

Volume 12 | Issue 4

---

1961

# Default Judgments in Ohio

Myron L. Joseph

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



Part of the [Law Commons](#)

---

## Recommended Citation

Myron L. Joseph, *Default Judgments in Ohio*, 12 W. Res. L. Rev. 747 (1961)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol12/iss4/7>

This Note 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.

## Default Judgments in Ohio

### INTRODUCTION

Plaintiff files a petition and a praecipe causing summons to be issued to the sheriff for service upon Mr. *D*. Rule day passes and Mr. *D* has filed neither an answer nor a demurrer to plaintiff's petition. Judgment is now entered by default in favor of the plaintiff and against the defendant. Later, Mr. *D* abruptly learns, for the first time, that a judgment has been obtained against him when he discovers the sheriff seizing his automobile and is informed by the sheriff that the seizure is a levy of execution based on a judgment against him. Mr. *D* wonders if he is obliged to submit to the effect of such a judgment or whether he may have a remedy under the law. This note will concern itself with Mr. *D*'s predicament by considering the structure of default judgments, how they may be obtained as well as how they may be vacated.

### NATURE OF DEFAULT JUDGMENTS

In most lawsuits the plaintiff files his petition and the defendant files an answer or demurrer thereto before rule day for pleadings, as provided by rule of court or by statute.<sup>1</sup> But there are instances where, upon the expiration of the rule day, the defendant has not filed a pleading. When he fails to plead within the time allowed by law for that purpose, the defendant is deemed in "default."<sup>2</sup> The name implies an omission to take a necessary step in the action within the proper time. Default judgments are generally based on a failure to answer or demur to an original or supplemental petition within the time required, or upon failure to plead again after a former pleading has been declared insufficient. For example, if a demurrer is overruled, the court can render judgment by default if the party declines to plead further.

#### *Types of Cases in Which Default Judgment Can Be Taken*

In the common pleas and municipal courts of Ohio, the general classification of actions in which default judgments may be obtained includes foreclosures,<sup>3</sup> actions for money only,<sup>4</sup> and certain equity cases.<sup>5</sup> The courts have held that a default judgment cannot be taken in a

1. OHIO REV. CODE § 2309.41. "The answer or demurrer to the petition shall be filed on or before the third Saturday . . . after the return day of the summons or service by publication."

2. *McCabe v. Tom*, 35 Ohio App. 73, 171 N.E. 868 (1929).

3. *State ex rel. Hughes v. Cramer*, 138 Ohio St. 267, 34 N.E.2d 772 (1941).

4. *Star Building & Loan Ass'n v. Smith*, 12 Ohio L. Abs. 162 (Ct. App. 1931).

5. *E.g.*, *Long v. Mulford*, 17 Ohio St. 484 (1867) (specific performance of a contract); *Yood v. Daley*, 37 Ohio App. 574, 174 N.E. 779 (1930) (injunction).

divorce case,<sup>6</sup> nor in those will contests in which the defendants are not required to file pleadings,<sup>7</sup> nor in an action to secure appointment of a receiver,<sup>8</sup> since none of these cases fall within the statutory classification.

### *Statutory Basis for Default Judgments*

The basic statute providing for default judgments is Ohio Revised Code section 2323.10:

When all or part of one or more of the causes of action set out in a pleading are not put in issue by answer, or otherwise, judgment may be taken, as upon default, for so much of the demand as is not in issue, on any of the causes alleged, without prejudice to the rights of the pleader as to that portion of his demand which is disputed.

Under this statute, judgment by default cannot be rendered at any time during the term after the defendant is in default for an answer, but only when the case is reached in its regular order or on special assignment.<sup>9</sup> The statute applies where *all* or *part* of one or more causes of action are not put in issue by the defendant. Judgment may be rendered by default for so much of the demand as is thereby admitted.<sup>10</sup> However, this does not foreclose the right of the defendant to litigate disputed issues.

