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Criminal Law and Procedure

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ground of the case and the principles involved were discussed in some detail in last year's Survey.[7] The fallacy inherent in the majority opinion is the assumption that there are only two possible positions for the court to take. One is that mandatory cumulative voting must be given maximum effect in guarantying minority representation and thus any form of classification is prohibited by the provision for mandatory voting.[8] The other position is that the mandatory provision does not insure minority representation, but merely establishes it in the absence of a classified board. The Supreme Court adopted the latter position and upheld the action of the corporation. It is submitted that there is a third position which the law can and should take, i.e., that both statutes should be given effect, and corporations should be permitted to classify the board, thus reducing the minority's right of representation, as long as the right of the minority is not completely abolished as it was in this case. This third position was the one adopted by the court of appeals, by the able dissent of Chief Justice Weygandt, and by the new Corporation Code.[9]

Another interesting case on voting control is *Whiting v. Bryant.*[10] The case is discussed in some detail elsewhere in this Survey.[11] It is important because of the dictum to the effect that a shareholder owes a duty to the corporation and to the other shareholders to vote his shares for the best interests of the group as a whole, and not for selfish motives. This language indicates the broadening scope of the fiduciary duty owed to a minority shareholder by a majority shareholder.[12] The case is also a perfect illustration of the adaptability of the trust device as an instrument of corporate control tailored to fit a specific corporation.

HUGH ALAN ROSS

CRIMINAL LAW AND PROCEDURE

Jurisdiction

It is interesting that the jurisdiction of a justice of the peace to try a misdemeanor case should be challenged successfully in the year immediately preceding the effective date of the justice of the peace salary

[7] 1955 Survey, 7 WEST. RES. L. REV. 263 (1956)

[8] This is the postion adopted by the Supreme Court of Illinois in *Wolfson v. Avery,* 6 Ill., 2d 78, 126 N.E.2d 701 (1955).

[9] The new code provides that boards can be classified, but no class may contain less than three persons. OHIO REV. CODE § 1701.57

[10] 131 N.E.2d 425 (Ohio App. 1956).

[11] See TRUSTS section, *infra.*

[12] See Note, *Fiduciary Duty of Controlling Shareholders,* 7 WEST. RES. L. REV. 467 (1956).

law. Until January 1, 1956, justices of the peace received the costs assessed in cases before them as their compensation. In the principal case the accused was charged with assault and battery and taken before a justice of the peace. He signed a written waiver of jury trial, and thereupon without hearing further evidence the justice found him guilty, fined him $100 and costs of $27.42, and committed him to jail for nonpayment. A writ of habeas corpus was then issued to free the accused from unlawful detention, and the probate court ordered his release.[1] It held on authority of the *Tumey* case[2] that the justice of the peace was disqualified from proceeding with the case because of his pecuniary interest. This disqualification was not removed by the waiver of jury trial. Another substantial ground for ordering the discharge was apparent on the record: the finding of guilty upon the complaint alone, without the hearing of any evidence, was considered a denial of due process of law.

Section 2945.05 of the Ohio Revised Code provides a procedure for a waiver of trial by jury in common pleas court. Ohio Revised Code section 2945.06 authorizes the court to proceed with trial without a jury when the defendant has waived his right to a jury trial. In the principal case the defendant, his counsel and the prosecutor orally stated to the court that it was agreed that the case should be heard without a jury and that a jury was waived. The court of appeals, on its own motion, there being no assignment of error, determined that the Revised Code provision requiring *written* waiver of trial by jury was a mandatory requirement for jurisdiction to try the case without a jury, and held that the trial court had no jurisdiction on the basis of the record.[3] The judgment was reversed and the cause remanded.

In another case, the petitioner brought an original action in habeas corpus in the court of appeals to challenge the validity of his arrest and detention upon a forgery indictment, which had been reinstated after the court had vacated a *nolle prosequi* entered at the previous term.[4] The petitioner was discharged from custody. After the term the trial court may not set aside its order of *nolle prosequi* and reinstate the indictment. The court pointed out, however, that such a ruling did not in any way prejudice the prosecution in proceeding against the offender in a proper case at a subsequent term under a new indictment.

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[1] *In re* Tullius, 137 N.E.2d 312 (Ohio Prob. 1955).

[2] Tumey v. State, 273 U.S. 510 (1927).

[3] State v. Fife, 100 Ohio App. 550, 137 N.E.2d 429 (1954). Lack of jurisdiction because of non-written waiver was also one of the bases for the decision in *State v. Ferguson,* 100 Ohio App. 191, 135 N.E.2d 884 (1955).

[4] *In re* Golib, 99 Ohio App. 88, 130 N.E.2d 855 (1955)

Construction of Statutes Defining Crime

An interesting court of appeals decision[5] reversed a conviction of first degree murder under Ohio Revised Code section 2901.01 because of the lack of any evidence to show premeditated malice. There was evidence that the killing was without reason, justification or excuse, but the accused had never seen the victim before the killing occurred in a scuffle over a gun which the accused had been holding in his hand. This did not constitute evidence that there was deliberate and premeditated malice in the accused's mind at the time of the homicide. Nor could the verdict be supported in this case by application of the principle of law that one who intends with deliberate and premeditated malice to kill another person, but instead kills a third person against whom he has no malice, may be found guilty of murder in the first degree. There was no overt act against an intended victim.

Section 2901.11 of the Oho Revised Code makes it a criminal offense to escape from "any confinement" or restraint imposed as a result of a criminal proceeding. The accused had been charged with assault and battery and carrying concealed weapons. He had been convicted of assault and trespass by a village mayor without having waived a jury trial and had been sentenced under this conviction. In addition, he had been held in jail, in default of bond, on the concealed weapons charge for a total of eight months without ever having had or waived a preliminary hearing. He took matters into his own hands and escaped from the county jail. He was indicted for escaping. At his trial, the common pleas court entered a directed verdict for defendant on the ground that the confinement from which he escaped was illegal, and released him from custody.

The prosecuting attorney then filed a bill of exceptions in the court of appeals in accordance with the Revised Code.[6] The court of appeals allowed the bill to be filed and rendered a decision which has the effect of determining the law to govern in a similar case.[7] The court of appeals

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[5] State v. Cosby, 100 Ohio App. 459, 137 N.E.2d 282 (1955) Since the jury had adopted the prosecution's theory that defendant knew what he was doing and did intend to kill the victim, with ample evidence to support this finding, the court of appeals modified the judgment and remanded the cause to the trial court with instructions that a judgment be entered finding the defendant guilty of second degree murder with sentence accordingly.

[6] OHIO REV. CODE §§ 2945.67 and 2945.68 authorize the presentation of a bill of exceptions by a prosecuting attorney to the trial judge and its presentation in a criminal action to the court of appeals or Supreme Court, upon leave obtained, for the decision of the court upon the points presented.

