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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

Jurisdiction

An original habeas corpus proceeding in the court of appeals[1] challenged the authority of the Ohio State Penitentiary warden to continue the petitioner's imprisonment. The petitioner who had been indicted for, convicted of, and sentenced for, armed robbery had been transferred from Columbus to the Lima State Hospital from which he had escaped and fled to Tennessee. Since the prisoner had been returned to Ohio without the formality of extradition, he charged that this fact made his detention in the Ohio penitentiary unlawful. The court denied the writ, relying upon a prior similar decision and a lower court holding that an unauthorized return to Ohio could not be shown to vitiate an original prosecution and conviction.[2]

The Ohio Code[3] authorizes a trial court in which a plea of not guilty by reason of insanity has been filed to commit the defendant to a mental hospital to remain under observation for a period not to exceed one month. A defendant who had filed such a plea sought release from the Toledo State Hospital on the grounds that the statute was unconstitutional and also that the trial court was without jurisdiction because the accused had been twice ordered committed by the court of probate and had on one occasion been found mentally ill. The writ was discharged by the court of appeals, and affirmed by the Supreme Court;[4] both holding that the trial court clearly had statutory jurisdiction and further that the statute is valid.

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1. Wood v. Alvis, 149 N.E.2d 21 (Ohio Ct. App. 1957).

2. The similar escapee-return situation was the subject of the decision in Wise v. State, 96 N.E.2d 786 (Ohio Ct. App. 1950). That decision in turn relied very heavily upon *Ex parte* James Camp, 7 Ohio N.P. 614, 8 Ohio Dec. 681 (Ohio C. P. 1896), involving the refusal to grant a discharge under a writ of habeas corpus to a person returned to Ohio under an irregular executive warrant for extradition and thereupon prosecuted and convicted of a felony. The court declared that there is no right of asylum as between the states for the benefit of a fugitive from justice. The opinion suggested that the holding would have been the same had the return to Ohio been by means of kidnapping.

3. OHIO REV. CODE § 2945.40.

4. *In re* Fisher, 167 Ohio St. 296, 148 N.E.2d 227 (1958). The court's opinion carefully distinguishes its former holding in State *ex rel.* Smilack v. Bushong, 159 Ohio St. 259, 111 N.E.2d 918 (1953), in which it affirmed a discharge from custody under a writ of habeas corpus when the trial court had summarily ordered commitment to the Lima State Hospital on suggestion of the prosecutor and against the strong objection of the defendant who had filed a plea of not guilty. In that case the court indicated the general validity of the statute but held that its specific application under the circumstances was a denial of due process of law.

Juvenile Jurisdiction

In a juvenile delinquency proceeding the Juvenile Court of Cuyahoga County found a minor to be delinquent, placed him on probation, and attempted to regulate his social contacts. On appeal, counsel for the delinquent contended that the decision was against the weight of the evidence, that inadmissible evidence had been received and that the constitutional right against self-incrimination had been infringed. The court of appeals, in affirming determined that a juvenile delinquency proceeding is not a criminal trial, and that the rules of civil procedure apply as nearly as possible — including the preponderance of the evidence rule. Since the proceeding is civil in nature, there is no violation of the provisions against self-incrimination because the testimony would not involve him in a criminal prosecution or relate to one.[5]

Other decisions applied the statutes relating to juvenile jurisdiction to adults. One statute prohibits conduct by adults, who "act in a way tending to cause delinquency in such child."[6] The parents of a 16-year-old girl actively participated in a plan to achieve her marriage by transporting her to another state and consenting to the marriage there. They were convicted of acting in a way tending to cause delinquency.[7] The Supreme Court indicated that the prosecution did not have to show an actual delinquency, only that the consenting to an under-age marriage would tend to cause the minor to commit an act of delinquency, *e.g.*, truancy from home or school.[8] Unlike the child charged with delinquency in the juvenile court, the adult being tried by that court is entitled to the constitutional protection against self-incrimination.[9] The basic statute[10] on this subject is fully applicable, including the privilege of the prosecutor to comment on the defendant's decision not to take the stand. The Supreme Court, in affirming a decision of the court of appeals,[11] held that the state in prosecuting an adult for "participation" in the

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5. State v. Shardell, 153 N.E.2d 510 (Ohio Ct. App. 1958). Since the trial judge struck the hearsay evidence from the record, there was no error and the judge had the training and experience to disregard incompetent evidence in the record when considering the merits.

6. OHIO REV. CODE § 2151.41.

7. State v. Gans, 168 Ohio St. 174, 151 N.E.2d 70 9 (1958).

8. OHIO REV. CODE § 2151.02 (C), (D).

9. State v. Parks, 105 Ohio App. 208, 152 N.E.2d 154 (1957).

10. OHIO REV. CODE § 2945.43.

11. State v. Miclau, 104 Ohio App. 347, 140 N.E.2d 596 (1957), *Aff'd*, 167 Ohio St. 38, 146 N.E.2d 293 (1957); See Comment, Survey of Ohio Law — 1957, 9 WEST. RES. L. REV. 303-04 (1958).

"delinquency of a minor" must establish beyond a reasonable doubt that there was some delinquency of the minor.[12]

State v. Meadows[13] presented a familiar problem of statutory definition of crimes: Does the "cutting and/or stabbing"[14] statute define only one crime with respect to a single series of acts or a single transaction? Meadows was indicted, tried and convicted on two counts: cutting and/or stabbing with intent to wound and cutting and/or stabbing with intent to kill. The conviction of the two separate offenses was sustained though both offenses are defined in the single statute.

An Ohio statute[15] requires anyone drilling or digging wells for hire to keep an accurate and careful "log" of each operation and file a copy with the State Division of Water. The defendant failed to file logs for a number of wells which he had drilled and he was prosecuted under the criminal penalty provisions of this state. The trial court held the statute unconstitutional on two grounds: (1) arbitrary classification; (2) the taking of valuable property without compensation and without due process of law in violation of the Constitutions of Ohio and the United States. This decision was reversed by the court of appeals[16] whose decision was affirmed by the Supreme Court.[17] The higher courts found that the statute makes a reasonable classification in distinguishing between well diggers or drillers for hire and all others and treat all persons in the "for hire" category equally. They further held that it is a reasonable exercise of the state's police power relative to the conservation of the water resources of the state.

