CONTENTS

ARTICLES

FROM COMMANDMENTS TO CONSENT: OHIO IN THE DIVORCE REFORM ERA
   Henry E. Sheldon, II ........................................ 119

PHOTOGRAPHS IN THE COURTROOM—"GETTING IT STRAIGHT BETWEEN YOU AND YOUR PROFESSIONAL PHOTOGRAPHER"
   Marvin S. Flower ........................................ 184

LANDLORD-TENANT REFORM IN OHIO
   Robert E. Haley ........................................ 212

SHAREHOLDER DERIVATIVE ACTIONS: A GENERAL SURVEY WITH OBSERVATIONS
   John A. Lloyd, Jr. and Thomas P. Mehnert ............. 249

SIXTH CIRCUIT REVIEW ........................................ 269

BOOK REVIEWS .................................................. 310

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INTRODUCTION—THE WINDS OF CHANGE

Like the great Nor’Westers of winter which periodically, after a slow and lengthy buildup of natural forces on the tundric plains of Canada, roar through the Midwest, uplifting and shifting human destinies in their paths of cold and icy power, the winds of change in the law have produced, after characteristic sputtering and halts, new and dramatic results in the area of divorce and family law reform which should affect the lives of millions of Americans in the countless generations that lie ahead. State legislatures across our country, suddenly sensitive to these winds of change, have bowed creatively, after decades of apathy, inaction and hypocrisy, to sometimes homogeneous, but often countervailing and contradictory, pressures by erasing, via repeal, the black letter antiquities of the past two centuries and by the promulgation of new and vibrant family law concepts which honestly and openly seek to conform to the demands and needs of an urban society, burdened with problems of overpopulation, inflation, juvenile delinquency, reaction to the end of an unwanted war, and the mounting stress and strain of everyday living. As one legal scholar once aptly described the situation, divorce law reform occurs only when the legislature marches in tune and beat with “the modern drummer.”

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I. SEPARATION AS GROUNDS FOR DIVORCE

The first clearly discernible assault by reformers upon the citadel of fault-oriented divorce began in 1850 in the Commonwealth of Kentucky,\(^2\) in Wisconsin at the end of the Civil War,\(^3\) in Rhode Island in the early 1890's,\(^4\) and in Louisiana at the outset of World War I.\(^5\) These laws contained an additional and co-existing ground for divorce, and permitted severance of the marital relationship upon proof that the parties had lived separate and apart for a stated period of time. This reform effort continues even today,\(^6\) with roughly one-half of our states having such legislation on the books at the outset of this decade.\(^7\)

Broadly speaking, these separate and apart statutes fall into four very distinct categories:

(1) those which require proof at trial that the parties \textit{mutually} and \textit{voluntarily} separated for purposes of obtaining a divorce and that their plan continued, unabated, for the specified period of time;

(2) those permitting spouses, in the absence of reconciliation, to live separate and apart pursuant to an earlier decree of separate maintenance (alimony only, limited divorce, etc.) and further permitting those spouses to seek an absolute divorce after the expiration of the stated time period, irrespective of fault, including an adverse adjudication of misconduct in the prior adjudication;

(3) those which allow only the injured and non-transgressing spouse to seek an absolute divorce after having lived separate and apart from the wrong-doer for the specified time period; and

(4) those sanctioning divorce, regardless of fault, upon proof of separation for the required time period.\(^8\)

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\(^2\) Kentucky Laws of 1850, Chapter 498, page 55.
\(^3\) Wisconsin General Laws of 1866, Chapter 37, page 40.
\(^4\) Public Laws of Rhode Island, Chapter 1187, page 313.
\(^5\) Louisiana Act 169 of 1916.
\(^8\) Wadlington, Divorce Without Fault Without Perjury, 52 VA.L. REV. 32 at 53 (1966); Couch, supra, note 1, at 258-59; Comment, Divorce on Ground of Separation, 18 WASH. & LEE L. REV. 157 (1961).
The statutes described in the first category have been bitterly assailed as "patently unrealistic" because: (1) proof of the mutual and voluntary nature of the separation rarely can be corroborated; (2) when the voluntary agreement can not be established, the non-consenting spouse can either prevent an otherwise justified termination of the relationship or extort a satisfactory settlement before capitulation; and (3) when neither party can prove this, they are forced to resort to fraud and collusion, the very tactic sought to be avoided by such legislation. Perhaps the most merited criticism is that such statutes permit judicial "legislation" on the facts of the case, causing conflicting rulings on the meanings of "voluntary" and "mutual," thereby creating unnecessary instability in the law.

The statutes mentioned in the second category have been justly condemned for requiring and forcing, at least in the abstract, if not in reality, battling spouses into two-fold litigation with all the attendant adverse legal, social and economic consequences flowing therefrom.

Scathing critiques have been aimed against the third category, the so-called "injured" spouse statutes, for the reason that misconduct and fault are re-injected into the law by allowing only the aggrieved party to prevail. Under this type statute, a spouse who

13. Note, Divorce—Construction of Voluntary Separation Statute, 29 Geo. L. J. 787 (1941); Note, Further On Five Years Voluntary Separation As Ground For Absolute Divorce, 7 Md. L. Rev. 146, 158 (1943). The same criticism applies to courts which, in an effort to destroy the no-fault aspects of statutes in the fourth and final category, read into the statute the requirement of "mutual" and "voluntary". See Rutman, Departure From Fault, 1 J. Fam. L. 181, 198 (1961); Note, Separation by Mutual Consent, 40 N. CAR. L. Rev. 808, 811 (1962); Note, "Voluntary" Two-Year Separation, 6 L.A. L. Rev. 472, 473-75 (1945); Note, Living Apart as Ground—Effect of Fault on Plaintiff's Part, 17 Tex. L. Rev. 93, 94 (1939); Note, Construction of Statute Making Separation for a Period of Years a Ground for Absolute Divorce, 87 U. Pa. L. Rev. 124, 125 (1938).
wants out of a broken marriage can not succeed in court—a totally impossible situation.

The fourth category, sanctioning divorce regardless of proof of fault, upon evidence establishing that the parties have lived separate and apart for the statutory term, is the only one of the group mentioned above with potential to fulfill and carry out the underlying policy and philosophy of the law—that the best interests of the parties themselves and society as a whole are served by judicial recognition and severance of the unwanted bonds of a long-dead marriage. 18

As Justice Brown of the North Carolina Supreme Court once put it:

It is plain to me that the object of the act is to annul the marriage tie and to give such unfortunate persons an opportunity to marry again and perchance to make a happy and congenial union, as such relation leads to virtue and unselfishness and makes better and more useful citizens. After . . . long years of separation, why inquire into whose fault it was? Why dig up from their graves the buried memories of broken lives? It is better to let the dead past bury its dead and not disturb and remains. 17

Under this type of statute it is immaterial that the party seeking the divorce is wholly and exclusively at fault and is forcing the physical separation. 18 Indeed, it has been deemed irrelevant that the spouse desiring the divorce has committed open adultery, 19 bigamy, 20 or produced illegitimate offspring. 21 In one case, Wanser v. Wanser, 22 the adulterer testified as a corroborative witness for his adulteress in a successful action for divorce.

While the literal application of the law to the facts has been met with no small measure of approval in some quarters, 23 there have

17. Cook v. Cook, 164 N.C. 272, 80 S.E. 180 at 180 (1913) (concurring opinion).
23. Note, Recrimination As Bar To Divorce On Ground Of Three-Year Voluntary Separation, 17 Md. L. Rev. 268 (1957); Note, Separation For Statutory Period As A Ground
been countless judicial detractors who have reluctantly followed the letter of the statute. As Chief Justice Smith of the Arkansas Supreme Court observed in concurring in the affirmer of a divorce granted to a husband in his sixth attempt to gain that end:

About all a married gentleman . . . is required to do . . . is to chase his wife from home with a baseball bat, see that she does not tarry on the driveway, then lock all doors against reentry and stand guard at the front gate with an ice pick. When the head of the family has disciplined his wife by ejectment [for the statutory period] he may then substitute sentimental activities for sentinel (sic.) duty and find suerese from travail in the arms of another taker, blonde, brunette, or blended . . .

Another major hurdle encountered by those seeking meaningful reform gradually erupted from the inconsistent and conflicting judicial interpretations of basic words or phrases commonly found in all of the separation statutes. One authority, for example, asserts that no other type of divorce grounds statute has undergone such appellate scrutiny as the separation statute. Having pawed through hundreds of the separation cases one could not find any quarrel with his realistic appraisal of this sadly confusing Pandora's Box of antagonistic socio-legal views. By way of illustration, courts across the country have reached utterly different conclusions on whether:

1. Spouses may, under the same roof but without marital sexual intercourse, live "separate and apart";
2. Separations produced by reasons other than the breakup of the union (but which may be a significant contributing cause), such as those arising from business considerations;

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25. Wadlington, supra note 8, at 59, 66-67. See also, Comment, Untying The Knot: The Course And Patterns Of Divorce Reform, 57 CORN. L. Q. 649, 656-57 (1972).


