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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

Jurisdiction

The court of common pleas is a court of general jurisdiction in criminal matters, but its jurisdiction is completely subject to legislative determination. Specific legislation therefore determines whether its jurisdiction is general or special in any given situation. State v. Kraus held that the jurisdiction of the court of common pleas is special and limited with respect to revocation of probation, and a proceeding of this type must comply with all statutory requirements to be valid. In the principal case the court revoked probation without according the accused any hearing whatever, and its order revoking probation and imposing sentence was held to be invalid. In the exercise of such limited jurisdiction the record should show on its face compliance with the special statutory requirements which include a hearing at which evidence may be submitted, and if after the hearing an order revoking probation is made, it must be based upon conduct of the accused in violation of the order.

The special problems arising from the assertion of jurisdiction by "other courts inferior to the court of appeals" led to several reported decisions. The court of appeals granted an original writ of procedendo in State v. Ferris. A mayor's court had tried several defendants for violating Section 5577.04, Ohio Revised Code, prohibiting overweight trucks upon the public highways and providing for possible imprisonment for 30 days as a part of the penalty, and had taken its decision under advisement, having overruled a motion of defense counsel to dismiss. No written waiver of the right to jury trial or request for jury trial had been filed by any defendant. The court held that the mayor's court was without final jurisdiction in the prosecution and that its function was solely that of a committing magistrate.

State v. Keefe decided two important jurisdictional issues. The petition filed in the court of common pleas asked for a writ of prohibi-

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1 Ohio Const. art IV § 4, reads: "The jurisdiction of the courts of common pleas, and of the Judges thereof, shall be fixed by law."
2 103 Ohio App. 209, 145 N.E.2d 131 (1957). Ohio Rev. Code § 2951.09, accords the defendant on probation the right to a judicial inquiry at which evidence may be received and considered by the judge in determining whether conditions of probation have been violated justifying termination of the probation.
3 Ohio Const., art IV, § 1.
4 102 Ohio App. 412, 140 N.E.2d 901 (1956). The effect of granting the writ is to order the court to discharge the accused, or to recognize them to the proper court, with appropriate conditions for bail.
5 141 N.E.2d 248 (Ohio C.P. 1957).
tion to prevent a judge of the municipal court from proceeding to try a case on the docket of that court, based on an affidavit charging relator with violation of a city ordinance. At the outset, the jurisdiction of the court of common pleas to grant the writ was challenged. The court held that it had jurisdiction, citing the fact that the court of common pleas is the court of general original jurisdiction in all civil matters and most criminal prosecutions, carrying with it implied jurisdiction to issue the writ of prohibition on a concurrent basis with the Supreme Court and the court of appeals. It concluded that present conditions rendered the issuance of the writ appropriate since the lower court was inferior in jurisdiction and was attempting to exercise power which it did not possess. On the merits, the court held that the lower court lost jurisdiction when the affidavit which initiated the prosecution was quashed. Nor could the jurisdiction be reinstated through amendment of the affidavit.8

State v. King7 decided a jurisdictional issue of academic interest concerning the power of a municipal court to hear causes arising in a township outside the territorial limits of the court’s jurisdiction where there was a qualified justice of the peace and the offense was not one over which a justice of the peace had county-wide jurisdiction. The court in State v. Haycook8 held that J.P. court’s judgment of conviction was null and void where the affidavit on which defendant was tried charged a failure to exhibit a fishing license and the evidence showed a failure to have a fishing license. The court indicated also that an imposition of fine and costs for fishing without a license was void since the jurisdiction in such a case is limited to binding the case over to the grand jury.9

A J.P. court had no inherent power to punish for contempt. The Ohio statutes gave a very restricted contempt power, and In re Sheldon10 held that a 30-day sentence for failure to obey an order was not only void for excessiveness but also for failure to hold the hearing required by Ohio Revised Code, § 1907.23.11

8The court pointed out that many Ohio cases had held that there was no authority for amending an affidavit during trial, and further that no case had ever held that it could be amended after having been quashed. The effect of quashing was the loss of all jurisdiction. The court was careful to indicate that the prosecuting witness could file a new affidavit, starting a new prosecution.
7166 Ohio St. 293, 142 N.E.2d 222 (1957).
8 103 Ohio App. 183, 144 N.E.2d 890 (1957).
9 Conceivably similar issues of jurisdiction might arise in connection with the operation of the new county court system which has replaced the justice courts since January 1, 1958. The criminal jurisdiction of these courts is identical with the former jurisdiction of the justice of the peace court. See OHIO REV. CODE § 1907.012.
11This section was repealed effective January 1, 1958, but identical contempt powers have been conferred on the new county courts. See OHIO REV. CODE §§ 1907.171, 1907.181, 1907.191.
Construction of Statutes Defining Crime

HOMICIDE

_Baus v. Alois_\(^{12}\) raised the question whether second degree murder is an included offense in the crime of first degree murder predicated on the killing of a guard, set out in § 2901.03, Ohio Revised Code. It was the claim of the petitioner that his imprisonment was void since he was sentenced for a crime not included in his indictment. Drawing upon the analogy of first degree indictments for homicide committed by means of poison and during attempts to rob, in which there had been findings of second degree, the court held that second degree murder is an included offense in first degree murder when the facts warrant it.

_State v. Powell_\(^{13}\) recognized that intent or purpose to kill is an essential element of second degree murder in Ohio, but held that the failure to use a deadly weapon was not conclusive of lack of intent to kill or cause serious bodily harm. When an accused uses his fists in effecting an escape from apprehension for possible theft and brutally beats a man who lay on the ground senseless from previous fighting, such conduct will support a charge of intentional and purposeful killing.

In _State v. Robinette_\(^{14}\) the indictment charged the defendant with the denial of an alleged statement in testimony before the grand jury. The court held that the indictment did not charge perjury because the alleged statements were not charged as material to any criminal cause being investigated by the grand jury. The statute uses the phrase "falsehood as to a material matter." This phrase refers to testimony before a grand jury, material to a criminal offense being investigated by the grand jury.

_State v. Snider_\(^{15}\) is an example of the difficulty created by, and perhaps wisdom of the statutory evidence rule set out in the definition of perjury,\(^{16}\) requiring proof by two witnesses, or one witness and corroborating circumstances.

LARCENY

Larceny is defined in terms of "stealing,"\(^{17}\) and the use of the word "steal" carries with it all the essential elements of the crime of larceny —

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\(^{12}\) 140 N.E.2d 93 (Ohio C.P. 1956).