It is not necessary that damages be liquidated when seeking a default judgment under this section. Ohio Revised Code section 2323.11 gives the judge the right to determine damages upon hearing testimony in proof thereof, or the case can be referred for determination to a trial by jury. A defendant who is in default can request and is entitled to have a jury assess the damages against him.<sup>11</sup> Even though a defendant is in default for failure to plead, he has the right to appear in person or by counsel at the trial for the assessment of damages, to object to the introduction of evidence that is improper or to participate in the trial in order to minimize damages.<sup>12</sup> But where the damages are liquidated, it is not error for the judge, in certain circumstances, to render judgment on default without proof of damages by the plaintiff.<sup>13</sup> This is within the discretion of the judge.<sup>14</sup>

6. *Smith v. Smith*, 103 Ohio St. 391, 396, 133 N.E. 792, 794 (1921) (dictum); *McCallister v. McCallister*, 27 Ohio L. Abs. 80 (Ct. App. 1938).

7. *Hood v. Garrett*, 53 Ohio App. 464, 5 N.E.2d 937 (1936).

8. *Edmonds Elevator v. DiAndrea*, 7 Ohio L. Abs. 404 (Ct. App. 1929).

9. *K.B. Co. v. Dixon*, 32 Ohio C.C. Dec. 426 (Ct. App. 1911). See, *Phillips Jewelry Co. v. Schantz*, 9 Ohio L. Abs. 667 (Ct. App. 1931).

10. See, *Wheeling & Lake Erie R.R. v. Stewart*, 13 Ohio C.C.R. 359 (1896).

11. *Averill Coal & Oil Co. v. Verner*, 22 Ohio St. 372 (1872).

12. *Stockhaus v. K. & G. Trucking Co.*, 29 Ohio L. Abs. 34 (Ct. App. 1939).

13. *Baltimore & O.R.R. v. Walker*, 45 Ohio St. 577, 582, 16 N.E. 475, 478 (1888); *Dallas v. Ferneau*, 25 Ohio St. 635 (1874).

14. *Steiner v. Roberts*, 131 N.E.2d 238 (Ohio Ct. App. 1955).

Another statute, closely related to the above section and very often used to obtain a default judgment, is Ohio Revised Code section 2311.12:

In an action upon an account or written instrument for the payment of money only, or in foreclosure, judgment may be entered at any time during the term after the defendant is in default for an answer, unless for good cause shown the court gives further time to answer.

This statute is significant for two reasons. First, it is only applicable in three types of situations; actions on an account, actions on a written instrument for the payment of money only, and foreclosure suits.<sup>15</sup> The statute does not include an action for money had and received.<sup>16</sup> Furthermore, an action brought under this section must be for a sum certain, and not for damages unliquidated in amount.<sup>17</sup> Second, the entry of default can be entered against the defendant any time after rule day, even before the case appears on the trial list, if the defendant has not answered within the time so specified.<sup>18</sup> It is to be remembered that such a proceeding is not applicable under section 2323.10. Under this section one must wait until the case reaches the trial list or is set for an earlier hearing by special assignment.<sup>19</sup> When a judgment is rendered by default in an action on an account, as provided under section 2311.12, it is not reversible error that said judgment was entered without proof of the plaintiff's claim,<sup>20</sup> the matter being discretionary with the judge.

In addition to the two sections previously discussed, the Ohio Revised Code makes provision for use of the default judgment in three other situations. Section 2309.45 provides that when a party refuses to answer interrogatories, the court may enter an order of dismissal, attachment, or default judgment, as the case requires. Judgment by default was entered under authority of this section in *Simpson v. Jackson*<sup>21</sup> when one party refused to answer the attached interrogatories. The court also has authority under section 2317.12 of the code to enter judgment by default against the plaintiff or defendant, if either refuses to produce books, records, or writings pertinent to the case. The remaining section in the code under this topic is 5309.19, which pertains to real property. It provides that if no person appears or files a plea to an application in a land registration case, the probate court may enter an order by default to place title in the name of the plaintiff. These last three sections are

15. *Phillips Jewelry Co. v. Schantz*, 9 Ohio L. Abs. 667 (Ct. App. 1931).

16. *K.B. Co. v. Dixon*, 32 Ohio C.C. Dec. 426 (Ct. App. 1911).

17. *Dorsey v. Pearce*, 154 N.E.2d 177 (Ohio Ct. App. 1956).