27. Lillias v. Lillias, 235 Md. 490, 201 A.2d 794 (1964); Bockman v. Bockman, 202 Ark. 585,
commitments,\textsuperscript{28} imprisonment,\textsuperscript{29} or insanity,\textsuperscript{30} are includible within the time period; and

(3) visits with the other spouse\textsuperscript{31} or single or infrequent sexual intercourse between the parties\textsuperscript{32} constitutes a complete defense or tolls the running of the time period.

By far the most piercing criticism of the separate and apart statutes is their relative impracticality to the client and his counsel. At the onset of marital representation the lawyer is always forced to compare which remedy or approach (to seek divorce on fault or no-fault grounds) is most practical and suitable for his client. If the court in his own "backyard" has a fault-oriented philosophy he would scarcely jeopardize his client's chances for divorce by resorting to separation statute relief, especially if the spouse can prevail on the grounds of misconduct in the marriage. This is particularly so where the time span for compliance with the statute would preclude recourse to the statute anyway. People simply hate to wait for a divorce! Besides, the client may be totally unwilling or financially unable to separate from the other spouse where a battle looms on the horizon over property rights, alimony or child custody, or the hope still flickers for reconciliation.

In conclusion then, the living apart statutes, while offering much-needed reform in the abstract, are not at all what they appear to be

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in the divorce court arena because they are not practical for the client and apparently unwise and risky for counsel. To those who, from a factual standpoint, possessed no other hope because of their wrongful acts in the marriage, the living apart statutes constituted a successful legislative victory in the warfare against the legions of fault. In the final analysis, then, these efforts were and may continue to be a step in the right direction, imperfections notwithstanding.

II. INCOMPATIBILITY—THE "CONFLICT OF PERSONALITIES" STANDARD FOR TERMINATION OF THE MARITAL CONTRACT

A second significant divorce law development began in 1921 in the Virgin Islands with the utilization of existing Danish Law making "incompatibility of temperament" a ground for absolute divorce. The occurrence was an isolated event in legal history. It was not, by way of comparison with the separation statute developments of this century, a major influence.

New Mexico, in 1933, became the first state to pass legislation making incompatibility a so-called no-fault ground for divorce. The Territory of Alaska followed suit in 1935. Eighteen more years passed before Oklahoma joined the ranks. Another fourteen years passed before Nevada, in 1967, enacted the law, followed by Delaware and Kansas in 1969, Alabama two years later, and finally Connecticut in 1973.

Before embarking upon a brief discussion evaluating this divorce concept, it is imperative to note that in each and every instance the


34. The legislation was on a municipal level only and did not become territorial in scope until 1944. Divorce Law of Virgin Islands, Bill No. 14, Laws 1944.

35. Indeed, a Washington statute, which permitted divorce for "any cause" where the parties could no longer live together, was repealed in 1921. Note, Incompatibility of Parties as Ground for Divorce, 4 WASH. L. REV. 83 (1929).


41. KAN. STAT. ANN. §60-1601(8) and §60-1609(d) (Supp. 1974).

42. ALA. CODE, Tit. 34 §20(7) (Supp. 1973).

incompatibility statutes were mere additions to codes containing, almost exclusively, fault-oriented grounds and defenses. This being so, the courts in these jurisdictions, necessarily at the outset, struggled (it is suggested, erroneously) along “fault” lines with the facts presented; logically they were additionally plagued by incessant demands to have the doctrine of recrimination applied by way of defense; and, having no legislative guidelines, they labored long and arduously to define and structure, through interpretation, a concrete meaning of and for the term.44

Therefore, almost from the start, the statutes and the judicial decisions springing therefrom came under fire on the following grounds: (1) it was claimed that the term was so vague that it fostered judicial emasculation;45 (2) others argued that the concept behind the law was distorted by the pre-occupation of the courts with “fault” and affirmative defenses;46 and (3) others suggested that the presence of fault destroyed the real function and purpose of the legislation—the opportunity to terminate or continue a marriage based upon a consideration of the personalities involved and not their respective faults.47

The principal problem, one authority observed, was that the courts, regardless of the obvious legislative intent, could not force themselves, at the dawn of this reform, to eliminate fault from their consideration, and that the legislatures, oblivious of the problem, created a monster by introducing incompatibility into an existing fault-directed framework. Like “living apart,” incompatibility could not stand together with fault.48

Broadly speaking, the courts had, by the mid-1960’s, through crushing and frustrating experience, crystallized their respective approaches to incompatibility by ruling that:

(1) a divorce would be granted upon proof that the marital relationship had irremediably broken down and disintegrated through the reciprocal and bilateral conflict of the spouses’ personalities, regard-


46. Walker, supra note 33.

47. See materials cited supra note 44; Rutman, Departure from Fault, 1 J. Fam. L. 181, 185-91 (1961).

48. Wadlington, supra, note 8, at 52.
less of whether neither, either, or both had been “guilty” of misconduct or fault; and
(2) the doctrine of recrimination had no place in the incompatibility system. 50

These courts did not, however, authorize divorce by agreement and would turn down the requested severance where only petty quarrels and bickering were involved. 51 Divorce, accordingly, was not an automatic remedy. 52

A similar effort on the part of several state legislatures was undertaken to define and delimit the incompatibility concept. Delaware, for example, codified Oklahoma case law defining the concept and was joined by Connecticut in requiring incompatibility to exist for a stated time period before an action for divorce could be filed. 53

These legislative and judicial adjustments having been made, the courts in these jurisdictions were freed to utilize this broad concept to seek the supposed reasons why the personalities of married couples clashed to the extent that recourse to divorce was necessitated. What did these courts, in the objective and subjective search for the truth about divorce, find? The reported cases show dramatically that a marriage may disintegrate with conflicts and quarrels about, among other things, the following: physical or emotional illness, 54 fear of physical violence or the mutual resort thereto, 55 excessive drinking, 56 unwarranted jealousies, 57 money, 58 lack of sex, 59 extra-

marital affairs, real or imagined, inability to communicate, constant fights and arguments, religion, and lengthy separations. In many instances neither party had committed sufficient wrongs to justify a divorce for fault, i.e. gross neglect of duty, desertion, etc.

Using these illustrations as a premise, it is conceivable that in every merited divorce action instituted there exists unilateral, if not bilateral, incompatibility. Jurists in Ohio and elsewhere have repeatedly recognized the validity of this postulate and, indeed, some authorities in Ohio have advocated the statutory adoption of the incompatibility concept as preferable to fault alone. However, Ohio courts, like those in many other jurisdictions, refuse to grant a divorce on the grounds of incompatibility, (although such a ruling...
ing might well be justified from the breakdown of the marriage standpoint, 6) because of a lack of statutory authority.

Outside of perjury and chicanery there was nothing that could be done in divorce court for an incompatible couple, an Ohio lawyer wistfully wrote, shortly after the turn of this century. The frustrated husband’s plight was set to rhyme by his counsel, as follows:

I have no other woman,
She has no other man,
Only we’ve lived together
As long as ever we can;
And so I have talked with Betsy
And Betsy has talked with me,
And we have agreed together
That we kaint never agree. 7)

In summary, then, while Ohio and many other states have not adopted incompatibility as a ground for divorce, and those states which have done so have encountered major difficulties in developing the concept into a constructive legal tool, the reform effort, focusing not on fault, but rather on the gyrating dynamics of persons under domestic stress, has been a major breakthrough in the divorce laws of the United States. Unlike “living apart,” where fault is obscured by a physical parting of the ways, incompatibility demands and secures self-cleansing and refreshing revelation. There are few authorities, sadly enough, who share this view. 71

69. Cases cited supra, note 68. (For example, divorces denied for extreme cruelty would have been granted for incompatibility): Falknor v. Falknor, 41 Ohio L. Abs. 476, 68 N.E.2d 699 (Ct. App. 1944); McAllister v. McAllister, 27 Ohio L. Abs. 80 (Ct. App. 1938); Raddatz v. Raddatz, 8 Ohio N.P. 123 (C.P. 1900). The same is true where decree was declined on gross neglect: Stephens v. Stephens, 78 Ohio L. Abs. 300, 156 N.E.2d 159 (Ct. App. 1957); Sevi v. Sevi, 83 Ohio L. Abs. 257, 168 N.E.2d 440 (1959); Brown v. Brown, 60 Ohio L. Abs. 90, 76 N.E.2d 730 (Ct. App. 1947).

70. Watermire, Marriage and Divorce Laws, 50 Wkly. L. Bull. 45, 46 (1905).

71. Materials cited supra, note 44.
III. THE COLLAPSE OF THE FAULT STRUCTURE—FROM DEBURGH TO IRRECONCILABLE DIFFERENCES AND IRREMEDIABLE BREAKDOWN

It may be seen from the foregoing discussion that there were two strong parallels between the "living apart" and "incompatibility" concepts. First, both focused the attention of the judiciary, through the grind of adversary litigation, away from fault and to the social reality of marital breakdown. And, secondly, the hoped-for changes sought were not achieved.

