Cleveland State Law Review

Volume 10 | Issue 1 Article 18

1961

Recent Ohio Procedure Changes

Lee E. Skeel

Recent Ohio Procedure Changes

*Lee E. Skeel**

IT MIGHT BE WELL TO BEGIN by giving consideration to the recent cases dealing with appellate procedure, before considering statutory changes. The questions of when a motion for new trial tolls the time for giving notice of appeal, and what constitutes a final order, have been given consideration in recent cases. The office of the motion for a new trial as provided by R. C. 2321.17 is a re-examination, in the same court, of the issues, after a final order or judgment. Under such circumstances, either after trial of the issues in the original case, or where subsequent to the original judgment, upon motion issues of law or fact are properly presented on matters separate and apart from the issues tried originally, a motion seeking a new trial of such order will toll the time for giving notice of appeal. In the case of *Mullineaux v. Gary* (79 O. L. A., 31, 154 N. E. 2d, 96) the first headnote states:

> In a hearing upon a motion to distribute appeal bond money, the appeal having been dismissed, one of the issues is the extent of appellee's damage because of the appeal not being properly brought, a factual question, the determination of which is subject to re-examination upon a motion for a new trial.

But where the proceeding is one seeking the vacation of a judgment after term, which in reality is a request (either by motion or petition) for a new trial, a motion for rehearing (or new trial) is not provided for and, if filed, does not toll the time for appeal. In the case of *Gynn v. Gynn* (106 Ohio App., 132) a petition to vacate a judgment after term under the provisions of R. C. 2325.01, et seq., was filed July 1, 1955 (three years after the decree for divorce was journalized). Upon trial, the court denied the relief prayed for on May 11, 1957. A motion for new trial was filed May 21, 1957, and overruled on July 26, 1957, and the notice of appeal on questions of law was filed on August 14, 1957, nineteen days after the overruling of the motion for new trial, directed to the final order of May 11, 1957, denying defendant's petition to vacate. The court held that the final order was the overruling of defendant's petition to vacate (after term) the previous judgment, which in reality was a motion for new trial, and that a request for a rehearing of such "petition" did not toll the time for filing an appeal. A motion for new trial is provided only for the re-examination of the issues in a proceeding after trial in the first instance.

---

* Judge of the Ohio Court of Appeals, Cleveland; President of Cleveland-Marshall Law School; etc.

[*Note:* This is a revision of an address recently delivered by Judge Skeel to the Annual Meeting of Judges of the Courts of Appeals of Ohio.]

There have been a number of cases dismissing appeals on law and fact and retaining the appeals on questions of law where the subject of the action does not come within the provisions of R. C. 2501.02. Alimony, *Williams v. Williams* (109 Ohio App., 399); Decision of Board of Tax Appeals, *Bliss v. Bowers* (109 Ohio App., 443); Alienation of Affections, *Franklin v. Schreyer* (82 O. L. A., 545); Decree disorganizing a Conservancy District, *In re Scioto, Sandusky Conservancy District* (82 O. L. A., 522). The most interesting of these cases is the determination that an appeal from a local administrative agency under Chapter 2506 of the Revised Code must be on questions of law. In the case of *Vlad v. Cleveland* (82 O. L. A., 602) the court said:

> While appeals under R. C. 119.12 are limited to state agencies, R. C. 2505.03 and Chapter 2506 of the Revised Code, when taken together, provide for appeals to the courts from administrative agencies of all political subdivisions of the government, state or local.

The provisions of Chapter 2505 of the Revised Code having to do with appeals on law and fact, as limited by R. C. 2501.02, are not applicable to appeals from administrative agencies. (Sections 119.12 and 2506.01 to 2506.04.)

The fact that the notice of appeal sets out that the appeal is on law and fact is not determinative of the nature of the appeal.