\(^{13}\) 142 N.E.2d 244 (Ohio Ct. App. 1955).

\(^{14}\) 143 N.E.2d 186 (Ohio Ct. App. 1957).

\(^{15}\) 101 Ohio App. 507, 140 N.E.2d 427 (1956).

\(^{16}\) _OHIO REV. CODE_ § 2945.62.

\(^{17}\) _OHIO REV. CODE_ § 2907.20.
it imports a wrongful taking, appropriation, and carrying away of the property of another. The statute pertaining to the formal charging of crime permits the charging of the offense of larceny by the single verb "stole." If any other language is used, it must include a charge of wrongful taking, and asportation with intent to appropriate without permission, and with a purpose to deprive the owner of the goods in question. The phrase "wilfully and unlawfully take" does not charge larceny.

EMBEZZLEMENT

State v. Kearns required a construction of § 425.12, Ohio Revised Code, governing the payment of an allowance to the prosecuting attorney for expenses incurred in performance of official duties and in the furtherance of justice not otherwise provided for. The court was of the opinion that this statute requires the prosecutor to keep this money separate from his own personal property and to use it only for the purpose specified in the statute. Since the evidence established that the accused used the larger part of such a payment to discharge a personal debt, the court held that he converted public money in violation of § 2919.03, Ohio Revised Code, and committed an act of embezzlement.

LESSER INCLUDED OFFENSES

State v. Fleming resulted in a conviction for discharging firearms with intent to wound. There was evidence presented from which the jury could have found a simple assault. The defense requested the trial judge to charge on the "lesser included offenses" of assault, discharging firearms and pointing firearms. The court charged only on the crime of maliciously shooting with intent to wound. The court of appeals reversed the conviction and remanded for a new trial because assault is an included lesser offense of maliciously shooting with intent to wound. There was only one error in the lesser included offense charge, however, because the offenses of discharging a firearm and aiming a firearm, while lesser offenses than the one charged in the indictment, are not offenses of the same general character. They are distinct and independent offenses of a different class.

18 Ohio Rev. Code § 2941.07.
20 165 Ohio St. 573, 138 N.E.2d 650 (1956).
Sunday Closing Legislation

Two court of appeals decisions settled a number of questions about the validity and applicability of this type of legislation. In *State v. Ulmer*,24 the court held that this legislation25 prohibited all Sunday opening of business places with the exceptions noted within the act itself. No knowledge or intent to violate the law need therefore be alleged in the complaint. Sunday closing legislation is properly based on a valid exercise of the police power, and the exceptions provided within the statute are not unreasonable. Since observance of one day out of seven as a day of rest is a valid exercise of the police power, the legislature need not assign a reason for choosing Sunday, rather than leaving it to an individual choice. *State v. Keich*26 held that the statute prohibited the opening of a general store which offered for sale household items, automobile accessories, general merchandise, some patent medicines and sundry drug items. Such an establishment is not a business or work of necessity.

Escape

In 1955, *State v. Ferguson*27 held that the offense could not be committed by a person who had broken away from an illegal confinement pending trial. The later case of *Riebesehl v. Alvis*28 decided that the offense had been committed by the accused who had walked through an unlocked jail door wherein he was being confined on a charge of breaking and entering an inhabited dwelling.

Traffic Laws

*City of Akron v. Willingham*29 dealt with the power of a municipal court to suspend the driver's license of a person found guilty (pleading guilty) of operating a motor vehicle in violation of a speed ordinance very similar to the state speed law.30 The Supreme Court sustained the suspension authority, holding that a law or ordinance prohibiting speeding creates an offense "relating to reckless operation" of a motor vehicle.

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24 143 N.E.2d 849 (Ohio Ct. App. 1957). The court summarily rejected the argument that there was any impairment of freedom of religion.
27 100 Ohio App. 191, 135 N.E.2d 884 (1955); see comment, 8 West. Res. L. Rev. 220 (1957).
28 103 Ohio App. 311, 145 N.E.2d 207 (1957).
29 166 Ohio St. 337, 142 N.E.2d 653 (1957).
30 Ohio Rev. Code § 4511.21. This section contains the "reasonable and proper" and the "assured clear distance ahead" tests, together with the prima facie lawful speed limits.
within the meaning of § 4507.34, Ohio Revised Code, which authorizes suspension or revocation as to any person convicted or pleading guilty to such an offense, for a period up to one year.

*City of Toledo v. Soldier* held that the "due regard" ordinance and the "speed" ordinance of the city created separate offenses. Evidence of speed alone will not support a conviction under an affidavit based on the "due regard" ordinance. The latter ordinance is very similar to the state statute on the same subject.

*State v. Hale* decided that the definition of "under the influence of intoxicating liquor" as used in the traffic code was not controlled by a definition of intoxicating liquor contained in § 4301.01, Ohio Revised Code. Since all the testimony introduced by the state indicated that the defendant was beyond a doubt, under the influence of alcohol, the conviction was affirmed.

**Test of Obscenity**

An ordinance of the City of Cincinnati dealing with the sale and distribution of obscene materials, pictures, and publications came before the municipal court for construction in *Cincinnati v. Walton*. In a very carefully written opinion, Judge Bettman sought to define obscene matter in such a manner as to come within the pattern of the several United States Supreme Court decisions dealing with the relationship of such regulatory legislation to free speech and press. He adopted a two-fold test: (1) The obscene material must be calculated to appeal to the reader's or viewer's prurient interest, i.e., the material must be "dirt for dirt's sake"; (2) the material must have a substantial tendency to excite lustful desires or be material dealing with sexual perversion. The judge ruled further that individual pictures or stories in a magazine not related

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*Ohio Rev. Code* § 4511.20. In *State v. Martin*, 164 Ohio St. 54, 128 N.E.2d 7 (1955), the Ohio Supreme Court construed this section to mean that a person must operate the named vehicle in the same manner as would a reasonable prudent person under similar circumstances.

In the present court of appeals report, the court found that the defendant in the operation of his automobile complied with this standard.


*Ohio Rev. Code* § 4511.19.

