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Criminal Law and Procedure

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time of the decision, does purport to handle the problem, but since it was drafted prior to the decision, does not do so very clearly. The new code expressly states that in a derivative action the plaintiff must allege that he has sought redress from the directors or was excused from this demand by the situation.[17] The comment of the drafting committee states that this means that an appeal to the shareholders is not necessary.[18] If the committee's interpretation of the statute is to be followed, as it should be, in the ordinary case where there has been no express ratification, an appeal to the shareholders is not a prerequisite to a derivative action. But where there has been an express ratification, the *Claman* case, which sets forth a substantive rule, would probably control over the statute, which is phrased in procedural terms.

HUGH A. ROSS

CRIMINAL LAW AND PROCEDURE

Jurisdiction

Several cases dealt with jurisdictional matters and the power of the trial court to maintain the respect for and the dignity of the court.

An interesting question arose concerning the continuing power of the court of common pleas to commit a delinquent child to the Boys' Industrial School, upon recommendation of a grand jury, without necessity for an indictment, under Ohio Revised Code section 5141.16. In reversing an order of commitment by the Common Pleas Court of Lucas County to which the case had been transferred by the Juvenile Court of Lucas County, the Supreme Court held that Ohio Revised Code section 5141.16 is entirely inconsistent with and necessarily repealed by the subsequently enacted provisions of Ohio Revised Code sections 2151.25 and 2151.26.[1] The implication from this decision is that the court of common pleas in case of a referral from the juvenile court, has only the jurisdiction to dispose of the youth's case which it would have for a like act committed by an adult.

A court of appeals[2] decision was concerned with the proper juvenile court to hear a case of alleged acts of neglect of minor children by an adult. The appeal was from a decision of the Juvenile Court of Crawford County, overruling a motion made, on a special appearance, to dismiss the complaint for lack of jurisdiction. It was alleged that the neglect occurred in Crawford County. In affirming the order of the lower court, the court

[17] OHIO REV. CODE § 2307.311.

[18] OFFICIAL COMMENT AND FINAL REPORT OF THE OHIO STATE BAR ASSN. CORP. LAW COMMITTEE (1955). The Comment is published in BALDWIN'S OHIO REV. CODE ANN. (1955 Supp.).

of appeals held that the juvenile court of the county in which acts constituting neglect or dependency of the minor child occur has jurisdiction over complaints concerning the child. It is therefore immaterial whether the minor child or parent are nonresidents of the county in which the complaint is filed.

Another court of appeals[3] case outlines one of the circumstances, at least, under which a court of equity may indirectly aid in the enforcement of the criminal law. While there is a general rule that an injunction will not lie to prevent or punish the commission of a crime, the court holds that this rule in no way limits the power of a court of equity to intervene in a situation where such courts are accustomed to granting permanent or perpetual injunctions. Thus an action to abate a nuisance under Ohio Revised Code section 4301.73, declaring any place where intoxicating liquor or beer is illegally sold or kept to be a common nuisance, may be maintained in the appropriate court of equity, and it is immaterial that an ensuing injunction has the incidental affect of restraining the commission of crime. Since injunction lies to abate such a nuisance, violation of the order may be punished by contempt proceedings where there is proof of what the law denominates a nuisance as distinguished from a mere crime.

A per curiam opinion of the Supreme Court,[4] adopting the opinion of the court below, affirmed a court of appeals judgment which had sustained a judgment of the common pleas court finding persons guilty of contempt of court for violating an oral order of the trial court against the taking of any photographs in a forthcoming scheduled court session. The court of appeals[5] had previously declared that the court while in session is under the complete control of the judge whose directions, reasonably necessary to maintain order and prevent disturbance and distraction, must be obeyed. It also rejected any contention that a court in enforcing reasonable courtroom decorum, and prohibiting photographs, interferes with the freedom of the press, and held the order a reasonable one. It indicated that such an order enforcing proper court room decorum and directed expressly to a person in attendance at a judicial proceeding, need not be journalized to be of full legal effect.

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[1] State v. Worden, 162 Ohio St. 593, 124 N.E.2d 817 (1955). A dissenting opinion by Judge Bell contended that the juvenile judge divested himself of authority to commit to the correctional school by his act of recognizing to the court of common pleas, and in effect transferred that authority to the court of common pleas provided the Grand Jury so recommended, under § 5141.16, REV. CODE, asserting that this section is not inconsistent with OHIO REV. CODE §§ 2151.25-26.