18. *State ex rel. Hughes v. Cramer*, 138 Ohio St. 267, 34 N.E.2d 772 (1941); *Phillips Jewelry Co. v. Schantz*, 9 Ohio L. Abs. 667 (Ct. App. 1931).

19. *K.B. Co. v. Dixon*, 32 Ohio C.C. Dec. 426 (Ct. App. 1911).

20. *State ex rel. Hughes v. Cramer*, 138 Ohio St. 267, 34 N.E.2d 772 (1941); *Dallas v. Ferneau*, 25 Ohio St. 635 (1874).

21. 29 Ohio App. 530, 163 N.E. 307 (1928).

always available to the court but most default judgments are entered under the authority of sections 2323.10 and 2311.12.

*Persons Against Whom Default Judgments  
Can Be Taken*

As a general rule, a judgment by default may be taken against any person who is legally bound by an admission.<sup>22</sup> As a result, default judgments cannot be taken against infants,<sup>23</sup> or incompetent persons.<sup>24</sup> In such cases it is the duty of the guardian *ad litem* to answer for such defendant, and it is error to let judgment go by default against such defendant if no guardian *ad litem* has been appointed or if, after appointment, the guardian fails to file an answer for such defendant, even if the court has heard evidence as to the plaintiff's claim.<sup>25</sup> Situations have also occurred where several co-defendants are to file answers and one co-defendant fails to file. The question arises whether judgment by default is to go against the one joint defendant who failed to answer. It has been held by the Ohio Supreme Court<sup>26</sup> that where it appears from the pleadings or during the progress of the case that an individual judgment is proper against one defendant, the court may, in its discretion, render a default judgment against him in the amount for which he is liable, leaving the action to proceed against his co-defendants. But where the co-defendants are jointly and severally liable, one of the defendants who fails to answer, may have the benefit of a successful defense set up by his co-defendants.<sup>27</sup> And it has been held error, in the latter situation, to render judgment by default in advance of trial.<sup>28</sup>

GENERAL RULES IN OBTAINING DEFAULT JUDGMENTS

After the plaintiff files his petition and service of summons is secured upon the defendant, the defendant has time to file an answer or demurrer. The rule day for pleadings in the common pleas court is provided by statute<sup>29</sup> and by rule of court for the municipal court.<sup>30</sup> It is

22. 30 AM. JUR. *Judgments* § 204 (1958).

23. *St. Clair, Adm'r v. Smith*, 3 Ohio 355 (1829); *Beaver v. Bates*, 109 Ohio App. 164, 164 N.E.2d 429 (1960).

24. *Sturges v. Longworth*, 1 Ohio St. 544 (1853); *Hasty v. Weller*, 33 Ohio L. Abs. 190 (P. Ct. 1940).

25. *Sturges v. Longworth*, note 24 *supra*.

26. *Hempy v. Ransom*, 33 Ohio St. 312 (1877).

27. *Baker v. Jerome*, 50 Ohio St. 682, 35 N.E. 1113 (1893) (a co-maker of a promissory note was in default of an answer); *Sprague v. Childs*, 16 Ohio St. 107 (1865).

28. *Osburn v. Bartram*, 8 Ohio C.C. Dec. 259 (1897).

29. OHIO REV. CODE § 2309.41.

30. *E.g.*, CLEVELAND MUNIC. CT. (civ.) R. 10, 11.

improper for a court to render judgment by default against the defendant in advance of rule day.<sup>31</sup> But a defendant may not plead as of right after rule day or after expiration of any extensions of time granted by the court.<sup>32</sup> However, if the defendant does file a pleading after rule day, it is improper for a court to render a default judgment based on this fact alone since there is a pleading on file, and the court cannot ignore it.<sup>33</sup> If the plaintiff wishes to obtain a default judgment in such a situation, he should first file a motion to strike the pleading from the files, as being improperly filed after rule day.<sup>34</sup> If there is no pleading of the defendant's on file, the court may grant a default judgment; or the court, within its discretion, may grant time in which to file an answer upon a motion for leave to plead *instanter* made by the defendant at that time. It is judicial policy to give everyone his day in court.