Several distinct reasons were advanced by scholars why the fault grounds structure should be totally jettisoned and replaced by updated standards, some of which are set forth below.

A. _Adversary Divorce Litigation Destroys What Little Is Left of a Once-United Family_

Professor John Bradway, writing in the mid-1930's, became one of the first scholars in the field to forcefully and thoughtfully advance the then radical contention that divorce courtroom battles were not only painful in the present tense, but also left permanent scars on the entire family forever. Since it is unquestioned today that the stability of the family entity is fractured and destroyed in such situations, Bradway's radical critique has been vindicated.

The shattering experience of divorce has been described as "an acute exacerbation of an extremely painful and suppurating lesion" and analogous to the once-popular prizefight. It is because of the fears for the family or for one's own well-being, as opposed to apprehension of losing the battle, that most divorce cases are uncontested in Ohio and elsewhere.

B. _Divorce Litigation, be it Contested or Not, is Farcical, Hypocritical, and Perjury-Oriented_

From a strict construction standpoint it is mandatory, under the
fault system, for one spouse to prove that the former mate has been guilty of some specific transgression outlined by statute to achieve the desired end in divorce. Critics have, with merit, attacked the specific-grounds requirement as being "artificial" and "legal hocus-pocus" because, more often than not, the witnesses do not testify as to the real reasons that the litigation was instituted.

For example, Jane, tells the Court that her husband, John, drinks too much and beats her—which is not true—because she is ashamed to disclose to the world that John is in love with Connie, a divorcer with no children. Conversely, John cannot reveal that Jane is a drug addict under psychiatric care (because he may be forced to take custody of the children, which both he and Connie oppose); so he tells the court that Jane is a spendthrift and a poor homemaker or, more likely, he never attends the divorce hearing.

Plutarch once wrote of a recently-divorced Roman who was being criticized for it by some contemporaries. By way of explanation he took off a shoe and displayed it, telling them it was new and well-made, and commented, "Yet none of you can tell me where it pinches." That is precisely the point—the court, never knowing what the real reasons for divorce are, grants a divorce for the wrong reason—it is never told where the "pinch" is.

Perjury, as one authority put it, is a "small price to pay for matrimonial freedom." While throughout our history, Ohio courts have repeatedly stated that a divorce court, as a matter of public policy, should be vigilant against perjury and have expressed great disdain when it is discovered, they have done very little about it.

The individual victimized by perjury has little hope of recovering civil damages. As an additional adjunct to this criticism it has been claimed that the specific statutory grounds of fault, many of them enacted decades ago, do not and cannot encompass in a modern day society all the events that may destroy a marital relationship. For example, one spouse may have perverted and abnormal sex drives or an addiction to drugs which have led to a breakdown of the marriage but which, under the law, would not constitute "extreme cruelty" or "gross neglect of duty".

C. Under Fault, Divorce Litigation is Demeaning to the Legal Profession and the Lawyer

The public, confused about divorce, the functions of a Court of Domestic Relations, and the role performed by lawyers in matrimonial cases, often views the attorney as:

(1) a "vulture" preying upon the carcass of a dead or dying marriage through the perjury of his client or his witnesses;

(2) a "villain" who, as an ordered trial strategy, raises unprovable and questionable defenses (such as condonation or recrimination) to block a divorce, drag out the case, or to extort a more

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favorable settlement of collateral issues (as in alimony or custody); or

(3) an insensitive "profiteer" who pushes a perhaps resolvable skirmish into full-scale courtroom war. It is for these reasons that many attorneys, otherwise qualified, refuse to take divorce cases.

While there are those who disagree with this evaluation, it is hard, if not impossible, for the Bar or the individual practitioner to refute the feelings of the public, reacting out of ignorance, when we all know that no one (except the lawyer who gets paid) wins under a fault-oriented divorce system.

D. Divorce Litigation Under Fault Wastes the Client's Money (and Emotions) and the Court's Time

From a practical standpoint protracted divorce litigation on fault grounds frequently calls for an extended capital outlay for court costs, pre-trial discovery and attorneys' fees. Many times the spouses, financially unprepared and unaware, can not afford to pay for the battle. It has been said that resort to divorce under fault was for the rich only; that the antiquated system discriminated against the less economically fortunate; and that, as a result, those from lower income groups were forced to avoid court altogether, ending their marriages via common law divorce, by entering into new and illegal marriages, or by disappearing entirely, thereby creating a whole series of complex legal problems. Still others with cash in hand but with no grounds or stomach for a lengthy fight were


94. Cannell, Abolish Fault-Oriented Divorce in Ohio, 4 Akron L. Rev. 92, 100 (1971). The avoidance may also be prompted by ethical considerations. See: Marks & Catheart, Discipline Within the Legal Profession: Is it Self-Regulation?, 1974 U. Ill. L. F. 193, 194.

95. Alexander, Public Service by Lawyers in the Field of Divorce, 13 Ohio St. L. J. 13 (1952).


forced to use the migratory divorce vehicle. The problems arising for both spouses under this practice need no elaboration—they are all too apparent.102

Because divorce litigation may often be used by one spouse as a "device for punishment,"103 particularly where children have become the pawns in a chess-like fight,104 the emotional damage wrought is ever-felt and the loss therefrom incalculable.105 Entering divorce litigation, even in those states where counseling and rehabilitation facilities are available,106 made, under fault, as much sense as taking a fine watch in need of repair to a myopic blacksmith.107

Obviously, courts did nothing to reduce the emotional turmoil of the parties when, on fault grounds, they were denied a divorce and returned, harshly, to status quo bellum.108 The entire process involved a gross waste of the court's time, energy and financial resources.109

E. The Philosophy Justifying Retention of Divorce for Fault is Erroneous and Out-Modèd—The Decision to Terminate a Marriage Relationship is a Private, Not Public, Matter in which the State Should Have No Interest

Throughout Ohio history fault divorce retention was justified by the assumption that the State itself, represented by the court, had a clear duty to preserve the institution of marriage.110 In a chain of


103. Fiorette, supra note 77, at 1196.


107. Bradway, supra note 72, at 390.


110. Van Voorhees v. Van Voorhees, Wright 636 (Ohio 1834); Siebert v. Siebert, 32 Ohio App. 487, 168 N.E. 223 (1929); Burke v. Burke, 36 Ohio App. 551, 173 N.E. 637 (1930); Gatton
consistent decisions, the Ohio Supreme Court, from Harter v. Harter\textsuperscript{111} in 1832 to Coleman v. Coleman,\textsuperscript{112} fourteen decades later, had uniformly exercised this authority. Elsewhere, however, the resort to such power has been decried. It has been claimed that the fault system is premised on an \textit{unwarranted}\textsuperscript{113} governmental assumption of power — that a domestic relations judge, regardless of statutory mandate, has no right or authority to make an intrusion into private areas of interpersonal decision-making.\textsuperscript{114} The United States Supreme Court has ruled, for example, in Griswold v. Connecticut,\textsuperscript{115} that a state statute prohibiting the use of contraceptive devices was an unjustified intrusion by government in the private affairs of a married couple and therefore unconstitutional. Similarly, a state miscegenation statute, precluding interracial marriage, was ruled unconstitutional in Loving v. Virginia.\textsuperscript{116} Most recently in Boddie v. Connecticut,\textsuperscript{117} a state statute requiring the prepayment of divorce court costs was held void because a state may not pre-empt one's right to dissolve a marriage by preventing equal access to the courts. These three decisions, buttressed by others,\textsuperscript{118} lend credence to the belief that neither state legislatures nor the courts have a duty to prevent a divorce and that such a decision may be made only by the individuals.

\textsuperscript{111}5 Ohio 318 (1832). The entire text of Judge Hitchcock's opinion has been cited in innumerable legal journals.


\textsuperscript{115}381 U. S. 479 (1965).


\textsuperscript{117}401 U. S. 371 (1971).

F. Fault Doctrines Do Not Deter Divorce . . . At Least Not in Ohio

There is said to exist in Ohio a mandatory judicial duty, based on public policy,\(^{119}\) to encourage forgiveness\(^{120}\) and reconciliation.\(^{121}\) Under fault the judge must construe divorce laws against granting a divorce.\(^{122}\) Thus, in \textit{VanDeRyt v. VanDeRyt},\(^{123}\) the Supreme Court ruled that a divorce court judge had an \textit{absolute} obligation to determine if a party actually wanted a divorce, even if the case was \textit{uncontested}. One theory behind these decisions has been that divorce laws, strictly construed and applied to the facts, would serve to deter divorce. A brief review of divorce statistics disproves this theory.

It is said that divorce is an unseen ghost in every home.\(^{124}\) While no one knows exactly why divorces occur, although some authorities guess,\(^{125}\) the horrible fact, from the sociological perspective, is that they are happening — and at an alarming rate.