Despite the literal applicability of this section to the entire code, the court looked upon this section as referring exclusively and solely to the liquor control act and held that this section has no reference to or application to any other civil or penal sections of the code.

to the whole could be singled out and tested by these standards without considering the magazine as a whole.\textsuperscript{37}

\textbf{MISCELLANEOUS OFFENSES}

The Ohio criminal trespass (land or premises) statute\textsuperscript{38} is silent on the matter of intent. \textit{State v. Larson}\textsuperscript{39} held that evidence of an apparent technical obstruction on land by the defendant with innocent belief that he had a right to be there did not establish a violation. This substantially requires the prosecution to offer proof of intent to make out a prima facie case.\textsuperscript{40}

In \textit{State v. Hershberger},\textsuperscript{41} the accused was convicted of failing to cause his children to attend school, and the trial court fined him and ordered him to give bond in the sum of $250 to keep the peace for two years. The court of appeals modified the judgment to the extent of requiring the accused to give a bond in the sum of $100. It held that the special bond section under the compulsory education laws\textsuperscript{42} was controlling over the general recognizance statute\textsuperscript{43} under which the trial judge required the accused to enter into the peace bond in question.

\textit{State v. Rudy}\textsuperscript{44} affirmed a conviction of the accused for violating the special assault statute, § 2903.01, Ohio Revised Code, which protects a child under the age of 16. The court applied this statute to acts committed against a male child under that age, in accordance with a prior construction of the statute in this case.\textsuperscript{45}

\textsuperscript{37} Since § 901-13, Code of Ordinances of Cincinnati, did not deal separately with the problem of sales or exhibitions to minors, the court ruled out of consideration all evidence as to the effect on minors to avoid any possible invalidity which might flow from the decision in Butler v. Michigan, 352 U.S. 380 (1957).

Applying his tests to the evidence presented, namely the pictures, magazines, etc., the judge found as a fact that certain of them (named) were obscene, and therefore found the accused guilty.

The comparable state statutes are \textbf{OHIO REV. CODE} § 2905.34, dealing with sales and other offerings generally and also specifically to minors: § 2905.341 and § 2905.342. Also exclusively as to minors: § 2903.10 and § 2903.11.

\textsuperscript{38} \textbf{OHIO REV. CODE} § 2909.21.

\textsuperscript{39} 143 N.E.2d 502 (Ohio C.P. 1956).

\textsuperscript{40} The present statute varies considerably from the former \textbf{GENERAL CODE}, § 12522, which originally required that unlawful entry be first forbidden.

\textsuperscript{41} 103 Ohio App. 188, 144 N.E.2d 693 (1955).

\textsuperscript{42} \textbf{OHIO REV. CODE} § 3321.38 (a).

\textsuperscript{43} \textbf{OHIO REV. CODE} § 2947.16.

\textsuperscript{44} 101 Ohio App. 241, 139 N.E.2d 81 (1954).

\textsuperscript{45} The indictment was held good against a demurrer in \textit{State v. Rudy}, 162 Ohio St. 362, 123 N.E.2d 426 (1954); 1955 Survey, 7 \textbf{WEST. RES. L. REV.} 265, 268 (1956).
In *State v. Silberberg*, land owners had purchased for personal occupancy undivided but specifically designated resident units in a multiple residence real estate project; title to the entire building project was to be taken in the name of a corporation and each unit owner was to have stock according to the value of his ownership in the project. The court held that the agreements among these landowners were contracts for the sale of real estate and not "securities" within the meaning of the Ohio Securities Act. The court indicated that the nature of the transaction was greatly influenced by the individual control which the "shareholder" had over the property. This factor determined whether the interest was an investment or a real estate transaction.

**Criminal Procedure**

**Limitations on Municipal Misdemeanors**

The 1955 Cincinnati Earned Income Tax Ordinance provided for prosecution of violators within 10 years after the occurrence of any violation. Accused was prosecuted for failure to file a return within one year and three months of the violation. Since the state law provided a period of one year, the facts in *Cincinnati v. Faig* directly raised an issue of possible conflict between the ordinance and a general law of the state. The court, following the views of the Supreme Court and the court of appeals that a conflict in the provisions of a statute and an ordinance is not alone sufficient to invalidate the ordinance, held that the 10 year "limitations" provision of the income tax ordinance was valid and convicted the accused. This holding is consistent with the decisions that a more severe penalty in an ordinance than that provided for by

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47 OHIO REV. CODE §§ 1707.01-.03.
48 OHIO REV. CODE § 1905.33.
50 There is a general statement in Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) that a police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, even though greater penalties are imposed by the municipal ordinance. In re Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949) states the general proposition that "conflicts with the general laws is not determined by the penalties prescribed but rather whether the ordinance permits or licenses that which the statute prohibits and forbids, and vice versa." This decision sustained a conviction of assault and battery under an ordinance which provided for a punishment in excess of the general rule set out in OHIO REV. CODE § 715.67 (formerly OHIO GEN. CODE § 3628), and in excess of the state penalty for that offense provided by OHIO REV. CODE § 2901.25.
general law does not bring the ordinance into conflict with the provisions of Art. XVIII, § 3 of the Ohio Constitution, although there has been some disagreement on this point among the various courts of appeals.\(^{61}\)

**Grand Jury Proceedings**

In *Wickine v. Alvis*\(^ {62}\), the court of appeals rejected petitioner's contention that his sentence upon a murder indictment was void because allegedly incompetent testimony was heard by the grand jury. In fulfilling its function as an inquirer, the grand jury does not exercise a judicial function and the courts in Ohio lack the power, even in a direct attack, to inquire into the legality or sufficiency of the evidence on which an indictment is based.

**INDICTMENTS AND AFFIDAVITS**

After an accused had been tried, convicted, and sentenced to the Ohio Penitentiary, it was discovered that the indictment was not executed in accordance with the requirements of the statute. The signature of the grand jury foreman was not subscribed after the words "a true bill." In *Kennedy v. Alvis*\(^ {63}\), the accused obtained his release from imprisonment through a habeas corpus proceeding which urged the court to declare the indictment a nullity. The Code\(^ {64}\) requirement of the foreman's signature was held mandatory and the only feasible way under Ohio law for certifying that the Grand Jury had indicted the accused as provided by law.

*State v. Williams*\(^ {65}\) raised the issue of whether an indictment charging a felony should be drawn with at least the factual allegations, required by statute, of an affidavit and warrant charging a misdemeanor. In holding that the indictment need not be so specific, the court pointed out that an

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\(^{61}\) See City of Cleveland v. Betts, in which the court of appeals apparently held that a municipal ordinance applying to concealed weapons which provided a penalty of a misdemeanor when the state statute provided for punishment as a felony, was invalid. See Cleveland News, March 13, 1958. On the other hand, City of Toledo v. Kohlholfer, 96 Ohio App. 355, 122 N.E.2d 20 (1954) sustained a municipal ordinance which provided a misdemeanor penalty for its violation when the state statute punishing a similar offense prescribed a felony.

\(^{62}\) In City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 144 (1929), the court's opinion states that OHIO GEN. CODE § 3628, is not a law defining offenses and prescribing punishment within the meaning of OHIO CONST., art XVIII, § 3, since an alleged conflict must relate to a state law applicable to the same subject matter.

\(^{63}\) 103 Ohio App. 1, 144 N.E.2d 207 (1957).

\(^{64}\) 145 N.E.2d 361 (Ohio C.P. 1957).

\(^{65}\) OHIO REV. CODE § 2939.20. The court held that §§ 2941.08, 2941.29, and 2941.54 were inapplicable to a void indictment.

\(^{66}\) 145 N.E.2d 245 (Ohio C.P. 1957).
accused under indictment for felony is entitled to a bill of particulars more specifically setting out the nature of the offense charged. An indictment is not subject to a motion to quash if it contains a statement that the accused has committed a public offense, which statement is in ordinary and concise language or in the words of the enactment, or in any words sufficient to give the accused notice of the offenses of which he is charged.56

In State v. Porcaro,57 the accused was charged in a single count indictment with burglary of an inhabited dwelling and grand larceny on the night of May 30, 1948, at the hour of 5:00 o'clock. Otherwise the indictment followed the statutory form for charging the offense. The court held that an indictment which charged the offenses in substantially the form prescribed by statute was not demurrable, and with the offense properly charged, the statement of the hour should be treated as surplusage or at most an immaterial variance. The court also held that the general rule against joining two offenses in the same count does not apply to an indictment for burglary and for larceny committed while perpetrating the burglary.

In State v. Patty,58 the defendant was convicted of acting in a manner tending to cause the delinquency of a minor, the affidavit charging immoral and indecent conduct. Nowhere did the affidavit charge that the minor was a delinquent. The court held that it was not necessary to charge the minor with being a delinquent when the charge against the adult was "acting in a manner tending to cause the delinquency" of a minor.

Under Art. I, § 10, Ohio Constitution, an accused is entitled to have an affidavit which charges him with an offense and describes the offense sufficiently to set out its nature. This requirement is generally met when the affidavit charges an offense in the language of the statute defining the crime. But in any case, a defendant who goes to trial on a plea of not guilty without objecting to the form or substance of the affidavit waives his right to demand sufficient averments in the charge.59

56 OHIO REV. CODE § 2941.05, seems to authorize alternative methods of charging an offense in an indictment or information. State v. Yudick, 155 Ohio St. 269, 98 N.E.2d 415 (1951) gave literal application to its provisions in sustaining an indictment challenged for legal sufficiency.
57 102 Ohio App. 128, 141 N.E.2d 482 (1956).
58 102 Ohio App. 18, 140 N.E.2d 804 (1956).
59 Toledo v. Soldier, 101 Ohio App. 273, 139 N.E.2d 631 (1956). The court held in this case that the evidence tended to show a violation of speed alone whereas the affidavit attempted to charge an offense under the due regard ordinance. For this variance, the judgment of conviction was reversed.
In *Hasselworth v. Alms*, the accused was indicted for burglary in the night season of an uninhabited dwelling. A plea of guilty was entered to an unlawful breaking and entering in the daytime, and the court amended the indictment by striking out the word "night" and substituting the word "day." This amendment changed the identity of the offense, and the accused was illegally imprisoned. He was discharged on a writ of habeas corpus.

**Right of Counsel**

In *State v. Alvts*, the petitioner was urging that he had been denied his constitutional rights because counsel was not appointed for the preliminary hearing before a mayor. Since it appeared that the Code Section which provides for the appointment of counsel after the serving of indictment or opportunity for receiving it had been afforded, was seasonably observed, the charge was not supported, and there was no denial of any constitutional rights.

While a defendant's plea of guilty raises a presumption of a waiver of his right to have counsel, the presumption may be rebutted by the record and special facts. *State v. Porcaro* involved such a situation. It appeared upon arraignment that the accused was insane, and the judge entered a plea of not guilty for him, ordering that he be committed to the Lima State Hospital for examination and report. This commitment was later made indefinite, until his reason was restored. About 9 months later, accused was released and returned to the court. He then changed his plea to guilty and was sentenced for his crimes. The record did not indicate that he was ever advised by the court of his constitutional rights, including the right to counsel when unable to employ professional advice. The court held that the record in the case tended to rebut the presumption that due process under the Federal and Ohio Constitutions was accorded to the accused.

In *State v. Ray*, the accused contended that he was prejudiced by the appearance of private counsel, hired by the prosecuting witness, to assist the prosecution. Since no complaint was made of the conduct of the private attorney, there was no showing of any prejudice. The court stated that it is a sound policy of law which permits the appearance of

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60 143 N.E.2d 862 (Ohio Ct. App. 1956). The court held that the two offenses were separate and distinct; the proper procedure would have been to procure an indictment charging breaking and entering in the daytime before entering the plea of guilty.

61 140 N.E.2d 59 (Ohio Ct. App. 1952)

62 **Ohio REV. CODE** § 2941.50.

63 102 Ohio App. 128, 141 N.E.2d 482 (1956)

64 102 Ohio App. 395, 143 N.E.2d 484 (1956).
private counsel, especially in courts of limited jurisdiction, when both
the public and the individual litigants are likely to be benefited by his
presence.

**Double Jeopardy**

In *Washington Court House v. Carson*, the accused had been tried
once for violating a municipal ordinance prohibiting driving under the
influence of intoxicating liquor. During the course of that trial, the
municipal court granted a motion of the city to dismiss without prejudice
to a future action. A new affidavit was then filed and a second prose-
cution instituted which resulted in a conviction. Accused had moved to
dismiss the new affidavit for the reason that he had been placed in jeop-
dardy under the prior affidavit, which was overruled. The court of ap-
peals affirmed the judgment on the ground that there was no jeopardy
under the first affidavit because that instrument was void for failure to
state an offense and there was never any jeopardy under it.

**Pleas**

*Craft v. Alvis* was an original habeas corpus proceeding in the court
of appeals. Petitioner sought release because of the alleged inability to
plead guilty to second degree murder under an indictment which charged
first degree murder. Reasoning by analogy to the cases in which con-
victions of lesser degrees of homicide under indictments which charged
first degree murder had been sustained, the court denied the application
and held the plea proper.

**Change of Venue**

*State v. Tannyhill* held that an application for change of venue was
not substantiated by a showing of substantial newspaper and radio pub-
licity of a factual nature concerning the crime for which the accused was
being tried. The court indicated that the grant or denial of the motion
lies within the sound discretion of the trial court, and a record which
does not show inability to obtain a fair and impartial trial contains no

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55 143 N.E.2d 853 (Ohio Ct. App. 1956), *appeal dismissed*, 166 Ohio St. 248, 141
N.E.2d 175 (1957); *cert. denied*, 355 U.S. 270 (1957). The opinion by the
municipal judge suggested that the accused could not attack the second affidavit be-
cause she had moved to dismiss the first for insufficiency. It should be noted, how-
ever, that the court overruled that motion, but later granted the city's motion based
on the same ground.


57 101 Ohio App. 466, 140 N.E.2d 332 (1956), *appeal dismissed*, 165 Ohio St. 482,
135 N.E.2d 765 (1956).
prejudicial error as to denial of a change of venue. The court indicated that the most important factor for the court to consider on the motion is whether a fair and impartial jury can be obtained in the county in which the offense is alleged to have been committed.68

Jury Trial

State v. Hershberger69 was an appeal from a judgment of guilty of failing to cause the defendant's children to attend school. The juvenile court tried the case and imposed the maximum fine of $20 after defendant had formally demanded a trial by jury. The denial of a jury was correct under § 2945.17, Ohio Revised Code, which provides a statutory right to trial by jury except in cases in which the penalty does not exceed the sum of $50.

Nor is a first offender charged with violating the Sunday closing law70 entitled to a trial by jury. State v. Keich71 held that there was no denial of any constitutional right in refusing a trial by jury, relying upon the cases which hold that there is no constitutional right to trial by jury under the Ohio Constitution where the punishment is by fine only.

State v. Mays72 considered several questions concerning the impanneling of a jury. In the course of a trial of the accused for violation of the Ohio narcotics law, defense counsel moved prior to the voir dire examination to dismiss the jurors summoned on the ground that there were among the panel, persons who had participated in the trial of another

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68This decision was rendered prior to the decision of the Supreme Court in State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340 (1956). That decision amply confirms the soundness of the position of the court of appeals. The Sheppard decision established three propositions on the matter of change of venue in criminal cases: (1) ordering a change in venue lies in the discretion of the trial court; (2) refusing to order a change of venue without prejudice until it can be determined whether a fair and impartial jury can be impaneled is not an abuse of discretion; (3) denying the motion to change is not error where a jury is obtained from the special panel of prospective jurors where only 14 are excused because of having formed a firm opinion and before accused has exercised all of his peremptory challenges, is not an abuse of discretion. See 1956 Survey, 7 WEST. RES. L. REV. 293, 294 (1957).

In the principal case, 12 regular and two alternate jurors were obtained. Most of them had very little knowledge of the details; several had formed undisclosed opinions which they declared on the voir dire would not not influence them in the trial of the case. No challenges for cause were overruled; 52 were excused having formed a fixed opinion; five were excused for disbelief in capital punishment; six others were excused for health or physical reasons; four had used or were using counsel in the case. The accused's peremptory challenges were not exhausted.

69103 Ohio App. 188, 144 N.E.2d 693 (1955).

70OHIO REV. CODE § 3773.24. The punishment for the first offender under § 3773.99 (P) is a maximum fine of $25.00.

71145 N.E.2d 532 (Ohio Ct. App. 1956).

defendant involving a similar charge and the same witnesses. This motion was overruled. Upon voir dire the panel was asked questions concerning the crime charged and their attitude toward the presumption of innocence and necessity of the state proving all elements of the crime. To these questions there was no audible answer but none of these former jurors were challenged for cause. Three were challenged peremptorily and the final jury selected had four members who had participated in the trial of the other defendant who had been found guilty. The judge did not participate in examination of the jurors as to their qualifications. The court of appeals found no error in the proceedings incident to the selection of the jury. It indicated that broad discretion is conferred on the court in these preliminaries, including the matter of personal examination of the jurors, and an abuse of discretion on which to predicate error must clearly appear. The court found no indication of abuse in the record, especially in view of defendant's failure to challenge for cause and in view of the established practice to use a venire continuously during the term for which it is called.

Evidence

*State v. Brown*\(^7\) considered the question of the propriety of granting a defendant's motion to dismiss and the burden of proof under the defense of alibi. Where there is any substantial evidence that a crime has been committed by the defendant, the question of his guilt or innocence must be submitted to the jury; only when there is no evidence to establish all the essential elements of the crime charged may the trial court sustain a motion of the defendant for dismissal.

While it was apparent that the jury did not believe the witnesses used to prove the alibi, the court properly told the jury that the defendant did not have the burden of proof of establishing his alibi beyond a reasonable doubt, nor by a preponderance of the evidence, but if the proof of the alibi raised a reasonable doubt in their minds concerning his guilt he should be acquitted.

*State v. Titak*\(^4\) decided several questions about the admissibility of physical tests relative to the defendant who had been convicted of driving under the influence of intoxicating liquor. The defendant granted permission to a police officer to conduct an intoxi-meter test on him, although the accused was not warned that the result of the test might be used against him at his trial. The trial court allowed the results of the intoxi-meter test to go to the jury, and covered the consideration and

\(^7\) 102 Ohio App. 113, 141 N.E.2d 686 (1956).
weight of this evidence in his general charge, leaving the weight and credit of this evidence as well as all other evidence in the case to the determination of the jury. On the first objection, the court held that it was not a violation of a constitutional right to make the test when willingly submitted to by the accused although without a warning of its possible incriminating use. Submission of the results of the test along with all the other evidence under the general charge was not error, especially since there was ample evidence aside from the test from which the jury could have found the accused guilty.