It is essential that plaintiff's petition state a cause of action.<sup>35</sup> Merely because the defendant is in default of an answer does not mean that the plaintiff is automatically entitled to a judgment. When a court requires proof of a cause of action, which, in its discretion it may do, the court will enter judgment required by such proof. When the evidence discloses that the plaintiff has no cause of action, the plaintiff's action will be dismissed at his cost.<sup>36</sup> A misjoinder of causes of action can only be taken advantage of by a demurrer or answer, and a judgment rendered on a default is a waiver of any objection to a misjoinder of causes of action.<sup>37</sup> If a petition has been filed which alleges two causes of action, and the rule day for each cause of action is different,<sup>38</sup> a judgment by default cannot be granted until the expiration of the longer of the two periods.<sup>39</sup>

It is also important that the amount of money prayed for by the plaintiff in his petition be entered on the summons, for if such amount fails to appear, the court has no power to render a judgment by default.<sup>40</sup> Where a summons is endorsed, "action for recovery of money only," and the petition claims a further and different relief, the court will not render a judgment by default against a defendant for relief other than that endorsed on the summons.<sup>41</sup> Moreover, the relief granted to a plain-

31. *Kimmel v. Pratt*, 40 Ohio St. 344 (1883); *Williamson v. Nicklin*, 34 Ohio St. 123 (1877).

32. *McCabe v. Tom*, 35 Ohio App. 73, 171 N.E. 868 (1929).

33. *Hawke Bros. Co. v. Silver Inc.*, 2 Ohio L. Abs. 617 (Ct. App. 1923).

34. *Streeton v. Roehm*, 83 Ohio App. 148, 81 N.E.2d 133 (1948).

35. *Smitheron v. Owens*, Wright 574 (Ohio Sup. Ct. 1834).

36. *Streeton v. Roehm*, note 34 *supra*.

37. *Brattan v. Smith*, 2 Ohio Dec. Reprint 360 (Dist. Ct. 1860).

38. CLEVELAND MUNIC. CT. (civ.) R. 10, 11.

39. *Robbins v. Jones*, 90 N.E.2d 696 (Ohio Ct. App. 1949).

40. *Russell v. Moody*, 40 Ohio St. 603 (1884); *Finckh v. Evers*, 25 Ohio St. 82 (1874).

41. *Williams v. Hamlin*, 12 Ohio Dec. Reprint 46 (Super. Ct. 1854).

tiff in a default judgment cannot exceed that which is demanded in his petition.<sup>42</sup>

Without service of summons, a default judgment cannot be rendered against the defendant.<sup>43</sup> It is necessary that the court obtain jurisdiction of the person of the defendant, or a judgment rendered will not be personally binding upon said defendant. It is up to the court to determine whether or not there was, in fact, service, and if it is claimed by the plaintiff that service was waived, it is likewise the duty of the court to determine this issue upon the evidence presented.<sup>44</sup> Where summons is duly served on the real party in interest, but under a wrong or inaccurate name, such defendant must make timely objection to this error, for if he fails to do so, he will be deemed to have waived the defect and will be governed by the judgment rendered against him.<sup>45</sup>

### *Obtaining Default Judgments In Ohio Common Pleas Courts*

The procedure for obtaining default judgments in Ohio common pleas courts is exemplified by that of the Cuyahoga County Common Pleas Court. Here the procedure is begun by a periodic search of the cases filed, to find cases that are in default of an answer. If a defendant is found to be in default he is given two weeks after return day to file an answer and avoid a default judgment. Under rule of court,<sup>46</sup> the list of default cases is published in the Daily Legal News each week. In Cuyahoga County, the practice is to publish this case list on Wednesday, Thursday and Friday, and on each Friday, at a time set and noted in the periodical, a hearing is held on these cases in Room One. When the list of default cases is published, the plaintiff's counsel is also listed. When counsel for the defendant is known his name is published. If the court learns the identity of defense counsel, it does so only in those cases in which the defendant takes leave to plead but for one reason or another fails to file an answer. The court sends a post card to plaintiff's counsel, and to defendant's counsel, when identified, notifying them of the hearing to be held on a specific Friday. Unless the court learns the identity of defendant's counsel, the defendant gets no further notice that he is in default.