For example, during the past ten years, 350,000 divorces were granted in Ohio, nearly doubling, from 25,000 in 1964 to 48,000 in 1973.\(^{126}\) In this period 700,000 persons were freed by divorce to marry again, if the spirit moved them. In 1964 there were three times as many marriages as divorces. A comparison of the graphs illustrated in Figures 1 and 2 shows that during this one decade the ratio has shifted to two to one (99,524 marriages to 48,001 divorces). During the same period, 1.7 million persons married, the figures jumping

\(^{119}\) State \textit{ex rel.} Haun \textit{v.} Hoffman, 145 Ohio St. 31, 60 N.E.2d 657 (1945); Tucker \textit{v.} Tucker, 143 Ohio St. 658, 56 N.E.2d 202 (1944); Fessenden \textit{v.} Fessenden, 32 Ohio App. 16, 165 N.E. 746 (1928).

\(^{120}\) Rousey \textit{v.} Rousey, 7 Ohio L. Abs. 467 (Ct. App. 1929); Sevi \textit{v.} Sevi, 83 Ohio L. Abs. 257, 168 N.E.2d 440 (Ct. App. 1959); Wilson \textit{v.} Wilson, 21 Ohio L. Abs. 131 (Ct. App. 1935); Dase \textit{v.} Dase, 78 Ohio L. Abs. 144, 152 N.E.2d 20 (C.P. 1958); Mears \textit{v.} Mears, 42 Ohio L. Abs. 346, 30 Ohio Op. 177 (C.P. 1945). In Ohio, a \textit{single act of marital intercourse} has been deemed a condonation. Huffine \textit{v.} Huffine, 48 Ohio L. Abs. 430, 74 N.E.2d 764 (C.P. 1947).

\(^{121}\) Falknor \textit{v.} Falknor, 41 Ohio L. Abs. 476, 58 N.E.2d 699 (Ct. App. 1944); Pashko \textit{v.} Pashko, 63 Ohio L. Abs. 82, 101 N.E.2d 804 (C.P. 1951); Berry \textit{v.} Berry, 18 Ohio N.P. (n.s.) 521 (C.P. 1916).

\(^{122}\) Kennedy \textit{v.} Kennedy, 111 Ohio App. 432, 165 N.E.2d 454 (1959); Moody \textit{v.} Moody, 76 Ohio L. Abs. 477, 142 N.E.2d 276 (Ct. App. 1957); Bargdill \textit{v.} Bargdill, 19 Ohio N.P. (n.s.) 120 (C.P. 1915).

\(^{123}\) 6 Ohio St.2d 31, 215 N.E.2d 698 (1966). The same obligation was found to exist in a contested divorce. \textit{See} Wickham \textit{v.} Wickham, 35 Ohio App. 142, 171 N.E. 864 (1930).

\(^{124}\) KIRKPATRICK, THE FAMILY AS PROCESS AND INSTITUTION (1963) at 571-72.


\(^{126}\) The author wishes to express his thanks to Mary F. Smith, Chief Statistician, Division of Data Services, Ohio Department of Health, for these official figures. According to the writer's calculations, the exact number of divorces was 349,369.
FIGURE 1

(OHIO DIVORCES, 1964-1973)

YEAR


NO. OF DIVORCES AND ANNULMENTS

20,000 30,000 40,000 50,000
FIGURE 2

(OHIO MARRIAGES, 1964-1973)

YEAR

1973
1972
1971
1970
1969
1968
1967
1966
1965
1964

70,000 80,000 90,000 100,000

NO. OF MARRIAGES
from 75,000 in 1964 to 99,500 in 1973. The statistics for 1973 show that all of the 48,000 divorces were granted upon proof of "fault"; that roughly fifty percent involved couples married for five years or less; and that more than 60,000 children were affected by this judicial process.

Without citing further statistics, it is apparent that the high incidence of divorce among the young is a continuing phenomenon and that during the past ten years more than one-half million children in Ohio alone have experienced the trauma of the divorce of their parents. From an analysis of these statistics it can not be persuasively argued that divorce for fault alone served as a deterrent to persons desirous of divorce. The truth is that, because of the legal impedimentia of the fault system, the clients and their counsel have circumvented the process whenever possible by taking the divorces "uncontested", for if the courts, under fault, would not sever a broken marriage, the parties would, by agreement and ex parte divorces.

Mr. Justice Traynor and the DeBurgh Case

The seekers of reform, armed with the wedge of the "living apart" and "incompatibility" statutes and supported by the valid criticisms outlined above, were moved still closer to the goal of no-fault divorce when the California Supreme Court in the 1952 decision of DeBurgh v. DeBurgh severely restricted the doctrine of recrimination and suggested that a court should, after examining the interpersonal relationship of the parties, terminate the marriage where there had been a "total and irremediable breakdown" of it.

In DeBurgh, Daisy and Albert separated after a 28 month marriage. She was tired of his drunken sprees, the beatings, his jealousy about her former boyfriends, his attitude about money, and the quarrels over her daughter by a prior marriage. Albert, on the other hand, deeply resented her interference with his business activities and her claims that he was a homosexual. Reconciliation being out of the question, each filed for divorce on "extreme cruelty" and

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129. Id., Table 35.
130. Id., Table 34.
substantiated their contentions during the divorce court hearing.\textsuperscript{133}

The California Supreme Court, Mr. Justice Traynor speaking for a divided body, reversed the judgment of the trial court (wherein both parties had been denied a divorce because of their mutual fault and recriminations), rejected the unpopular fault doctrine of recrimination,\textsuperscript{134} and suggested that the standard of "irremediable breakdown" be used by the courts. Because a strict application of recrimination produced unconscionable results and left the demoralized and miserable spouses in the shambles of their broken marriage, the \textit{DeBurgh} decision was heralded as sociologically visionary.\textsuperscript{135}

By way of comparison, this was not, prior to 1970, the view taken by fault-oriented courts in Ohio, where, on facts virtually identical to those in \textit{DeBurgh}, divorces were consistently denied.\textsuperscript{136} Accordingly, under recrimination, if both Ohio spouses were at fault in the marriage they were denied relief. The courts assumed that the couple was mature enough to work out their problems.\textsuperscript{137}

The utter inequity of the doctrine was dramatically displayed in \textit{Lewis v. Lewis},\textsuperscript{138} where, after the husband was confined to prison, the wife fell in love, became pregnant and delivered a bastard child. These facts being discovered by the court, along with testimony that the marriage had been troubled at the outset, the court, although the divorce action was uncontested, dismissed the action on the grounds of recrimination. The court was obviously wrong in this situation because the wife's "transgression" was subsequent to and

\textsuperscript{133} 39 Cal.2d at 860, 871, 250 P.2d at 599, 605.
\textsuperscript{138} 103 Ohio App. 129, 144 N.E.2d 887 (1956).
unrelated to the reality that the marital relationship had broken down.

In July, 1970, the Stark County Court of Appeals in Newell v. Newell,\(^{139}\) reversed this trend and ruled, on facts identical to those in Lewis, that the best interests of the community and the welfare of the children would be served by granting a divorce to the wife. While the Court did not expressly reject the recrimination doctrine, it was critical of lower courts which had denied divorces on isolated facts unrelated to more significant evidence which showed a breakdown of the marriage.\(^{140}\) Less than a year later an Ohio court in Bales v. Bales,\(^{141}\) specifically rejected recrimination and ruled that a divorce should be granted where a continuance of the marriage would be grossly detrimental to the entire family. It would appear, then, that as the 1970's began, the courts in Ohio, with an assist from Mr. Justice Traynor, were sensing the need for wholesale reform of the fault system.

IV. FROM IRRECONCILABLE DIFFERENCES TO IRRETRIEVABLE BREAKDOWN AS STANDARDS FOR MARRIAGE DISSOLUTION

At roughly the same time that Newell became law in Ohio, the California State Legislature, eighteen years after DeBurgh and after more than three years of toil, totally abolished fault divorce and made California America's first state to enact a no-fault law, making proof of "irreconcilable differences" causing an "irremediable breakdown" of the marriage grounds for dissolution.\(^{142}\) Oregon quickly adopted the same grounds under a total no-fault system.\(^{143}\) Within the next two years five other states incorporated "irreconcilable differences" statutes into their existing fault ground frameworks.\(^{144}\) Another group of states, including Michigan\(^{145}\) and Iowa,\(^{146}\)

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140. Id. Several decisions rendered prior to Newell suggest that recrimination had been rejected in Ohio, at least by implication. Holmes v. Holmes, 82 Ohio App. 33, 80 N.E.2d 507 (1949); Opperman v. Opperman, 77 Ohio App. 69, 65 N.E.2d 655 (1945); Nelson v. Nelson, 3 Ohio App.2d 293, 210 N.E. 2d 137 (1964).
141. 294 N.E.2d 252 (Ohio C.P. 1971).
no-fault "breakdown of the marriage" their standard, and Kentucky, Washington, Nebraska, and others on the basis of "irretrievable breakdown," became total no-fault, dissolution jurisdictions. In addition, other states incorporated the standard as a separate ground for termination of the marriage in their coexisting fault setup. Texas enacted a totally unique no-fault statute.

Because of space and subject-matter limitations, it would be physically impossible to analyze this wealth of legislative material. While there are naturally many fine differences and legislative distinctions, tailored to fit local needs, it may be said generally that nearly all the dissolution statutes were modeled after the California code, the suggestions of the Family Law Section of the American Bar Association, and/or the recommendations of the draftsmen of the Uniform Divorce and Marriage Act. It would likewise be premature to undertake, because of the recent nature of this legislation, an in-depth critique of the enactments. There are, however, a few observations which must be made.

Courts in at least three jurisdictions have upheld the constitutionality of dissolution statutes, rejecting the claim that the standards of "irreconcilable differences" and "irretrievable breakdown" were too vague to assure uniform application and the assertion that the exclusion of fault evidence violated due process. In these decisions...
the courts dispelled one of the major proffered criticisms of the acts. The courts interpreting this legislation have uniformly held that evidence of fault must be excluded during hearings on dissolution and the collateral issues of property division, alimony and child support, thereby eliminating another area of scholarly scepticism concerning dissolution. Much of the undesired acrimony and economic blackmail were thankfully gone — at least from the court room.

The ancient doctrine of recrimination has been rejected under the dissolution statutes. The rejection of the fault concept by the Florida Supreme Court in Ryan v. Ryan was accompanied by a last ditch dissent of a senior member of that court:

Under the majority view a wrongdoing husband can come home every Saturday night for five years, drunk and penniless because of skirt-chasing, gambling, or some other mis-deeds; then, he may beat, bruise and abuse his wife because he is unhappy with himself, and then he will be permitted to go down and get a divorce on printed forms purchased at a department store and tell the trial judge that the marriage is "irretrievably broken." Or, the offending wife, after jumping from bed to bed with her new found paramours, chronically drunk, and when at home nagging, brawling and quarreling, all against the wishes of a faithful husband who remains at home nurturing the children, is permitted to divorce her husband who does not desire a divorce, but rather, has one forced upon him, not because of anything he has done, but because the offending wife tells the trial court that her marriage is "irretrievably broken."

There are unquestionably thousands of Americans who share these views, being fearful that family homes, institutions and trad-
tions may soon evaporate under dissolution statutes. It is simply hard for some to adjust to the possibility that terminating a lifelong marital relationship may become as easy as buying a package of gum.

It was precisely for this reason that a California court ruled that their dissolution statute did not contemplate dissolution of marriage by consent of the parties. Dissolution not only should, but must, be based on the fact that a breakdown does exist. For these reasons it is apparent that courts will not permit parties to collusively agree to a dissolution.

A California Court of Appeals has ruled in In re Walton’s Marriage that the function of a court under dissolution is judicial, not ministerial, and that although the proceedings are essentially non-adversary there must be substantial proof of breakdown before a decree may be granted. In other words, there must be positive evidence that the irreconcilable differences caused an irremediable breakdown of the marriage.

V. FROM COMMANDMENTS TO CONSENT — OHIO IN THE DIVORCE REFORM ERA

Until the early fall of 1974, little change had been made in Ohio in the substantive law governing the grounds for divorce for one hundred and seventy years. In December, 1804, legislation was passed providing for divorce upon proof of fault in four specific categories, including extreme cruelty. By 1840 the number of fault grounds was increased to nine with the addition, among others, of gross neglect. The final ground for divorce became law in 1853.

162. Sass, supra, note 146 at 637.
166. McKim v. McKim, 6 Cal. 3d 673, 493 P.2d 888, 100 Cal. Rptr. 140 (1972); contra, In re Marriage of Collins, 200 N.W.2d 886 (Iowa 1972).
169. 3 Ohio Laws 177 (1804); 18 Ohio Laws 302 (1819).
170. 38 Ohio Laws (General) 37 (1839); Perkins, Divorce Laws of Ohio, 1 Western L. J. 170 (1843).
There are a number of reasons, none of them historically documented, to explain why reform was so slow to arrive in Ohio. First, throughout this long period the lawyers themselves were resistant to change,\(^{172}\) it being conceded by them that there was an ample variety of grounds to choose from and that it was easy to procure a divorce in Ohio.\(^{173}\) The statistics bore them out!\(^{174}\) Second, those lawyers advocating abolition of fault were restricted to publication,\(^{175}\) there being no receptive forum in Columbus. Third, Ohio courts possessed no power or authority to institute change. An Ohio appellate court observed in *Heim v. Heim*,\(^{176}\) for example, that the legislature had enacted the "Ten Commandments" of divorce and that both the courts and the practitioners, not to mention the litigants, were stuck with them. The courts simply could not be concerned with the wisdom of "broadening the grounds for destruction of family ties."\(^{177}\) Fourth, from the vantage point of a state legislator there was security in numbers and wisdom in constructive delay. Until 1974, for example, Ohio, like the other populous industrialized states of Pennsylvania,\(^{178}\) Massachusetts,\(^{179}\) and Illinois,\(^{180}\) conservatively declined to adopt divorce ground reform. And who could question the prudence of avoiding a lobbyless political hot potato\(^{181}\) as other jurisdictions furnished the judicial and legislative raw material? Fifth, in truth the Ohio General Assembly during recent years had been overwhelmed with legislation revamping the entire civil, criminal and juvenile codes.\(^{182}\) Massive reforms having been enacted in 1951 to require mandatory court investigations in divorce cases

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\(^{172}\) Address by Robert N. Gorman, Ohio State Bar Association Annual Meeting, May 11 and 12, 1951, in 24 Ohio Bar 451, 452 (1951).

\(^{173}\) Watermire, supra, note 70; Lambros and Simmons, supra, note 66.

\(^{174}\) Supra, notes 126-30.


\(^{176}\) 35 Ohio App. 408, 172 N.E. 451 (1930).


involving children, to correct alimony procedures, and to adopt a uniform reciprocal support act, the legislature coasted until 1969, when it enacted court-supervised reconciliation facilities in divorce cases and authorized, by resolution, a complete overhaul of the family law of Ohio.

State legislators, working together with the Family Law Section of the Ohio State Bar Association, which, in 1950, had recommended the elimination of fault from the divorce law and the adoption of a no-fault living apart statute in 1966, and, subsequently, with a select panel of judges favoring non-adversary dissolution of marriage by agreement, pushed through the General Assembly, along with a series of most significant collateral reforms, the so-called Norris Bill, introducing to Ohio four new and vibrant concepts:

1. abolition of the doctrines of condonation and recrimination in all fault divorce cases;
2. no-fault divorce upon living separate and apart for a period of two years;
3. no-fault divorce upon living separate and apart for a period of four years in which one of the parties has been continually confined to a mental institution; and
4. totally non-adversary dissolution by consent of the parties, subject to the court's approval of a written separation agreement.

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187. Ohio House Joint Resolution #38, adopted September 11, 1969, 133 Ohio Laws, 3059 (1969). The author wishes to express his gratitude to State Representative Norman Murdock of Cincinnati, Ohio, for furnishing both valuable legislative materials otherwise unobtainable and suggestions concerning the format of the topic immediately above.
190. Norris, Divorce Reform, Ohio Style, 47 Ohio Bar 1031, 1033 (1974).
A. Recrimination and Condonation Eliminated as Defense in Divorce Actions Brought for Fault

The General Assembly, following the lead of the courts in DeBurgh, Newell, and Bales, struck down the ancient, ecclesiastical doctrines of recrimination and condonation by eliminating them, pursuant to §3105.10(B), Ohio Revised Code, as defenses to any divorce action sought on one or more of the ten fault-oriented grounds for divorce under Ohio Revised Code, §3105.01. While the "Ten Commandments" of fault were retained as grounds for divorce in Ohio, the inequities, injustices and human waste produced by the doctrine of recrimination, as detailed previously, have been removed from Ohio's divorce actions.

Section 3105.10(B) also abolished the doctrine of condonation, a device by which the adverse spouse sought to defeat a divorce action predicated upon his fault by producing evidence that his "sins" had been forgiven, thereby making his transgressions a nullity. A classic illustration of the workings of the condonation doctrine appears in the 1833 decision of the Ohio Supreme Court, McDwire v. McDwire, where a divorce was denied to the wife because she had lived with her husband after he had beaten and scarred her throat with a knife.

It has long been the rule in Ohio that if, after the grounds for divorce arose, the ill-treated spouse continued to live under the same roof with the adverse spouse, presumed condonation, arising from established cohabitation, could be successfully raised as a defense. Indeed, the condonation doctrine was stretched to a maximum extreme by two Ohio courts which held that a single act of voluntary intercourse, after the fault arose but without prolonged cohabitation, was sufficient to absolutely bar a divorce.