[2] *In re* Belk, 97 Ohio App. 114, 123 N.E.2d 757 (1954).

[3] State v. Denny's Place, 98 Ohio App. 351, 129 N.E.2d 532 (1954).

[4] State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954).

[5] State v. Clifford, 97 Ohio App. 1, 118 N.E.2d 853 (1954).

Construction of Statutes Defining Crimes

Many statutes defining specific crimes came before the courts for construction during the reported period.

The Supreme Court determined that operation of an automobile to avoid the prohibitions of Ohio Revised Code section 4511.20 must be in the same manner as would be followed by a reasonably prudent person under similar circumstances, and that a person charged with "automobile homicide" under Ohio Revised Code section 4511.18, to avoid the penalties of that section, must have so operated his automobile, since section 4511.20 is a law applying to the "use or regulation of traffic."[6]

The crime of rape and the crime of kidnapping for the purpose of committing rape (Ohio Revised Code section 2901.31) are not the same offense, and a conviction of the former cannot be pleaded in a bar of a prosecution for the latter.[7] The court pointed out that it is not necessary for a conviction of the crime of rape that the state present any evidence of the kidnapping of the person raped.

When in the course of a prosecution for violation of Ohio Revised Code section 2901.23 (maliciously shooting at another person with intent . . .) the defendant admits shooting at the prosecuting witness, the element of malice is presumed from such an intentional act on the part of the accused.[8]

An essential element of the case against an accused charged with embezzlement of public funds is that he received public money by virtue of his office.[9]

In interpreting Ohio Revised Code section 2949.34, providing for commitment as an habitual offender a person three times previously convicted of misdemeanors involving moral turpitude, one court[10] held that the offenses of intoxication and driving while intoxicated were not misdemeanors involving moral turpitude.

The giving of a postdated check is the delivery of a check within the meaning of Ohio Revised Code section 115.23, making it a criminal offense to deliver any check with intent to defraud when the drawer at the time has insufficient funds or credit with the depository on which the check was drawn.[11]

Ohio Revised Code section 2903.01, defining the crime of assault upon a child under sixteen by a person over the age of eighteen, was amended

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[6] State v. Martin, 164 Ohio St. 54, 128 N.E.2d 7 (1955).

[7] State v. Terlecki, 128 N.E.2d 212 (Ohio App. 1952).

[8] State v. Wilson, 127 N.E.2d 426 (Ohio App. 1952).

[9] State v. Kearns, 127 N.E.2d 541 (Ohio Com. Pl. 1955).

[10] State v. Deer, 129 N.E.2d 667 (Ohio Com. Pl. 1955).

[11] State v. DeNicola, 163 Ohio St. 140, 126 N.E.2d 62 (1955).

effective January 1, 1946, by the elimination of the word "female" from the phraseology describing the victim of the assault. This was held to constitute an enlargement of the scope of the offense, and an indictment was held good[12] which charged the defendant with an assault upon a male child under the age of sixteen.

Ohio Revised Code section 2145.41, defining the offense of "tending to cause delinquency" in a child was sustained against a charge of voidness for uncertainty.[13] The court of appeals held that this statute describes the offense with reasonable certainty, and concluded that a lack of uniformity among courts in the construction of the statute does not render the statute void for lack of uniform operation.

Ohio Revised Code section 4549.05 forbids the malicious removal without consent of the owner of enumerated parts and portions of an automobile, and in conclusion further prohibits the removal of "any other appurtenance or any part attached to said motor vehicle which is necessary in" its use. The court of appeals[14] held that the quoted phraseology was not limited to a similar device to those enumerated before, and that it includes any object vitally necessary to the operation of the automobile, including the keys to the ignition and gas tank. Therefore an affidavit charging removal of such keys charged an offense under the statute.[15]

One court of appeals[16] held that an injunction was improperly granted against the seizure and confiscation of certain pinball machines. These machines all granted the customer a right to replay without charge upon the attaining of a set score. Such a machine is a gambling device within the meaning of Ohio Revised Code sections 2915.04 and 2915.15.

Another court of appeals decision held that the word "whoever" in a municipal ordinance prohibiting games of chance referred only to natural persons and corporations and that an unincorported association could not be charged with the offense of operating a game of change — bingo.[17]

The court also discussed the comparable language of Ohio Revised Code section 2915.19, with the implication that the word "whoever" used therein should be similarly construed.[18]

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[12] State v. Rudy, 162 Ohio St. 362, 123 N.E.2d 426 (1954).