Notices of default having been published, the case comes up for hearing. If the plaintiff appears but the defendant does not, an entry of

42. *First Nat'l Bank of Akron v. Greene*, 101 Ohio App. 267, 139 N.E.2d 664 (1956).

43. *Van Hee v. Jackson*, 113 N.E.2d 119 (Ohio Ct. App. 1953).

44. *Callen v. Ellison*, 13 Ohio St. 446 (1862).

45. *Maloney v. Callahan*, 127 Ohio St. 387, 188 N.E. 656 (1933); *Wells v. Brown*, 22 Ohio L. Abs. 472 (Ct. App. 1936).

46. C.P. Ct. (Cuyahoga County) R. 15 (g, h).

default is recorded. In actions which fall under Ohio Revised Code section 2311.12, it is not necessary for the plaintiff himself to appear as long as his counsel is present. Then, after the entry of default is made, the court will enter judgment for the plaintiff. In cases arising under section 2323.10, where damages cannot be determined without the presentation of evidence and testimony, after the entry of default is made, the following entry is also put on the journal:

Defendant ----- being in default of pleading, cause advanced for ----- 19 \_\_\_\_ at \_\_\_\_ M. in Court Room One for proof as to damages or claim.

At this hearing the plaintiff must be present since the evidence is given, and he will probably testify himself. A jury trial can be requested by the plaintiff, or the defendant, if the defendant chooses to make an appearance in an effort to mitigate damages. After all the evidence has been presented, the court makes a determination as to the damages, and renders a judgment.<sup>47</sup>

Since it is the policy of the court to avoid default judgments, if the defendant appears in Room One on the Friday so specified in the Daily Legal News, the court, if so requested by the defendant, will grant a motion for leave to file an answer instanter. When leave to file an answer is granted, the case is taken off the default list.

In some instances the sheriff is unable to get service upon the defendant, and when the plaintiff appears on Friday morning for the hearing, it is here that plaintiff sometimes learns for the first time that defendant has never been served. The court will then grant a leave to try to obtain service if requested to do so. If there is no service within sixty days, the case is again picked up on the default list, but this time it may be dismissed since jurisdiction over the defendant cannot be obtained.

After a default judgment has been entered, a journal entry is drawn up by the plaintiff's counsel and entered on the journal. Since no defense counsel is known in most cases, no approval of the journal entry is necessary,<sup>48</sup> as is generally required by rule of court.<sup>49</sup> At this point the default judgment is valid and binding, and has the full force and effect of any other judgment lawfully rendered in the state.

#### *Obtaining Default Judgments in Ohio Municipal Courts*

The procedure in the municipal courts is somewhat different from that in common pleas. In the Cleveland Municipal Court,<sup>50</sup> for example,

47. Where defendant is a member of the military service, see Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. § 520 (1952).

48. *Interstate Life Assurance Co. v. Raper*, 78 Ohio St. 113, 84 N.E. 754 (1908).

49. C.P. Ct. (Cuyahoga County) R. 20.

50. In the Cleveland Municipal Court, cases are divided into First Class Cases (all actions



Rule day for answers and replies is set forth in the rules of court,<sup>51</sup> and if a party has not filed his pleading within the specified time, he is deemed in default. The court rules provide a time when these cases are to be called for trial.<sup>52</sup>

In Cleveland in actions on an account or on an instrument for the unconditional payment of money only, the clerk of court takes the file into Room One and judgment is rendered thereon.<sup>53</sup> Cases for the recovery of real property and for forcible entry and detainer are taken to Room Eleven, where they are tried and disposed of, except for those in which a jury is demanded. The latter cases are handled as soon as juries are available. All other cases that are in default for pleadings are taken by the clerk to the assignment room on call day and assigned for trial.<sup>54</sup> Within ten days these cases are sent into a trial room and finally adjudicated.

By rule of the Cleveland Municipal Court, the default cases are listed in the Daily Legal News. In those cases in which judgment is rendered on call day, notice thereof is printed the following day. In the other cases, the assignment room has them published for five days before they are sent to a trial room.<sup>55</sup> The officials in the assignment room telephone counsel for both parties to inform them of the time of trial. If defense counsel is unknown, the only notice to defendant of these proceedings is the publication in the Daily Legal News.