Two sound reasons therefore existed for abolition of the condonation defense. First, like recrimination, it fostered perjury and chicanery. Second, the doctrine, contrary to the alleged reasons for its existence and time-honored survival, actually frustrated, rather

195. Ohio Rev. Code §3105.01 (A) through (J) (1972).
198. Wright, 354 (Ohio 1833). See also Barnes v. Barnes, Wright, 475 (Ohio 1833).
than encouraged, reconciliation between the parties.\textsuperscript{201}

The elimination of these defensive pleas should, in time, substantially reduce the contested dockets in Ohio, making life in court somewhat more endurable than in the past. But it is doubtful that such dockets will become obsolete instantaneously. There are a number of reasons which prompt this conclusion:

(1) the reform being limited to divorce actions, it will have no bearing on actions for alimony only\textsuperscript{202} or annulment;\textsuperscript{203}
(2) less frequently-used defenses have not been removed as bars to divorce: connivance,\textsuperscript{204} collusion,\textsuperscript{205} laches\textsuperscript{206} and res judicata;\textsuperscript{207}
(3) it should not be assumed that proof of cohabitation will be meaningless, for proof of continued cohabitation may tend to show that no cause of action for fault ever existed;\textsuperscript{208} and
(4) the blind desire of persons engulfed in litigation to win — no matter what the cost — should keep the contested dockets busy.

B. The Living Separate and Apart Statute

In an independent reform from those of the Norris Bill, the General Assembly enacted Amended Senate Bill 348, effective May 7, 1974, bringing to an end the exclusive one hundred and seventy year

\textsuperscript{201} Mayer, Suspension of Condonation Defense Increases Reconciliations, 28 Tex. B. J. 737 (1965); Comment, Cohabitation During Pendency of a Divorce Action, 19 Wash. & Lee L. Rev. 243 (1962); Note, Condonation, 3 Ala. L. Rev. 203 (1950); Note, Condonation, 28 N.Y.U. L. Rev. 1047 (1953).

\textsuperscript{202} Ohio Rev. Code, §3105.18, as amended, (Legislative Bulletin Supp. #3 at 102, 1974).

\textsuperscript{203} Ohio Rev. Code §3105.31 (1972).

\textsuperscript{204} Backenstoe v. Backenstoe, 14 Ohio Dec. 353 (C.P. 1904); Mayer v. Mayer, 2 Wkly. L. Bull. 47 (Ohio C.P. 1877).


\textsuperscript{207} Ohio Rev. Code §3105.01(K), as amended, (Legislative Bulletin Supp. #1 at 7, 1974).

reign of the fault-oriented "Ten Commandments," and adding as an
eleventh ground for divorce the living apart of a married couple for
a period of two years. Specifically, Ohio Revised Code §3105.01(K),
provides that a divorce may be granted:

On the application of either party, when husband and wife have,
without interruption for two years, lived separate and apart without
cohabitation. A plea of res judicata or of recrimination with respect
to any provision of this section does not bar either party from obtain-
ing a divorce on this ground. (Emphasis added).

The enactment of this legislation constituted a bold departure from
the past, since living separate and apart was not previously grounds
for divorce in Ohio.209

At the outset it must be conceded that the purpose of such legisla-
tion will be sociologically appealing to Ohioans,210 for the statute
empowers a court to grant a divorce to either spouse, regardless of
fault (recrimination as a defense having been abolished)211 or the
result of prior litigation between the parties (the plea of res judicata
is unavailable),212 upon proof that the parties have lived separate
and apart for two years in a private and public display of the death
of their marital relationship. Further, it must be admitted that such
legislation was necessary to modernize the Ohio divorce structure by
affording persons otherwise unqualified to obtain a divorce under
fault an opportunity to legally sever the relationship. However,
while such legislation, being strictly no-fault in nature, creates an
ultra-liberal impression, it introduces Ohio litigants, counsel and
the courts to a problem area pregnant with pitfalls, with the result
that it fashions, in practical reality, a most conservative and cau-
tious reform.

The precise working of the statute forces the conclusion, but-
tressed by decisions in other jurisdictions,213 that the party seeking

209. Fessenden v. Fessenden, 32 Ohio App. 16, 165 N.E. 746 (1928); Apple v. Apple, 28
Ohio N.P. (n.s.) 620 (C.P. 1931).
210. Cases cited supra, note 16.
211. Ohio Rev. Code §3105.01(K), as amended, (Legislative Bulletin Supp. #1 at 7, 1974).
212. Ohio Rev. Code §3105.01(K), as amended, (Legislative Bulletin Supp. #1 at 7, 1974).
This provision appears in virtually all of the living apart statutes to insure that prior litigation
between the parties based on fault, whether for divorce or alimony, would not preclude relief
under no fault. For cases illustrative of the crippling effect of the concept, see: Engler v.
Engler, 153 Ohio St. 459, 91 N.E. 2d 897 (1950); Lewshitz v. Lewshitz, 35 Ohio App. 189, 172
N.E. 413 (1939). For the function under separation, see: Brickley v. Brickley, 205 Ark. 373,
168 S.W. 2d 845 (1943); Goud v. Goud, 203 Ark. 244, 156 S.W. 2d 225 (1941); Sutherland v.
Sutherland, 75 Nev. 304, 340 P. 2d 581 (1959).
14, 143 S.W. 2d 1098 (1940); Robertson v. Robertson, 217 S.W. 2d 132 (Tex. Civ. App. 1949);
George v. George, 56 Nev. 12, 41 P. 2d 1059 (1935); Smith v. Smith, 54 R.I. 236, 172 A. 323
(1934); Ward v. Ward, 213 Ky. 606, 281 S.W. 801 (1926).
a divorce on this ground must, at the time the complaint for divorce is filed, have lived:

1. separate and apart from the adverse party;
2. without cohabitation or interruption for a period of two years;
3. for the reason that the marriage had ceased in fact to exist.

While there is some prior Ohio case law supportive of the proposition that a spouse may live under the same roof with the adverse spouse while successfully maintaining a divorce action on grounds of fault, it is suggested that these decisions would not be controlling or even persuasive authorities under Ohio's separation statute. A majority of courts in this country have held, for example, that a spouse cannot, within the purview of such a statute, live "separate" and "apart" while in fact living under the marital roof.

The statute also specifically bans "cohabitation" between the parties. According to a long line of prior Ohio decisions, cohabitation is inferred from a husband and wife living together. Also, while the pleas of res judicata and recrimination are eliminated as bars to a divorce for living apart, the doctrine of condonation remains a viable defense under §3105.01(K). Finally, it must be borne in mind that a divorce is obtainable under a separation statute through evidence that interspousal isolation from one another has produced a status of non-marriage. A party need not prove, as is required in fault divorce cases, specific facts, incidents or events which have caused a breakdown of the marriage.

It is precisely because of these problems of proof, however, that


215. Gates v. Gates, 192 Ky. 253, 232 S.W. 378 (1921); Lillis v. Lillis, 235 Md. 490, 201 A. 2d 794 (1964); Rogers v. Rogers, 258 Ala. 477, 63 So.2d 807 (1953); McNary v. McNary, 8 Wash.2d 250, 111 P. 2d 760 (1941); Neff v. Neff, 30 Wash. 2d 593, 192 P. 2d 344 (1948); Wife v. Husband, 238 A.2d 606 (Del. 1968). In DeRienzo v. DeRienzo, 119 N.J. Super. 192, 290 A. 2d 742 (1972), under a statute requiring separate "habitations", a husband whose bedroom was locked on both sides of the door by a key he alone possessed was denied a divorce. There is authority to the contrary. Cases and materials cited supra note 26.


218. Ohio Rev. Code §3105.10(B) eliminates condonation. Nothing in the legislation indicates that those provisions at all apply to the specialized provisions of Ohio Rev. Code §3105.01(K).
it may be assumed that divorce court relief will not be granted in Ohio to a spouse who remains under the same roof.\textsuperscript{219} Those who attempt to do so will not only be faced with prior case law authority to the contrary, but they will also be faced with the awesome evidentiary burden of establishing the termination of the marital status under circumstances where the physical evidence of living together may reflect precisely the contrary.\textsuperscript{220} The conservative thrust of the legislation is even more dramatically reflected by the additional pre-requisites (even where the evidence would show conclusively that the parties had lived in different abodes) that the separation be uninterrupted for two years and that the physical severance be prompted by marital breakdown.

If, for example, the evidence indicated either that the separation was sporadic and/or accompanied by serious reconciliation attempts\textsuperscript{221} or that the separation was not caused by the breakdown of the marriage,\textsuperscript{222} it is highly unlikely that an Ohio court would find a full compliance with the statutory mandates.

