more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Sec. 11336.

ANNA FAYE BLACKBURN

# REAL PROPERTY

## ALLOWANCE OF ATTORNEY FEES IN STATUTORY PARTITION

Plaintiff sought to partition a piece of land which was subject to a mortgage. The mortgagee consented to come into the partition proceedings. Even though the proceeds of the partition sale were insufficient to cover the mortgage indebtedness, the Court of Appeals for Hamilton County gave plaintiff's attorney priority in his claim for a fee over the mortgagee. *Klosterman* v. *Klosterman,* 58 Ohio Ap. 511, 16 N.E. (2d) 826 (1938).

The decision was made on the authority of Ohio G. C. section 12,050, "Having regard to the interest of the parties, the benefit each may derive from a partition, and according to equity, the court shall tax the costs and expenses which accrue in the action including reasonable counsel fees, which must be paid to plaintiff's counsel unless the court awards some part thereof to other counsel for service in the case for the common benefit of all the parties, and execution may issue therefore as in other cases."

There are several other statutes in Ohio allowing attorney fees to be assessed as costs: in taxpayer's suits for the recovery of misappropriated funds, Gen. Code sec. 2923; in suits by municipalities for appropriation of land (allowance to defendant's attorney if land is not taken or money paid over within six months after the decree) Gen. Code sec. 3697; in suits for the collection of sanitary district assessments, Gen. Code sec. 6602-85; in land owner's suits for costs of erecting a fence for a railroad, Gen. Code sec. 8915; in appeals from justice courts to the common pleas court when there is a failure to substantially better appellant's judgment, Gen. Code sec. 10,356; in appeals from the court of appeals to the Supreme Court where there is no reasonable cause for appeal, Gen. Code sec. 12,223-36; in proceedings by one holding a mechanic's

lien where more than one lien claimant will benefit, Gen. Code sec. 8323; and in proceedings to perpetuate testimony where an attorney is appointed by the court to represent one of the parties, Gen. Code sec. 12,219. Fees are also allowed as costs in administration and receivership cases and the like: Gen. Code secs. 10,509-193, 10,510-10 and 10,511-25. Sometimes attorneys' fees are allowed as part of exemplary damages. *Iron Co.* v. *Harper*, 41 Ohio St. 100 (1884).

The theory behind most of these allowances seems to be that the plaintiff has been compelled to take the initiative or is acting in a semi-administrative or semi-judicial capacity or that there is a penalty for malice, unjustifiable appeal, or the like. The theory of the Ohio Partition Statute and of nearly all the decisions allowing counsel fees in partition involves considerations of mutual benefit to all the parties arising from the initiative of the plaintiff and his payment of many of the formal procedural expenses.

In the instant case it is difficult to see just how the mortgagee was benefited by the services of the plaintiff's counsel. The effect of levying the fees as costs against the property amounts in this case to compelling the intervening mortgagee to pay them all. Did not the plaintiff assume some risk that the property would not cover the mortgage indebtedness? There is no showing in the opinion that the mortgagee got any more clear title by virtue of the suit or acquired any other benefit.

Although not mentioned in the principal case, the Court of Appeals for Warren County in a similar case denied the right of the plaintiff's attorney to have fees allowed when the mortgagee purchased the property in partition. *Columbus Mutual Life Insurance Company* v. *Dennull*, 21 Ohio App. 363, 153 N.E. 133 (1926). In this case it was emphasized that the mortgagee paid appraiser's fees, costs of advertising and sale, and ordinary court costs. While it does not appear that the mortgagee paid these items in the instant case, the opinion does not make that the *ratio decidendi*, or even mention the fact. It is hard to see any valid basis of distinction on the grounds that where the mortgagee buys the property there is never any fund paid into the hands of the court to be distributed. Neither distinction seems valid and the courts in these two cases seem to have started with different assumptions as to the scope and purpose of Gen. Code sec. 12,050. In each case, by answering, the mortgagee consented that the property be sold free from the lien but expected that the proceeds from the sale would be applied first to its payment. Although a mortgagee is not a necessary party to a partition action in Ohio as he is in some states, *Marx* v. *State Bank of Chicago*, 294 Ill. 568, 128 N.E. 475 (1920), yet it does not seem just that he

should be penalized for volunteering to consolidate litigation. In the Illinois case just cited the mortgagee paid the other costs but did not pay the fee of the plaintiff's attorney.