In the ordinary cases, after judgment has been entered the bailiff will make up the journal entry and the judge will sign it. This step, as well as many of the others, such as publication and notice to defense counsel, are matters within the determination of each municipal court.

#### PROCEEDINGS TO VACATE DEFAULT JUDGMENTS

There are many reasons why a default judgment may have been taken against the defendant. In some instances he may have had no knowledge at all that legal proceedings were being instituted against him.<sup>56</sup> In other cases, he might have known that the plaintiff had commenced an action against him, but was unable to file an answer because

---

for the recovery of money only where the amount sought exceeds \$100; and all actions and proceedings equitable in nature), and Second Class Cases (all actions for the recovery of money only where the amount sought does not exceed \$100; and actions for the recovery of real and personal property). CLEVELAND MUNIC. CT. (civ.) R. 1.

51. CLEVELAND MUNIC. CT. (civ.) R. 10, 11, 13.

52. CLEVELAND MUNIC. CT. (civ.) R. 18, 19.

53. CLEVELAND MUNIC. CT. (civ.) R. 20(c).

54. CLEVELAND MUNIC. CT. (civ.) R. 24.

55. CLEVELAND MUNIC. CT. (civ.) R. 23.

56. *Smetana v. Dregala*, 29 Ohio L. Rep. 104 (Ct. App. 1929).

of illness<sup>57</sup> or death.<sup>58</sup> In one case, the defendant just ignored the petition and refused to file an answer because he felt he owed the plaintiff nothing and that, therefore, the plaintiff had no cause of action.<sup>59</sup> Negligence or inattention by defendant's counsel has resulted in default judgments in some cases.<sup>60</sup> In *Mitchell and Company v. Knight*,<sup>61</sup> defendant's counsel made a compromise agreement with the plaintiff and thereafter paid no further attention to the matter. When he failed to appear at the trial, a default judgment was rendered against the defendant. These are only a few examples of the manner in which default judgments have occurred. However, merely because a default judgment has been entered does not prevent the court from reopening the case and allowing the defendant to answer.<sup>62</sup> As has been previously stated, default judgments are not favored in the law,<sup>63</sup> and the court will do all it can to permit the party to have his day in court.

### *Manner in Which Vacation of Judgment Commenced*

The general procedure to be followed when a party seeks to vacate a default judgment within the term in which it was rendered depends chiefly upon the rules and practice of the particular court.<sup>64</sup> The generally accepted method is to file a motion with the court.<sup>65</sup> But when the defendant desires to vacate a default judgment after term, he must file a petition.<sup>66</sup> The petition should be verified. It should set forth the judgment, the grounds to vacate or modify it, and the defense to the action.<sup>67</sup> When the motion or petition is filed, it is generally considered a part of the original action,<sup>68</sup> although occasionally when a petition is filed, a new and separately numbered action *may* be commenced.<sup>69</sup>

---

57. *Lazarus v. Cleveland Household Supply Co.*, 23 Ohio App. 15, 154 N.E. 343 (1926).

58. *Welton v. Williams*, 28 Ohio St. 472 (1876).

59. *Hiller v. Cohen*, 7 Ohio L. Abs. 232 (Ct. App. 1929).

60. *Balind v. Lanigan*, 26 Ohio App. 149, 159 N.E. 103 (1926); *Millers Nat'l Ins. Co. v. Waligora*, 3 Ohio L. Abs. 356 (Ct. App. 1924); *Illinois Nat. Supply Co. v. Whitman*, 13 Ohio N.P. (n.s.) 562 (C.P. 1911).

61. 3 Ohio C.C. Dec. 729 (1829).

62. *Third Ohio Savings & Loan Co. v. Libbee*, 12 Ohio L. Abs. 300 (Ct. App. 1932).

63. *Midwest Striping Co. v. Thormeyer*, 163 N.E.2d 177 (Ohio Ct. App. 1958).

64. *McVickar v. Ludlow*, 2 Ohio 246 (1826).

65. *Bellows v. Bowlus*, 83 Ohio App. 90, 82 N.E.2d 429 (1948); *Slater v. Brown*, 43 Ohio App. 497, 183 N.E. 393 (1932).