One final \textit{caveat} must be issued concerning the separation statute. In the midst of wide-spread publicity on the subject of the new Ohio divorce law, the general practitioner, at least for the time being, may be deluged with requests for information or advice concerning the termination of marriage. If the questions asked by the prospective client relate to the ramifications of a physical removal from the home on a permanent basis, the advice and instructions given must be preceded by a thorough explanation of the new separation and dissolution statutes and the old fault grounds for divorce. In the latter area, particular attention should be given to the code section making "wilful absence" a ground for divorce, as set forth in Ohio Revised Code \$3105.01(B). It is the only section under fault which makes the physical separation of the parties for a specified time period (of one year) sufficient justification for termination of a marriage. Existing Ohio case law provides that wilful absence is established as a grounds for divorce by evidence that one spouse, intending to end the marital relationship completely, unilaterally and wil-


\textsuperscript{220} Cases cited supra, note 214.

\textsuperscript{221} Cases and materials cited supra, notes 31 and 32.

\textsuperscript{222} Cases and materials cited supra, notes 27-29.
fully abandons his mate for a year or more, the action being against the wishes and will of (and without the fault or provocation of) the abandoned spouse.

Assume that Ferd comes into your office and relates that six months ago he left his wife Hazel when she refused him a divorce. A few days later he moved in with Stella. Hazel’s discovery of his new relationship prompted his consultation with you.

What advice do you give? Poor Ferd is advised (marriage counseling and reconciliation being out of the question) that he is at fault and that Hazel can divorce him on a number of grounds. Six months from now he will also be “guilty” of wilful absence. As a crowning blow you instruct him to come back in eighteen months for a divorce under the separation statute! As he crawls out of your office, a beaten man, you know you have lost a client.

Similar, if not more complex, problems arise where the so-called abandoned spouse finds it impossible to secure a divorce under the one year wilful absence statute. For example, wilful absence does not apply to situations either where the absenting spouse was not at fault and was ejected from the home of the absented spouse or where the parties mutually agree to legally separate. The latter distinction is most significant, for nothing under the no-fault living apart statute precludes the parties from formally or informally agreeing to a permanent separation or living apart under an alimony decree.

For the above reasons it is submitted that a substantial amount of confusion and inequity probable in the wilful absence versus living apart dichotomy would be eliminated by reducing the time period for separation to one year. Such an amendment would then


225. Barnes v. Barnes, Wright, 475 (Ohio C.P. 1833); Frarel v. Frarel, Wright 455 (Ohio C.P. 1833); Friend v. Friend, Wright, 639 (Ohio 1834).


227. Comment, Five Years Voluntary Separation as New Ground for Absolute Divorce, 2 Md. L. Rev. 357 (1938).

228. Comment, The 1971 New Jersey Divorce Law, 25 Rutgers L. Rev. 476, 480-82 (1971); Note, The No Fault Concept: Is This the Final Stage in the Evolution of Divorce?, 47 Notre Dame Law. 959, 967 (1972). It should be noted that General Code §11979, the predecessor statute to Ohio Rev. Code §3105.01 was amended in 1951 to reduce the time period for wilful
make divorce relief available, regardless of circumstance, to both the absented and the absentee.

Indeed, in the final analysis, the conservative legal hurdles of the separation statute are largely overshadowed by essentially non-legal functional obstacles in the form of the two year period of living apart and the economic burden of so living. While many, if not virtually all, litigants could survive the extra financial load, it is doubted that many Ohioans would endure the two year wait for divorce. There is every reason to believe, accordingly, that (1) the new separation statute will not pre-empt the field of fault divorce and that (2) quite the contrary, the Ten Commandments will remain vibrant divorce concepts in Ohio, particularly if the time period remains unaltered.

C. Four Year Continual Confinement of a Spouse In a Mental Institution as Grounds for Divorce

One of the truly unique aspects of the Ohio divorce reform is the addition of a twelfth ground for divorce, providing, under Ohio Revised Code §3105.01(K), that either spouse may procure a divorce upon proof that one of the spouses has been continually confined to a mental institution for a period of four years. The section also provides that pleas of recrimination and res judicata do not bar a divorce. Before a meaningful analysis of this section may be undertaken it will be necessary to briefly review the prior status of the law of insanity as applied to divorce cases in Ohio and elsewhere, particularly in those jurisdictions where separate and apart statutes exist.

It will be recalled that prior to the 1974 enactment all of the grounds for divorce were fault-oriented. Insanity, or acute mental illness, being a condition of the mind unrelated to fault, was therefore not included as a ground for divorce in the statutory framework. Indeed, in a touch of historical irony, the Ten Commandment doc-

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absence from three years to one year. At least one jurisdiction, Vermont, has reduced the time period for separation to six months. 15 Vt. Stat. Ann. §551(7), effective April 6, 1972.

229. Ohio Rev. Code §3105.01(K), as amended, (Legislative Bulletin Supp. #1 at 7, 1974).

230. For in-depth discussions of the problems involved, see: Hardisty, Insanity as a Divorce Defense, 12 J. Fam. L. 1 (1972); Wadlington, A Case of Insanity and Divorce, 56 Va. L. Rev. 12 (1970); Comment, Insanity as a Defense or Ground of Divorce, 18 Wash. & Lee L. Rev. 321 (1961); Note, Divorce on Ground of Separation, 18 Wash. & Lee L. Rev. 187 (1961); Note, Divorce: Living Apart Statutes as a Replacement for Fault, 1959 Wash. U.L.Q. 189.

231. This section, part of Amended House Bill 233, became effective on September 23, 1974.
trine of the *Heim* case arose from the decision of that court to deny a divorce where the spouse against whom the relief was sought was insane, for the reason that insanity was not a statutory ground for divorce. The rationale of the *Heim* decision was supported by prior and subsequent Ohio decisions.

An entirely different line of judicial reasoning appeared in the 1958 decision of *Nelson v. Nelson*, where a divorce was denied to the plaintiff-husband in an action against his insane wife, the court finding that her alleged breaches of marital duties were solely attributable to her lack of mental capacity arising from the birth of a second child and not from a wilful or purposeful disregard of her family obligations. Shifting attention and emphasis away from the grounds for divorce theory of *Heim* to a study of the actual mental status and conduct of the spouse, the *Nelson* court displayed traditional judicial reluctance, stemming from the ecclesiastical practice that divorce may be granted only where there is deliberate wrongdoing (or fault), to sever an unfortunate and impossible bond.

From the foregoing it is apparent that insanity, through case law decisions, could be an insurmountable defense in a divorce action, contrary equities notwithstanding. Struggling with the concept, some Ohio courts avoided the problem by finding that spousal misconduct constituting fault occurred during periods of lucidity and, accordingly, granted divorces, sometimes even where the defending spouse was insane at the time of the divorce hearing.

On the other side of the ledger, in situations where the insane person sought a divorce, Ohio courts uniformly ruled that the party-plaintiff, despite being represented by a guardian or attorney,

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lacked sufficient mental capacity and volition to renounce the marital contract and dismissed such suits.240 Numerous sister states, confronted with the same problems, sought to avoid the hazards encountered in Ohio by enacting legislation making insanity a substantive ground for divorce.

For example, under various statutes, a divorce may be granted upon proof of any of the following: mental illness,241 incurable mental illness,242 insanity,243 incurable insanity,244 or permanent insanity.245 Some states require continuous confinement in mental institutions or hospitals.246 Others do not make continual confinement mandatory.247 In other states there is no confinement required at all.248 Similarly, periods of confinement range from eighteen months249 to five years.

Other jurisdictions, already having separate and apart statutes, attempted to solve the insanity litigation problem (and the similar situation where one spouse was confined in prison)250 on the theory that the institutionalization of one spouse effected a physical, isolative separation of the parties, which severance transpired by operation of law without regard to fault.

The hoped-for solution was not, however, forthcoming. Almost uniformly — there were some decisional exceptions252 — courts re-

fused to grant divorces against an insane spouse for any one or all of the following reasons:

(1) that the separation of the parties was not caused by the free will and desire of the insane person; or
(2) that a breakdown of the marriage did not cause the physical separation; or
(3) that the marriage died after and because of the physical separation.\(^{253}\)

Often the courts, reflecting the impact of ecclesiasticalism upon the law, rationalized the refusal of divorce in words or sentiments similar to those of Justice Pryor of the Kentucky Court of Appeals in the case of *Pile v. Pile*:\(^{254}\)

This man, when he took the unfortunate woman to be his wife, vowed at the altar to love, cherish, and protect her in sickness and in health . . . . The more helpless she becomes, the greater his duty to love and protect her . . . .\(^{255}\)

Some of these decisions were technically justified in the law by the fact that the particular statutes involved required either a mutual and voluntary separation or that relief could be granted only to the injured spouse.\(^{256}\)

The most unusual decisional results occurred, surprisingly enough, in those jurisdictions having total no-fault living apart statutes identical in language to that of the recent Ohio enactment. Several years ago, for example, in *Crittenden v. Crittenden*,\(^{257}\) the Virginia Supreme Court denied a divorce against an insane spouse on the ground that the separation of the parties was not "voluntary." While the court conceded that it had not read into the statute the "voluntary" requirement, it concluded that the separation statute could not of itself make insanity a ground for divorce.\(^{258}\)

It was precisely for these reasons that the Ohio legislature enacted a special separation statute to deal with the insanity problem. Only two other states, Arkansas, in 1943,\(^{259}\) and North Carolina, in 1966,\(^ {260}\)

\(^{253}\) Cases cited supra, note 30. See also: Messick v. Messick, 177 Ky. 337, 197 S.W. 792 (1917); Woodruff v. Woodruff, 215 N.C. 685, 3 S.E. 2d 5 (1939); Cox v. Cox, 268 Ala. 572, 109 So.2d 703 (1959); Camire v. Camire, 43 R.I. 489, 113 A. 748 (1921); Clark v. Clark, 215 La. 835, 41 So.2d 734 (1949).