Chapter 2506 of the Revised Code, providing procedure on appeal from final orders of administrative agencies to the common pleas court, is supplemental to and additional to any other procedural rules on appeal provided by law. Its importance is to be found in the fact that Chapter 2505 of the Revised Code, while providing for appeals from final orders of administrative officers, tribunals or commissions (R. C. 2505.02), almost completely neglects the procedure to be followed after notice of appeal. (R. C. 2505.08, amended effective October 4, 1955, dealing with the filing of the transcript and the original papers in the reviewing court, can have application only in appeals from final orders or judgments of judicial tribunals. This is the only section in the chapter dealing with transcripts. R. C. 2506.02 requires the agency from which an appeal is taken to file, within thirty days of the filing of the notice of appeal, a complete transcript of all the original papers, testimony and evidence offered or heard and taken into consideration in issuing the order appealed from. This provision under some circumstances presents an almost impossible task for the agency. It is the exception and not the rule that the testimony of witnesses before local administrative agencies is preserved by reporters' shorthand notes. There is no provision of law (except as to some state agencies) requiring the reporting of such testimony. Section 2506.03 of the Revised Code fills the gap. The circumstances under which the

evidence to be considered on appeal may be taken to supplement that, if any, contained in the transcript, is here provided for. This section provides that the trial shall be as in civil actions, confined, however, to the transcript unless it appears on the face of the record or by the affidavit of the appellant that the transcript does not contain:

A. All the evidence admitted or proffered;

B. Or that the appellant was not permitted to be heard in person or by his attorney in opposition to the order

1. To present his position or argument;
2. To offer and examine witnesses in support of his position;
3. To cross-examine witnesses offered against his position;
4. To offer evidence to refute evidence offered in opposition to his contentions;
5. To proffer admissible evidence into the record, if denied admittance by the agency;

C. The testimony presented to the agency was not under oath;

D. Appellant could not present evidence because of the lack of power of subpoena on the part of the agency or the refusal, after request, of the privilege of subpoena when the agency possesses such power;

E. The agency failed to file with the transcript conclusions of fact supporting the order.

In any case, the appeal is to be heard on the transcript and such additional evidence as may be introduced by any party under any of the circumstances set out in the statute. The privilege of calling for cross-examination witnesses who had testified in opposition to a party is also provided for.

It is clear from this provision of the chapter that all that is intended is to supplement (when necessary) or to create a proper record upon which the appeal is to be heard. A trial de novo is not provided for. The judgment which the court is authorized to enter is also limited by R. C. 2506.04 to one which is usually entered in an appeal on questions of law. The entry deals with the order of the agency and not a judgment independent of the order of the agency. The court is authorized to adjudge the decision of the agency as to whether or not it is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of the evidence on the record. Consistent with such finding, the court may affirm, reverse, vacate or modify an order, adjudication or decision of the agency, or remand, requiring the agency to enter an order consistent with the finding and opinion of the court.

It should be noted that the power of the court is circumscribed in such appeals by the provisions of Chapters 2505 and 2506 of the Revised Code. Chapter 2505 provides for two appeals, one on questions of law and one on questions of law and fact. Law and fact appeals are limited by R. C. 2501.02 to what were formerly chancery cases. Therefore, without a provision such as is found in R. C. 143.27, amended effective November 2, 1959, providing for a law and fact appeal for a police officer when removed from office or disciplined by the Civil Service Commission, the appeal from final orders of administrative agencies, based on the authority of Chapter 2506 of the Revised Code, must be "appeal on questions of law." See, *Fleischmann, et al. v. Medina Supply Co.*, — Ohio App., — decided June 1, 1960 (Ninth District).

The jurisdiction of courts inferior to the common pleas court has been the subject of change by the 103rd General Assembly.

The mayor's court is now without any civil jurisdiction, is also without the power to act as a committing magistrate in felony cases, is limited in criminal prosecutions to hear violations of the ordinances of the city or village of the mayor's jurisdiction and moving traffic violations on state highways within said city or village, within the district of a county court and in cities and villages in the territory of a municipal court, except in the city or village which is the site of such municipal court. R. C. 1907.031, R. C. 1905.19, R. C. 1901.04, R. C. 1905.01 to 1905.09, inclusive. The mayor's court has no jurisdiction to try a criminal prosecution in which the defendant is entitled to a jury trial, unless the right to trial by jury is waived in writing. R. C. 2937.08, R. C. 2938.04. (R. C. 1905.05 is repealed by implication.)