[13] State v. Coterel, 97 Ohio App. 48, 123 N.E.2d 438 (1953).

[14] City of Cleveland Heights v. Friedman, 127 N.E.2d 425 (Ohio App. 1955).

[15] OHIO REV. CODE § 4549.05.

[16] Westerhaus, Inc. v. City of Cincinnati, 127 N.E.2d 412 (Ohio App. 1955), *rehearing and motion to certify on ground of conflict denied,* 128 N.E.2d 477 (Ohio App. 1955).

[17] Village of Bridgeport v. Fraternal Order of Eagles, 97 Ohio App. 245, 125 N.E.2d 202 (1954).

[18] OHIO REV. CODE § 1.02 (A) gives a general definition of the word "whoever,"

CRIMINAL PROCEDURE

Arrest

While the issue arose in a civil action for damages for false arrest and imprisonment, the decision of the Supreme Court in *Johnson v. Reddy*[19] has several important implications relative to criminal procedure. The main question presented by the case involves the extent to which a police officer in one community may rely upon the statements and requests of an officer in another community or another state concerning the arrest of a person sought by the latter. The specific case was presented by a person who was thought to be wanted by the police of another state and therefore called for a construction of Ohio Revised Code section 2963.12 of the Uniform Extradition Act. Identical problems could arise from requests originating within the state of Ohio and be presented under Ohio Revised Code sections 2935.04 and 2935.05. Two conclusions may be drawn from the decision: (1) Where a police office makes an arrest without a warrant at the request of another police agency, all reasonable doubts concerning the reasonableness of the information on which the arresting officer acts should be resolved in his favor. (2) When the police agency of another state requests an investigation of a person by a police agency of Ohio which request identifies the subject in major details and, after investigation and report to it, requests the arrest of the person investigated, the officer making the arrest without a warrant does so upon reasonable information and is not liable in tort if the detention subsequently turns out to be unwarrranted.

Extradition

The one case[20] in this field presented two conclusions: (1) A petition for extradition filed with the governor of the demanding state which complies with neither the law of the demanding state nor Ohio but which complies with the requirements of the federal statute, is sufficient. (2) Ohio Revised Code section 2963.17 vesting discretion in the Governor of Ohio to surrender or hold for trial one who has been charged with crime in this state is for the benefit of the State of Ohio and not the fugitive who

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and it includes "all persons, natural and artificial; partners; principles, agents, and employees; and all officials, public or private."

It would appear that a proper method of charging violations of the gambling laws by unincorporated associations would be by naming the managers or officials and the agents who actually participated in the operation of the device or devices as the defendants.

[19] 163 Ohio St. 347, 126 N.E.2d 911 (1955).

[20] State v. Smith, 127 N.E.2d 633 (Ohio App. 1953).

cannot be prejudiced by any error which might have been committed by the governor in this respect.

Bail

Two court of appeals decisions were concerned with the jurisdiction of that court to admit to bail a person convicted of second degree murder, pending decision of the court upon final hearing. In *State v. Hawkins*[21] the court was of the opinion that the punishment of one convicted of murder in the second degree is not imprisonment for life but that such imprisonment is only until legally released.[22] The court recognized that there may be some confusion and contradictions in the several statutes involving sentences, sentencing and parole, but concluded that any ambiguities and contradictions must be resolved most favorably to the imprisoned person, holding that the statutory provisions for suspension of execution and admission to bail rest in the sound discretion of the judge in the light of all the facts presented and the administration of justice, a strong consideration "being that an accused should not suffer the penalty for crime until by the due process of law it is determined that he has had a fair trial free from prejudicial error," and admitting the defendant to bail.

The other decision denied bail to a person convicted of second degree murder, pending an appeal on questions of law.[23] Relying on the provisions of Ohio Revised Code section 2949.02, the court held that the statutory law of Ohio prohibits either the trial court or the reviewing court to which an appeal is taken from extending the privilege of bail to one convicted of second degree murder pending appeal. It did not feel that the provisions of Revised Code section 5145.01, prohibiting a trial court from fixing the duration or limits of a sentence to the penitentiary of one convicted of a felony, with two exceptions, were applicable to the specific problem.

