

1960

Civil Procedure

Samuel Sonenfield

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Samuel Sonenfield, *Civil Procedure*, 11 Wes. Rsrv. L. Rev. 346 (1960)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol11/iss3/7>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

mony of the offending attorneys themselves showed the existence of the conflict; the attorneys had previously represented one of the conflicting interests in this same probate proceeding. No formal contempt proceedings are mentioned and the reprimand appears, therefore, to have been delivered not under the formal procedure of sections 2705.02 and 2705.03 of the Ohio Revised Code, which require written notice and hearing, but under the power of a court to summarily punish a person guilty of misbehavior in the presence of, or so near the court as to obstruct the administration of justice.¹⁴

PHILIP K. YONGE

CIVIL PROCEDURE

THE MEANING OF JURISDICTION

The Ohio Supreme Court, in *State ex rel. Beil v. Dota*,¹ had before it a case which involved the basic elements of the concept of jurisdiction. The proceedings were for contempt of the Common Pleas Court of Mahoning County, which had issued a temporary injunction in an action instituted by the prosecuting attorney to "padlock," as a common nuisance, premises used for gambling.² The statute permits the court to forbid any use whatever of the premises for one year, and the trial court ordered that the premises in question not be used for *any* purpose until further order of the courts. One DeNiro was found present on the premises two days after the sheriff padlocked them.

DeNiro contended that the evidence did not support even an inference that he was on the premises for the purpose of gambling, and that the portion of the trial court's order forbidding any other, and possibly lawful, use of the premises for a year was void, on the ground that such an order could not be made as a part of a temporary injunction, but only in a permanent injunction after a final hearing.

The question presented for the supreme court's consideration was, therefore, the difference between a void and a voidable order, and between usurpation of jurisdiction and erroneous exercise of jurisdiction.

Citing several landmark cases in this important area of the law,³ the supreme court pointed out that the temporary injunction had "not been attacked by anyone through a proceeding on a motion to dis-

14. OHIO REV. CODE § 2705.01. For recent cases dealing with the power to punish for contempt, see *Mahoning County Bar Ass'n v. Franko*, 167 Ohio St. 536, 150 N.E.2d 404 (1958), *Sonenfield, Attorneys at Law, Survey of Ohio Law — 1958*, 10 WEST. RES. L. REV. 344, 347 (1959); *Fidelity Finance Co. v. Harris*, 125 N.E.2d 812 (Ohio Ct. App. 1955), *Sonenfield, Attorneys at Law, Survey of Ohio Law — 1955*, 7 WEST. RES. L. REV. 230, 232 (1956); *In re Estate of Wright*, 123 N.E.2d 52 (Ohio Ct. App. 1954), *aff'd*, 165 Ohio St. 15, 133 N.E.2d 350 (1956).

solve or modify," that it *is* within the power granted to the common pleas court, in a permanent injunction, to issue an order forbidding the use or occupancy for any purpose of premises found to be a common nuisance by reason of gambling activities conducted thereon, and that, therefore, its order must be obeyed, "*regardless of whether such power was imprudently or prematurely exercised in a temporary injunction.*"⁴ (Emphasis added.) Conceding the scope of the injunction to be too broad, there was but an erroneous exercise of an existing judicial power, not a usurpation of a non-existing judicial power.

MINORS AS PARTIES

During the past few years, several cases have reached the supreme court involving the confusion which usually occurs when a minor is a party to litigation, but his status is not disclosed at the commencement thereof.⁵ It occurred again in 1959 in *Taylor v. Scott*.⁶ In 1955, plaintiff filed a bastardy complaint against defendant in the Portsmouth Municipal Court. Plaintiff was at that time a minor and so testified at the arraignment at which defendant was present and pleaded not guilty. No objection was made at that time to plaintiff's want of capacity or to the absence from the affidavit of a guardian or next friend, nor was the question raised in 1957 at the trial in common pleas court on the merits. Complainant was by then of full age. The jury found against the defendant, who thereupon, for the first time, raised the question of the defect by an oral motion for an order in arrest of judgment.