66. OHIO REV. CODE § 2325.05. The statute allows the defendant to file a *motion* to vacate a default judgment after term when the grounds used are Ohio Revised Code §§ 2325.01 (A) (B) or (C). Under subsections (D) through (J), a *petition* must be filed.

67. OHIO REV. CODE § 2325.05.

68. *Bellows v. Bowlus*, 83 Ohio App. 90, 82 N.E. 2d 429 (1948).

69. OHIO REV. CODE § 2325.05.

*Grounds for Vacating Judgment*

Ohio Revised Code section 2325.01,<sup>70</sup> sets forth ten grounds for vacating or modifying judgments, default or otherwise. The statute provides a basis for vacating or modifying where there is a bona fide excuse: mistakes or omissions of the clerk,<sup>71</sup> irregularities in the proceedings,<sup>72</sup> fraud practiced upon the court or the defendant,<sup>73</sup> inability of a defendant to answer,<sup>74</sup> or proceedings against an infant or person of unsound mind.<sup>75</sup> But where there is no bona fide excuse for vacating the judgment, in that the defendant had the opportunity to file an answer or defense but failed or neglected to do so, the court will disallow the defendant a second opportunity.<sup>76</sup> This statute is applicable to cases where the judgment is voidable, and void *ab initio*,<sup>77</sup> as it might be where the court had no jurisdiction over the defendant.<sup>78</sup> However, where the

---

70. The court of common pleas or the court of appeals may modify or vacate its own final order, judgment, or decree after the term at which it was made:

(A) By granting a new trial of the cause, within the time and in the manner provided in sections 2321.19 and 2321.21 of the Revised Code;

(B) By a new trial granted in proceedings against defendants constructively summoned as provided in section 2703.18 of the Revised Code;

(C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;

(D) For fraud practiced by the successful party in obtaining a judgment or order;

(E) For erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(F) For the death of one of the parties before the judgment in the action;

(G) For unavoidable casualty or misfortune, preventing the party from prosecuting or defending;

(H) For error in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in section 2325.21 of the Revised Code;

(I) For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgments;

(J) When such judgments or order was obtained, in whole or in a material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted.

71. *E.g.*, *Sterrett v. Hoover Bond Co.*, 38 Ohio App. 105, 175 N.E. 623 (1928).

72. *Cf.*, *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St. 445 (1854); *Dusha v. Binz*, 23 Ohio App. 285, 155 N.E. 256 (1926).

73. *Traul v. Kreinbuhl*, 83 Ohio App. 344, 83 N.E. 2d 660 (1947). But the fraud must consist of extrinsic acts collateral to the matter actually tried. *Kenney v. Kenney*, 76 N.E.2d 918 (Ohio Ct. App. 1946).

74. *Taylor v. Fitch*, 12 Ohio St. 169 (1861); *Stine v. Springfield City Lines Inc.*, 145 N.E.2d 435 (Ohio Ct. App. 1955); *Proctor v. Proctor*, 4 Ohio App. 245 (1915).

75. *Beaver v. Bates*, 109 Ohio App. 164, N.E.2d 429 (1958).

76. *Sackett v. McClure*, 29 Ohio L. Abs. 560 (Ct. App. 1939).

77. *Lincoln Tavern v. Snader*, 165 Ohio St. 61, 133 N.E.2d 606 (1956); *Shamen v. Roberts*, 87 Ohio App. 328, 94 N.E.2d 630 (1950).

78. *Donovan v. Decker*, 61 Ohio L. Abs. 607, 106 N.E.2d 167 (Ct. App. 1951).

judgment is void *ab initio*, the defendant may have it vacated after term by the filing of a motion,<sup>79</sup> without regard to section 2325.01.<sup>80</sup>

The primary purpose of section 2325.01 is to vacate judgments after term. Therefore, the court need not rely on it to vacate a judgment within term, and under such circumstances is not bound by its provisions.<sup>81</sup> A court has a right to control its dockets within term and may vacate a default judgment on its own motion.<sup>82</sup> However, after the expiration of the term at which said judgment is rendered, the court is powerless to vacate the judgment without complying with Ohio Revised Code section 2325.01.<sup>83</sup> The judgment can only be vacated at such time if the reason urged upon the court by the defendant is one of those enumerated in the ten subdivisions of the statute. The more commonly used grounds are failure to obtain proper service on the defendant,<sup>84</sup> irregularities in obtaining the judgment,<sup>85</sup> and unavoidable casualty or misfortune.<sup>86</sup> Section 2325.04 further provides that the motion to vacate a judgment on the ground that the entry of default was made before the action regularly stood for trial, can only be made within the first three days of the succeeding term. The three day limitation applies in instances where the default was entered prior to the expiration of the rule day for filing an answer.