The county court, replacing the court of the justice of the peace, has civil jurisdiction as provided by Chapters 1909, 1917, 1919, 1923, 2931 and the other chapters of the Revised Code set out in R. C. 1907.012, which in effect confers on such court the same civil jurisdiction formerly possessed by the justice of the peace within its district, except that its monetary jurisdiction is now increased whereby in actions for money or personal property it has exclusive jurisdiction where the money or the value of the property claimed is $300 or less, and concurrent jurisdiction in actions for money or property with the common pleas court up to $500. R. C. 1909.04 to 1909.08, inclusive.

The criminal jurisdiction of the county court is provided for by R. C. 1907.012. This section, in addition to the civil jurisdiction as above set out, provides: ". . . shall have jurisdiction in motor vehicle violations and all other misdemeanors." However, the last paragraph of the section provides: "Effective January 1, 1963, county courts shall be considered courts of record for all purposes of law." This section can have no other effect than to make of county courts, courts not of record until January 1, 1936. This means that, by the provisions of R. C. 2937.08 and R. C.

2938.04, the county court is without jurisdiction to try a jury case, and unless a defendant who is charged with a violation of law or ordinance for which a fine in excess of $50 or a jail penalty, or both, is provided, waives (in writing) the right to trial by jury, the county court must commit such defendant to a court of record for trial. The district of the county court is all that part of a county which is not included in the territory of a municipal court in such county. There are a number of counties where there are no municipal courts, so that such bindover must be to the common pleas court. Where there is a municipal court in the county, the judge of the county court has the power to, and must, send the case to a court of record "set by the magistrate," which could be either the common pleas court or the municipal court. Should the municipal court be chosen, and the jurors are selected from the territory of the municipal court, as is permissible under R. C. 1901.25, then the jury trial would be before jurors coming exclusively from the municipal court territory for a violation occurring outside such territory and within the county court district. This result follows because of the requirements of R. C. 1901.25 providing that jurors may be chosen as provided by rules of court. If the court sets up its own system, the jurors must of necessity come from the territory of its jurisdiction. This section also provides that the court, by rule, may call on the county jury commission to furnish jurors, but that "selection shall be made from residents within the territory and those appearing to reside outside the territory shall be returned to the jury wheel." R. C. 1913.14, dealing with selecting jurors for the county court, contains identical provisions. R. C. 2938.14, dealing with the magistrate's courts, provides that jurors may be drawn in the manner provided by the act creating the court, and that no challenge to the array shall be sustained because some of the venire men are not residents of the territory of the court, if it appears that the venire was regularly drawn and certified by the "jury commission of the county or municipality, as the case may be." While the county court cannot try a case to a jury in a criminal prosecution until it becomes a court of record (January 1, 1963), yet each of the quoted sections seems to show a legislative purpose to confine the selection of a jury to residents of the district or territory of the court where the unlawful act was committed. The history of selection of jurors supports the theory that they should be drawn from the people living in the "vicinage" or political subdivision where the crime was committed. This is the basis of our constitutional provision requiring the state to try a felony case before a jury of the county where it is alleged that the crime was committed. The same reasoning would seem to dictate that jurors should be selected from the political subdivision in which a misdemeanor is alleged to have been committed.

Upon the creation of a municipal court, which is a court of record, the mayor of the city or village where it is located

is excluded from all jurisdiction as a magistrate in such city or village. The mayors of other cities or villages within the territory of such court may continue to exercise jurisdiction in the trial of ordinance violations and moving traffic violations on state highways within such cities or villages, limited as above set out. R. C. 1901.04, R. C. 1907.031, R. C. 2937.08, and R. C. 2938.04.