Another "driving while intoxicated" prosecution presented an interesting question concerning the limits of cross-examination of an accused who voluntarily testifies. The Code\textsuperscript{75} authorizes a showing of the witness's conviction of other crimes for the purpose of affecting his credibility. In \textit{State v. Hickman},\textsuperscript{76} there was cross-examination of the accused pursuant to this statute as well as under the statute\textsuperscript{77} authorizing the admittance of evidence of like acts of the accused, previously committed, which are so related to the offense charged, in character and point of time, as tend to show intent, motive, habit or state of mind of the accused at the time he committed the offense charged. The questions related to prior arrests and convictions for violations of a city ordinance prohibiting operating a motor vehicle while under the influence of intoxicating liquor. The court held that evidence of other convictions, to be admissible under the two statutes, must come within the designation of the \textit{crimen falsi} of the common law.\textsuperscript{78} Former convictions involving violations of city ordinances is not evidence of this character. \textit{State v. Miclau}\textsuperscript{79} held that the conviction of the accused for contrib-

\textsuperscript{75} OHIO REV. CODE § 2945.42.  
\textsuperscript{76} 102 Ohio App. 78, 141 N.E.2d 202 (1956).  
\textsuperscript{77} OHIO REV. CODE § 2945.59.  
\textsuperscript{78} The showing of treason, felony, or any of the \textit{crimen falsi} was permissible to disqualify a witness at common law. This disqualification was removed by statute (OHIO REV. CODE § 2945.42), but the same kind of criminal conduct can be shown under the statute to affect the credibility of the witness. A leading case is Kornreich v. Industrial Fire Insurance Co., 132 Ohio St. 78, 5 N.E.2d 153 (1936) in which the opinion states that "\textit{Crimen falsi} was characterized as any crime which might injuriously affect the administration of justice by the introduction of falsehood and fraud." In this case, a formal confession of arson was considered the equivalent of a conviction of such an offense. Also, the cross-examination must be confined to showing conviction of \textit{crimen falsi}. Evidence of indictment alone is inadmissible. See Wagner v. State, 115 Ohio St. 136, 152 N.E. 28 (1926).  
\textsuperscript{79} 140 N.E.2d 596 (Ohio Ct. App. 1957). Briefly, a 15-year-old girl came into Cleveland Central police station at midnight under the obvious influence of intoxicating liquor which allegedly had been consumed, among other places, at the establishment of which the accused was the manager. A police officer and a policewoman obtained the consent of the girl to accompany an older man to the bar managed by the ac-
uting to the delinquency of a minor should be reversed. Two judges concurred in the judgment of reversal but for different reasons. The dissenting judge felt that the evidence was competent and that the conviction should be affirmed. One of the concurring judges felt that the evidence was inadmissible because of the manner in which it had been procured; the other expressed the view that there was no affirmative or positive evidence to support a charge of contributing to the delinquency of the child within the meaning of the Ohio statutes.

There were the usual number of cases in which convictions were either sustained or reversed on the question of the overall sufficiency of the evidence presented in the particular cases.

Instructions

The statute regulating written charges contemplates that counsel's request be made at the conclusion of the evidence and that the charges be reduced to writing on the request of either party. It permits deviation from the order of procedure set out therein. In State v. Fleming, a prosecution for malicious shooting with intent to wound, the defendant filed a written request with the clerk of court several days before the commencement of trial requesting a written charge be given the jury and that the charge include the elements of assault, discharging firearms, and pointing firearms. The court followed the request to reduce the charge to writing but it dealt only with the crime set out in the indictment. The court of appeals considered it a proper exercise of discretion to deviate from the statutory routine with regard to the time for requesting charges to the jury, but upon considering the resumé of the evidence, determined that the lesser included offense of assault was an issue in the

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80 State v. Hicks, 139 N.E.2d 689 (Ohio Ct. App. 1954) (receiving and concealing stolen property, knowing it to have been stolen); State v. Franken, 140 N.E.2d 23 (Ohio Ct. App. 1955) (excessive speed under OHIO REV. CODE § 4511.21); State v. Rucks, 141 N.E.2d 265 (Ohio Ct. App. 1956) (illegally possessing burglary tools); State v. Moore, 139 N.E.2d 381 (Ohio C.P. 1956) (driving while under influence of intoxicating liquor).


102 Ohio App. 244, 142 N.E.2d 546 (1957).
case. It was therefore error to refuse a charge on assault but not on the other offenses because they were not lesser included offenses, being of a different class.

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the accused requested that special charges be given the jury before argument. This request was denied, but the substance of these charges was included in the court's general charge. The court of appeals held that the court could properly deny the request to charge before argument, and that it had sufficiently included the requested charges in its later general charge to the jury. The appellate court reminded counsel of the necessity of raising specific objections to the general charge before the trial judge, in order to raise a question of further omissions in the general charge, which was not done in this case.

An instruction is improper which leaves to the jury the consideration of a matter on which there is no evidence. In 

acquitted was tried under an indictment for first degree manslaughter, and the only evidence presented on the issue of the accused being the aggressor was against such a theory. It was therefore error for the court to charge in such a way that the jury could draw an inference that the defendant was the aggressor. Also the accused offered a plea of self defense which was corroborated by eyewitnesses. The court did correctly state the obligation of the accused if the jury found the deceased in the wrong. However, the court submitted the "reasonable person similarly situated" test for the jury to use in considering the reasonableness of the accused's belief in danger which would justify the use of deadly force in defense. This latter submission was erroneous because the Ohio law entitles the accused to have the fear, which he asserts caused his use of deadly force, measured by his own physical and mental constitution and not by that of the hypothetical reasonable man.

Verdict

The Ohio statute governing procedure in the common pleas courts provides that the jury must be sent out again for further deliberation when the verdict in substance is defective. In 

the jury returned with a verdict upon a form which had been given it. The trial judge examined the verdict, and found that it was improper, not conforming to the charge. He explained the matter to the jurors, presented proper forms of verdict to them, and directed them to conduct

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144 N.E.2d 656 (Ohio Ct. App. 1956).
103 Ohio App. 163, 144 N.E.2d 683 (1956).
OHIO REV. CODE § 2315.10. Quaere: Does this statute have any relevance to criminal procedure?
further deliberations. They later returned a verdict of guilty in proper form. The court of appeals held that the judge's action was authorized by the statute.

State v. Baldridge\textsuperscript{88} considers the time at which a jury ceases to have any official status. The jury had returned its verdict, and defendant had waived polling, the judge and prosecutor had thanked the jury. The court then asked counsel for defendant if they had anything to say, and they declined. Thereupon the foreman of the jury arose and asked permission to make a statement. This was refused and the refusal was assigned as error. The court reasoned that the jury had terminated its duties when it returned its verdict and announced it. There was therefore no prejudicial error in denying permission to make a statement.

Sentence

The Ohio Criminal Code\textsuperscript{89} establishes certain prerequisites to passing sentence, including the asking of the accused whether he has anything to say as to why judgment should not be pronounced against him. This requirement applies to a defendant found guilty of a misdemeanor.\textsuperscript{90} This procedure is mandatory, and unless observed, the trial court will be reversed and the case remanded for resentencing only, provided there is no other error apparent on the record.