When the petition to vacate the judgment is filed, the judge must proceed to a hearing of the defendant's allegations.<sup>87</sup> At this point the defendant must offer sufficient proof of his contentions to place himself within Ohio Revised Code section 2325.01. Before vacating the judgment the court will first try to decide upon the grounds to vacate before trying to decide upon the validity of the defense to the action claimed by the defendant.<sup>88</sup> But a judgment shall not be vacated on motion or petition until it is determined that there is a valid defense to the action in which said judgment was rendered, or that there was not a valid cause of action stated.<sup>89</sup>

The only action a court may take prior to the hearing is to suspend

---

79. *Ibid.*

80. *Snyder v. Clough*, 71 Ohio App. 440, 50 N.E.2d 384 (1942).

81. *Bellows v. Bowlus*, 83 Ohio App. 90, 82 N.E.2d 429 (1948).

82. *Rabb v. Board of Comm'rs of Cuyahoga County*, 36 Ohio App. 481, 173 N.E. 255 (1930).

83. *Rabinovitz v. Novak*, 31 N.E.2d 151 (Ohio Ct. App. 1935); *Rabb v. Board of Comm'rs of Cuyahoga County*, note 82 *supra*.

84. *Hayes v. Kentucky Joint Stock Bank of Lexington*, 125 Ohio St. 359, 181 N.E. 542 (1932).

85. *Mount Ida School v. Clark*, 39 Ohio App. 389, 177 N.E. 604 (1931).

86. *Proctor v. Proctor*, 4 Ohio App. 245 (1915).

87. *Rabinovitz v. Novak*, 31 N.E.2d 155 (Ohio Ct. App. 1935).

88. OHIO REV. CODE § 2325.06.

89. OHIO REV. CODE § 2325.07.

proceedings under said judgment by means of an injunction as permitted by section 2325.08.<sup>90</sup> When the sheriff tries to seize property to satisfy the judgment on a levy of execution, the defendant may resort to the remedy provided under this section. The injunction may be granted by the judge where it is rendered probable, by affidavit, or exhibition of the record, that the defendant is entitled to a vacation or modification of said judgment.

*Time Within Which  
Judgment Can Be Vacated*

One final important note concerning vacating judgments must be mentioned. The petition or motion must be filed within the statute of limitations established by Ohio Revised Code section 2325.10. The statute provides that proceedings to vacate a judgment based upon divisions D, E, and G of section 2325.01<sup>91</sup> must be commenced within two years after judgment is rendered; proceedings under C and F<sup>92</sup> to be commenced within three; under section I<sup>93</sup> within two years after the defendant has notice of the judgment; and under J,<sup>94</sup> proceedings may be commenced after the guilty party is convicted, if the conviction is within two years of the rendition of the default judgment.

CONCLUSION

It has been demonstrated that courts do not favor default judgments. If the default judgment has not yet been rendered, the court will probably grant the defendant's motion for a leave to file an answer. If the judgment has already been rendered, the court will allow the judgment to be vacated if the defendant shows the court that there is good cause to do so. The case will then be tried again giving the defendant an oppor-

---

90. OHIO REV. CODE § 2325.08. The party seeking to vacate or modify a judgment or order may have an injunction suspending proceedings in the whole or part thereof, granted by the court or a judge thereof, when it is rendered probable, by affidavit, or by exhibition, of the record, that such party is entitled to a vacation or modification of such judgment or order.

91. (D) For fraud practiced by the successful party in obtaining the judgment or order;

(E) For erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(G) For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

92. (C) For mistake, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order;

(F) For the death of one of the parties before the judgment or order in the action.

93. (I) For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of such hearing.

94. (J) When such judgment or order was obtained, in whole or in part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted.