477; 50 A.L.R. 1450. It will be noted that the emphasis in the principle case was placed upon the control element.

NOAH J. KERN

Appeal and Error

MOTION TO CERTIFY — EFFECT OF OVERRULING MOTION — STARE DECISIS.

"The refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an adjudication of the question by this court as an established precedent for future cases." This unequivocal language was used by the Supreme Court of the State of Ohio in the recent case of *Village of Brewster* v. *Hill.* The circumstances of the controversy calling forth this statement were that the capacity of a town to contract under Article VIII, section 6 of the Ohio Constitution was challenged by Hill, a taxpayer. The case of *Nicol* v. *Tolhurst, Village of Amherst* (unreported), decided by the Court of Appeals of Lorain County in a pro forma opinion, was similar factually, and that court had decided in favor of the Village. Counsel for the Village of Brewster cited the Amherst case as authority for his position, since a motion to certify had been overruled by the Supreme Court. The Court, however, held in favor of Hill and against the Village. We may take it, then, as an indisputable fact that overruling a motion to certify is not an affirmance. *Village of Brewster* v. *Hill,* 128 Ohio St. 343, 190 N.E. 766, 40 O.L.B. 66 (1934).

At first blush, it would seem that this situation is highly contradictory; two cases similar factually, yet having two opposing decisions upon the question involved. In fact, however, there is no ambiguity. In reference to the law of Ohio generally, the Supreme Court has spoken, and their word is the law. It would be well, however, for the lawyer to keep the Amherst case in mind when before the Court of Appeals of Lorain County.

A further instance of this principle is found in the words of Judge Jones in *The Cleveland Railroad Co.* v. *Masterson,* 126 Ohio St. 42, 183 N.E. 873, 37 O.L.R. 337, 42 A.L.R. 15 (1932). "Various cases involving the application of the 'last clear chance' rule have, from time to time, appeared on the motion docket of the court, and in such cases this court has generally given its sanction to the rule in *Erie Railroad Co.* v. *McCormick, Adm'x,* 69 Ohio St. 45. A recent case knocking at our doors for certification was *Ross* v. *Hocking Valley Railroad Co.,*

reported by the Court of Appeals of the second district, in 40 Ohio App. 447, 178 N.E. 852, 11 Abs. 487 (1931). We do not generally allude to appellate opinions in our reported cases, but we shall refer to that case because it discloses the attitude of this court upon the subject in controversy." Judge Marshall, in his concurring opinion, says of the Ross case, "It is true that this court overruled a motion to certify the record. We must, however, protest against any opinion . . . . declaring that the overruling of a motion to certify constitutes an adherence 'to the principle announced by the Appellate Court, otherwise it would have admitted and reversed the case.' The contrary of that declaration has been stated a score of times from the bench during the last few years, and in at least one opinion the bar has been advised that theoverruling of a motion to certify does not amount to any declaration of legal principles." There can be no doubt as to exactly what the rule is in the mind of the Supreme Court. Unless there is some drastic change, the overruling of the motion can never be construed as an affirmance of the lower court.

The practice in New York is very similar to that in Ohio. "A denial by this court of a motion for leave to appeal from an order of the Appellate Division affirming such an order is not equivalent to an affirmance of the order. While, therefore, the order appeale from may be binding as res adjudicata, it may not be held binding under the rule of stare decisis." Further along in the same case the court makes the following astounding statement: "A denial of a motion for leave to appeal is not equivalent to an affirmance of the order thus withdrawn from review. It does not give to the order the value of a precedent. Motions for leave to appeal have the careful consideration of the judges of the court, yet they lack the authority that attaches to a decision with all the aid of argument. . . . Appellate divisions and trial courts are at liberty, if the please, to give to such a refusal some measure of significance, as a token, though indecisive, of the impressions of this court. They are not bound thereby as by an authoritative precedent." This statement on the part of the court indicates the lower courts may give some slight weight to a refusal to review. This is the most liberal of the views taken by any court that we have been able to discover. *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929).

What we have said of the Supreme Court of Ohio, applies with equal force to the Supreme Court of the United States. *United States* v. *Carver* 260 U.S. 482, at 290 (1922).

"The denial of a writ of certiorari imports no expression of opinion

upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libelant's argument is supported by the decisions to which they refer." Here too, then, the overruling of the motion has absolutely no effect upon later decisions, and here they may not even be considered by the lower courts.

However, in Ohio there are various factors which help to build up the impression that the strictness of this view is not shared by inferior courts. In the case of *The Cuyahoga Improvement Co. et al.* v. *Moore*, 41 Ohio App. 30, 179 N.E. 501, 8 Abs. 148 (1929) the court cites the case of *Strangward* v. *American Brass Bedstead Co.*, 82 Ohio St. 121, 91 N.E. 988 (1910) as holding that a recovery for monthly installments of rent, (that being all that was due at the time the action was commenced) is not a bar to recovery for future instalments coming due under the terms of the lease. This doctrine has been followed in several cases, one being *Gusman* v. *Mathews*, 29 Ohio 163 N.E. 636 App. 402 (1928) which was considered by the Supreme Court on a motion to certify, the motion being overruled. The Appellate Court in the Cuyahoga case says: "referring to the Strangward case; "This case has recently been approved and followed in two cases arising in this county, one being that of *Yerman* v. *Boccia*, 6 O.L.A. 218, and the other being the case of *Gusman* v. *Mathews*, 29 Ohio App. 402, 163 N.E. 636. This last case was considered by the Supreme Court of this state upon a motion to certify, and on June 20, 1928, the motion to certify was overruled. We, therefore, recognize that the Supreme Court approves the Strangward case and the doctrine therein announced, and such is now the law of Ohio."

