

legislation; but under this section, there could be no emergency with reference to an ordinance passed authorizing a contract with a public utility.

“If we give effect to the general provision of the Constitution (referring to Article II, Section 1-f), the authorizing statutes enacted thereunder, and the special provision relating to ordinances enacted by Council, *the only construction that could be given to the latter would be that it was a limitation on the powers of Council and did not in any way effect the rights reserved to the people to initiate an ordinance authorizing a contract.*” (Italics, the writer’s).

Since the Court of Appeals in the principal case issued a decree of injunction on the basis of the constitutional question raised, and since the court in *Goodman v. Hamilton*, (supra) reached a directly opposite conclusion, it is to be regretted that the Supreme Court of Ohio refused to pass on that particular question when it held that there was no constitutional question involved.

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POWER OF COURT OF APPEALS TO GRANT REVERSAL ON WEIGHT OF EVIDENCE — JURISDICTION.

The case of *Werner v. Rowley*, 129 Ohio St. 15, 193 N.E. 623, 1 Ohio Op. 303, 16 Abs. 378 (1934), involved an action for personal injuries. The plaintiff recovered a verdict in the first trial which on the defendant’s motion was set aside as being against the weight of the evidence. On the second trial of the cause, the plaintiff again received a verdict to which the defendant objected again on the grounds that it also was against the weight of the evidence. While the Court of Appeals considered other errors assigned, it refused to consider the assignment that the verdict was against the weight of the evidence and held that by the cases of *Cleveland Ry. Co. v. Trendel*, 101 Ohio St. 316, 128 N.E. 136 (1920), and *Rolf v. Heil*, 113 Ohio St. 113, 148 N.E. 398 (1925), it was precluded from so doing. In the *Werner case*, supra, the Supreme Court overruled these cases and held Section 11577, General Code, unconstitutional as applicable to the facts of that case. Although not so stated in the opinion the decision in the *Werner case* also overrules *Mahoning Valley R.R. Co. v. Santoro*, 93 Ohio St. 51, 112 N.E. 190 (1915), which held in effect that when the Court of Appeals has granted one reversal on the weight of the evidence, it cannot grant a second reversal on the same ground. The statute provides that the trial court shall not grant more than one new trial on the

weight of the evidence against the same party in the same case and that not more than one judgment of reversal shall be granted on this ground. The pertinent constitutional provision involved in Section 6, Art. IV as amended in 1912: "The courts of appeal shall have . . . appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify or reverse the judgment of the courts of common pleas, superior courts and courts of record within the district as may be provided by law." It is to be observed at this point that no question is raised as to whether Section 11577 General Code is a usurpation of judicial power as conferred by Article IV, Section 1 and this matter is not considered in this note.

It is a necessary hypothesis of the opinion in the *Werner case* that the Constitution, through the section above quoted, is the sole source of the jurisdiction of the Court of Appeals which the legislature can neither enlarge nor restrict; and second, that restricting the Court of Appeals to but one reversal on the weight of the evidence is a matter of jurisdiction.

The first assumption is well supported by precedent in Ohio, the leading case being *Cincinnati Polyclinic v. Balch*, 92 Ohio St. 415, 111 N.E. 159 (1915). As pointed out by Chief Justice Nichols in his dissenting opinion to this case, however, there is some basis for doubting the soundness of this proposition. From 1802 to 1851 the jurisdiction of all courts of the state, except as specifically stated by the Constitution, was of legislative and not of constitutional origin. Section 2, Art. III of the Constitution of 1802 provides that the Supreme Court shall have appellate jurisdiction both in law and chancery in such cases as directed by law. Section 4 of the same article provides that the Supreme Court and Court of Common pleas shall have appellate criminal jurisdiction in such cases and in such manner as may be pointed out by law; Section 5, Art. III providing that the Court of Common Pleas shall have jurisdiction of all probate and testamentary matters and such other cases as shall be prescribed by law. Thus "directed," "pointed out," and "prescribed by law" were the terms used and generally understood as conferring power on the legislature to regulate the jurisdiction of these courts. *Ludlow v. Johnson*, 3 Ohio 553 (1827), *Way v. Hilhir*, 16 Ohio 105 (1847), *In re Gregory*, 19 Ohio 357 (1850).

The Constitution of 1851, Section 2, Art. IV in conferring appellate jurisdiction on the Supreme Court, designated this as such power "as may be provided by law," the same term as employed in the amendment of 1912 to Article IV, Section 6, in reference to Appellate courts. The same phrase was employed when the Circuit Court was created by

amendment to the Constitution Oct. 9, 1883; appellate jurisdiction was such as was provided by law. Section 6, Art. IV. Section 8, Art. IV. creating the Probate Court provided that the Probate Court shall have jurisdiction in probate and testamentary matters and such other jurisdiction in any county or counties as may be provided by law. In *Railway Co. v. O'Hara*, 48 Ohio St. at 354, 30 N.E. 958 (1891) this was interpreted to mean that the legislature had the power to regulate and add to the jurisdiction of the Probate Court.

In the *Cincinnati case*, supra, after the amendment of 1912, the court treated the clause "as may be provided by law" to mean that the legislature had the power to provide only the method for the exercise of the jurisdiction. It would seem, in the light of previous interpretation of the phrase "as may be provided by law" that if a change were intended in its meaning it would have been explicitly provided for by the framers of the Constitution. However this may be, it seems to be well settled in Ohio that the appellate jurisdiction of the Court of Appeals comes from the Constitution with which jurisdiction there can be no interference by the legislature or otherwise.

Next, the question arises whether the denial of the power of the Court of Appeals to grant more than one reversal on the weight of the evidence or to pass on the weight of the evidence after the trial court has granted one new trial on this ground is an invasion of appellate jurisdiction as conferred by the Constitution or merely a matter of procedure which it is conceded the General Assembly may regulate. "Jurisdiction has been defined: The power to hear and determine a cause; the authority by which judicial officers take cognizance of and decide them; the power of a court or judge to entertain an action, petition, or other proceedings; a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law.' 15 C.J. 723. While practice or procedure is 'The mode of proceeding by which a legal right is enforced; that which regulates the formal steps in an action or other judicial proceedings; course of procedure in courts; the form, manner, or order in which proceedings have been and are accustomed to be led; the form, manner, and order of conducting and carrying on suits or presentations in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts.' 40 C.J. 1312. Jurisdiction relates to the forum, court, or judge that may hear and determine a legal cause or controversy, while practice or procedure relates to the form or manner of conducting the suit." *Mahoning Valley R.R. Co. v. Santoro*, 93 Ohio St. at 56, 112 N.E. 190 (1915).

Considering what has previously been treated by the Supreme Court as an invasion of jurisdiction we find the court in *Cincinnati v. Balch*, supra, holding unconstitutional a statute which provided that civil cases which can be appealed from the municipal court of Cincinnati would be limited to cases involving three hundred dollars or more, Section 6, Art. IV was construed to mean that courts of appeal had appellate jurisdiction to review, affirm, modify or reverse *all* judgments of the courts of common pleas whereas the statute attempted to divest the court of power to pass on judgments of less than three hundred dollars. Similarly when the legislature attempted to increase the jurisdiction of the Court of Appeals by Section 12224 General Code providing that in all cases where the right to demand a jury trial did not exist an appeal might be taken from a judgment in a civil action, the court held that the right to appeal as set out in the Constitution was limited to chancery cases and that this couldn't be enlarged by any action of the legislature. *Wagner v. Armstrong*, 93 Ohio St. 443, 113 N.E. 397 (1915). To the same effect was the decision in *In re Hawke*, 107 Ohio St. 341, 140 N.E. 583 (1923), where Section 1709 General Code attempted to give right of appeal in disbarment proceedings.

In *Albertini v. Shaffer*, 15 Ohio App. 55, 32 C.C.N.S. 245 (1921), Judge Washburn treated Section 12270 General Code, providing that the petition in error shall be filed within 70 days after entry of final judgment or order, as depriving the Court of Appeals of jurisdiction if not complied with; further jurisdiction cannot be conferred on the Court of Appeals by appearance alone. He contends that while Art. IV, Section 6 confers jurisdiction on the Court of Appeals, still this power, giving effect to the phrase "as may be provided by law," is conditions on limitations which the legislature may provide. In *Craig v. Welby*, 104 Ohio St. 312, 136 N.E. 143 (1922), the Supreme Court treated the same statute as providing only for a method of the exercise of the jurisdiction, a matter of procedure as contrasted with matter of jurisdiction.