The principal case is in accord with the tendency of the majority of the states to be quite liberal in allowing the fees where there is a statute permitting it. While it is often spoken of as a matter of reversible judicial discretion, the allowance of the trial court is usually affirmed. *Mathews* v. *Lytle*, 220 Ala. 78, 124 So. 197 (1929); *Randell* v. *Randell*, 4 Cal. (2d) 575, 50 Pac. (2d) 806 (1935); *Jennings* v. *Jennings*, 225 Mo. App. 1010, 33 S.W. (2d) 165 (1931); *Fibbe* v. *Poland*, 24 Ohio App. 532, 157 N.E. 808 (1927); *Watkins* v. *Merrihew*, 102 Vt. 190, 147 A. 345 (1929). But an allowance of fees has been refused on the grounds that defendant is entitled to be represented by counsel of his own choice. *Brown* v. *Rosenbaum and Little*, 125 Miss. 87, 87 So. 130 (1921); *Lewis* v. *Crawford*, 175 Ark 1012, 1 S.W. (2d) 26 (1928); 73 A.L.R. 24. And while the general rule seems to be that the interposition of a substantial defense in good faith precludes the allowance of attorney fees (73 A.L.R. 22), Ohio is apparently in the minority in allowing the fee regardless of the type of defense. *Lowe* v. *Phillips*, 21 Ohio St. 657 (1871). In *Young* v. *Stone*, 55 Ohio St. 125, 45 N.E. 57 (1893), however, we find a pronouncement that the services must be for the common benefit of all. That case denied the assessment of fees against the property of those whose title would have been affected if the adverse claim had been successful because the litigation did not "benefit or affect" the persons entitled to one-half the ancestral estate in controversy.

While the Ohio Statute has been classed as mandatory in form (73 A.L.R. 35), it differs very little from the statute in Illinois which provides that each party shall pay his equitable portion of the fee which was construed in *McMullen* v. *Reynolds*, 209 Ill. 504, 70 N.E. 1041 (1904) reversing 105 Ill. App. 386 (1903), as not requiring apportionment in cases where that would be inequitable or would work a hardship on defendant who must of necessity employ counsel to adequately protect his interests. Illinois has held that allowance of fees could not be sustained without evidence in the record showing what services were performed and the value thereof.

It is frequently stated that statutes in derogation of the common law should be strictly construed. Statutory authority of some sort seems to be a prerequisite to the taxation of any counsel fees in partition cases (73 A.L.R. 17). Inasmuch as the partition statute is the only basis for the claim of the plaintiff's attorney, in a partition action for an allowance

of fees out of the proceeds of the sale, there would seem to be adequate grounds for denying him a priority over an intervening mortgagee's interest. There would also seem to be ample authority for such a holding on the basis of *Young* v. *Stone, supra.* In that case the assessment of the fees against the property of those who might have received some tenuous benefit was denied because all the parties did not benefit. Although there was a definite contract for compensation, the court said that the fact that the service was not for the "common benefit of all" was equally decisive of the case. In *Klosterman* v. *Klosterman* there was no apparent benefit to the other defendants nor to the mortgagee.

A zealous attorney can usually find a speculative or theoretical benefit on which to base the allowance of fees when the allowance tends to be made on the basis of custom and inertia without a strict examination of the merits of the claim. The general rule in other proceedings in this country is to have each party pay his own attorney. If the question of benefit is put in issue it would seem reasonable to make the plaintiff's attorney bear the usual burden of proof as to the existence and amount of benefit conferred on the defendant.

ARTHUR N. MINDLING

# SALES

## TRANSFER OF TITLE TO AUTOMOBILES UNDER NEW CERTIFICATE OF TITLE ACT

The Ohio Supreme Court in *State ex rel. The City Loan & Savings Co.* v. *Taggart, Recorder,* 134 Ohio St. 374, 17 N.E. (2d) 758, decided November 16, 1938, upheld the constitutionality and validity of sections 6290-2 to 6290-17 of the General Code enacted in 1937 which repealed code sections 6310-3 to 6310-14 relating to motor vehicles and requiring a bill of sale to be executed in accordance with the provisions of the act which imposed a penalty in case of failure to comply. The new *Certificate of Title Act* provides that title to all motor vehicles owned and operated in Ohio be represented by certificates of title. Code section 6290-2 provides that "no manufacturer, importer, dealer, or other person shall sell or otherwise dispose of a new motor vehicle to a dealer to be used by such dealer *for purposes of display and resale* without delivering to such dealer a manufacturer's or importer's certificate duly executed in accordance [with the act] and with such assignments thereon as may be necessary to show title in the purchaser thereof; nor shall such dealer purchase or acquire a new motor vehicle without obtain-