The trial court refused complainant leave to amend the original complaint to add the name of complainant's mother as next friend and granted the defendant's motion to dismiss. Presumably, the court felt compelled to do so by a Hamilton County Court of Appeals decision.⁷

The Court of Appeals for Scioto County⁸ reversed and certified the conflict to the supreme court, which upheld the Scioto County decision and by implication overruled that of the Hamilton County case.

1. 168 Ohio St. 315, 154 N.E.2d 634 (1958). See also discussion in *Equity* section, p. 377 *infra*.

2. OHIO REV. CODE § 2915.02.

3. *E.g.*, *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N.W. 909 (1904).

4. *State ex rel. Beil v. Dora*, 168 Ohio St. 315, 321, 154 N.E.2d 634, 639 (1958).

5. See *Ritzler v. Eckleberry*, 167 Ohio St. 439, 149 N.E.2d 728 (1958); *Canterbury v. Pennsylvania R.R.*, 158 Ohio St. 68, 107 N.E.2d 115 (1952); *Sonenfield, Civil Procedure, Survey of Ohio Law — 1958*, 10 WEST. RES. L. REV. 354 (1959).

6. 168 Ohio St. 391, 155 N.E.2d 884 (1959). See also discussion in *Domestic Relations* section, p. 376 *infra*.

7. *State ex rel. Love v. Jones*, 98 Ohio App. 45, 128 N.E.2d 228 (1953).

8. Opinion not reported.

Bastardy proceedings are substantially civil in nature, at least so far as procedure is concerned.⁹ *Canterbury v. Pennsylvania Railroad*¹⁰ and *Ritzler v. Eckleberry*¹¹ established the rule that a court has "virtually unlimited discretionary power to protect the rights of a minor in an action"¹² under Ohio Revised Code section 2307.11. While neither of those cases dealt with a bastardy action, prosecutions of complaints under the bastardy sections¹³ are, unless specified otherwise therein, governed by the procedure provided for in the trial of civil cases. Furthermore, unlike the situation in *Canterbury* and *Ritzler*, in this case the minor had come of age prior to the trial of the action, and her minority at the time of commencement of the action was known to defendant. If the liberal power of amendment given to the courts by Ohio Revised Code section 2309.58 was sufficient to allow *instanter* amendment to protect the minor's rights in the *Canterbury* and *Ritzler* cases, there was all the more reason why it should have been sufficient in the instant case.

In *Evans v. Evans*,¹⁴ however, there arose a somewhat different problem concerning minors. In this action for divorce, both plaintiff and defendant were minors. Plaintiff's action was brought by her mother as next friend. Defendant and his father were both served with process. They filed an answer and cross-petition, with which plaintiff and her mother were both properly served. At this point plaintiff withdrew her petition. Next, defendant filed an amended cross-petition, with which plaintiff and her mother were both served, but no guardian ad litem was ever appointed for plaintiff. Defendant was subsequently granted a divorce from plaintiff, together with other relief, on his amended cross-petition.

The court of appeals vacated this decree and remanded the case for a new trial, holding that Ohio Revised Code sections 2307.16 and 2307.17 require the appointment of a guardian ad litem, and that failure to do so constituted prejudicial error.

The result can probably be reconciled with that in the *Ritzler* case on the ground that in the latter the case was actually defended, whereas in *Evans* defendant obtained his divorce on his cross-petition by default. The court of appeals in *Evans* seemed to feel very strongly that coming as and when it did, defendant's cross-petition was tantamount to the commencement of an original action in divorce. With all due respect to the excellent court which decided the case, the result, to this writer, appears a bit strained.

9. State *ex rel.* Gill v. Volz, 156 Ohio St. 60, 100 N.E.2d 203 (1951).

10. 158 Ohio St. 68, 107 N.E.2d 115 (1952).

11. 167 Ohio St. 439, 149 N.E.2d 728 (1958).

12. Taylor v. Scott, 168 Ohio St. 391, 394, 155 N.E.2d 884, 887 (1959).

13. OHIO REV. CODE §§ 3111.01-.24.

14. 161 N.E.2d 401 (Ohio Ct. App. 1959). See also discussion in *Domestic Relations* section, p. 372 *infra*.