Sometimes the Appellate Court cites another Appellate case and merely states that a motion to certify has been overruled, without going to the length of explanation that was found in the Cuyahoga case. This means at least that the Appellate Court does give some weight to this fact.

Further the Ohio Appellate Reporter, in the front of the book, carries the later case history of cases reported, and Ohio Jurisprudence carries footnotes to the same effect. These are further indications that this information is regarded as being of value in determining the probable attitude of the Supreme Court on a given question, by reason of their action on a motion to certify.

All these things build up the impression that overruling a motion to certify means more than merely that the Supreme Court refuses to hear the case on its merits. We have no way of determining how often the lawyer cites such material in his brief, but it must be done often. If

the court itself cites such material with approval, it must be because the lawyers are continually citing it to them. From this, we conclude that it is probably good practice to cite such material to the courts of appeal, but that it is very bad practice to cite the overruling of motions to certify when before the Supreme Court.

The Ohio State Bar Association Report of the forty-seventh annual meeting, held July sixth to July eighth, 1926, at page 248, sets out the following resolution submitted to that body, "*Be it resolved*, that it is the belief of the members of the Ohio State Bar Association here assembled, that the Supreme Court of Ohio could expedite its work, aid attorneys in their work, save much money for litigants and generally promote the interests of justice, if when overruling motions to certify the record and for leave to file petitions in error, it would render and publish a short and concise opinion giving reasons for its rulings and the vote of the members of the court thereupon." This resolution was referred to the Committee on Judicial Administration and Legal Reform. At the following Mid-Winter Meeting, the Committee approved the resolution, after changing it to read: "*Be it resolved*, that it is the opinion of the Ohio State Bar Association, that the Supreme Court of Ohio, by making public the reasons for its action when overruling motions to certify the record, and motions for leave to file petitions in error, will generally promote the interests of justice and will furnish a guide for future action by the bar; and we further express the belief that the announcement of the vote of the members of the court on such decisions is advisable."

These advantages would probably follow. But on the other hand, such a plan would enormously burden an already burdened court. Even if such opinions were short and concise, it would take considerably more time than is consumed in passing the motion now. Secondly, having opinions which are written tends to bind the court strictly. It seems of doubtful benefit to hold the court strictly to an opinion on a question which they have not investigated thoroughly. And if they must investigate thoroughly, then there will be no ground for refusing to hear a case, and every case knocking at the doors of the court, will be decided upon the merits. Each decision on a motion to certify would be the basis of stare decisis and a binding precedent. This would hinder any change of opinion which might later be demanded by reason of a change in circumstances. There is much to be said, then for leaving the court free to act on a motion as it sees fit.

One of the jurisdictional requirements of the Supreme Court is that the case be one of "public or great general interest." Shortly after

this Constitutional provision was enacted, the case of *Akron* v. *Roth*, 88 Ohio St. 456, 103 N.E. 465 (1912), was decided. The Court in that case said that not only need the case be one of "public or great general interest," but also that error has probably intervened. Some eight years later, (1920) the Court in ruling on a motion said, "overruled, the Court finding that the case is one of public interest, but no error has intervened." *Records of the Supreme Court*, Case Number 16,710, Journal 28, page 476, July 16, 1920.

This notation has not been repeated that we know of, but it is some indication that the Court considers the factor of probable error when passing on a motion to certify. It seems an inescapable conclusion that this was in fact, for the particular case, at least, an affirmance of the lower court, for the Supreme Court admittedly had jurisdiction, because the case was of "public or great general interest," but the Court refused it because it thought that there was no error in the case.

This suggests that a milder reform might be to use formal reasons, similar to these, in disposing of these motions. Thus perhaps the advantages sought after by the Ohio Bar Ass'n. in its resolution, without the attending disadvantages of binding precedent or excessive labor on the part of the Court would be attained. In giving these reasons, the Court would not be binding itself irrevocably to one position, for it would merely be an indication of how the Court reacts to a given question upon a cursory examination. And of course, the Court would not be faced by the task of writing an opinion on the case, but could dispose of the whole problem by designating a number of these reasons.

The problem clearly merits further study and thought by those connected with the profession with a view to evolving a plan which will satisfy both the judiciary and the bar.

CARL R. JOHNSON.

Automobiles

NEGLIGENCE — DOCTRINE OF ASSURED CLEAR DISTANCE AHEAD — STATUTE AS SUBJECTIVE TEST.

The defendant stopped his truck on the highway. The evidence tended to show that there was no negligence in parking the truck but that there was no tail light burning. The night was dark, rainy, and foggy; the deceased was driving between 30 and 35 miles per hour and had just met a car coming from the opposite direction. Under such circumstances the deceased collided with the rear end of the truck and