The monetary jurisdiction of municipal courts has been increased: $7500 in municipal courts in Cuyahoga County (thirteen in number), $5000 for the Columbus Municipal Court, and a limit of $3000 in all other municipal courts. Municipal courts have jurisdiction to try and enter final judgment in all misdemeanor cases and ordinance violations, with or without the intervention of a jury. A jury must be demanded in writing within three days of the trial or one day after the trial is set, whichever is the later. R. C. 2938.04. This section is in direct conflict with R. C. 1901.24 (found in the municipal court act), which latter section must be considered as repealed by implication. R. C. 1913.09, dealing with county courts, has the same conflict.

One change in the uniform municipal court act, applicable to both civil and criminal cases, is R. C. 1901.30 (E), which provides that the clerk of the court shall strike a notice of appeal from the files if a precipe for transcript is not filed and the required fee paid therefor within ninety days of the filing of the notice of appeal. Other changes, insofar as civil process is concerned, have to do with territorial jurisdiction of certain courts, equity powers of certain courts, substituting references to justices of the peace still remaining in some statutes to "county courts," adopting and publishing rules, providing for branch offices, and the like.

Criminal proceedings in municipal courts have been the subject of change. R. C. 1901.21 was reenacted, effective November 6, 1959. (It was passed in House Bill 571 of the 103rd General Assembly and approved by the Governor on August 6, 1959, which is the same date on which Senate Bill 73, of which R. C. 2938.15 is a part, became law, (under Article II, Section 16 of the Constitution). By the provisions of this section, the procedure in criminal cases is that provided for police courts of municipal corporations; or if not there provided, then the procedure provided for mayor's courts is to apply; but if not there provided, then the procedure provided for in county courts shall apply. R. C. 1913.31 to R. C. 1913.34, inclusive, set out clearly the procedural rules for filing bills of exception in county courts, mayor's courts and police courts in both civil and criminal cases. The last effective date of these sections is January 1, 1958, so they have been recently re-examined by the legislature. These sections are direct, positive and specific, so that the provisions of R. C. 2938.15, which are general in character, providing that "rules of evidence and procedure, including those governing notices, proof of special matter, depositions, and joinder of de-

fendants and offenses set forth in Chapter 2945 of the Revised Code, which are *not*, by their nature, inapplicable to the trial of misdemeanors, shall prevail in trials under Chapter 2938 of the Revised Code where no special provision (is) made in such chapter * * *" do not here apply. The effect of the application of the sections in Chapter 1913 of the Revised Code is to fix the time for filing a bill of exceptions in magistrate's courts as within ten days of the judgment or overruling a motion for new trial, and not thirty days as provided in R. C. 2945.65. The rule for filing a motion for new trial in criminal cases in municipal courts is provided for by R. C. 2931.15, amended and passed in Senate Bill 133, which bill was likewise passed and became law (under the Constitution) (approved August 12, 1959) subsequent to Senate Bill 73 (August 6, 1959). The time for filing a motion for new trial in municipal courts would come to the same thing in either event, because R. C. 2945.79 to R. C. 2945.83 are controlling under either of the statutes referred to (R. C. 2931.15 and R. C. 2938.15).

There are two other legislative changes dealing with appeals from magistrate's courts that need to be mentioned. R. C. 2953.05 now provides that an appeal as of right from judgments in criminal cases in magistrate's courts must be filed within ten days of the judgment or final order. This amendment was not too clearly worded, but, when it refers to "such judgment or final order," it must be considered as meaning ten days from the judgment or the overruling of a motion for new trial or from the date of the suspending of the imposition of sentence and putting the defendant on probation. R. C. 2953.051, effective January 1, 1960, provides that on the filing of a motion for new trial or a notice of appeal in a misdemeanor or violation of an ordinance, the execution of the sentence shall be suspended, if the defendant is then on bail, and such bail shall continue, with the power vested in the trial court or the appellate court to order new or additional bail.

Mention should be made of the fact that Senate Bill 73, passed and approved on August 6, 1959, effective by its provisions January 1, 1960, amended procedure as outlined in Chapter 2937 of the Revised Code dealing with arrest and preliminary hearings in magistrate's courts. Chapter 2938, dealing with trials in magistrate's courts, is completely new. Under Chapter 2937, the preliminary rights of defendants to be informed as to who filed the complaint, rights on arraignment, bail, employing counsel, continuance and pleas, including the plea of "no contest," and to be informed as to right to trial by jury and the like, are now provided for. In a preliminary hearing in a felony case, a plea of guilty must be in writing. The defendant must be informed as to the probable penalty, if convicted, and as to his right to a preliminary hearing, and also the effect of offering evidence in his behalf, or testifying himself or making a statement in explanation of the evidence.

An amendment in Chapter 2945 of the Revised Code (a part of the code on criminal procedure), that is, R. C. 2945.65, needs to be considered. This amendment corrected the failure to spell out the time for filing a bill of exceptions in a criminal case. This failure was the subject dealt with by the Supreme Court in *State v. Nickles* (159 Ohio St., 353, 112 N. E. 2d 531). The section now provides that the bill of exceptions may be filed within thirty days of the judgment and sentence, or within thirty days from overruling a motion for new trial, or a like period from suspending the imposition of sentence and placing the defendant on probation, whichever is the later entry. This section also provides that, except where the appeal is on the sufficiency of the evidence or that the judgment is contrary to law, where a complete bill of exceptions is necessary, the bill of exceptions need contain only so much of the evidence as is necessary to demonstrate the error. Upon hearing, the reviewing court, however, may order a complete bill, if necessary to consider the case, which addition to the bill of exceptions may be filed subsequent to the time fixed within which a bill of exceptions must be filed.

The amendment to R. C. 2953.03, effective January 1, 1960, creates a conflict with R. C. 2953.04. Formerly, R. C. 2953.03 provided that upon application of defendant or someone in his behalf and the payment of the proper fee, the clerk or one charged by law with keeping the public records or docket entries, as provided by R. C. 2953.02, shall make and deliver to the accused or his counsel a certified transcript of the record. It was also the duty of such officer to deliver the original papers to the clerk of the reviewing court. R. C. 2953.04 provides that the judgments and final orders to be reviewed by appeal are instituted by filing a notice of appeal in the court rendering the judgment or final order. Upon filing the notice of appeal, there shall be filed in the appellate court (by the defendant or his counsel) the transcript and the original papers as provided by R. C. 2953.03. It is also provided that the appellant shall file his brief with the transcript and the appellee is to file his brief fifteen days thereafter. By the amendment to R. C. 2953.03, the clerk of the trial court is now required to file the transcript as well as the original papers in the reviewing court within five days [illegible]filing of an application therefor and the tender of the proper fee. It would seem, therefore, that the appellant should file his assignments of error and brief, after serving a copy thereof on the prosecutor, within five days of filing his application for transcript, or, upon notice to the prosecutor seek an order of the reviewing court fixing the time for filing assignments of error and brief.

Some mention should be made of the rules for appeal from judgments or final orders of the juvenile court.

The juvenile court is vested with both civil and criminal jurisdiction. In dealing with the question of whether a child under eighteen years of age is a neglected, dependent or de-

linquent child, the court exercises its special jurisdiction, which must be classed as civil, and is subject when applicable to civil procedure as distinguished from procedure applicable to criminal cases. This is clearly true in bastardy cases. When trying an adult for neglecting or contributing to the delinquency of a child under eighteen years of age, the court is exercising its power to try a criminal case. The procedure upon trial and on appeal in criminal cases is provided for by R. C. 2151.43 to R. C. 2151.52, inclusive. In such cases, appellate procedure is as provided in common pleas court. R. C. 2151.52. The latter part of R. C. 2151.52, requiring leave to appeal to the court of appeals by the appellate court in a criminal case charging an adult with criminal conduct under the juvenile court act, must be considered as to its constitutionality. The constitution fixes the jurisdiction of the court of appeals. The juvenile court is a court of record. It is not inferior to the common pleas court. The constitution, in dealing with the jurisdiction of the court of appeals, provides "* * * and such jurisdiction as may be provided by law to review, affirm, modify, set aside or reverse judgments or final orders * * * of courts of record." The phrase "as provided by law" must mean the method by which an appeal is taken and not the right of the legislature to prevent or prohibit an appeal to the court of appeals from a judgment of a court of record exercising its original jurisdiction. The supreme court, in the case of *Green v. Insurance Co.* (156 Ohio St., 1, 100 N. E. 2d 211), said, in holding a part of R. C. 2505.02 unconstitutional (that part of the section declaring the granting of a motion for new trial a final order) as follows:

> The amendment of Section 6, Article IV of the Constitution of Ohio, adopted November 7, 1944, and effective January 1, 1945, is the sole source of jurisdiction of the Court of Appeals and such jurisdiction can not be enlarged by the General Assembly. The latter may legislate as to the jurisdiction of the Court of Appeals to review, affirm, modify, set aside or reverse final orders or judgments of boards, commissions, officers, tribunals or courts of record inferior to the Court of Appeals, but it has no authority to confer on the Court of Appeals jurisdiction to review any orders which do not constitute final orders or judgments.

If the statute requiring leave to appeal is interpreted as meaning that the court of appeals could refuse the right of appeal from a judgment of a court of record without a full consideration of the case on the merits, then defendants charged with misdemeanors under the juvenile court act would be deprived of rights afforded others charged with like crimes under general law. What rule is to guide the court of appeals when passing on the question of whether or not leave should be granted "for good cause shown"? Certainly, the refusal to grant the right of

appeal would violate the equal protection clause and due process clause of the Constitution of the United States. Where the original jurisdiction of the court of appeals is invoked, a party feeling aggrieved may appeal to the supreme court without securing leave. It must also be noted that no such limitation is provided for appeals of the judgments of the juvenile court finding a child under eighteen years to be delinquent, neglected or dependent. Any doubt that such judgments are appealable is now set at rest by R. C. 2501.02, where an appeal from such orders is provided. There are a number of cases decided prior to the amendment of R. C. 2501.02, sustaining the right to such appeal. It is true that in the case of *State v. Parks* (105 Ohio App., 208, 152 N. E. 2d 154) it was held that unless leave to appeal was requested and granted under R. C. 2151.52, upon good cause shown, after notice to the prosecutor, an appeal will be denied and the judgment affirmed. It is difficult to see how a judgment can be affirmed if the appeal is dismissed as not properly within the jurisdiction of the court for failure of procedural requirements.

In addition to the interpretation of the constitution as not authorizing the legislature to empower a court exercising appellate jurisdiction to refuse the right of appeal because "in its judgment" the appellant failed to show good cause as the basis of being afforded such right, such limitation being applicable only under a "special" chapter of the Revised Code dealing with juveniles, and not being applicable to defendants (who, of course, cannot choose the forum in which their guilt or innocence is to be tried) charged under general law with a like offense, is unconstitutional for not affording equal protection under the law. R. C. 2151.52 is the only statute in the criminal code of Ohio under which a defendant is required to get leave to appeal in the court to which the appeal is taken from a judgment or final order of a trial court rendered in the exercise of its original jurisdiction. This part of the section requiring leave must be unconstitutional, being in violation of Article I, Sections 2 and 16 of the Constitution of Ohio and the due process section of the Constitution of the United States. In Volume II, Ohio Jurisprudence 2d, paragraph 680, page 25, under the title, "Constitutional Law," it is said:

> A statute which discriminates between persons similarly situated by not allowing an appeal on equal terms denies the equal protection of the laws.