VACATION OF JUDGMENTS

Courts in Ohio are given specific statutory authority to vacate their judgments after term.¹⁵ One of the situations most frequently giving rise to a petition for such relief is that of the judgment taken on a cognovit note. There has been little agreement among the various appellate courts as to the duty of a trial court in passing upon such a petition. The difficulty seems to stem from some past inconsistencies in the conduct and rulings of the supreme court, and also from the fact that the considerations which surround the entry of a judgment on a note with a cognovit feature are somewhat different from those which attend other default judgments.

In the case of *Livingstone v. Rebman*,¹⁶ a majority of the supreme court concurred in an opinion which should provide a guide to trial courts in the future, at least in cases involving judgments on cognovit notes. First of all, it is clear from the statute that, either on petition after term or on motion within term, a judgment shall not be vacated until it is adjudged that there is a valid defense to the action in which the judgment was rendered. In its opinion, the supreme court seems to put its approval upon the common practice of tendering an answer to the original proceeding in order to establish the validity of the defense.

As the court points out, the confusion begins at the point where the court is enjoined first to pass upon the grounds asserted for vacation of the judgment before proceeding to decide upon the question of the validity of the defense. Some grounds for vacation of judgment can be passed upon without regard to the validity of the defense tendered; others cannot, if, for example, the proof required to establish the ground is the same as the proof required to establish the tendered defense, such as payment, forgery, limitations, or want or failure of consideration.

Up to the time of the decision in *Bulkley v. Greene*,¹⁷ it appears to have been well settled that even when the court in which vacation was sought did decide that there were grounds for vacation, the case was by no means ready for final vacation or modification. Before such could be done, it must have been *adjudged* that there was a valid defense to the action, and, in order that the validity of the defense might be adjudged, an issue thereon should have been made up by proper pleadings, and such issue should have been tried *as in other cases, i.e.*, by jury if one is demandable and not waived.¹⁸ Only after it had been decided by such means that the tendered defense was in

15. OHIO REV. CODE §§ 2325.01-13.

16. 169 Ohio St. 109, 158 N.E.2d 366 (1959).

17. 98 Ohio St. 55, 120 N.E. 216 (1918).

18. *Lee v. Benedict*, 82 Ohio St. 302, 92 N.E. 492 (1910); *Follett v. Alexander*, 58 Ohio St. 202, 50 N.E. 720 (1898); *Watson v. Paine*, 25 Ohio St. 340 (1874); *Frazier v. Williams*, 24 Ohio St. 625 (1874).

fact proved, could final judgment of vacation be entered; in the interim, the proper course was *suspension* of the judgment, preserving the liens and priorities thereof in the event that a similar judgment should be rendered upon the trial of the cause.

Bulkley v. Greene had cast doubt on this procedure primarily for the reason that it appears from the supreme court's opinion that "issues were joined by the parties, not only on the ground set forth for vacation, but also on the defenses set forth in the petition for vacation,"¹⁹ and this without the intervention of a jury and over the protests of the judgment debtor. The court's opinion in that case seems to have approved the action of the trial court — hence the confusion.

The supreme court resolved the matter in *Livingston v. Rebman*²⁰ and laid down the following rule, which is quoted in full, with the caution that it may in the future be held to apply only to petitions to vacate judgments taken on cognovit notes:

We conceive this to be the correct rule in the procedure under consideration, where the proof of the ground for vacation is totally unrelated to the proof of a defense. That is, where it is proved by a preponderance of the evidence that one of the grounds for vacating a judgment exists, and that proof does not involve proof of the defense, it is then the duty of the court to look further to the defense. If the defense will be effective if proved, the court should suspend the judgment and permit the issues raised by the defense to be tried by a jury or, if a jury is waived, by the court.