Motor Vehicles and Traffic

Three decisions related to separate problems under the traffic laws. In one case the defendant was operating a trailer bearing Illinois license plates in the distribution of interstate shipments in the Cleveland area. This trailer was based in Cleveland and used for hauling from the main

12. State v. Miclau, 167 Ohio St. 38, 146 N.E.2d 293 (1957). Three members of the Supreme Court dissented from the decision of the court. Their position was essentially that an act of delinquency was in fact committed by the minor under the facts even though what she did was done at the request of the law enforcement officers and further that the decision of the majority was inconsistent with the legislative policy expressed in the statutes relating to juveniles.

Also the practical indirect affect of this decision is to permit a greatly liberalized conception of the defense of entrapment, as applied to acts in relation to a juvenile.

13. 105 Ohio App. 86, 148 N.E.2d 345 (1957).

14. OHIO REV. CODE § 2901.23.

15. OHIO REV. CODE § 1521.05.

16. State v. Martin, 105 Ohio App. 469, 152 N.E.2d 898 (1957).

17. State v. Martin, 168 Ohio St. 37, 151 N.E.2d 7 (1958).

terminal in Cleveland to outlying Ohio destinations. The court of appeals held the exemption and reciprocal provisions of the Code[18] inapplicable to this defendant since the Illinois "licensed" trailer was not properly licensed in Illinois.[19]

A construction of the "stop sign" statute[20] grew out of a prosecution for "traffic" manslaughter in which the trial court sustained defendant's motion to dismiss at the conclusion of the State's case, and the state appealed on questions of law. The court of appeals held[21] that the statute is not a right-of-way statute and that a violation of it begun by a failure to stop and yield the right of way is a continuing one as the violator continues through the intersection. Thus when the violator drives into the through street without stopping and strikes another vehicle which in turn strikes and kills a pedestrian, it is a jury question to determine whether the violation which has continued to the point of impact with the other car is a proximate cause of the death of the pedestrian.

Finally, a Supreme Court decision provides further clarification of the meaning of an "emergency vehicle,"[22] which is authorized by statute to ignore traffic control signals under stated conditions. The statutory definition extends to motor vehicles used by volunteer fireman responding to emergency calls in the fire department service. A volunteer fireman, observing all of the requirements of the statute, ignored a city traffic signal while driving to a place of assembly in response to a summons for emergency fire department service. He was arrested by city police and was convicted. Judgment was reversed by the court of appeals. On appeal, the Supreme Court affirmed the appellate decision and held that the definition of an emergency vehicle includes one operated by a volunteer fireman traveling in a properly identified vehicle to a designated assembly point from which emergency fire department service is to begin.[23]

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18. OHIO REV. CODE § 4503.36.

19. City of Cleveland v. Ryan, 106 Ohio App. 110, 148 N.E.2d 691 (1958). Another contention of the defendant was that another driver for the same interstate trucking line had been arrested under similar circumstances and had been found not guilty. This amounted to a construction of the statute, he thought, binding upon the court in similar cases. In rejecting this contention the court's opinion asserted that the principle of stare decisis is not to be followed blindly particularly in criminal cases where justice requires otherwise. The court's opinion also contains a very startling statement: "The principle of res judicata has no application to the criminal law." The context indicates that it intended by this to assert merely that each criminal prosecution is a separate and distinct case from every other prosecution.

20. OHIO REV. CODE § 4511.43.

21. State v. Knadler, 105 Ohio App. 135, 151 N.E.2d 763 (1957).

22. OHIO REV. CODE § 4511.01(D).

23. City of Canton v. Snyder, 168 Ohio St. 69, 151 N.E.2d 15 (1958).

Forgery

The Ohio offense[24] of forgery includes the uttering of a check as a false instrument, knowing it to be false, with the intent to defraud. In a case arising under this offense the defendant signed a check as the maker with his own name upon a drawee bank with which he had no account. He was convicted in the trial court on a plea of guilty to the crime of forgery. The court of appeals[25] took the position that forgery includes only the signing of a name other than that of the signer. The case was certified because of a conflict[26] with the point of view of another court of appeals, and the Supreme Court[27] held that the act in question constituted forgery within the terms of the Ohio statute; *i.e.*, signing his own name to a check drawn on a bank with which he had no account constituted the false making of a check within the meaning of the statute.

Habitual Criminal

In *State ex rel. Daley v. Myers*,[28] the accused, who had been sentenced to the workhouse three times previously following convictions for intoxication, was convictd a fourth time. The trial court sentenced him under the so-called "habitual offender" statute.[29] The accused asserted that the statute, providing for a sentence of one to three years for the fourth offense, was unconstitutional because it failed to differentiate between offenses which did and did not involve moral turpitude.[30] The argument was rejected because there was no "moral turpitude" requirement in the section under which this sentence was imposed; its only requirements be-

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24. OHIO REV. CODE § 2913.01.

25. The court of appeals relied on its prior decision in State *ex rel* Bailey v. Henderson, 76 Ohio App. 547, 63 N.E.2d 830 (1945).

26. In State v. Havens, 91 Ohio App. 578, 109 N.E.2d 48 (1951), the opinion indicates that the Ohio offense of forgery goes beyond the common law conception of forgery as the alteration of another's signature.

27. *In re* Clemons, 168 Ohio St. 83, 151 N.E.2d 553 (1958).

28. 153 N.E.2d 531 (Ohio Ct. App. 1958).

29. OHIO REV. CODE § 753.07.

30. Under the better known "cumulative sentence" sections of the Criminal Code (OHIO REV. CODE § 2949.33-.34) an identical sentence may be imposed on the 4th conviction for a misdemeanor, but here the prior misdemeanors must involve moral turpitude on each occasion. At least one court has held that conviction of intoxication does not involve moral turpitude within the meaning of this section. State v. Deer, 129 N.E.2d 667 (Ohio C. P. 1955).

The statute under which Daley was imprisoned in the principal case does not mention moral turpitude. Its emphasis is on three previous workhouse sentences for violation of Ohio criminal statutes or municipal ordinances.

ing "three times convicted, sentenced and imprisoned in any workhouse for violation of law or ordinance."