The Ohio Criminal Code\textsuperscript{91} also requires the clerk to supply a mittimus, including a copy of the sentence and indictment to accompany every convicted felon to the place of imprisonment. In Stewart v. Alvis,\textsuperscript{92} the defendant claimed that he was illegally imprisoned because the judge did not sign the journal entry. The court never signed any written sentence or journal entry in this case. It orally pronounced judgment and sentence, and the clerk entered the judgment and sentence in the journal. The judgment was complete, and the accused was not entitled to release on habeas corpus. A collateral point in this case was whether it was necessary that the defendant be present in the event that the journal record in the trial court needed to be completed or corrected. Physical presence of the defendant is not necessary. Foglio v. Alvis\textsuperscript{93} is a similar holding. In Reiter v. Alvis,\textsuperscript{94} an original writ of habeas corpus was filed

\textsuperscript{88} 144 N.E.2d 656 (Ohio Ct. App. 1956).
\textsuperscript{89} \textsc{Ohio Rev. Code} § 2947.05.
\textsuperscript{90} City of Columbus v. Shuffelt, 139 N.E.2d 488 (Ohio C.P. 1956).
\textsuperscript{91} \textsc{Ohio Rev. Code} § 2949.12.
\textsuperscript{92} 144 N.E.2d 907 (Ohio C.P. 1957).
\textsuperscript{93} 143 N.E.2d 641 (Ohio C.P. 1957).
\textsuperscript{94} 144 N.E.2d 902 (Ohio Ct. App. 1957). This court refuses to accept its own decision in the much publicized but unreported case of Dean v. Alvis, No. 5590.
in the court of appeals. The ground asserted for release was the lack of a signed entry issued to the clerk ordering that the sentence pronounced orally in court be journalized. The court dismissed the writ, concluding that the petitioner had pursued an improper remedy to correct any alleged errors in the proceeding. Since the judgment had been journalized, the failure of the judge to sign the entry was at most erroneous and not subject to collateral attack.

*In re Shelton,* previously discussed in connection with another matter, held that a trial court in sentencing a defendant for violation of the larceny statute had no power to impose any sentence other than that provided in the statute. Therefore, that part of the sentence which ordered the defendant to "produce" the thing stolen (a pistol) was void.

*State v. Westlake* raised a question of the power of the court of common pleas to modify a sentence in a criminal case after the term at which the judgment was entered and with the sentence already in effect. The court held that it had no jurisdiction until the first order was set aside. It could not set aside the first order because a court has no power, at a subsequent term, to vacate its prior judgments.

In *State v. Alvis,* the accused argued for his release on a writ of habeas corpus because he filed a plea of guilty to both counts against him, and the trial judge referred the matter to the probation department, and later another judge called him before the court, asked him the usual statutory questions and sentenced him on both counts, with the direction that they be imposed consecutively. The court indicated that the accused had neither a constitutional nor statutory right to probation. It found that the probation department and the court performed all duties required of it under the law, held the sentence a valid order of the court and dismissed the writ of habeas corpus.

Referral to a probation officer is discretionary before passing sentence on a plea of guilty. In *Riebesehl v. Alvis,* the accused pleaded guilty to breaking and entering an inhabited dwelling and escaping from jail, and was sentenced to the Ohio penitentiary without any referral to a probation officer. The court commented on the severity of the sentence on the basis of the defendant's record, but held that defendant had been accorded due process, and dismissed the writ of habeas corpus.

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103 Ohio App. 436, 145 N.E.2d 673 ((1957)).
145 N.E.2d 501 (Ohio C.P. 1957). The motion was to modify a sentence from assault with intent to rob to one of plain assault. The court indicated that it would not modify on the merits even if it did have authority under the circumstances.
103 Ohio App. 38, 144 N.E.2d 223 (1957).
103 Ohio App. 311, 145 N.E.2d 207 (1957).
145 Ohio App. 128, 141 N.E.2d 482 (1956).
The journal entry in the case of State v. Porcaro indicated that the defendant was sentenced for violation of the burglary and larceny sections of the Code. The entry did not specify the manner in which the sentences should be served. Though the judgment was reversed on another ground, the court stated that there is a presumption that the court intended that the prisoner should serve the aggregate time of both sentences when the record is silent as to whether they should be served concurrently or cumulatively.

**Probation and Parole**

Because of the differences in the statutes governing these two subjects, radically different procedures are possible in effecting their revocation. State v. Krauss discusses the essential requirements of the revocation of a probation order and the limited jurisdiction of the court of common pleas in hearing such a matter. The latter problem has been discussed earlier in this article. Ohio Revised Code, § 2951.99 provides that the judge, before whom an arrested probationer is brought, shall immediately inquire into the conduct of the defendant and shall have the power to terminate probation and impose the proper sentence. This section accords the defendant, who is out on probation, the right to a judicial inquiry prior to termination of probation. Probation will be revoked if the defendant has violated the conditions of his probation. The record of the trial court must show compliance with the statutory requirements, and when the order revoking probation is not based upon any conduct of the defendant in violation of the probation order, the revocation is unauthorized.

The Supreme Court in In re Varner discussed the rights of a convict to have a judicial inquiry into the procedure for revocation of his parole by the Pardon and Parole Commission. Specifically, it held that the legality of the revocation could not be tested by the writ of habeas corpus, but its reasoning leads to the inference that there is no right to any judicial review of any aspect of the parole proceedings. Without expressing any opinion as to the soundness of the several court of appeals decisions which have held that there must be a judicial hearing before probation may be revoked, the court pointed out that the statutes governing probation proceedings lend support to this position. But on the contrary, the statutes governing parole proceedings are silent. Furthermore, probation is court administered, while parole is administered by an au-

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100 103 Ohio App. 209, 145 N.E.2d 131 (1957). The mandate to the trial court was reversed, defendant discharged subject to the order of probation.