Where, however, proof of the ground that judgment was taken "upon warrants of attorney for more than was due the plaintiff" is dependent upon the same evidence that proves a defense, whether that defense be one of payment, statute of limitations, forgery, lack of consideration, or any other defense that would show that the judgment is for more than was due, we conceive the duty of the trial judge to be similar to his duty where he is confronted with a motion for a directed verdict at the close of all the evidence. That is, if there is credible evidence supporting the defense (which would, as a matter of course, establish the ground) from which reasonable minds may reach different conclusions, it is then the duty of the court to suspend the judgment and permit the issue raised by the pleadings to be tried by a jury or, if a jury is waived, by the court.²¹

The court, in its syllabus, did not overrule *Bulkey v. Greene*, but "questioned" paragraph one of the syllabus of that case.²²

PLEADING DAMAGES

In *Falter v. City of Toledo*,²³ the supreme court put its seal of approval upon a method of pleading damages to personalty which has long been used, but which was heretofore of doubtful validity.

19. *Bulkley v. Greene*, 98 Ohio St. 55, 56, 120 N.E. 216 (1918).

20. 169 Ohio St. 109, 158 N.E.2d 366 (1959).

21. *Id.* at 121, 158 N.E.2d at 375.

22. *Id.* at syllabus 4.

23. 169 Ohio St. 238, 158 N.E.2d 893 (1959).

The better way is to plead market values before and after, but it is now also proper to plead the reasonable cost of repairs, *provided* that such cost does not, upon proof, exceed the difference in market value before and after the injury.

PRIVILEGE FROM ARREST

Ohio Revised Code section 2331.11 grants the privilege of freedom from arrest to "suitors . . . and witnesses while going to, attending, or returning from court." In 1957, the supreme court held, in *Zumsteg v. American Food Club, Incorporated*,²⁴ that the statute does not grant a privilege from service of summons in a *civil action*, and thereby overruled two cases of long-standing authority.²⁵

In *City of Akron v. Mingo*,²⁶ the supreme court had before it for construction the provisions of the related code section, 2331.13, which states that "sections 2331.11 to 2331.14, inclusive, of the Revised Code do not extend to cases of treason, felony or breach of the peace" One Mingo had been tried in the Akron Municipal Court on a charge of driving his automobile while under the influence of alcohol. At the conclusion of his trial the court discharged him and he immediately left the courtroom. Having thus escaped the frying pan he proceeded to land in the fire, for, while driving to his home, he was arrested, placed in jail, and charged under city ordinances with driving through a red light and driving without a license. He filed a motion for summary discharge, as provided by section 2331.14, contending that he was privileged from arrest, since he was returning from court at the time.²⁷

Citing many authorities, both from this state and from other jurisdictions, the court held that "treason, felony and breach of the peace" embrace all criminal cases and proceedings whatever; that excluded from the privilege are all arrests and prosecutions for criminal offenses; and that, therefore, the privilege from arrest granted by the legislature is confined to arrests in civil cases.

Therefore, under the *Zumsteg* case, the privilege does not extend to protection against service with process in a civil action, and under the *Mingo* case, it does not protect against arrest, incarceration, and trial for any criminal offense. It apparently covers only the comparatively narrow ground of *arrest on civil process* during attendance at court and for a reasonable time in going and returning.

24. 166 Ohio St. 439, 143 N.E.2d 701 (1957), 9 WEST. RES. L. REV. 237 (1958).

25. *Barber v. Knowles*, 77 Ohio St. 81, 82 N.E. 1065 (1907); *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N.E. 483 (1888).

26. 169 Ohio St. 511, 160 N.E.2d 225 (1959), *affirming* 108 Ohio App. 570, 162 N.E.2d 865 (1958); see also *City of Troy v. Cummins*, 107 Ohio App. 318, 159 N.E.2d 239 (1958). See also discussion in *Criminal Law* section, p. 366 *infra*.

27. He also prayed for dismissal of the new charges, with prejudice, apparently under the impression that the privilege for which he contended was not only an immunity from arrest, but also from prosecution for that which brought about the arrest.

THE EXTRAORDINARY WRITS

Habeas Corpus

The Court of Appeals for Summit County decided a question which, though raised elsewhere, appears never to have been previously decided in Ohio. In *In re Fincher*,²⁸ it was held that actual physical restraint of a person is necessary before it can be said that he is restrained of his liberty and that when a prisoner has been released on bond for appearance in court, he is not so restrained of his liberty as to be entitled to a writ of habeas corpus.