Blue Law

The "Ohio Sunday closing" statute[31] has been under attack in the court of appeals in recent years.[32] A series of current court of appeals decisions sustained its validity. These cases were consolidated for argument before the Ohio Supreme Court, and the validity of the statute was upheld.[33] The Court considered this statute a valid police power statute which is neither arbitrary, capricious nor unreasonable, nor is it a statute for the enforcement or promulgation of religious observances. It seems the exception made in the statute for "work of necessity or charity" is not an unreasonable classification.

Public Safety and Morals

Lower court decisions have sustained prosecutions for violations of police power legislation enacted in the interest of public safety and morals. In *State v. Rothschild*[34] a conviction was sustained under the statute[35] which prohibits the exhibition of motion pictures which teach or advocate the violation of any criminal laws of the state. A municipal court conviction for the violation of a city ordinance which prohibited the sale of obscene publications or pictures was affirmed in *City of Cincinnati v. King*.[36]

Testimonial Immunity

The Ohio Supreme Court[37] upheld convictions of witnesses who refused to testify before the Ohio Un-American Activities Commission during 1952, relying upon the "Fifth" Amendment. These prosecutions were brought under the "immunity bath" provisions of the Code[38] which attempts to bar all possible penalties which a state might impose as a result of the testimony given and makes it a misdemeanor to refuse to testify as to all matters "pertinent to the matter under inquiry." Upon

31. OHIO REV. CODE § 3773.24.

32. See Survey of Ohio Law-1957, 9 WEST. RES. L. REV. (1958).

33. State v. Kidd, 167 Ohio St. 521, 150 N.E.2d 413 (1958), appeal dismissed for want of a substantial federal question, 358 U.S. 131 (1958).

34. 149 N.E.2d 57 (Ohio C. P. 1958). Specifically the film exhibited advocated the practice of "nudism" which is prohibited by OHIO REV. CODE § 2905.31, as a misdemeanor.

35. OHIO REV. CODE § 2905.342 (B).

36. 152 N.E.2d 23 (Ohio C. P. 1958).

37. State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956).

38. OHIO REV. CODE § 2917.42.

appeal to the Supreme Court of the United States, that Court vacated the Ohio judgments and remanded the causes "for consideration" in the light of the *Sweezy*[39] and *Watkins*[40] cases. In 1958 the Supreme Court of Ohio reconsidered its decisions, concluded that the named cases did not materially affect its decision and adhered to its former judgment.[41] The final chapter in this litigation has not been written since an appeal has been taken from the reinstated judgments. A decision may be expected during the 1958 Term of the United States Supreme Court.[42]

Municipal Legislation

The appellate courts considered the validity of municipal legislation in two subject matter areas. Two courts of appeals' decisions upheld the validity of ordinances which prescribed punishment as a misdemeanor for ownership[43] or possession[44] of pinball machines. The respective trial courts, for different reasons, agreed on issuing injunctions against the enforcement of the ordinances. One of these cases was appealed to the Supreme Court of Ohio.[45] It sustained the validity of the ordinance, holding that it could not be considered invalid merely because it prohibits rather than regulates. Enacted within the police power, the prohibition against coin operated pin games may stand even though the only inducement offered to a player is the amusement arising from the play.

Concealed Weapons

An arrest and conviction for carrying concealed weapon in violation of an ordinance of the City of Cleveland resulted in a decision which clearly delimits the authority of municipal legislative bodies to define

39. Sweezy v. New Hampshire, 354 U.S. 234 (1957), concerned principally with the matter of pertinency in state investigations.

40. Watkins v. United States, 354 U.S. 178 (1957), dealing with some aspects of pertinency in questions asked by congressional investigating committee.

41. State v. Morgan, 167 Ohio St. 295, 147 N.E.2d 847 (1958).

42. Morgan v. State of Ohio, — U. S. —, 79 S. Ct. 99 (1958), transferring the case to the appellate docket and setting it for argument.

43. Feak v. City of Toledo, 104 Ohio App. 304, 148 N.E.2d 703 (1957), appeal dismissed for want of a debatable constitutional question, 167 Ohio St. 167 (1957), *cert. denied*, 357 U.S. 905 (1958). The court of appeals asserted that it was not deciding any constitutional issue because it had not been presented, merely reversed the trial court on its factual determination and rendered final judgment for the city.

44. The issue of constitutionality was directly raised in Benjamin v. City of Columbus, 104 Ohio App. 295, 148 N.E.2d 695 (1957), *aff'd*, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied* 357 U.S. 904 (1958).

45. Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957). Since the City of Columbus seems to have had the more severe ordinance, this decision appears controlling also on the validity of the "ownership" type of ordinance involved in the City of Toledo case.

punishment for violations of local police "regulations." A Supreme Court decision[46] has stated that the "test is whether the ordinance permits or licenses that which the statute forbids and prohibits and vice versa." A City of Cleveland ordinance had made the carrying of concealed weapons a misdemeanor, whereas a state statute prescribed the same offense as a felony. The court of appeals,[47] with the Supreme Court affirming,[48] however, held that a municipal ordinance which makes the carrying of concealed weapons a misdemeanor is in conflict with a general statutory enactment making the identical offense a felony and is therefore invalid. This position is based upon a construction of the Ohio Constitution[49] which authorizes municipalities to adopt and enforce within their limits only such local police regulations as are not in conflict with general laws.

In the future a municipality must in prescribing a penalty for violation of ordinance which prohibits in the identical manner of an existing state statute impose the same penalty that the state law imposes. In practical effect this excludes from the municipal regulations field, the imposition of penalties for identical offenses which are felonies under state law.

Arrest

The defendant was prosecuted for driving a motor vehicle while under the influence of intoxicating liquor. Under the Ohio Code[50] an arrest may not be made on Sunday except on a charge of treason, felony, or breach of the peace. The defendant was arrested on Sunday and went on trial the following Monday; the proper affidavit was prepared and warrant was issued on Monday. Defendant responded to this warrant and entered a plea of not guilty. The court of appeals held that the Monday affidavit and warrant cured the infirmity, if any, resulting from the Sunday arrest.[51]

Another court of appeals decision clearly defines the authority of a police officer to arrest without a warrant in misdemeanor cases. A city policeman in Columbus was called to a residential address. Although there was no breach of peace of any kind in progress, there was an

46. Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

47. City of Cleveland v. Betts 148 N.E.2d 708 (Ohio Ct. App. 1958).

48. City of Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1959). This case is discussed here because it concludes the litigation and the decision is too important to hold until the next annual survey issue.

49. Art. XVIII, § 3.

50. OHIO REV. CODE §§ 2331.12, 2331.13.

51. City of Piqua v. Collett, 151 N.E.2d 770 (Ohio Ct. App. 1956).

active dispute over ownership of an automobile. Upon examination of the papers concerning the car, the officer ordered the defendant to hand over the papers under threat of arrest for disorderly conduct. Defendant refused, and she was then forcibly arrested and charged with resisting an officer. Her conviction, however, was reversed.[52] Since no misdemeanor was in progress when the officer arrived, he could not arrest without a warrant. Further, when the officer undertook to settle the disputed claim, the defendant could forcibly resist attempts to make her comply and this display of force could not be used as a basis for charging her with resisting an officer.[53] The accused had been charged under an affidavit with first degree murder, and upon his formal written demand he had been granted a preliminary hearing before a municipal judge who then ordered him held for the grand jury. Thereupon accused demanded another hearing in common pleas court. The common pleas court also ordered him recommitted to custody. An appeal from the common pleas decision however, was dismissed by the court of appeals.[54] While the language of the statute seems clear,[55] as indicated in the court's opinion, the provision for the preliminary examination is applicable only before indictment, and an appeal from the adverse decision of an examining court becomes moot after an indictment has been returned.

An interesting construction of the Ohio extradition statute[56] arose from a habeas corpus hearing. The requistion of the demanding governor did not state in the words of the Ohio statute that the accused was present in the demanding state at the time of commission of an alleged crime. It did, however, recite that the accused had been charged with breaking and entering committed in the demanding state. A mandatory habeas corpus hearing[57] was granted the accused, and the court discharged him because of lack of authority of the governor to issue the warrant for his extradition.[58]

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52. City of Columbus v. Holmes, 152 N.E.2d 301 (Ohio Ct. App. 1958).

53. The court stated that a mere suspicion or belief that a misdemeanor has been committed will not authorize an arrest without a warrant citing OHIO REV. CODE § 4505.04 *et seq,* as being a part of the Ohio Code of Criminal Procedure, incorporating into Ohio law the general rule throughout the country. This is undoubtedly a typographic error since the code sections cited are not in the Criminal Code but rather refer to certificates of title for motor vehicles. Earlier in its opinion the court correctly refers to § 2935.03, as applying to an officer arresting without a warrant, and it is this section which incorporates into Ohio law the general rule throughout the country.

54. Howell v. Keiter, 104 Ohio App. 28, 146 N.E.2d 452 (1957).

55. OHIO REV. CODE § 2937.34. One of the early clauses in this section reads: "charged with an offense for which he has not been indicted . . ."

56. OHIO REV. CODE § 2963.03.

57. OHIO REV. CODE § 2963.09.

58. *In re* McMeans, 146 N.E.2d 159, 161 (Ohio C. P. 1957). The attitude of the

The demanding governor's requisition complied with the federal statute on extradition which only requires that a copy of the charge against the person who has fled the demanding state be authenticated by the governor of the state from whence the accused has fled.[59] In the principal case the requisition appears to have been in the usual form, and in a similar situation the Supreme Court of the United States declared that it was the duty of the governor of the asylum state to issue his warrant when confronted with authenticated copies of the charges (indictment in this case) against the accused.[60]

The action of the trial court in the principal case also seems contrary to an 1878 decision of the Supreme Court of Ohio.[61] In this early case the court indicated that any conflict between a federal statute and an Ohio statute must be resolved in favor of the former. Further, in passing upon the sufficiency of the requisition, the opinion states: "We are not to be governed by the rules of construction applicable to special pleading, but the rules applicable to the construction of statutes . . ." A later court of appeals opinion indicated that extradition documents which depart from Ohio statutory requirements but comply with the federal statute are adequate.[62] Under a similar statutory provision in Massachusetts substantial compliance is sufficient to justify issuance of the governor's warrant.[63]

The attitude of the court is conveyed by the following quotation from the opinion:

> This Court feels that the requirements of Section 2963.03 of the Revised Code of Ohio are mandatory and unless there is a compliance with the provisions of Section 2963.03 that the Governor of Ohio has no authority in law to recognize a demand from another state for the extradition of a person charged with crime in such other state unless the demand from such other state meets the mandatory requirements of 2963.03 of the Revised Code of Ohio.

There is not a hint in the report of this case that a federal statute is paramount.

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59. 62 Stat. § 822 (1948), 18 U.S.C. § 3182 (1952).

60. Marbles v. Creecy, 215 U.S. 63, 67 (1909).

There is not a hint in the report of this case that a federal statute is paramount.

61. *Ex parte* Sheldon, 34 Ohio St. 319, 323 (1878).

62. *In re* Sanders, 31 N.E.2d 246, 251 (Ohio Ct. App. 1937).

63. *In re* Baker, 310 Mass. 724, 39 N.E.2d 762 (1942). The Massachusetts statute said: "shall allege that the person demanded was present in the demanding state at the time of the commission of the alleged crime . . . ."

A court of appeals decision applied the long established rule in Ohio[64] that venue in a criminal case may be established by all the facts and circumstances of a case without necessity for proof in express terms.[65]

Another decision[66] applied the rule that a statement of criminal charge in the words of the section of the Revised Code describing the offense is sufficient.[67] A paragraph in the syllabus emphasized that this ruling was to be expected where the defendant failed to request a bill of particulars.

Giordano v. State[68] considers the question whether an indictment charging a person with being an habitual criminal must charge that the prior felony convictions resulted in imprisonment. Despite judicial authority[69] holding under a former version of this statute[70] that imprisonment must be alleged, the present statute requires only that convictions be alleged.[71]

Pleas

A habeas corpus proceeding raised the question whether the accused's attorney may in his presence change the plea of "not guilty" to "guilty." Counsel made the request for change of pleas in the midst of trial, it was accepted by the court, and accused was sentenced. At no time did accused personally plead guilty nor did the court ask the accused whether the statement of the attorney was his personal plea. There appears to be no statutory answer to this question in Ohio, and the court of appeals decided that the greater weight of authority holds that a plea of guilty when entered by counsel has the same force and effect as a plea personally entered by the accused when the latter is present in court and

64. State v. Dickerson, 77 Ohio St. 34, 82 N.E. 969 (1907).

65. State v. Neff, 104 Ohio App. 289, 148 N.E.2d 236 (1957).

66. State v. Parks, 105 Ohio App. 208, 152 N.E.2d 154 (1957). While the prosecution's statement was contained in an affidavit charging the offense of acting in a way tending to cause the delinquence of a minor, the OHIO REV. CODE § 2941.35 renders the specific statutes applicable to indictments or information also applicable to affidavits.

67. OHIO REV. CODE § 2941.05.

68. 148 N.E.2d 56 (Ohio Ct. App. 1957).

69. Blackburn v. State, 50 Ohio St. 428, 36 N.E. 18 (1893). The statute under consideration in this case (82 Ohio Laws 237) required "imprisoned in some penal institution for felony."

70. The report of the case is not clear on the exact nature of the sentence, though it appears that he was sentenced under what is now OHIO REV. CODE § 2961.11.

71. The allegation of three listed felony convictions indicated an objective of the prosecutor to bring defendant's fourth felony conviction within the scope of § 2961.12 which carries mandatory life imprisonment. The principal case was a habeas corpus proceeding and the decision was that accused was not being unlawfully detained in the Ohio penitentiary.

when from the circumstances it appears that the accused understood what was being done and acquiesced in the charge.[72]

An interesting court of appeals decision[73] considered the effect of a plea of double jeopardy by a person who had pleaded not guilty to an unsigned affidavit charging him with driving an automobile while under the influence of intoxicating liquor. He had had a partial hearing prior to the filing of a proper affidavit to which a plea of not guilty was again filed. During the second trial the municipal judge suddenly granted a motion to quash on the ground that the arrest was illegal and discharged the accused. The prosecutor appealed on questions of law. The court of appeals found that the initial proceeding without proper affidavit was a nullity and therefore did not put accused in jeopardy and that the prosecution did not commence until the filing of a proper affidavit by the police officer. Thus, the motion to quash was improperly granted and the court of appeals reversed and remanded the cause for further proceedings.[74]

An accused who had been tried for murder while perpetrating a robbery and been acquitted was later tried on an indictment charging armed robbery growing out of the same transaction or situation. He was found guilty on this indictment but obtained a new trial. Upon the new trial the accused sought to file a plea of res judicata. The accused insisted that the only issue for the jury in the robbery trial was the same issue which was presented to the jury in the murder trial — alibi. The majority opinion in overruling the plea of res judicata asserted that its decision was controlled by a leading double jeopardy decision in Ohio,[75] and denied that the doctrine of res judicata had any application.[76] The minority opinion points out that alibi was the sole defense in both cases, and therefore that the decision in the murder case was res judicata to the single issue of fact in dispute in the robbery case. The widely differing points of view expressed in the court's opinions, coupled with a lack of authoritative Ohio[77] judicial decisions on the point, raises a question

72. *In re* Morelli, 148 N.E.2d 96 (Ohio Ct. App. 1956).

73. State v. Zdovc, 106 Ohio App. 481, 151 N.E.2d 672 (1958).

74. The court of appeals stated that the motion to quash was granted because the trial court was of the opinion it did not have jurisdiction because of an unauthorized arrest. The court does not decide the arrest issue because it holds that the jurisdiction of the court is predicated upon a proper charge and the presence of the accused in the court. Whether the arrest was proper or not was therefore immaterial. A second point was made that the plea of not guilty waived all defects which might be expected by a motion to quash. See OHIO REV. CODE § 2941.59.

75. Duvall v. State, 111 Ohio St. 657, 146 N.E.90 (1924).

76. State v. Orth, Ohio App. 35, 153 N.E.2d 395 (1957).

77. See concurring opinion in State v. Martin, 154 Ohio St. 539, 96 N.E.2d 776 (1951).

of whether the defense of res judicata has any established place in Ohio criminal procedure.

Article I, Section 10 of the Ohio Constitution contains an express guaranty of "a speedy public trial . . . in the county in which the offense is alleged to have been committed." Under the caption of "acquittal without trial," the statutes[78] provide for the discharge of persons held too long in jail or under bail after being formally charged with an offense. A discharge for "unreasonable delay" in bringing the accused to trial is a statutory bar[79] to further prosecution for the same offense. The statutory provisions however, do not apply to a person who is being held in the Ohio penitentiary for another crime. Two cases involved attempted prosecutions of persons charged with criminal offenses prior to and all during their incarceration in the Ohio penitentiary after their release and return to the county of the alleged offenses under "detainers." These cases illustrate the vitality of the constitutional requirement of a speedy trial. The periods of imprisonment during which the affidavits had been outstanding were nine years and one month, and twenty-eight months respectively. When the defendants were brought to trial, defense counsel moved to dismiss the indictments for denial of the constitutional right to a speedy trial. The motions were granted.[80] The court pointed out that incarceration in a penal institution is not a satisfactory excuse for delay in prosecution of outstanding criminal charges. Recognizing that the statutes governing dismissals are inapplicable to persons confined in the penitentiary under prior convictions, the court took notice of the time fixed by the legislature in these statutes in determining whether the constitutional provision had been violated. Since the time in each case exceeded the maximum permitted by the statutes, it concluded that both accused had been denied a speedy trial.

Another significant point in the court's opinion is the rejection of the state's argument that the constitutional right is waived if the defendant has knowledge of a criminal charge and fails to demand a speedy trial.[81] The court concluded that there is no obligation on the accused to demand a speedy trial. It is the duty of the state to provide such trial, consistent with the rights of the defendant.[82]

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78. OHIO REV. CODE §§ 2945.71, 2945.72.

79. OHIO REV. CODE § 2945.73.

80. State v. Milner, 149 N.E.2d 189 (Ohio C.P. 1958).

81. Such an argument could not be applicable to the facts of these cases because the police merely filed affidavits with the court and failed to prosecute the criminal actions to a point at which accused could have demanded a trial.

82. In the leading case of Shafer v. State, 43 Ohio App. 493, 183 N.E. 774 (1932), the court indicated that it is the duty of the state to provide for a speedy trial and there is no obligation on the accused to demand it. Accused had been indicted three

The Ohio statute[83] directs the trial judge to question the jury under oath or affirmation on the voire dire. In a recent case the judge apparently asked no questions though he required the jury to be sworn, permitted questions by the prosecution, and solicited questions from defense counsel. The latter stated that he had none but made a point of reserving all of his client's constitutional and statutory rights in the impaneling of the jury. The court of appeals determined[84] that the failure or error in not asking questions of the jury in the principal case was one of omission and not prejudicial. It was the duty of defendant or his counsel to call the court's attention specifically to the nature of his objections. His general reservation of constitutional and statutory rights of the defendant was considered insufficient to take advantage of the court's error of omission.

Three cases dealt with the alleged improper conduct of the prosecution during the course of trials. In the first case,[85] the prejudicial conduct charged was the prosecutor's having the decedent's wife present at the trial table during the murder trial of the accused. There was no showing that the selection of the wife to sit at the state's table was in bad faith; there was no irregularity arising from her presence there. Another point brought out in this trial was the activities of a stranger who had tried to observe the jury in its deliberation and had also conferred with the defense counsel. The matter came to the attention of the trial judge who took steps to prevent a recurrence of the stranger's activities. The court of appeals held that neither of the foregoing incidents prevented the accused from having a fair trial.

The second case[86] concerned the prosecutor's conduct during the direct examination of a witness in a robbery prosecution. The witness had apparently failed to pick the defendant out in the court room, and the prosecutor asked the witness to look at a specific table. This was not misconduct though a leading question, when prosecutor stated that the wit-

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times, and all three cases were set for trial in 1930; accused pleaded guilty to one of the charges and was sentenced and incarcerated in the penitentiary. Eighteen months later accused moved to dismiss the other two indictments, and there was no request that they be set for trial. The court of common pleas heard the applications and overruled them without prejudice to defendant's right to request a date for trial. On appeal the court of appeals determined that the judgment of the trial court that a delay of 18 months was not a denial of a speedy trial was not manifestly wrong. It indicated however, that further delay after attention directed to the matter would constitute a denial of constitutional rights.

83. OHIO REV. CODE § 2945.27. The 1957 amendment to the section required the administration of the oath or affirmation to the jury prior to the voire dire questioning.

84. City of Columbus v. Vurris, 151 N.E.2d 690 (Ohio Ct. App. 1958).

85. State v. Bryant, 105 Ohio App. 452, 152 N.E.2d 678 (1957).

86. State v. Waters, 105 Ohio App. 397, 152 N.E.2d 818 (1957).

ness had looked either once or twice before at the accused without recognizing him. The defense then attempted unsuccessfully to impeach the verdict by requesting subpoena of the entire jury to testify on the matter of the identification of the accused.

The third case[87] involved the right of the prosecution to comment on the failure of an adult to testify, the adult being prosecuted for acting in a way tending to cause the delinquency of a minor. Such a prosecution of the adult is a criminal proceeding and the accused may not be compelled to give testimony which will either incriminate or tend to incriminate him. This failure may be commented on by the prosecutor and taken into consideration along with all the other facts and circumstances in evidence in determining the accused's guilt or innocence.

Another case[88] determined that comment of the trial judge about the court's decisions in cases in which an accused has submitted to alcohol tests and the tests have shown a content below that making a person under the influence of alcohol was prejudicial under the circumstances. The accused had refused to take such test and the court had instructed the jury that he had a constitutional right to refuse. The court of appeals felt that the language used might well have been interpreted by the jury as a suggestion or an opinion by the trial courts as to the guilt or innocence of the accused.

Evidence

A number of appellate cases presented a cross-section of special problems in criminal evidence. Defendant was charged with selling liquor to an intoxicated person. It was held proper[89] to admit in evidence the plea of guilty to a charge of intoxication by the person to whom the accused was alleged to have sold the intoxicating liquor.

In one case judicial notice of geographic facts assisted the prosecution in establishing venue.[90] In another case the introduction of evidence of a bottle sold by the defendant was allowed without proof of its contents where it was labelled as gin, sealed with a federal revenue stamp and was imprinted by the Ohio State Department of Liquor.[91]

A defendant who seeks to claim an alibi is required by statute to serve written notice of such proposal on the prosecutor. This requirement continues as a mandatory one.[92]

87. State v. Parks, 105 Ohio App. 208, 152 N.E.2d 454 (1958).
88. City of Columbus v. Mothersbaugh, 104 Ohio App. 147 N.E.2d 132 (1957).
89. State v. Morello, 154 N.E.2d 83 (Ohio Ct. App. 1958).
90. State v. Neff, 104 Ohio App. 289, 148 N.E.2d 236 (1957).
91. City of Dayton v. Winton, 105 Ohio App. 510, 147 N.E.2d 510 (1947).
92. State v. Payne, 104 Ohio App. 410, 149 N.E.2d 583 (1957).

The problem of sufficient proof of the corpus delicti of crime to render admissible confessions or admissions alleged to have been made by the defendant is a continuing one. In prosecutions for failing to stop after a motor vehicle accident[93] and also for bribery,[94] evidence of the accused's statements were properly admitted when state witnesses narrated facts and statements which indicated the crimes charged had been committed. In the latter case the trial court correctly admitted "verbal facts" of police officers as both evidence of the corpus delicti and as statements against the defendant's interest.

Another case illustrates the rule that a defendant in a criminal case who claims to be within the exception to a rule prohibiting an act must offer testimony that he comes within the exception[95] to secure the consideration of the exception as to him.

Another interesting case grew out of an effort to convict an accused charged with practicing optometry without a license. It appeared that the accused had been properly licensed at one time, and there was some very confusing evidence about his license having been revoked. Because of the criminal law rule that the fact of revocation must be established beyond a reasonable doubt, the presumption of innocence continued and a judgment of conviction was accordingly reversed.[96]

Instructions

The Ohio Code of Criminal Procedure requires the trial court, in charging the jury, to state the meaning of the presumption of innocence, and read the statutory definition of reasonable doubt.[97] While it is permissible for the court to further explain the meaning of reasonable doubt, the additional explanation must be consistent with the statute. Indulgency in such descriptive terms as "strong probabilities of guilty" is not consistent with the statute and is reversible error.[98]

The Ohio Code of Criminal Procedure[99] also refers to proof of defendant's motive when that matter is material. A Supreme Court decision neatly draws the line on the necessity of instructions on motive in homicide. Where there is direct evidence of a deliberate killing without provocation, and the determination of guilt or innocence dependent upon the credibility of witnesses to the act of killing, the trial court is not re-

93. City of Columbus v. Glover, 154 N.E.2d 91 (Ohio Ct. App. 1958).
94. State v. Moore, 150 N.E.2d 323 (Ohio Ct. App. 1958).
95. State v. Casper, 106 Ohio App. 176, 154 N.E.2d 9 (1958).
96. State v. Barhorst, 106 Ohio App. 335, 153 N.E.2d 514 (1958).
97. OHIO REV. CODE § 2945.04.
98. State v. Stubbs, 153 N.E.2d 214 (Ohio Ct. App. 1958).
99. OHIO REV. CODE § 2945.59.

quired to charge on the question of motive. If, on the other hand, in a homicide case, the evidence is purely circumstantial and there is no direct identification of the killer, evidence of motive is very important, and when such evidence is offered, it is the duty of the trial court to instruct the jury that it should take the evidence on that question into consideration together with all the other evidence and circumstances, in determining the guilt or innocence of the accused.[100]

The Code of Criminal Procedure requires the trial judge to inform the jury that it is the exclusive judge of all questions of fact,[101] and it is an axiomatic rule that a judge cannot make a comment upon the evidence in the giving of written instructions. However, this does not forbid the trial judge from advising the jury in an instruction that the statements by the accused have established a fact as a matter of law. This is illustrated by a prosecution for possession and sale of narcotics. The first count of the indictment charged unlawful possession, and the defendant denied possession but admitted sufficient facts to establish his possession as a matter of law. It was proper under these circumstances for the court to instruct the jury that the defendant admitted doing the acts set forth in the indictment.[102]

In a felony prosecution the trial court gave an instruction that the defense of alibi should not be considered unless it is established by a preponderance of the evidence, though overall the burden of proof was still on the state if the alibi defense was not proved. This was not entirely consistent with rule in Ohio, that the evidence of alibi may be considered when properly presented by the defense.[103] It appeared from the record, however, that no statutory notice of alibi had been filed and also that the record was totally devoid of any evidence — not even a scintilla — of alibi during the time of the alleged offense. Under these circumstances, the charge need not have been given at all, and it could not, as given, prejudice the defendant, though erroneous, because there was no evidence before the jury on the subject of alibi.[104]

State v. Taylor[105] applies the Ohio rule that it is the duty of defense counsel to call to the court's attention any errors of *omission* and if this is not done, the omission may not form the basis of error proceedings. In a prosecution for second degree murder, the court did charge on the

100. State v. Lancaster, 167 Ohio St. 391, 149 N.E.2d 157 (1958).

101. OHIO REV. CODE § 2945.11.

102. State v. Lightfoot, 149 N.E.2d 173 (Ohio Ct. App. 1956).

103. Walters v. State, 39 Ohio St. 215 (1883). The court indicated that a trial court's charge on alibi should conform to the holding in this leading case.

104. State v. Payne, 104 Ohio App. 410, 149 N.E.2d 583 (1957). The statutory notice to which the court refers is set out in OHIO REV. CODE § 2945.58.

105. State v. Taylor, 104 Ohio App. 422, 148 N.E.2d 507 (1957).

"reasonable man theory" but failed to fully develop the distinctions between voluntary and involuntary manslaughter. There was a conviction of manslaughter. The court of appeals held that a general exception did not reach this error of omission.[106]

Probation, Sentence and Parole

The Ohio Code[107] provides that the judge or magistrate shall immediately inquire into the conduct of the defendant prior to terminating a probation and imposing sentence. The Supreme Court of Ohio determined that this does not mean a "judicial inquiry," either a formal trial or even any notice of a hearing on termination of probation, other than that given to the defendant by his arrest as a suspected probation violator. This inquiry may be summary and informal so long as it is an inquiry which shows a sufficient range of investigation and sufficient consideration of evidence of violation of the terms of probation to indicate an exercise of sound judicial discretion.[108] In this much litigated case, the defendant had been convicted of felonious assault, fined and placed on probation for three years on condition that he not violate any laws of the state during that period.[109]

In another probation revocation case the trial court acted favorably upon the prosecutor's motion which charged the defendant with contempt of court, perjury in a criminal case, and violation of the express terms of the probation by going from the county without the express consent of the court. The Supreme Court affirmed the decision of the trial court revoking the probation.[110] Its *per curiam* opinion relied exclusively on the *Theisen* case, discussed above, in which the court announced the doctrine that revocation of probation is within the sound judicial discretion of the trial court.

Sentence

The defendant had been charged with kidnapping, an offense for which the maximum penalty is death, but the victim had been liberated unharmed, and the defendant had pleaded guilty. The trial judge gave

106. The court indicates that the failure to fully charge on manslaughter was perhaps prejudicial to the state but not to the accused because of the entry of the general exception only.

107. OHIO REV. CODE § 2951.09.

108. State v. Theisen, 167 Ohio St. 119, 146 N.E.2d 865 (1957).

109. This case was previously before the Supreme Court on the trial judge's authority to impose a fine, suspend imprisonment and grant probation. State v. Theisen, 165 Ohio St. 313, 135 N.E.2d 392 (1956).

110. State v. Luera, 167 Ohio St. 125, 146 N.E.2d 870 (1957).

him the minimum sentence. After imprisonment the defendant sought release by writ of habeas corpus on the ground that the court lacked jurisdiction to impose sentence because there was no written waiver of jury trial and furthermore that the sentence was void because not imposed by a three judge court. On both points, the court of appeals held against the petitioner. The plea of guilty removed any question of the right to jury trial, and on the sentence, since the trial judge gave the accused the most lenient punishment possible, there was no deprivation of constitutional or legal rights.[111]

In another habeas corpus proceeding the petitioner contended that the sentence was void because the trial judge had sentenced him for one year for a narcotic violation wherein the penalty was either a felony or misdemeanor. The court applied[112] the "saving" statute[113] to this sentence, determined that the judge intended to sentence for a felony, and construed the term as general as provided by the statute.

