer is subordinate to the other, they are said to be of equal dignity and torts of the subordinate will not be imputed to the superior.<sup>39</sup> This is true even of a subordinate who has been appointed by the officer sought to be charged, where there has been no negligence in the selection of the subordinate. Before the superior can be charged personally it must be shown that he ordered the act to be done.<sup>40</sup> The term subordinate as it has been used does not include deputies, as the acts of a deputy are in law the acts of the principal and he is responsible for them.<sup>41</sup> A deputy is one appointed as a substitute to act for another.<sup>42</sup> He is the alter ego of the officer and in the contemplation of the common law, his acts are the acts of the officer himself.<sup>43</sup> The deputy is appointed only by the principal, and is removable at his pleasure,<sup>44</sup> and so it is reasoned that the liability resulting from acts of the deputy should be borne by the principal. The distinction between deputies and other subordinates might have been valid at common law but is questionable today. Many subordinates serve at the pleasure of their superior, are hired and fired in his discretion, and a true master servant relationship exists.

The law as it now stands is far from satisfactory and several

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<sup>36</sup> *Champaign County Bank v. Smith*, 7 Ohio St. 42, (1857).

<sup>37</sup> *Loomis v. Spencer*, 1 Ohio St. 154 (1853).

<sup>38</sup> *State v. Gardner*, 54 Ohio St. 24, 42 N.E. 999 (1896); *Kirker v. Cincinnati*, 48 Ohio St. 507, 27 N.E. 898 (1891); *Ex Parte Strang*, 21 Ohio St. 610 (1871).

<sup>39</sup> *Conwell v. Voorhees*, 13 Ohio 523 (1844).

<sup>40</sup> *Conwell v. Voorhees*, *supra* note 39.

<sup>41</sup> OHIO GEN. CODE §9 (1940); *Warwick v. State*, 25 Ohio St. 21 (1874).

<sup>42</sup> *State v. Metzger*, 10 Ohio N.P. (N.S.) 97, 106 (1910).

<sup>43</sup> *Warwick v. State*, 25 Ohio St. 21 (1874).

<sup>44</sup> *Warwick v. State*, *supra* note 23.

alternatives would seem more desirable. A complete solution of the problem would be a total abolition of the doctrine of sovereign immunity whereby the state and its local units would assume responsibility for tortious acts of their officials. The extra burden could easily be absorbed by the sovereign but the desirability of such a solution is questionable. The less sincere public official might become immune to any sense of responsibility if the deterrent of civil liability were removed. A second solution might be one similar to that provided by the Federal Tort Claims Act whereby the injured person has his choice of suing the government or the tortfeasor. As a third solution we might retain the civil liability of public officials but adopt the cure suggested by Mr. Jennings that the criterion for liability should be whether the officer has acted unreasonably under the circumstances, whether his act be regarded as discretionary or ministerial, or with or without jurisdiction.<sup>45</sup> An honest, reasonable mistake should not be penalized, nor should an unreasonable blunder, or corrupt or malicious conduct, be invested with immunity. A few cases have recognized the merit of such a rule of liability and have shown a trend in this direction.<sup>46</sup> In fact, as suggested previously, the language of some of the Ohio cases would seem to commit the courts to a position not too far removed from that of Mr. Jennings. Typical of the Ohio cases is *Thomas v. Wilton*<sup>47</sup> where the court failed to discuss the ministerial or discretionary character of the act but denied liability on the ground that the defendants "acted in their official capacity, in good faith and in the honest discharge of official duty." Language such as this might well be used as a stepping stone for the simplification of tort liability of public officials in Ohio.

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<sup>45</sup> Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 301 (1937).

<sup>46</sup> Tyrell v. Burke, 110 N.J.L. 225, 164 Atl. 586 (1933); Silva v. MacAuley, 135 Cal. App. 249, 26 P. 2d 887, 27 P. 2d 791 (1933); Wallace v. Feehan, 181 N.E. 862 (Ind. App. 1932).

<sup>47</sup> 40 Ohio St. 516 (1884).