There appear to be conflicts in the provisions of the various statutes applicable to the problem of admission to bail after conviction of second degree murder, and there is sharp conflict in the decisions of these two courts as to the discretionary power to admit the convicted person to bail pending the appeal.

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[21] 97 Ohio App. 477, 124 N.E.2d 453 (1954).

[22] OHIO REV. CODE § 5145.01 provides that the court in imposing sentence for felonies, except treason and murder in the first degree, shall make such sentences general and not fixed or limited in their duration, with all terms of imprisonment in the penitentiary being ended in the manner provided by law (meaning, the law governing paroles and releases).

[23] State v. Sheppard, 97 Ohio App. 489, 123 N.E.2d 544 (1955).

Affidavits, Indictments, Informations

Two court of appeals decisions were concerned with minor problems of pleading to an affidavit. One such problem concerned the proper method of attacking a factual variance in the affidavit. When the affidavit charged operation by a gasoline engine powered truck, and the evidence showed an oil burning engine, and the mode of attack was a demurrer, the demurrer was overruled. While the affidavit would have been subject to a motion to quash, the demurrer did not reach the claimed defect because the affidavit as a whole continued to charge the same thing.[24] The other case involved the mechanics of amending an affidavit. The affidavit had been amended in the lower court without verification by the individuals preferring the charges. This was held to be an unauthorized act inasmuch as there is no provision in the Ohio statutes for the amendment of an affidavit.[25] In effect the court says that the only way to secure the affect of an amendment, is to file a new verified affidavit in the form required.

One trial court opinion discussed the necessary allegations of an indictment for embezzlement to stand against a demurrer, and upheld a demurrer because the indictment failed to allege the official capacity of the defendant and his receipt of the money in question by virtue of his office.[26] Subsequently another indictment was prepared charging the official character of the accused and receipt of public moneys, using very largely the statutory definition. This was supplemented on motion of the defendant for a bill of particulars, and the indictment was sustained against a demurrer.[27]

Consolidation of offenses charged by separate indictments rests in the sound discretion of the trial court, and it was held not error to order consolidation for trial of the offense of trespass and that of damaging a fence.[28]

Will evidence be received to vitiate an indictment? This question was raised by a plea in abatement, presenting the assertion that there was no competent evidence before the grand jury. The plea was overruled[29]

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[24] City of Cleveland v. Antonio, 124 N.E.2d 846 (Ohio App. 1955). The court indicates that a motion to quash would be an accepted method of attack, and cited OHIO REV. CODE § 2941.59, to the effect that accused waived the varience by filing his demurrer.

[25] City of Ironton v. Bundy, 129 N.E.2d 831 (Ohio App. 1954). The court reasons that criminal procedure is statutory, and, in the absence of statutory authority to amend an affidavit, no such authority exists. Statutory authority does exist for the amendment of indictments and informations. OHIO REV. CODE § 2941.30.

[26] State v. Kearns, 127 N.E.2d 541 (Ohio Com. Pl. 1955).

[27] State v. Kearns, 129 N.E.2d 547 (Ohio Com. Pl. 1955).

[28] State v. Brown 128 N.E.2d 179 (Ohio App. 1954).

[29] State v. Selby, 126 N.E.2d 606 (Ohio Com. Pl. 1955).

with the comment that an indictment of the grand jury regular upon its face is conclusively presumed to have in its support sufficient evidence to justify the action of the grand jury. The accused is not entitled to know the evidence before the grand jury.

The case of *State v. Kearns*[30] was before the trial court on another intermediate matter, namely the right of the defendant to have a bill of particulars. The court strongly affirmed the right of the defendant to have a bill of particulars under Revised Code section 2941.07. This bill must contain something over and above the mere essentials of the averments necessary to state an offense, and the defendant is entitled to a statement of the ultimate facts upon which the state expects to rely in establishing its case, and the state is limited in its proof to the indictment and the matters specified in the bill.

Pre-trial Inspection of State's Written Evidence

In *State v. Potts*[31] the trial court denied defendant's motion to inspect any written matter or other evidence that the prosecutor had and expected to use in the trial. This motion was directed toward the procuring of a confession for inspection prior to trial. It was held that defendant was not entitled to such inspection.[32]

Trial Proceedings

General

The decision of the court of appeals includes the rulings on the more than a score of alleged trial errors in the celebrated *Sheppard* case.[33] Discussion of these various rulings will be omitted, however, from this article because of the pending appeal in the Supreme Court of Ohio.[34]

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[30] 126 N.E.2d 607 (Ohio Com. Pl. 1955).

[31] 124 N.E.2d 180 (Ohio App. 1953).

[32] The court of appeals relied upon the decision in State v. Yeoman, 112 Ohio St. 214, 147 N.E. 3 (1925), wherein the Supreme Court held that the prosecutor could not be compelled to submit documentary evidence prior to trial. That court found that OHIO REV. CODE § 2317.33 (O.G.C. § 11552) requiring inspection and copy applied only to civil proceedings, and that REV. CODE § 2945.46 (O.G.C. § 13444-6) made civil procedure applicable to criminal procedure only with reference to compelling the attendance and testimony of witnesses, their examination, the administering of oaths and affirmations, and proceedings for contempt to enforce the remedies and protect the rights of parties.

[33] State v. Sheppard, 128 N.E.2d 471 (Ohio App. 1955).

[34] 29 OHIO BAR 35 (1956). The Supreme Court granted leave to appeal (January 11, 1956). On the same day the Court ordered the dismissal of the appeal as a matter of right for want of any debatable constitutional question. State v. Sheppard, 164 Ohio St. 428 (1956).

It is clear that the Chief Justice of the Supreme Court of Ohio has authority to assign any judge of the court of common pleas to any county to hold court therein. In addition to this authority by assignment, the court of appeals[35] has held that the constitution vests a common pleas judge with authority to preside in each and every county in the state, and that this is self-executing. Therefore, a common pleas judge presiding in a county other than the one in which he was elected or appointed acts in a de jure capacity, even without formal assignment by the Chief Justice.

Pleas

Two decisions involved the affect of pleading in a particular manner. In *State v. Evola*[36] the defendants had been granted the privilege of withdrawing their pleas of guilty and re-entering pleas of not guilty, these having been journalized. It was held that the trial court lacked authority to vacate this journal entry and restore prior pleas of guilty without the consent of the defendants made in open court. In the other case[37] it was held that a plea of "guilty to homicide generally" is synonymous with a plea of guilty to murder vesting the trial judge with authority to hear the cause and pronounce sentence without the necessity of a formal waiver of jury trial by the defendant. The plea of guilty waives the right to a jury trial. The application for a writ of habeas corpus was accordingly denied.

The Public's Right to a Public Trial in Criminal Cases

The unusual case of *E. W. Scripps Co. v. Fulton*[38] decided several very novel questions. The defendant in a felony prosecution had requested that the public be excluded from the trial. This request was granted, and all members of the public including the press were excluded for the duration of the trial of the case of *State v. Baker* (the felony prosecution). The issue for the public was raised by an original action in prohibition in the court of appeals. The court of appeals held that the relators as members of the public had a right to maintain the action. On the merits the court held that Article 1, section 10 of the Ohio Constitution does not guarantee the

[35] State v. Powers, 129 N.E.2d 653 (Ohio App. 1954).

[36] State v. Evola, 130 N.E.2d 166 (Ohio App. 1955).

[37] State v. Eckle, 130 N.E.2d 157 (Ohio App. 1954).

[38] 125 N.E.2d 896 (Ohio App. 1955). The court distinguished its holding in State v. Clifford, 97 Ohio App. 1, 118 N.E.2d 853 (1954), and the following quotation is relevant: "The judge in exercising his complete control of the proceedings may exclude those whose conduct is of a disturbing nature, or whose presence is likely to interfere with the administration of justice as well as making such orders of exclusion as will protect the public health, the public morals and the public safety. With these limitations it is the duty of the trial judge to afford both the state and the defendant a trial in 'open court.'"

defendant a private trial as against the public and that the defendant cannot by a written waiver of public trial secure a trial hidden from public view. Finally, under the circumstances of this case, total exclusion at the request of the defendant was without legal foundation; under such circumstances it is the duty of the trial judge to afford both the state and the defendant a trial in "open court."

Judicial Comment During the Trial

Two cases dealt with the propriety of comment by the trial judge during the course of the trial. In *State v. Lawrence*[39] the trial court repeatedly interrupted defense counsel while conducting the direct examination of his witnesses in a trial before the judge without a jury. The Supreme Court determined that the entire atmosphere of the trial as shown by the record fell far short of the requirements of the law and ordered a retrial.

In the other case[40] the jury returned to the court room and asked the trial judge to summarize the testimony of a witness on a specific point. The trial judge gave his recollection of the testimony orally in response to the question. It was held that the trial judge has such power to summarize at the request of the jury in a criminal case. Also in this case the trial judge discovered that he had submitted an incorrect form of a guilty verdict at the time the jury retired. Upon discovery of this mistake he substituted a corrected form. This was held proper.

Scope of Cross Examination

One case[41] illustrates the extreme importance of allowing the greatest breadth in the defense cross-examination of the witnesses for the prosecution. The accused was being tried for unarmed robbery, and the victim and the accused were the only direct witnesses to the circumstances surrounding defendant's possession of the article allegedly stolen. The record showed a consistency of ruling against efforts of defense counsel to impeach the credibility of the prosecuting witness. It was held that this was a denial of the right of full and fair cross examination. The questions asked and refused were directed toward determining the witness's habits of sobriety, condition of sobriety at the time of alleged robbery, mental health, associations, similar accusations and habits in general. These were all considered

[39] State v. Lawrence, 162 Ohio St. 412, 123 N.E.2d 271 (1954). The concurring opinion of Judge Lamneck has this comment: "It is not proper for a court, in a criminal case, to intervene when counsel is examining a witness on direct examination and before such direct examination has been concluded to cross-examine such witness on the assumption he is not telling the truth."

[40] State v. Kollar, 128 N.E.2d 669 (Ohio App. 1952). OHIO REV. CODE § 2315.06 so provides in the Code of Civil Procedure, but the rule in the principal case is derived from judicial precedent.

[41] State v. Browning, 98 Ohio App. 8, 128 N.E.2d 173 (1954).

pertinent as reflecting on his credibility, and the questions should have been permitted.

Bill of Exceptions

A court of appeals decision was concerned with whether a post-trial document, namely a pre-sentence probation department report, should be made a part of the bill of exceptions. It was held that there was no legal right to have the report made a part of the bill[42] where it had not been introduced in evidence.

Evidence

It is competent as a rule to show the refusal of the defendant to submit to intoxication tests.[43] This becomes very important in traffic code violations where the charge is driving while intoxicated or while under the influence of intoxicating liquor. The Supreme Court has held, however, that comment on this refusal is improper where the defendant has refused to submit unless his own physician is present at the examination when there is no showing that physician is unavailable, the refusal being a reasonable one.[44]

State v. Gordon[45] applied the rule that error in the admission of evidence is not ground for reversal unless it affirmatively appears that the admission of such evidence prejudiced the defendant.

Another court of appeals decision[46] applied the rule that a person cannot be convicted of an offense on circumstantial evidence unless the circumstances are inconsistent with innocence; the circumstances must be proved and must all point in the same direction, and together must be irreconcilable with any reasonable hypothesis other than that of guilty.

Instructions

Ohio Revised Code section 2945.83(D) prohibits reversal for a misdirection of the jury unless the accused was or may have been prejudiced thereby. This rule was observed in a case involving the procurement of credit by giving false statements wherein the jury found the value to be $250 where the judge had read the former statute which called for a smaller amount but which was in other respects the same as the law subsequent to the amendment[47] increasing the minimum amount for a felony.

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[42] State v. Weed, 129 N.E.2d 648 (Ohio App. 1954).

[43] City of Columbus v. Waters, 124 N.E.2d 841 (Ohio Com. Pl. 1954), on appeal from a conviction in Municipal Court.

[44] City of Columbus v. Mullins, 162 Ohio St. 419, 123 N.E.2d 422 (1954).

[45] 124 N.E.2d 167 (Ohio App. 1955).

[46] City of Cleveland v. Coleman, 127 N.E.2d 420 (Ohio App. 1955).

[47] State v. Kollar, 128 N.E.2d 669 (Ohio App. 1952).

Where the court was not requested to give any charges before argument, or to give additional charges at the close of the general charge, it may not be charged with error for any omission[48] it may inadvertently make.

State v. George[49] raised a question concerning the time at which the requested charges should be given. It was held that the only requirement of the law is that the general charge fully and completely instruct the jury as to the law applicable to the evidence presented. There is no mandatory duty upon the court to give any instruction to the jury before argument in criminal cases. Also it is not error to refuse to give the special requests of a defendant where the court instructed the jury on the subject matter contained in the special requests in its general charge.