A defendant had pleaded guilty to a charge of sodomy. The trial judge acting under the statute[114] concerning mentally deficient offenders, found him to be a mentally deficient person, and ordered him committed to Lima State Hospital. A writ of habeas corpus was denied[115] in the court of appeals, that court being of the opinion that the trial judge had jurisdiction to sentence; that the matters raised by petitioner could be appropriately raised on appeal. The Supreme Court affirmed[116] on the ground that the matters raised could have been determined on appeal and that the writ cannot be a substitute for the appeal.

Two cases deal with the jurisdiction of a trial judge to suspend the license of a motor vehicle operator under the Driver's License Law.[117] An operator questioned the authority of the trial judge to suspend his general driving license for fifteen months and to permit him to drive within the scope of his employment only. This was more liberal than the judge needed to be, and the operator had not been prejudiced by this lenient order. The judgment was affirmed[118] on statutory authority

111. State *ex rel.* Novack v. Eckle, 148 N.E.2d 529 (Ohio Ct. App. 1956).

112. State *ex rel.* Nawson v. Eckle, 148 N.E.2d 260 (Ohio Ct. App. 1957).

113. OHIO REV. CODE § 5145.01, providing that a sentence to the penitentiary for a definite term is not void but shall be considered as a minimum-maximum for the particular felony.

114. OHIO REV. CODE § 2947.25.

115. *In re* Latham, 153 N.E.2d 459 (Ohio Ct. App. 1958).

116. *In re* Latham, 168 Ohio St. 14, 150 N.E.2d 857 (1958), relying upon the decision of *In re* Harley, 165 Ohio St. 48, 146 N.E.2d 121 (1957), in which the writ's unavailability because of the right to appeal was discussed.

117. OHIO REV. CODE § 4507.16.

118. State v. Sparks, 151 N.E.2d 242 (Ohio Ct. App. 1957).

for misdemeanors[119] and the inherent power of a court to suspend and sentence and impose conditions.

The second case decided[120] that the statutory authority to suspend a driver's license for failing to stop and identify oneself at the scene of the accident applied to a trial judge sentencing for a conviction under a city "hitskip" ordinance. The statute uses the clause "when required by law to do so." The court holds that the word "law" in this statute[121] includes municipal ordinances.

An error was made on the notice of final release on parole indicating that the release applied to a sentence for which the term had not yet expired. This error was indicated by the fact that the correct offense to which the parole related appears on the official minutes of the Pardon and Parole Commission. The defendant's petition for release was denied because the official minutes of the Commission control over the certificate of release issued to the defendant.[122]

Criminal Appeals

A court of appeals decision emphasized the additional statutory requirement for appeals from juvenile court decisions convicting adults. The Juvenile Court Act[123] does not provide an appeal as a matter of right similar to appeals from criminal judgments of common pleas courts. Appeals may not be taken to the court of appeals except for good cause shown upon the filing of a motion for leave to appeal and notice to the prosecuting attorney. There are two ways of getting into the court of appeals: allowance of the motion by the court; the showing of good cause preliminarily to appealing. This reason, among others, was a basis for affirming a judgment of a juvenile court.[124]

Defendants filed appeals from orders of the trial court overruling a plea in abatement in a criminal case. The appeals were dismissed because the orders were not appealable.[125] The section of the Code for Criminal Procedure[126] which provides for a review of "judgment or final order" in a criminal case contemplates a final order as defined in the

119. OHIO REV. CODE § 2947.13.

120. City of Columbus v. Beery, 104 Ohio App. 344, 149 N.E.2d 22 (1957).

121. OHIO REV. CODE § 4507.16(E).

122. Trusley v. Eckle, 149 N.E.2d 575 (Ohio Ct. App. 1956). The court pointed out that the release could not have applied to the case indicated on the notice because the sentence had not expired on that offense and there was no jurisdiction to grant a final release.

123. OHIO REV. CODE § 2151.52.

124. State v. Parks, 105 Ohio App. 208, 152 N.E.2d 154 (1957).

125. State v. Roberts, 106 Ohio App. 30, 153 N.E.2d 203 (1957).

126. OHIO REV. CODE § 2953.02.

Revised Code.[127] This definition states that the final order must affect a substantial right which in effect determines the action, and prevents a judgment in favor of the party seeking relief. The overruling of a plea in abatement does neither, nor does the overruling of a motion to dismiss. Orders overruling an accused's demurrer to an affidavit and overruling a motion to dismiss the affidavit are not final orders from which appeals may be taken.[128]

The problem of properly perfecting a criminal appeal keeps recurring. The statute[129] states that appeals are instituted by filing a notice of appeal with the court rendering the judgment or order and with a copy in the appellate court where leave must be obtained. A defendant had filed notice with the common pleas court from which he was appealing but did not file a copy of the notice in the court of appeals. The notice was filed with the trial court within six days of judgment. No notice was required to the court of appeals.[130] This filing is only necessary when leave to appeal to the court of appeals must be obtained, *i.e.*, when the notice is filed with the trial court more than thirty days after sentence and judgment.[131]

The Code[132] requires that the brief of the appellant shall be filed with the transcript and shall contain the assignment of error relied on in the appeal. This is a directory provision and it is considered good practice to entertain requests for extensions of time. However, the failure to file the brief without any showing of good cause or excuse and without any request for additional time or for the court to fix a time for filing justifies a dismissal of the appeal for failure to file assignment of error and briefs in time.[133] An example of a proper waiver of time required for filing an assignment of error, bill of exceptions, and brief, occurred when there was an inadvertent delay by court officials in docketing an appeal in the court of appeals after a timely notice of appeal and a precipe for a transcript of docket and journal entries had been filed in the trial court.[134]

The original petitions of habeas corpus before the Supreme Court illustrate the impossibility of using the writ as a substitute for or as a

127. OHIO REV. CODE § 2505.02. The court indicated that this definition is applicable in both civil and criminal cases.

128. State v. Holbrook, 152 N.E.2d 897 (Ohio Ct. App. 1957).

129. OHIO REV. CODE § 2953.04.

130. City of Columbus v. Turner, 167 Ohio St. 541, 150 N.E.2d 412 (1958).

131. OHIO REV. CODE § 2953.05.

132. OHIO REV. CODE § 2953.04.

133. State v. Waymire, 105 Ohio App. 177, 152 N.E.2d 686 (1957).

134. State v. Payne, 149 N.E.2d 579 (Ohio Ct. App. 1957). The court overruled a motion to dismiss the appeal and permitted late filing.