As authority for this statement, the case of *Maynard v. B. F. Goodrich Co.* (144 Ohio St., 22, 56 N. E. 2d 195) is cited. This case was concerned in part with the circumstances under which the filing of a motion for new trial was a prerequisite to a review of the case in a reviewing court. On page 27 of the opinion, the quotation above set forth from Ohio Jurisprudence 2d is found

with a number of supporting authorities. There should be no question but that that part of the statute (R. C. 2151.52) requiring leave to appeal by an adult found guilty upon trial for the commission of a crime defined in the juvenile court act is clearly unconstitutional. While not directly in point because the case was tried before the amendment to the constitution in 1944, yet in principle the case of *State ex rel. Medical Center v. Wallace, Clerk* (107 Ohio St., 557, 140 N. E. 305) supports this conclusion. In this case, a similar provision for procuring leave to appeal in forcible entry cases was included in the Cleveland Municipal Court Act. The court held such provision unconstitutional in attempting to control the jurisdiction of the court of appeals by statute.

One remaining question is to determine what procedure to follow in appeals from judgments or final orders of the juvenile court finding a child to be neglected, dependent, or delinquent. There is no provision in the juvenile court act (Chapter 2151 of the Revised Code) covering this question in civil cases comparable to R. C. 2151.52, which covers it in the exercise by juvenile court of its jurisdiction in criminal charges against adults. The time for filing notice of appeal in civil cases is clearly provided for by R. C. 2505.07 (twenty days from the judgment or final order) but the right to file a motion for new trial, or the time in which to file a bill of exceptions as set forth in Chapter 2321 of the Revised Code for the common pleas court, is not referred to in Chapter 2151 of the Revised Code. However, R. C. 2153.17 (Chapter 2153 of the Revised Code provides for the creation of the Juvenile Court of Cuyahoga County) provides:

> The sections of the Revised Code regulating the manner and grounds of appeal from any judgment, order, or decree rendered by the court of common pleas in the exercise of juvenile jurisdiction shall apply to the juvenile court.

By interpretation, this section might be said to apply, although the language is somewhat confused. Where a right to appeal a judgment of the juvenile court, entered within its jurisdiction to deal with the dependency, neglect, and delinquency of children under eighteen years of age, is clearly granted by the constitution and also by statute, and there are general statutes setting out the procedure on appeal from judgments of courts of record, such statutes must be held to apply where there are no special statutes dealing with or spelling out the procedure in such cases.

In the case of *State ex rel., Prescott v. Hansueck, Justice of the Peace* (19 C. C., 303) it was held:

> Where the constitution itself bestows upon a court jurisdiction over a subject matter, if that court is an appellate court, it may prescribe a mode and rules and regulations for bringing a case before it on error * * *.

The theory of this case was followed in *Miller v. Akron* (16 C. C. N. S., 554) where the right of appeal was provided by statute but the statutes on procedure had been repealed. The court held that the general procedure on appeal where special procedure was not provided should apply.

The conclusion must be, therefore, that where the constitution provides the right to appeal all judgments and final orders entered by courts of record to the court of appeals (Article IV, Section 6 of the Constitution of Ohio), and where R. C. 2501.02 specifically provides for appeals from judgments of the juvenile court (a court of record) from its findings, orders, or judgments that a child is delinquent, neglected or dependent, and when R. C. 2505.07 specifically sets out the time and manner of giving notice of appeal applicable to appeals to the court of appeals, and when it has been clearly determined that a proceeding in the juvenile court to determine whether or not a child is a neglected, dependent or delinquent child is a civil proceeding (*State v. Shardell,* 107 Ohio App. 338, 153 N. E. 2d, 510), it must follow that, insofar as applicable, Chapter 2321 of the Revised Code, providing for filing motions for new trial and filing bills of exceptions, must apply to such cases.

The legislature will be called upon, when it meets in January, 1961, to correct and harmonize the difficulties above referred to, and many others. It is suggested that any matters of this character coming to the attention of any judges, which should be called to the attention of the legislature, be submitted to our Chief Justice.