[7] OHIO REV. CODE § 2945.70 authorizes the appellate court to allow the bill to be presented and to decide the matters presented. The decision does not affect the

confirmed the opinion of the lower court that the confinement was illegal under the circumstances, and that the "escape" statute could be applied only to an escape from "any legal confinement."[8]

Section 4511.31 of the Ohio Revised Code requires operators of motor vehicles to obey the directions of the Department of Highways in driving and passing other vehicles on any state highway. This requires obedience to the directions of the markings on the roadway. The department's traffic control manual declares that crossing a yellow line to overtake and pass is both illegal and extremely hazardous. The manual does not cover the situation in which a driver enters the left side of a two lane highway to pass another vehicle, and is forced to continue on the left side beyond the point where a yellow line begins on the right side of the center line. A driver who found himself in that situation and was forced to cross the yellow line in order to get back into his right hand lane, was convicted in a municipal court of violating this code section. The court of appeals, in affirming a reversal by the court of common pleas, held that the driver did not violate the code in continuing in the left lane until he could safely cross back into the right lane, when he started his passing before reaching the point where a yellow line began on the right side of the center line.[9]

Section 1433.45 of the Ohio Revised Code prohibits the use of "nets" in certain waters of the Lake Erie fishing district. The owners of land abutting upon Sandusky Bay had for some time engaged in commercial fishing by the use of seines along the beaches fronting on their property. This practice was allegedly carried on with the knowledge of the Division of Wildlife in the belief that the statute did not apply to seines. Eventually administrative officers, however, threatened enforcement against the use of seines, and the petitioners brought a declaratory judgment action to obtain a favorable construction of the statute. The court of appeals affirmed a judgment of the common pleas court sustaining petitioner's position.[10] The opinion utilized several rules of statutory interpretation. It pointed out that the question is not what the General Assembly intended to enact, but the meaning of what it did enact. The phrase "any net whatever" was the crucial provision in the statute. While the dictionary definition would include the term "seine" within the category of nets, the court looked at the business of fishing to ascertain the industry under-

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judgment on the merits. The decision, however, does determine the law to govern in future similar cases.

[8] State v. Ferguson, 100 Ohio App. 191, 135 N.E.2d 884 (1955).

[9] State v. Shackleford, 100 Ohio App. 487, 137 N.E.2d 637 (1955) The court adhered to the well-settled rule that a strict construction is to be given to penal statutes.

[10] Wadsworth v. Dambach, 99 Ohio App. 269, 133 N.E.2d 158 (1954).

standing of the two terms and found that they were distinguished and that a seine was not included within the term "net." Furthermore, for nearly 40 years the administrative officers within the area had not taken any steps to enforce the statute against the use of seines. This fact, together with the failure of the legislature to make any changes in the law after awareness of the administrative attitude, were considered good evidence of a legislative intent excluding seines. All of these factors combined were considered sufficient evidence to sustain a declaratory judgment on behalf of the plaintiffs, although injunctive relief was held improper because of the full and complete relief afforded by the granting of the declaratory judgment.

In another case the court had to consider the application of Ohio Revised Code section 4399.16, which specifically names as "tavern keeper" a person who was the manager of an establishment. The court held that the phrase as used in the code is a technical term and does not apply to a mere employee, even though he may exercise managerial authority; it means the owner.[11]

In one case the court of appeals was called upon to determine whether a sale of an undivided fractional interest in real estate, which was to be evidenced eventually by the issuance of shares of stock, was a sale of securities coming within the Ohio Securities Act and a sufficient basis for prosecuting the defendant for selling securities without being licensed to sell securities under the Blue Sky Law of Ohio.[12] The court concluded that the purchaser did not buy securities but the right to occupy suites in an apartment building, with the further right to have an undivided percentage interest in the property transferred by warranty deed. It held that the transaction came within the statutory exclusion of sales of real estate from the Ohio Securities Act.[13]

Two court of appeals decisions were concerned with multiple crimes growing out of the same transaction. In the first case the defendant threw lye water into the face of the prosecuting witness. He was prosecuted under an indictment charging him in the first count with maiming by unlawfully putting out the prosecuting witness' eye, and in a second count with purposeful disfigurement with the use of lye. A conviction on both counts was sustained.[14] Answering the defendant's argument that there was but one act involved, the court pointed out that the result was

[11] State v. Gullion, 132 N.E.2d 902 (Ohio C.P. 1955) This was an appeal from a judgment of conviction in the Municipal Court of Columbus for permitting rioting or drunkenness on the premises. Judgment was reversed and the case dismissed.

[12] State v. Hirsch, 131 N.E.2d 419 (Ohio App. 1956)

[13] OHIO REV. CODE § 1707.03.

[14] State v. Benjamin, 132 N.E.2d 761 (Ohio App. 1956)

both a maiming and a disfiguring, two separate offenses under the Ohio Revised Code.[15]

In the other case, from Franklin County, the accused was seeking release from the Ohio penitentiary on a writ of habeas corpus on the ground that convictions for breaking and entering in the night season and larceny could not be sustained where factually there was but one transaction. The writ was denied, since the court did not agree that there was but one transaction.[16] Breaking into a building in the night season with intent to steal was one transaction; the next step, which constituted the actual stealing from that building of property of a value sufficient to constitute grand larceny, was a different transaction.[17]

Two court of appeals decisions involved the power of municipal legislative authority to define crime. In the first case, the court held that a city has the authority to enact an ordinance which defines the offense of damaging property without requiring that the acts constituting the offense be done with intent.[18]

The other case involved an action to enjoin the enforcement of a city ordinance making it unlawful for any person to have a "pinball" game or machine in his possession, custody or control. A permanent injunction against the enforcement of the ordinance was granted.[19] Since the ordinance as drawn would preclude the possession of a pinball machine in a private home, solely for the amusement of the owner, it was considered absolutely prohibitory in nature and beyond the authority of the council to enact under the police power granted to municipalities by Article XVIII, section 3 of the Ohio Constitution.

CRIMINAL PROCEDURE

Arrest

The combined effect of two sections of the Ohio Revised Code[20] is to render persons immune from arrest on Sunday except when charged

[15] OHIO REV. CODE § 2901.19. The first paragraph of this section specifically defines maiming, and the third paragraph sets out the elements of the separate offense of disfigurement.

[16] Wyatt v. Alvis, 136 N.E.2d 726 (Ohio App. 1955).

[17] Burglary is defined by OHIO REV. CODE § 2907.10; grand larceny, by OHIO REV. CODE § 2907.20.

[18] City of Bexley v. Ivey, 136 N.E.2d 624 (Ohio App. 1955). The court of appeals affirmed the judgment of the court of common pleas, which in turn had affirmed a judgment of conviction entered in the mayor's court, on questions of law. It adopted the opinion of the common pleas court, reported in 136 N.E.2d 622 (Ohio C.P. 1953).

[19] Benjamin v. Columbus, 136 N.E.2d 641 (Ohio C.P. 1956).

[20] OHIO REV. CODE §§ 2331.12 and 2331.13.

with treason, felony, or breach of the peace. An interesting application of these code provisions appears in *State v. McCoy*.[21] A state highway patrolman made an attempt on Sunday to serve a warrant charging a man with operating an automobile with fictitious license plates. The patrolman pursued the violator into defendant's store where the defendant attempted to block the officer's entrance and prevent the arrest. The patrolman thereupon arrested the defendant, charging him with unlawfully interfering with and obstructing an officer in discharge of his official duties.[22] The defendant was brought to trial in common pleas court, and his motion for a directed verdict was sustained. The prosecutor appealed on questions of law, and the court of appeals affirmed the judgment. The operation of a motor vehicle under the conditions charged in the warrant of arrest was not a breach of the peace, and any arrest under it on Sunday would have been unlawful. Defendant, therefore, did not violate the code in attempting to prevent an unlawful act.[23] Since defendant's arrest was without a warrant, the holding of the court applies to any arrest, whether with or without a warrant, for alleged offenses not falling within the exceptions mentioned in the code: treason, felony or breach of the peace.

In another case an accused collaterally attacked a warrant issued for his arrest by the deputy clerk of a municipal court upon the theory that the issuance of a warrant is such an act of discretion that it cannot be delegated by the clerk of court to his deputy. The court of appeals held that the issuance of a warrant is a ministerial act and therefore is within the competence of a deputy clerk. A writ of habeas corpus was therefore denied.[24] Any objections of this kind must be raised by a direct attack on the judgment.

In a third case the court of appeals affirmed the judgment of conviction of operating an automobile while under the influence of intoxicating liquor where the accused pleaded to the affidavit without raising any question of the legality of his arrest without an affidavit.[25] His arrest had occurred at a time when he was not operating a motor vehicle and was not at the scene of the accident, and a timely objection by motion to

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[21] 99 Ohio App. 161, 131 N.E.2d 679 (1955).

[22] OHIO REV. CODE § 2917.33.

[23] OHIO REV. CODE § 2331.14 provides that a person unlawfully arrested in violation of sections 2331.11 through 2331.13 shall be discharged by a writ of habeas corpus or in a summary way by motion in the court from which the warrant was obtained, at the cost of the official who sued out the process.

[24] State *ex rel* Focke v. Price, 137 N.E.2d 163 (Ohio App. 1955), *aff'd per curiam*, 165 Ohio St. 340, 135 N.E.2d 407 (1956), *cert. denied*, 352 U.S. 892 (1956).

[25] State v. Williams, 98 Ohio App. 513, 130 N.E.2d 395 (1954)

quash at the time of the accused's plea to the affidavit would have raised the legality of his arrest.[26]

Preliminary Examination

Under Revised Code section 2937.02, a court or magistrate may postpone a preliminary hearing for a period not to exceed ten days, upon petition of either party. Any postponement beyond ten days, without consent of both parties, is forbidden. In one case,[27] a person charged with carrying concealed weapons was held in county jail for eight months without being accorded a preliminary examination. The court of appeals held that confinement under such circumstances was illegal and void.

Extradition

A person who desired to avoid extradition to another state to answer a charge of child desertion, filed a petition in common pleas court to have an order for support entered against him under the Uniform Support of Dependents Act.[28] Though there was no objection to his pleading, the court raised the question of jurisdiction on its own motion. It ordered the petition dismissed for lack of jurisdiction.[29]

The court stated that it is contrary to the policy of the support and extradition statutes to permit an absconding obligor to secure a support order in another state, based entirely on his own evidence, comply with the order and thereby avoid extradition for criminal nonsupport or child desertion.

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[26] *Ibid.* Despite the fact that the court of appeals ruled that pleading to the affidavit waived any objection to the arrest, paragraph one of the syllabi reads as follows:

"A police officer is authorized to arrest without a warrant a person found in a state of intoxication and who admits to driving a car which was involved in a collision; and such person may be held for a reasonable time until a warrant for his arrest can be secured."

This holding does not appear to be supported by OHIO REV. CODE § 2935.03, relative to arrest without a warrant generally, but might properly be based upon OHIO REV. CODE § 3773.22, namely, being found in a state of intoxication, without regard to the operation of a motor vehicle.

[27] State v. Ferguson, 100 Ohio App. 191, 135 N.E.2d 884 (1955). An escape by one who had been detained in this manner did not violate OHIO REV. CODE § 2901.-11 since that crime is based upon a "legal confinement." See discussion of the escape problem raised by this case, *supra* note 8.

[28] OHIO REV. CODE § 3115.01 *et seq.*

[29] Sands v. Sands, 136 N.E.2d 747 (Ohio C.P. 1956). The opinion indicates that no civil support action had been instituted in the other state. Thus the petitioner's claim was simply that he was entitled to bring the action and have an order for support entered against him, and abiding thereby, be exempt from future extradition on the criminal charge.

The Uniform Criminal Extradition Act[30] contemplates that a person arrested under the governor's warrant of extradition may have a writ of habeas corpus to test the legality of his arrest. There is no provision in the act for admission to bail in a proceeding under the act after arrest on the governor's warrant. A common pleas court heard the petitioner's complaint in the habeas corpus proceeding, denied release, and denied admission to bail also, pending appeal. The accused then applied to the court of appeals for admission to bail, pending his hearing on an appeal from the denial of the writ. The court of appeals admitted petitioner to bail.[31] It explained that the writ of habeas corpus is a collateral remedy, and independent legal proceeding apart from the extradition proceeding, and civil in nature.

The court of appeals had ample authority to stay the judgment of the common pleas court denying the release and to release the accused from custody upon whatever terms it deemed appropriate under the circumstances.

The Grand Jury

A witness was summoned to appear before the Grand Jury of Summit County. The witness instead sent his attorney who presented a letter stating that the witness would not appear because the jury was not legally constituted. A written motion for contempt was filed and heard after due notice. The trial court found the witness guilty of contempt and entered a judgment which, in effect, committed him to jail until such time as he was willing to give testimony; thereupon a term of ten days imprisonment and a fine of $500 would become effective, without credit for prior incarceration. An appeal was taken by the witness, raising the issue of the legality of the grand jury and claiming double jeopardy arising from the two sentences for contempt. The judgment was affirmed.[32] First, the court held that the grand jury was a legally-constituted body; second, that a summoned witness cannot challenge the authority of a court or of the grand jury, provided either has existence *de jure* or *de facto;* third, that there is no double jeopardy because the judgment in question combined a civil remedy and a criminal penalty in fixing the conditions of imprisonment.[33]

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[30] OHIO REV. CODE §§ 2963.01-.29. Section 2963.09 also makes it a misdemeanor for any person to deliver wilfully any person arrested upon the governor s warrant to an agent of the demanding state before the hearing requested by the accused has been held.

[31] Ruther v. Sweeney, 137 N.E.2d 292 (Ohio App. 1956).

[32] State v. Mirman, 99 Ohio App. 382, 133 N.E.2d 796 (1955)

[33] The order imprisoning the witness until his indicated willingness to give testimony was predicated on OHIO REV. CODE § 2705.06, a statement of the coercive powers

Affidavits and Indictments

The Ohio Revised Code[34] seeks to prevent inaccuracies or imperfections in an indictment, information or warrant from having any adverse effect on the prosecution, provided the charge is sufficient to inform the accused fairly and reasonably of the nature and cause of the accusation against him. One case in the court of appeals applied this "saving" provision to sustain a conviction. The affidavit charging the offense was irregular because not sworn to by one of two signing officers, but it was sworn to by the other and provided adequate information of the offense charged. The false signature of the one officer was treated as surplusage, and the irregularity in the affidavit was not prejudicial to the accused.[35]

Another statute[36] provides that an indictment shall not be held invalid because of surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged. An indictment for procuring a miscarriage concluded with words not included in or required by the statute defining the crime. The trial judge instructed the jury to disregard the surplus allegations and left them in the indictment. The indictment, however, fully informed the accused of the charge, and the court held that the surplus allegations, under the circumstances, were not left in the indictment prejudicially.[37]

Jurors and Jury Trial

An interesting question involving the general qualifications for jury service arose in the course of a motion to reconsider filed before a court of appeals. An affidavit alleged that one of the jurors at the trial was not a registered voter at the time she was impaneled as a juror in the case. The juror, however, had all of the qualifications of an elector as set out in Article V, section 1 of the Ohio Constitution, including residence for one year in the state, county and ward. The court distinguished between an elector and a voter, and held that a person who meets all of the qualifications of an "elector" as defined in the constitution, is a qualified

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of a court, without which witnesses could obstruct the administration of justice and impede the operation of the entire judicial system.

The order imprisoning and fining the witness upon finding him guilty of contempt was based on OHIO REV. CODE § 2705.05, a definition of a specific penalty which, in the discretion of the court, may be imposed in the public interest to vindicate the authority of the court and deter similar conduct.

[34] OHIO REV. CODE § 2945.83 (A).

[35] Toledo v. Miscikowski, 99 Ohio App. 189, 132 N.E.2d 231 (1955).

[36] OHIO REV. CODE § 2941.08 (I).

[37] State v. Roche, 135 N.E.2d 789 (Ohio App. 1955). The surplus allegation was: "and was prematurely delivered of said child."

juror, even though the person might not be registered as a voter for current elections, having thereby elected not to vote.[38]

Under section 1905.11 of the Ohio Revised Code, the mayor of a village has jurisdiction to try misdemeanors in which there is a constitutional right to jury trial. In this type of case there must be a waiver of jury trial in writing signed by the accused and filed before the commencement of the trial.[39] A village mayor tried, convicted and sentenced an accused of the offenses of assault and trespass, without the accused having waived a jury trial in writing, but without his having demanded a jury trial. The mayor sentenced him to pay a fine and serve a jail sentence for both offenses. During the time he was serving the jail sentences, he escaped, and was subsequently charged with and tried for escape. This brought into issue the legality of his detention under the foregoing sentences, among other things.[40] Since imprisonment could be imposed upon conviction of both offenses, the accused had a constitutional right to jury trial. His failure to demand a jury trial did not constitute a waiver since the record must actually show an affirmative waiver. The accused refused to waive a jury trial. In such cases of constitutional right to jury trial, the mayor is without jurisdiction to try the cause without a jury where the defendant does not waive trial by jury.

Right to Defend With Counsel

The Ohio Constitution, Article I, section 10, contains a guaranty of the right of an accused to appear and defend in person and with counsel. The criminal code[41] implements this right by requiring the court to determine whether the accused has counsel and if he is without counsel or unable to employ counsel, to assign counsel to defend him. *In re Motz*[42] presents an interesting application of this right. The accused had been indicted on seventeen counts. She had been unable to procure counsel until the eve of her trial. She appeared in court the next day with her "new" attorney who made a motion for a continuance. This motion was denied, and the attorney permitted to withdraw from the case. The trial then proceeded for seven days without counsel representing the

[38] *Ibid.*

[39] For similar provisions applicable to mayor's courts, see OHIO REV. CODE § 1905.03.

[40] State v. Ferguson, 100 Ohio App. 191, 135 N.E.2d 884 (1955) For a discussion of the crime of escape in this case see, 8 WEST. RES. L. REV. 220 (1957)

[41] OHIO REV. CODE § 2941.50.

[42] *In re* Motz, 100 Ohio App. 296, 136 N.E.2d 430 (1955) The order of discharge called for her removal from the Ohio Reformatory for Women and for delivery to the custody of the Franklin County Sheriff, to be returned to the trial court for further proceedings.

accused, and without the accused ever having been advised of her right to counsel or requesting the court to appoint counsel. She was convicted, and for more than four months thereafter she was unable to consult counsel. In the meantime the appeal period had expired. She obtained a writ of habeas corpus at her first opportunity. The court of appeals held that the failure to advise her of her right to have the court appoint counsel to defend her was a denial of a fundamental right, and therefore the conviction and judgment were void and the subsequent imprisonment illegal. The release from custody was not absolute, since the indictment was still in force and the common pleas court still had jurisdiction.

Trial Proceedings

1. *General*

The celebrated *Sheppard* case was finally terminated during the calendar year 1956. The trial of this case lasted for more than nine weeks, and the jury deliberated from December 17 to December 21, 1954 in reaching a verdict of guilty. The record consisted of 7,308 pages, and the defendant asserted 37 errors in his appeal to the court of appeals. That court overruled these assignments of error and affirmed the judgment of conviction of second degree murder.[43] The opinion of the court of appeals covers 53 pages in the official reports, devoting eight pages to the assignments of error. The defendant then appealed to the Supreme Court, assigning 29 errors by the court of appeals, and devoting 1,097 pages of briefs to their discussion. In the Supreme Court the 29 errors were combined into seven questions of law, and in oral argument only three of these were especially stressed. The Supreme Court affirmed the judgment of the court of appeals, holding that there was no error prejudicial to the defendant in the record.[44] The majority opinion directed its

[43] State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955).

There was a separate appeal from the action of the trial court in overruling a motion for a new trial on the ground of newly discovered evidence. This is reported as *State v. Sheppard,* 100 Ohio App. 399, 128 N.E.2d 504 (1955), *appeal dismissed for lack of a debatable constitutional question,* 164 Ohio St. 428, 131 N.E.2d 837 (1956).

[44] State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340 (1956), *cert. denied,* 352 U.S. 910 (1956). Mr. Justice Frankfurter filed a memorandum in which he sought to reiterate the significance of a denial of the discretionary writ of certiorari. He took pains to point out that the denial of the petition in no way implies Supreme Court approval of the decision of the Supreme Court of Ohio. The only significance which could be attached to the denial is that "for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Count to exercise its discretion in reviewing a lower court's decision."

A petition for rehearing was denied in December 1956. 77 Sup. Ct. 323 (1956).

attention to answering the three questions of law stressed in the oral argument:

1. Did the atmosphere under which the trial began require the trial court to grant a change of venue?
2. Did the handling of the jury, by permitting members to telephone their immediate families at night between sessions, require a reversal of the judgment on the verdict?
3. Was there sufficient evidence to submit the case to the jury and was there sufficient substantial evidence to justify the verdict rendered?

On the first question, the opinion reaffirms prior Ohio-rulings that the exercise of the right to order a change of venue lies in the discretion of the trial court. Further, it is not an abuse of discretion to refuse to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled. Finally, it is not an abuse of discretion to deny a change of venue when a jury of 12 members is impaneled and sworn before a venire of 75 is exhausted, only 14 having been dismissed because of a firm opinion, and the defendant having exercised only five of his six peremptory challenges.

On the second question, the opinion relies upon the statutory rule[45] that no judgment of conviction shall be reversed in any court for any cause, unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial. Since there was no affirmative showing of prejudice, the question was answered in the negative. The opinion states that the Court cannot presume as a matter of law that there was prejudice from the fact that some members of the jury made telephone calls during recesses in their deliberations to members of their immediate families.

On the matter of substantial evidence, the majority of the court examined the instructions of the trial judge, particularly those dealing with convictions based on circumstantial evidence, which it found consistent with the Ohio rule that the facts established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. Given a qualified jury and correct instructions, the opinion quotes with approval from a statement of the late Mr. Justice Holmes, in presuming that the jury found facts because they were proved: "But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they were proved."[45a]

[45] OHIO REV. CODE § 2945.83 (E)

[45a] Aikens v. Wisconsin, 195 U.S. 194, 206 (1904), *quoted with approval in State v. Sheppard,* 165 Ohio St. 293, 301, 135 N.E.2d 340, 346 (1956)

Since the majority of the court could not find any prejudice to the defendant in any of the other assignments of error, it affirmed the judgment of the court of appeals.

A very strong dissenting opinion was written and concurred in by one judge.[46] Some of the major points in this opinion are very interesting. First, it expressed dissatisfaction with the brief treatment of the 29 allegations of error, condensed to three questions of law presented in detail in the oral argument and exclusively discussed by the majority opinion. Second, it found much fault with the conclusion of the majority that from the facts found there could be no reasonable hypothesis of innocence, pointing out that the state had established by its evidence facts and circumstances which could not be reconciled with any reasonable hypothesis except that of defendant's innocence. Third, it deplored the majority's brief treatment of the disregard of the statutory rules relative to communications with the jury from the outside, i.e., the telephone communications with relatives where there was no evidence of content except on the nonprejudicial conversations of the jurors overheard by the bailiff. Fourth, it found numerous prejudicial errors in the instructions and rulings of the trial court, particularly concerning the purposes for which the jury might consider evidence of good character and reputation, the use of the legend of George Washington and the cherry tree as a device for illustrating the application of circumstantial evidence, and the admission of hearsay evidence which could have been given weight by the jury on the issue of motive.

Finally, it contended that the court should not deny the accused the opportunity to establish his innocence by summarily determining that the errors at the trial were not prejudicial: "On the record before this court, such a determination would represent in my opinion a mere and highly doubtful guess." In answer to the point made by the majority opinion that it must affirmatively appear from the record that the defendant was prejudiced thereby or prevented from having a fair trial, the dissenting opinion points out that the code is phrased differently on the matters of the admission or rejection of evidence and the misdirection of the jury where the phraseology used is that *"the accused was or may* have been prejudiced thereby."[47] (Emphasis added.) It concluded that it would be impossible to reach any other conclusion but that this defendant "may

[46] The Chief Justice disqualified himself from hearing the appeal, and Judge Matthias acted as Chief Justice, pursuant to OHIO REV. CODE § 2503.04, and Judge Montgomery of the Fifth Appellate District sat by designation in the place of Judge Matthias. Judge Bell wrote the majority opinion, concurred in by all other members of the court sitting except Judges Taft and Hart. Judge Taft wrote the dissenting opinion, concurred in by Judge Hart.

[47] OHIO REV. CODE § 2945.83 (C) (D).

have been prejudiced" by the errors in the judge's charge and by the admission of hearsay evidence.

2. *Pleas*

Two court of appeals decisions emphasize the fact that the plea of guilty is not to be entered lightly and that once entered and acted upon by the court, it is very difficult to secure a change of plea or a subsequent hearing on such a matter as insanity at the time of trial. In the absence of a showing of a fraudulent inducement to enter a plea of guilty, a party is not entitled as a matter of right to change to a plea of not guilty.[48] Furthermore, a person who might have pleaded insanity at the time of trial but who pleads guilty and is sentenced on the plea, waives any right to a hearing on the issue of insanity at the time of trial.[49]

The concluding paragraph of the opinion in the latter case contains some puzzling language. After asserting that the trial court acquired jurisdiction over the appellant, the court concludes that appellant's mental condition at the time of trial was not such as to prevent him from having a fair trial. Therefore none of his constitutional rights and privileges were invaded.[50]

The statute with which the court is concerned does not deal with the plea of "not guilty by reason of insanity." Its purpose is to provide machinery for determining whether the accused is insane at the time of trial.[51] The statute dealing with pleas to the indictment does provide that a failure to plead "not guilty by reason of insanity" raises a conclusive presumption of sanity.[52] But there is no comparable language in the statute considered in the principal case. On the contrary, it mentions three sources from which a suggestion of insanity at the time of prosecution may come: suggestion of counsel accompanied by a certificate of a reputable physician to that effect presented in court, suggestion of present insanity by the grand jury, or "if it otherwise comes to the notice of the court that such person is not then sane." Under this statute it becomes the duty of the court upon receiving notice under any of these methods to examine the question of sanity or insanity or, in the alternative, present the issue to a jury for determination in accordance with its terms.

The succeeding code section[53] gives a suggestion of the legislative in-

[48] *In re* Spensky s Petition, 133 N.E.2d 195 (Ohio App. 1955).

[49] McCane, Jr. v. Alvis, 98 Ohio App. 506, 130 N.E.2d 372 (1954).

[50] This conclusion relating to mental condition is inconsistent with the holding that the filing of a plea of guilty waives any question of insanity at the time of trial.

[51] OHIO REV. CODE § 2945.37

[52] OHIO REV. CODE § 2943.03 (E)

[53] OHIO REV. CODE § 2945.38. This section concludes with the following clause:

tent in providing for this procedure for determination of insanity at the time of prosecution: a person cannot in fairness be required to stand trial for a crime until such time as his "reason" is restored. Under the facts surrounding this case, appellant was under guardianship at the time of trial, had previously been adjudged mentally incompetent by the Army, and had also been charged with an earlier offense and upon suggestion of insanity had been committed to Lima State Hospital for a time. Were not these facts sufficient "notice" to the trial court of appellant's possible lack of sanity to require an inquiry into the issue?

3. *Double Jeopardy*

Two cases discussed the possibility of the same act giving rise to more than one offense. It is well recognized that a single act may constitute several offenses by virtue of different statutes or ordinances. Thus a conviction on one charge may not be a bar to a subsequent conviction and sentence on the other charge, unless the evidence required to support the conviction on one would be sufficient to warrant a conviction on the other. An example of this is presented by a Supreme Court decision, which held that a conviction of reckless driving in violation of a city ordinance could not be pleaded in bar of a charge of operating an automobile while under the influence of intoxicating liquor prohibited by another ordinance.[54] Evidence which would be sufficient to sustain a conviction for reckless driving would not be sufficient to sustain a conviction for operating or being in control of a vehicle while intoxicated.

On the other hand, the plea of double jeopardy is properly raised to a second indictment for an act predicated upon the same transaction and related to the same subject matter, according to one court of appeals.[55] The state of the record in this case was such that full relief could not be granted, but the court did agree with the contention of the accused that he could not be convicted under the Ohio maiming statute[56] on two indictments each charging a penalty growing out of the one act: one

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"And upon being restored to reason the accused shall be proceeded against as provided by law."

Sections 2945.37 and 2945.38 apparently proceed upon the theory that one whose mental condition is *now* so disordered that he is unable to understand the charge against him, and the possible defenses available, and hence not able properly to advise with his counsel concerning his defense, should not be tried now, but should be committed to some proper hospital to remain there until his reason is restored, at which time he should be returned to the court for trial.

[54] Akron v. Kline, 165 Ohio St. 322, 135 N.E.2d 265 (1956).

[55] *In re* Benjamin, 100 Ohio App. 455, 137 N.E.2d 298 (1955), *cert. denied,* 352 U. S. 933 (1956).

[56] OHIO REV. CODE § 2901.19.

charging unlawful assault and putting out an eye and the other charging maiming by throwing a caustic substance into the victim's face. Release from imprisonment could not be effected under the writ of habeas corpus because not even the minimum possible sentence had been served. The court of appeals suggested that the record be made to conform to the actual facts, if possible, and if this could not be done that the two indictments should be remanded to the trial court for further proceedings according to law.

This holding should be compared with the inconsistent holding of another court of appeals as to this same defendant — that the indictment which was there determined to have two counts based upon the same act, could sustain a verdict of guilty on both counts.[57] That court was of the opinion that the same act gave rise to separate and distinct crimes. Which decision is the correct construction of the maiming statute?[58]

Another court of appeals decision had to answer the question whether the same offenses which had been used as a basis for the sentence of a defendant under the habitual offender statute upon a prior conviction for petty larceny, could be used as a basis for characterizing the defendant as an habitual criminal in sentencing after conviction of a new offense.[59] This meant that the last conviction was added to the prior convictions previously considered. Counsel for the accused tried to keep the court from considering the prior offenses through the plea of *autrefois convict* before trial and objection at the trial. The plea was properly overruled because the prior convictions were resorted to for the sole purpose of determining the extent of the punishment. There was therefore no question of former jeopardy involved.

4. *Right to a Bill of Particulars in Municipal Courts*

A defendant in a petty larceny prosecution in the Municipal Court of Cincinnati demanded a bill of particulars. The general statutes of the state[60] governing procedure in criminal prosecutions in the municipal courts are silent on the question, and do not afford a right to a bill of particulars by direct reference to the procedure applicable in the common pleas court. The only statute governing bills of particulars in criminal cases is directed to the prosecuting attorney only and therefore does not apply to municipal court proceedings in absence of an incorporating provi-

[57] State v. Benjamin, 132 N.E.2d 761 (Ohio App. 1956), *appeal dismissed*, 165 Ohio St. 455, 135 N.E.2d 765 (1956), *cert. denied*, 352 U. S. 933 (1956).

[58] See discussion of this case under the heading of construction of statutes, *supra* note 14.

[59] Cincinnati v. McKinney, 137 N.E.2d 589 (Ohio App. 1955)

[60] OHIO REV. CODE § 1901.21 (A).

sion.[61] But is a demand for a bill of particulars necessarily predicated on a statutory right? If a statutory right does exist, the failure to make a demand for a bill in the indicated fashion, has been held to be a waiver.[62] Article I, section 10 of the Ohio Constitution guarantees the accused a right to know the nature of the accusation against him, and this guarantee seems controlling whether there is any statutory implementation or not.[63]

5. *Prejudicial Remarks of Counsel*

While a prosecuting attorney has a duty to conduct the prosecution with vigor and alertness, he also has a duty to observe rules of good practice and propriety in argument. He has considerable latitude in making deductions and drawing inferences which are based on credible and substantial evidence. But fundamentally, arguments before the jury must be confined to the evidence. Therefore it is reversible error for a prosecutor to use debasing characterizations directed toward the accused where they are wholly without evidentiary support and actually contrary to evidence of good character in the record.[64]

6. *Insanity of a Witness*

An interesting common pleas court decision refused to withdraw the testimony of a witness who had previously been adjudicated insane and had never been legally discharged.[65] The defendant learned of this fact on cross-examination, and thereupon moved to withdraw the testimony. The court in the absence of the jury interrogated the witness and determined that he had sufficient mental capacity to observe, recollect and communicate, and possessed a sense of moral responsibility. It then

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[61] Cincinnati v. McKinney, 137 N.E.2d 589 (Ohio App. 1955). The court distinguishes such cases as *State v. Hutton,* 132 Ohio St. 461, 9 N.E.2d 295 (1937), because of the incorporation of common pleas procedure into the particular municipal court organization.

[62] State v. Hutton, 132 Ohio St. 461, 9 N.E.2d 295 (1937). A court of appeals decision has held in accord with the leading case that there was no right outside of common pleas court under the general statute applicable to indictments and informations to demand a bill of particulars. State v. Gutilla, 99 N.E.2d 506 (Ohio App. 1950).

[63] In other jurisdictions the right to a bill of particulars seems to be a matter directed to the sound discretion of the court. See Annot., 5 A.L.R. 2d 444 (1949).

[64] State v. Morris, 100 Ohio App. 307, 136 N.E.2d 653 (1954). Compare *State v. Rhoads,* 137 N.E.2d 628 (Ohio App. 1955), in which the prosecutor made references to the fact that defendant had taken a lie detector test, during the *voir dire* examination of a prospective juror. The court held that such references to a lie detector test were not prejudicial or misleading when the court had ruled that the findings produced by the impulses of the lie detector test could not be admitted in evidence.

[65] State v. Webb, 131 N.E.2d 273 (Ohio C.P. 1955).

overruled the motion and instructed the jury that they could consider his presumed continued disability to the extent that it might affect his worthiness of belief. The court later overruled a motion for a new trial based on the same grounds. The trial judge predicated his rulings on an earlier Supreme Court decision which had held that the competency of an insane person as a witness is a matter which lies in the discretion of the trial judge, and that a person who is able to correctly state matters which have come within his perception relative to the issues of the case, and who appreciates and understands the nature and obligation of an oath, is competent as a witness despite some unsoundness of mind.[66]

7 *Evidence*

A decision on appeal from a police court conviction emphasizes the fact that it is a part of the prosecution's case to establish the corpus delicti of the alleged offense in every criminal proceeding. The offense of driving an automobile while under the influence of alcohol cannot be established solely on the evidence of a police officer who did not see the alleged driving, was not at the scene of the alleged offense and could only testify to what the accused told him.[67] Here, as in the other crimes, the offense cannot be established by extra-judicial confession alone.

A number of cases dealt with the problem of a sufficiency of evidence to establish the prosecution's case. For example, evidence that the defendant may have been the bottler of certain milk was not sufficient to establish the element of unlawful sale of milk of a low butter fat content.[68] Evidence of other criminal acts to show intent may, under the Ohio Code,[69] be introduced to show the intent with which the act in the principal case was done, but these offenses must be proven by substantial evidence.[70] In a prosecution for violation of an order of a municipal agency, a matter arose relating to proof of the order and the prosecution resorted to oral testimony. This was held to be a violation of the best evidence rule, in the absence of a satisfactory excuse.[71] The courts do take judicial notice of municipal ordinances, but not of rules, regulations or orders of an administrative agency of the municipality.

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[66] State v. Wildman, 145 Ohio St. 379, 61 N.E.2d 790 (1945). Also the trial judge took comfort in the fact that there was other substantial competent evidence in the record.

[67] Columbus v. Glover, 138 N.E.2d 32 (Ohio C.P. 1955), appeal from conviction in the police court.

[68] State v. Belle Vernon Milk Co., 99 Ohio App. 289, 132 N.E.2d 764 (1954).

[69] OHIO REV. CODE § 2945.59.

[70] State v. Roberts, 131 N.E.2d 665 (Ohio App. 1955)

[71] Toledo v. Tucker, Jr., 99 Ohio App. 346, 133 N.E.2d 411 (1954).

8. *Instructions*

Defense counsel in a first-degree manslaughter prosecution requested 16 special charges, and error was assigned because the trial judge did not give the substance of some of these charges. In its general charge the court fully covered all the facts which could be considered by the jury and included the substance of many of the 16 special requests, and no other omissions were brought to the attention of the court after the giving of the general charge. There was no error.[72]

Two court of appeals decisions dealt with the problem of the charge of the court on lesser included offenses. There is no duty to charge on manslaughter in a first-degree murder prosecution where there is no evidence of manslaughter. A court may not charge upon, and a defendant may not be found guilty of a lesser offense, unless the evidence tends to support each of the necessary elements of the lesser offense.[73] Furthermore, a failure to charge adequately on a lesser included offense is not prejudicial where the general charge states the law applicable to the specific crime charged.[74]

Under the Ohio Code[75] the court in charging the jury must state to it all matters of law necessary for the information of the jury in giving its verdict, but the charge must be confined to matters of law. The court may not give undue prominence to a portion of the evidence or go beyond the evidence and inject facts into the case not shown by the evidence. It was error, therefore, for a court, in instructing the jury on the use of an alcometer, to read the blood standards adopted by the National Safety Council where the evidence did not disclose these facts and figures so referred to.[76]

A request to charge the jury comes too late where it is made after the jury has retired to consider its verdict and then on its own motion returned to the box for further information.[77]

During the course of its deliberations a jury requested information about the testimony of a witness. At the suggestion of one of the defense counsel, the court read the part of a witness' testimony which answered the question. The court of appeals sustained this action of the trial judge.[78] Since there is no statutory requirement that testimony be read

[72] State v. Allen, 133 N.E.2d 167 (Ohio App. 1956).
[73] State v. Alexander, 130 N.E. 2d 378 (Ohio App. 1954).
[74] State v. Cooper, 137 N.E.2d 705 (Ohio App. 1955).
[75] OHIO REV. CODE § 2945.11.
[76] State v. Minnix, 101 Ohio App. 33, 137 N.E.2d 572 (1956).
[77] State v. Cross, 137 N.E.2d 690 (Ohio App. 1956)
[78] State v. Jessop, 131 N.E.2d 689 (Ohio App. 1952).

to the jury or that the trial judge state his recollections of the testimony, the method of handling such requests is one of discretion resting with the trial court. It was not abused in this case.

9. *Verdict*

The defendant was charged with auto theft and operating a motor vehicle without the owner's consent, in an indictment containing two counts. There was a general finding of guilty on each count. The record, however, did not support the charge of operation without the owner's consent. The court of appeals reversed the judgment as to the count for driving without permission, but affirmed it on the count of auto stealing, remanding the case to the trial court with instructions to resentence the defendant.[79]

Another case presented an example of an inconsistent verdict. The sole issue was whether a security sold came within the Ohio Blue Sky Law. The jury found the defendant-owner of the security not guilty and then found guilty the person who was charged as an aider and abettor. Such a finding is inconsistent and must be set aside.[80]

In another interesting case, the court actually accepted and considered the affidavit of a jury which was ostensibly impeaching in nature.[81] The juror in question had asked questions about the affect of the jury not reaching a verdict and also about the time required for deliberations. It appeared from her affidavit and from the record that the trial judge took unusual precautions to inform the jury of its duties and also that a failure to reach an agreement within a reasonable time would result in a discharge. The juror could not have been misled and no error occurred.

10. *Sentence*

Cases are continually coming before the appellate courts in which the trial court has sentenced a person to a specific period of imprisonment in the penitentiary. One defendant pleaded guilty to a violation of the Ohio Narcotics Law,[82] and was sentenced to two years in the penitentiary. The statute at the time carried no minimum sentence and a maximum of

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[79] State v. Givens, 133 N.E.2d 625 (Ohio App. 1953).

[80] State v. Hirsch, 131 N.E.2d 419 (Ohio App. 1956). The court distinguishes cases dealing with inconsistent findings on separate trials of codefendants and also in joint trials where issues of identity or participation in a criminal act are presented in the same trial.

[81] State v. Andlauer, 131 N.E.2d 672 (Ohio App. 1955) The use the court made of the affidavit was actually to sustain rather than impeach the verdict.

[82] OHIO REV. CODE §§ 3719.02, and 3719.99. Section 3719.99 was subsequently amended to provide a minimum sentence of two years.

5 years. The court held that the sentence was to be considered as general even though the lack of a minimum sentence might make the accused eligible for parole immediately upon sentence.[83]

In another case the sentence was for not less than one year, and upon the expiration of the year, the accused sought release on a writ of habeas corpus.[84] Relief was denied on the ground that the sentence was not void since it was to the penitentiary which made the general statute on sentencing applicable and which turned the specific sentence into a general sentence. This sentence was under a statute which permitted the trial judge to determine whether the punishment should be for a felony or a misdemeanor.