A court of appeals case enforced the familiar rule that the trial court must charge on the lesser included offenses under a charge of first degree murder and also on self-defense and accidental homicide where there is evidence on these issues.[50]

Several questions relative to instructions on the matter of punishment were raised in *State v. Meyer*[51] wherein the defendant was convicted of first degree murder without recommendation of mercy. The trial court had failed to charge that in determining the question of guilt the jury should not consider punishment but that punishment rests with the judge, except as to first degre murder, but there had been no request to charge on this point. Also the trial court may have committed a technical error in explaining in some detail the function and power of the executive department in modifying punishment by pardon or commutation and parole and in answering the jury's question relative to eligibility for parole of one convicted of second degree murder, but the Supreme Court felt that there was nothing prejudicial in this requiring a reversal.

Sentence

Accused was convicted after pleading not guilty by reason of insanity and then being committed to Lima State Hospital and reported back as sane, on his plea of guilty to a violation of Revised Code section 2303.01. He was then immediately sentenced to the Ohio Penitentiary, without the reference required by Ohio Revised Code section 2947.25 which states that the trial court "must" refer such a person for psychiatric examination where convicted of violating a number of statutes, including section 2903.01. On

[48] State v. Brown, 128 N.E.2d 179 (Ohio App. 1954).

[49] 128 N.E.2d 145 (Ohio App. 1953).

[50] State v. Bednarik, 126 N.E.2d 823 (Ohio App. 1955).

[51] 163 Ohio St. 279, 126 N.E.2d 585 (1955). Two of the judges dissented on the question of prejudice in the matter of the charge on punishment.

an original writ of habeas corpus the court of appeals[52] held that the reference for psychiatric treatment after conviction and before sentence is mandatory and that the court is without jurisdiction to sentence until this has been done.

Criminal Appeals

Under Ohio Revised Code section 2953.05 an appeal may be filed after 30 days from sentence and judgment only by leave of the court or two of the judges thereof. It is necessary that a defendant make a showing of clear right for leave to appeal before it will be granted. In the absence of such showing the application will be denied. The court has the widest discretion in granting or refusing the appeal.[53]

The Supreme Court has consistently held that the writ of habeas corpus cannot be substituted for the appeal where the committing court had jurisdiction of the subject matter and the person.[54]

State v. Benarik,[55] previously discussed as to its merits under the topic of instructions, is one of those rare cases in which leave to appeal has been granted. The verdict was returned in this case on March 18, 1947. In 1953 defendant was unsuccessful before the Supreme Court in an original writ of habeas corpus, and his successful petition for leave to appeal was filed on January 22, 1954, after several previously unsuccessful applications for leave to appeal had been overruled.

In *State v. Sheppard*[56] the court of appeals denied a motion to certify its decision denying an application for bail because the order refusing bail pending trial on the merits is interlocutory in character and cannot be reviewed by direct appeal.

When the court of appeals determines that a verdict is against the weight of the evidence, the Supreme Court is not required to and ordinarily

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[52] *In re* Henry, 97 Ohio App. 64, 123 N.E.2d 672 (1954). The judgment of the court discharged the petitioner from the custody of the prison warden and delivered him to the custody of the sheriff of Hamilton County with directions to return him to the court of common pleas for further proceedings according to law. This judgment was affirmed by the Supreme Court in *Ex parte* Henry, 162 Ohio St. 62, 120 N.E.2d 588 (1954). It agreed that the conviction was lawful but the sentence void, and therefore the petitioner was not entitled to absolute freedom.

[53] State v. Kramer, 70 Ohio L. Abs. 97, 127 N.E.2d 61 (1953). See also Poppa v. Wanamaker, 129 N.E.2d 764, 767 (Ohio App. 1954).

[54] *In re* Kramer, 163 Ohio St. 510, 127 N.E.2d 367 (1955); Bednarik v. State, 159 Ohio St. 596, 112 N.E.2d 817 (1953).

[55] State v. Bednarik, 123 N.E.2d 31 (Ohio App. 1954). The defendant had failed to file notice of appeal in the trial court and with the prosecutor as required by law, so the court of appeals granted defendant leave to amend his motion for leave to appeal by complying with OHIO REV. CODE §§ 2953.05 and 2953.06.

[56] 97 Ohio App. 493, 124 N.E.2d 730 (1955).