Mandamus Against Unincorporated Association

In *State ex rel. Tittler v. Brotherhood of Railroad Trainmen*,²⁹ the Court of Appeals for Cuyahoga County had before it the question of whether a writ of mandamus should issue to compel a "voluntary" unincorporated association to perform a duty to its members enjoined upon it by its constitution, but not by any statute.

Following decisions in other jurisdictions, the court held that in the absence of a statutory duty, and where no "public interest" is involved, the writ of mandamus will not lie against an officer of an unincorporated voluntary association.

Another issue, closely related to the action of mandamus, was involved in *State ex rel. Ross v. Guion*.³⁰ The case involved an attempt to compel the Commissioner of Building and Housing to issue a building permit to relator. The application complied in all respects with the legal requirements for a building of the kind sought to be built. The zoning ordinance permitted its erection on relator's land, but respondent refused to issue a permit, contending that the specific ordinance which rezoned relator's land for the present purpose was invalid, as being "spot zoning."

The specific question for decision was whether a municipal administrative officer may raise the question of the unconstitutionality of the statute or ordinance under which his duty to act is alleged to arise.

There is a general rule that unconstitutionality of a statute is not, *in the mouth of such an official*, a defense in an action of mandamus, unless his personal interests or rights will be affected, unless he will incur personal liability, or will violate his oath of office,³¹ or, unless the law is a matter of general public interest.³²

28. 107 Ohio App. 40, 156 N.E.2d 337 (1958).

29. 160 N.E.2d 321 (Ohio Ct. App. 1959). See also discussion in *Labor Law* section, p. 399 *infra*.

30. 161 N.E.2d 800 (Ohio Ct. App. 1959).

31. *State ex rel. State Bridge Commission v. Griffith*, 136 Ohio St. 334, 25 N.E.2d 847 (1940).

32. *Trustees of Cass Township v. Dillon*, 16 Ohio St. 38 (1864); *Citizens Bank v. Wright*, 6 Ohio St. 318 (1856).

Admitting that the last mentioned basis of exception to the rule "is not susceptible of accurate definition" (although cases in other jurisdictions which had made an effort to do so were cited),³³ the court of appeals in this case did "not deem the legislation which changed the land of Mrs. Ross from a two-family residence zone to a local retail business zone to be of general public interest."³⁴

GEOGRAPHICAL JURISDICTION OF MUNICIPAL COURTS

The issue in *Rose v. Associates Discount Corporation*³⁵ was the jurisdiction of a municipal court, in enforcing and collecting a judgment rendered by it in a matter wherein its jurisdiction was unquestioned, to issue orders in aid of execution to the sheriff of another county for service on a garnishee residing therein, so as to bind funds of the judgment debtor in the hands of the garnishee. The supreme court decided that such jurisdiction does not exist under the code. Ohio Revised Code sections 1901.02, 1901.18, and 1901.19 provide generally that municipal courts have jurisdiction within the corporate limits of their respective corporations, and within the limits of the county or counties in which their territories are situated. But sections 1901.13 and 1901.23 are not to be construed to permit the exercise of power outside that county, except to serve parties originally made defendants in the action. A garnishee is not ordinarily a defendant in the original action.

JURISDICTION OVER PLAINTIFF ON CROSS-PETITION IN DIVORCE

In *Locke v. Locke*,³⁶ plaintiff filed a petition for divorce from his wife, a resident of Wales, with an affidavit for service by publication. Defendant, by her attorneys, filed a motion for temporary alimony and support of their minor children, which was granted.

Next, plaintiff filed an amended petition, followed by an answer and cross-petition by defendant in which she prayed for affirmative relief. Then, plaintiff dismissed his amended petition, leaving the question of whether the court had jurisdiction over the plaintiff as to orders which had been and might be made upon him. Since service had been made on plaintiff on defendant's cross-petition, the court held that it still had jurisdiction over him, both as to orders made prior to such service and those made subsequent thereto.

SAMUEL SONENFIELD

33. State *ex rel.* Ross v. Guion, 161 N.E.2d 800, 803 (Ohio Ct. App. 1959).

34. *Id.* at 804.

35. 169 Ohio St. 321, 159 N.E.2d 459 (1959).

36. 161 N.E.2d 798 (Ohio Ct. App. 1959).