101 166 Ohio St. 340, 142 N.E.2d 846 (1956).
authorized administrative body. The following quotation expresses the essence of the court's position:

If under our statutes a convict has no right to a parole, it would seem that he should have no right to contest what may be in substance a revocation of his parole (that is the commission's declaring him to be a parole violator and determining that he should again be imprisoned) unless there is a clear statutory expression of an intent to confer such a right upon him. We find no such statutory expression.\(^\text{202}\)

Criminal Appeals

FILING BRIEFS AND ASSIGNMENTS OF ERROR

Section 2505.04 of the Ohio Revised Code states that an appeal is perfected when written notice of appeal is filed with the lower court, that no appeal shall be dismissed without notice to the appellant, and that no step required to be taken subsequent to the perfection of the appeal is jurisdictional. The Supreme Court has held that this section applies to both civil and criminal cases.\(^\text{103}\) Another section,\(^\text{104}\) expressly applicable to criminal appeals, seems to require that the appellant's brief and assignments of errors be filed simultaneously with the transcript. One court of appeals had held that the statute imposed a mandatory requirement and that a motion to dismiss an appeal would be sustained for failure to comply with this requirement.\(^\text{105}\) The same court, relying on an intervening Supreme Court of Ohio decision that the section is directory only, three years later overruled a motion to dismiss an appeal for failure to file assignments of error and a brief with the transcript.\(^\text{106}\) However, non-compliance with this requirement after notice may lead to a dismissal. In the exercise of its sound discretion the court can determine whether additional time for filing the brief and assignments of error should be granted, dismissing the appeal under appropriate circumstances.\(^\text{107}\) Another court of appeals held that its own court rules do not apply to appeals in criminal cases and overruled a motion to dismiss for failure to file within the time prescribed in the rule.\(^\text{108}\)

\(^{202}\) *In re Varner*, 166 Ohio St. 340, 347, 142 N.E.2d 846, 851 (1956).

\(^{103}\) *State v. Nickles*, 159 Ohio St. 353, 112 N.E.2d 531 (1953).

\(^{104}\) *Ohio Rev. Code* § 2953.04.


\(^{106}\) *State v. Rike*, 145 N.E.2d 538 (Ohio Ct. App. 1953). The Supreme Court in *State v. Nickles*, supra note 101, held that the provisions of § 2953.04 are directory, and the grant of an extension of time for filing briefs with assignment of error is within the sound discretion of a court.


LEAVE TO APPEAL

The criminal appeals statute permits appeals after the 30 day period only by leave of the court or two judges thereof.\(^{109}\) It is the policy of the court of appeals to grant leaves to appeal only after a showing of good cause. \textit{Ex Parte Hertz}\(^{110}\) held that a motion asserting as its sole ground that the petitioner learned that his sentence was illegal after he became imprisoned does not show good cause for the granting of leave to appeal. On the other hand, a motion for leave to appeal which was supported by an affidavit of the defendant's mother that she was unable by diligent effort to obtain counsel within the time to perfect an appeal as a matter of right, presented sufficient cause for granting the motion.\(^{111}\)

The necessity of supporting the motion for leave to appeal by adequate data is illustrated by \textit{In re Striker}.\(^{112}\) That case held that a petition for leave to appeal in a criminal case after the statutory time has expired will be denied where the request is not accompanied by a bill of exceptions,\(^{113}\) needed under the circumstances to show the existence of the alleged errors.

Review On The Merits

SUFFICIENCY OF THE EVIDENCE

Upon the hearing of the appeal, the reviewing court may affirm the judgment, reverse it in whole or in part, modify it within limits, and order the accused to be discharged or grant a new trial.\(^{114}\) The court of appeals in \textit{State v. Ray}\(^{115}\) held that it would not set aside a judgment of the trial court where the findings in a trial before the courts were based upon evidence which was susceptible of two views.

When the error assigned is that the verdict of the jury or findings of

\(^{109}\) \textsc{Ohio Rev. Code }§ 2953.05.
\(^{110}\) 139 N.E. 2d 645 (Ohio Ct. App. 1953).
\(^{112}\) 101 Ohio App. 455, 140 N.E.2d 620 (1956).
\(^{113}\) The court relied very heavily upon the decision of the Supreme Court in \textit{State v. Edwards}, 157 Ohio St. 175, 105 N.E.2d 259 (1952), in which the charge was made that the court of appeals abused its discretion in refusing to grant leave to appeal. There was no bill of exceptions filed. Only the transcript of the docket and journal entries with the original papers, were presented to the court of appeals in support of the motion. The court held that there was no abuse of discretion under the circumstances. Court appointed counsel failed to appeal within 30 days, and new counsel entered the case later and filed the motion about 4 months after the final order in the trial court. Court appointed counsel had never laid a foundation for a bill of exception at the trial.
\(^{114}\) \textsc{Ohio Rev. Code }§ 2953.07.
\(^{115}\) 102 Ohio App. 395, 143 N.E.2d 484 (1956).
the court in a trial without a jury, is against the weight of the evidence, it is the duty of the court of appeals not to weigh the evidence but to determine whether there exists in the record the degree of proof which the character of the case requires and render its judgment according to that determination. The work of the court of appeals for the period under review produced several examples of affirmances or reversals based on sufficiency of the evidence.

StateManager Geghan considered judgment which the court of appeals should properly render when it appears that there was sufficient evidence to go to the jury but insufficient evidence to support a verdict of guilty. In this case, the trial court had overruled a motion for a directed verdict and the court of appeals had reversed and ordered the accused discharged. The Supreme Court held that the sole function of the court of appeals, under these circumstances, when it unanimously concludes that the verdict was not supported by sufficient evidence, is to set aside the judgment of the trial court and remand the cause for a new trial.

When the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree or a lesser included offense, the court of appeals may modify the verdict or finding accordingly and affirm the judgment below as modified. State v. Hrynczyn is a good example of this rule in action. The accused was prosecuted for murder in the second degree. He presented a plea of self-

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218 Cooper v. State, 121 Ohio St. 562, 170 N.E. 355 (1930). This was a murder case in which there was little conflict in the evidence. Thus, it was not a situation in which the jury and trial judge were better qualified than a reviewing court to determine the truth. It was therefore a case in which the court of appeals had a duty to determine whether there was proof beyond a reasonable doubt, if it believed all of the evidence of the state and disbelieved all of the evidence of the defense favorable to the defendant, and so considering it, if there was doubt whether deliberation and premeditation had been proven by the degree of proof required in criminal cases, it had a duty to reverse and remand. The Supreme Court then proceeded to enter the judgment which the lower court ought to have entered.


216 Ohio St. 188, 140 N.E.2d 790 (1957). It is necessary, of course, that the reviewing court have first determined that there is sufficient evidence to have raised a jury question as to the defendant's guilt.

219 OHIO REV. CODE § 2953.07, authorizes the court hearing the appeal to modify the judgment as provided in § 2945.79 (D). This is not a power limited to the court of appeals. This section expressly states that the power extends to any court to which the cause may be taken on appeal.

221 139 N.E.2d 466 (Ohio Ct. App. 1957).