The court in *State ex rel. Medical Centre Co. v. Wallace*, 107 Ohio St. 557, 140 N.E. 305 (1923), held to be unconstitutional Section 1579-36 General Code, which provided in effect that no petition in error should be filed in actions of forcible entry and detention originating in the municipal court of Cleveland except on leave of the Court of Appeals. Here certainly no power was taken away from the Court of Appeals, but in a sense power was added *viz.*, to refuse to hear case on appeal. This seems to be somewhat removed from the *Cincinnati case*, supra, but a more evident illustration of the trend of the decisions

to restrict more and more the power of the legislature to infringe even indirectly on the appellate jurisdiction of the Court of Appeals is found in the cases of *Haas v. Mutual Life Insurance Co.*, 95 Ohio St. 137, 115 N.E. 1020 (1917), and *Commonwealth Oil Co. v. Turk*, 118 Ohio St. 273, 160 N.E. 856 (1928). The question involved was whether the right existed to appeal from the Superior Courts of Cincinnati and Cleveland directly to the Court of Appeals. It was contended that since Section 12224 General Code provided for appeal only from courts of Common Pleas, exclusion of the right to appeal from any other court resulted by implication. It was held in both cases that the right to appeal existed independent of any legislative provision and by analogy the same procedure as provided for by statute for appeals from the Common Pleas court should be followed. The basis for the contention that these cases are one step removed from the *Cincinnati case*, supra, rests on the fact that here no attempt was made on the part of the legislature to exclude cases arising in municipal court from appeal; rather by implication there seemed to be a legislative attempt to regulate the channel through which cases arising in the Municipal Court could reach the Court of Appeals, viz., by appeal first to the Court of Common Pleas, thence to the Court of Appeals. From this it could be argued that there was no interference with appellate jurisdiction but only a rule of procedure necessary to be followed to get into that court in like manner as commencement of proceedings within 70 days after entry of final order of judgment.

As suggested by Judge Wannamaker in *Mahoning Valley Railroad Co. v. Santoro*, supra, it would hardly be claimed that Section 11576 General Code providing grounds on which a new trial may be granted is a matter involving jurisdiction but rather relates to practice and procedure—merely a method of the exercise of the power. One of the grounds there provided is that the verdict is not sustained by sufficient evidence; this is used interchangeably with the term weight of the evidence. *Brittian v. Industrial Commission*, 95 Ohio St. 391, 115 N.E. 110 (1916). If this is treated as a matter of procedure where the trial court is concerned, why does it become a matter of jurisdiction when applied to the Court of Appeals? Further, even if grounds for a new trial are treated as matters of jurisdiction, it is within the power of the legislature to regulate them as the General Assembly is the sole source of jurisdiction of courts of common pleas, Article IV, Section 4 of the Constitution, *Allen v. Smith*, 84 Ohio St. 283, 95 N.E. 829 (1911). Hence it would follow that the legislature could abolish the right of the trial court to grant a new trial on the weight of the evidence; yet a

necessary result would be to deprive the Court of Appeals of the power to review on these grounds. Otherwise we would have the anomalous situation of a legislature without power to undo that which it originally could do, and this without constitutional intervention.

To substantiate its position, the court in the *Werner case*, *supra*, stated, in referring to the provision in the Constitution that concurrence of all the judges of the courts of appeal is necessary to grant a reversal on the weight of the evidence, "That provision of the Constitution connotes the fact that judges of the Court of Appeals under the Constitution have the right to pass on the weight of the evidence limited *only* that this shall be done by concurrence of all the judges (*Italics mine*). And yet the court by way of dicta through Judge Jones promulgated a rule of court that the Court of Appeals is without power to pass on the weight of the evidence unless a motion for new trial is made in the lower court. *Jacob Laub Baking Co. v. Middleton*, 118 Ohio St. 106, 160 N.E. 629 (1928). Further the litigant defeated a second time if once he has obtained a new trial on the weight of the evidence is precluded by virtue of section 11577 General Code from receiving a second trial on the same ground and yet according to the *Baking Co.* case, *supra*, if he did not ask for the second trial the court of appeals will not pass on the question. In *Majors v. The Cleveland Interurban R.R. Co.*, 127 Ohio St. 255, 187 N.E. 857 (1933), Judge Jones again by dicta, incorporated into the syllabus, however, stated that when there is a reversal in the court of appeals because of the failure of the trial court to direct a verdict, it is the duty of the Court of Appeals to enter final judgment. This result is based on Section 12272 General Code. It seems difficult to understand how limitation on number of reversals which Court of Appeals can give involves jurisdiction while power to enter final judgment is only a matter of procedure.

The decision of the *Werner case*, *supra*, represents the ever increasingly narrow interpretation of Article IV, Section 6 with reference to the phrase "as may be provided by law" with the corresponding limitation on the power of the legislature. If it is the fear that the legislature is encroaching on the judicial power conferred on the courts (Art. IV, Section 1) which prompts the court more and more to curtail any interference by the legislature, it would seem desirable to rest their decisions on this ground. The logical result of the trend of the decisions will necessarily be a crystallization of the rules of procedure and practice as applied to the court of appeals subject to change only by constitutional amendment, both the legislature and the courts being without power to make any alteration which changing conditions or expediency may demand.

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