Another writ of habeas corpus case raised an issue as to whether a person who had been committed under two sentences was entitled to his release. One of the sentences was void but the other was valid, and the valid sentence had not yet been served completely. Release was denied.[85]

Ohio Revised Code section 2947.25, the *Ascherman Act,* authorizes a trial court in a criminal case after conviction and before sentence to refer the persons convicted for psychiatric examination. Under a finding of mental illness, mental deficiency or being a psychopathic offender, the court imposes the appropriate sentence for the specific offense and, in addition, orders an indefinite commitment to the department of mental hygiene and correction, during which time the sentence is suspended. If an accused is convicted of one of the specified sex offenses or has shown abnormal sexual tendencies, the journal of a court proceeding under section 2947.25 must show every step in the process, and when it is silent on any one of the nine requirements, it is deemed reversible error, when raised by appeal.[86] Such a sentence, even though the procedure required by the statute is not followed precisely, is good against a collateral attack, and release cannot be obtained through a writ of habeas corpus.[87]

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[83] State v. Preston, 100 Ohio App. 536, 137 N.E.2d 446 (1955). OHIO REV. CODE § 5145.01 was held applicable to a specific sentence under section 3719.99, even though the latter section was enacted subsequent to the former, and the sentence should automatically be treated as imprisonment for an indeterminate period.

[84] Smith v. Alvis, 134 N.E.2d 868 (Ohio App. 1953).

[85] *In re* Oponowicz, 100 Ohio App. 531, 135 N.E.2d 778 (1955).

[86] State v. Verzi, 102 Ohio App. 1, 134 N.E.2d 843 (1956) The record in this case was silent except for the imposition and suspension of the sentence. The other seven requirements were not mentioned in the record.

[87] McConnaughy v. Alvis, 100 Ohio App. 245, 136 N.E.2d 127 (1955), *aff'd,* 165 Ohio St. 102, 133 N.E.2d 133 (1955). See reference to the Supreme Court opinion at notes 101, 102 *infra.*

State v. Trunzo[88] applies the normal rule that a person found guilty of several separate crimes under different counts of an indictment may be sentenced on each of the counts, and the question of whether these sentences shall run concurrently or consecutively is a matter within the sound discretion of the trial court.

11. *Parole*

Prisoners are continually using the writ of habeas corpus in an effort to obtain a release when they have served their minimum sentences and are eligible to be considered for parole.[89] The courts continue to emphasize that the rights of a parolee are based solely on the discretion of the commission, which can grant or refuse a parole for any or no reason. There is no right to parole on the expiration of a minimum sentence. Therefore a petitioner who has neither been paroled nor served his maximum sentence is not entitled to release from imprisonment.[90]

A person who is declared a parole violator is not entitled to credit for time served from the day he is declared a parole violator to the time of his arrest for being a violator. The time then begins to run again from the time of arrest or return to imprisonment. If upon his arrest he is allowed to remain at liberty, this fact does not interrupt the running of the time of sentence. In such a case the time continues to run until the sentence has expired or he has been again declared a parole violator before its expiration.[91]

Criminal Appeals

Criminal appeals lie from inferior courts to the common pleas courts in certain instances. The scope of such appeal from a conviction of assault and battery in a justice of the peace court arose in *State v. Mason.*[92] This case involved a trial in which a jury had been waived in writing. The lower court had final jurisdiction in such a case, and the appeal to the common pleas court was limited to questions of law. There

[88] State v. Trunzo, 137 N.E.2d 511 (Ohio App. 1956) The judge directed that the sentences run consecutively, and the court of appeals held that this was not error.

[89] The provisions of OHIO REV. CODE §§ 2965.17, 2965.31, and 5145.03-5145.05, must be considered together. *Ex parte* Tischler, 127 Ohio St. 404, 188 N.E. 730 (1933), held there was no right to a parole upon expiration of the minimum term of imprisonment.

[90] State *ex rel.* Mason v. Alvis, 135 N.E.2d 90 (Ohio C.P. 1954)

[91] State *ex rel.* Nevins v. Eckle, 137 N.E.2d 509 (Ohio App. 1955). In this case there was an arrest in Georgia and a release there without a return to Ohio. About three years later the petitioner was declared a parole violator and returned to prison after that. The court held that the time between the Georgia arrest and the next parole violation declaration should be counted, and having served his maximum sentence, he was released.

[92] State v. Mason, 133 N.E.2d 435 (Ohio App. 1954).

was no bill of exceptions. The review was therefore limited to determining whether there was error in the record. There is no trial *de novo* in the common pleas court on an appeal from a final judgment of the trial court.

On an appeal on questions of "law and fact" from a municipal court to the common pleas court from a conviction in the former court, it is proper for the common pleas court to consider it as an appeal on questions of law only, and it may reverse the conviction upon a determination that the evidence did not achieve the high degree of probative force and certainty which the law demands to support a conviction.[93]

Ohio Revised Code section 2953.05 authorizes an appeal as a matter of right within thirty days after sentence and judgment. This contemplates a formal judgment, and an appeal does not lie from a ruling of the trial court in sustaining a demurrer to a plea in abatement to the information.[94]

After the thirty day period has expired, the appeal may be filed only by leave of the court or two of its judges.[95] An appellant who had pleaded guilty to a charge of fraudulent delivery of checks was denied leave to appeal upon his charge that the evidence was not sufficient to support a conviction. Such a ground may not be urged upon a plea of guilty.[96]

A recurrent question submitted on appeals to the court of appeals is whether the verdict of guilty is against the weight of the evidence. This involves more than a determination as to whether there is some evidence which tends to support the verdict. It is the duty of the court of appeals to determine the weight of the evidence.[97] This involves passing judgment upon whether the record contains evidence, direct and circumstantial, from which the jury, if it believed such evidence, could conclude that the accused was guilty beyond a reasonable doubt.

The convicted accused who is successful in obtaining a new trial must stand trial again upon the original indictment or information as though there had been no previous trial. Thus, an accused who had obtained a new trial after a conviction of second-degree murder under an indictment charging murder in the first-degree, could be retried under the original indictment and found guilty again of murder in the second degree.[98] While there has been some question about the affect of the granting of a new trial under similar circumstances in a number of other

[93] Toledo v. Lowenberg, 99 Ohio App. 165, 131 N.E.2d 682 (1955)
[94] State v. Himlerick, 100 Ohio App. 476, 137 N.E.2d 297 (1954).
[95] OHIO REV. CODE § 2953.05.
[96] State v. Hertz, 135 N.E.2d 781 (Ohio App. 1954)
[97] State v. Arrindella, 137 N.E.2d 136 (Ohio App. 1956).
[98] State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956).