\(^{254}\) 94 Ky. 308, 22 S.W. 215 (1892).

\(^{255}\) Id. at 309, 22 S.W. at 216.

\(^{256}\) Cases and materials cited supra, notes 8, 10-13, 15.


\(^{258}\) Id. See Serio v. Serio, 201 Ark. 11, 143 S.W. 2d 1097 (1940).


have enacted distinct insanity separation statues. Both of these statutes grant relief to the same spouse only upon institutionalization of the other spouse for incurable insanity for three consecutive years. Neither statute requires confinement of the lock and key variety. Accordingly, the Arkansas and North Carolina statues differ markedly from the Ohio version. The provisions of §3105.01(K) are therefore truly unique.

Under the Ohio statute either spouse may procure a divorce upon proof that one of the spouses has been continually confined in a mental institution for a period of four years. By making relief available to either spouse, the legislature has solved the problems created in the Heim-Nelson decisions and those which rejected divorce actions filed by plaintiffs afflicted with mental illness. Theoretically, both spouses could be insane and either would be able to obtain a divorce under the statute.

Unfortunately, none of the phrases set forth in the statute, to wit: "continually," "confined," and "mental institution" carry statutory definitions. A fair reading of the statute, however, prompts these conclusions:

(1) because both the phrases “without interruption” and “continually” appear in the same statutory sentence, the four year confinement can not be intermittent and must be in an unbroken string of at least 48 months;

(2) these provisions probably will preclude utilization of the statute where the confined person has privileges which permit him to periodically leave the institution, such as trial visits or out-patient group therapy sessions;

(3) the use of the word "confined" implies that the person institutionalized need not have been "committed" under a court order; and

(4) the phrase "mental institution," without any "private," "public," "state," or "Federal" qualification indicates that any licensed mental institution could be the place of confinement.

Other than the statutory construction problems, there are several


263. Cases cited supra, note 240.

other observations concerning the statute which justify brief discussion.

First, the Ohio Civil Rules indicate the need for the appointment of a guardian to represent the insane person in the divorce proceedings.\(^{265}\) Secondly, the court would be obligated to construe strictly the provisions of §3105.01(K) in favor of the insane party so that complete compliance with it would be mandatory.\(^{266}\) Third, while the statute does not require proof of mental incompetency per se, it would appear necessary to present completely such evidence at trial.\(^{267}\) In this connection it should be borne in mind that, in the absence of waiver, a sane spouse may not testify against an insane spouse under Ohio law.\(^{268}\) In conclusion, the statute constitutes a tremendous advance. The major drawback is the four year time period.\(^{269}\) It seems grossly unfair to require, in addition to continuous confinement, such a lengthy wait, particularly where neither party normally would in any way be responsible for the mental affliction.

VI. \textbf{The Divorce Law: Prospective or Retrospective?}

Harry and Mary Lou Mayer were each barely twenty when they were married in 1968. Within two years a little boy and girl were born and a move made to a larger apartment. It was a happy and financially secure family. A few days before a loan was to be made for their first home, Mary Lou sustained permanent brain damage in an auto accident. Late in 1970, as a result of the accident, Mrs. Mayer was permanently institutionalized for an inoperable and incurable mental illness. Harry, unable to carry the additional financial load, was forced to file bankruptcy and place the children in foster homes. His visits to the hospital became less frequent—the emotional strain was too great. Finally, in 1974, the visits stopped entirely. The parties agreed to a divorce.

When Mr. Mayer comes to your office for advice, what do you tell him? Do you indicate that he may file immediately under the insanity separation statute? Or do you tell him that another four years


must pass before he may file? The question is: will the new separation statutes be applied prospectively or retroactively?

As a general rule, a majority of American courts, when faced with this most serious dilemma, have found that the individual state legislatures, in enacting "living apart" statutes, have authorized the courts to apply the law retroactively and to grant divorces for causes of action which arose before the effective date of the legislation.270

With reference to a separation caused by insanity, the Supreme Court of Maryland, in Dodrer v. Dodrer,271 held that a divorce could be granted where one spouse had been institutionalized for the required time period, regardless of whether such period occurred before or after the passage of the act.

These courts have repeatedly upheld the constitutionality of the statutes, retroactively applied, against the claims of disgruntled spouses that such an approach constituted:

(1) a violation of the equal protection of the law;272 or
(2) an ex post facto law;273 or
(3) an abrogation of prior contract rights.274

Being cognizant of the fact that retroactivity is disfavored in the law, the courts have taken different approaches to justify their identical conclusions. The Supreme Court of Alabama, for example, held, in Sills v. Sills,275 that the policy against retroactive legislation was not controlling with respect to the separation statute for the reason that it was a remedial statute which did not create, enlarge, destroy or diminish any vested rights favored under the law. The South Carolina Supreme Court in Singley v. Singley276 found that the arguments concerning retroactivity were not binding because the separation statute did not relate specifically to a "cause of ac-


271. 183 Md. 413, 37 A.2d 919 (1944).


275. 246 Ala. 165, 19 So.2d 521 (1944).

tion" between the parties, but rather dealt with a state of affairs or condition between them.

A large number of other courts have found implied retroactive legislative intent and authorization from statutory words phrased in the past tense.277 The Virginia Supreme Court in Hagen v. Hagen,278 found that the words italicized below, contained in their statute, forced a retroactive interpretation:

... When husband and wife have, without interruption for two years, lived separate and apart without any cohabitation ... .

On the basis of these authorities it would appear that Ohio courts will not apply the statutes prospectively. This, however, may not prove to be so. Legal scholars contend that Ohio is a minority jurisdiction which construes statutes prospectively in the absence of legislative directive to the contrary,279 and cite as authority an 1834 decision of the Ohio Supreme Court, Scott v. Scott,280 wherein it was held that a new amendment to the divorce code did not apply to cases which had arisen before the passage of the act. There are some older cases from other jurisdictions which support the prospective-construction theory.281

On the other hand, it should be noted that the most recent decision in favor of prospective application was rendered more than fifty years ago, when the "living apart" reform movement was in its infancy.282 By way of comparison, the majority view, favoring retroactivity, has been expressed by five state courts of last resort within the past ten years.283

Retroactivity in Ohio may be additionally questioned for the reason that the State Constitution and an existing statute provide that the General Assembly has no power or authority to enact retroactive

278. 205 Va. 791, 139 S.E.2d 821 (1965).
278.1 VA. CODE 20-91(9) as amended (1962).
279. Materials cited supra, note 270.
Pursuant to the constitutional mandate it has been held that every statute which takes away or impairs vested rights, acquired under existing laws, or which creates a new obligation, duty or disability in respect to past transactions or considerations, must be deemed retroactive and in violation of the Ohio Constitution. This argument against retroactivity is without merit. There is ample decisional authority in Ohio and elsewhere that there are absolutely no vested rights in a marriage or marriage contract (indeed, there is strong feeling that marriage is not a contract at all, but rather a status) and that whatever rights, duties or obligations created or arising during a marriage may be enforced in independent actions unrelated to a divorce proceeding. From a constitutional standpoint there is also support in Ohio for the proposition asserted in the Sills case that the rule of construction against retroactivity does not apply in the "living apart" instance because such statutes are remedial in nature and do not effect substantive rights.

The strongest and most modern threat to the retroactivity theory arises in the legislative guidelines for statutory construction under recent Ohio legislation. One provision of that legislation, Ohio Revised Code §1.48, states:

A statute is presumed to be prospective in its operation unless expressly made retrospective. (Emphasis added)

While it might be argued, as in the Hagen case, that retroactivity is implied from the wording of Ohio Revised Code §3105.01(K), it must be conceded that there is no express authorization in the statute. Accordingly, an Ohio court would have to presume the statute to be prospective in its operation.

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286. Goodman v. Gerstle, 158 Ohio St. 353, 109 N.E. 2d 489 (1952); In re Millward's Estate, 166 Ohio St. 243, 141 N.E.2d 462 (1957); Judy v. Trollinger, 110 Ohio St. 576, 144 N.E. 44 (1924); Davis v. Warner, 47 Ohio App. 495, 192 N.E. 270 (1933).
288. Ricke, supra, note 146.
290. 246 Ala. 165, 19 So.2d 521 (1944).
293. Ohio Rev. Code § 3105.01(K) as amended (Legislative Bulletin Supp. #1 at 7 1974).
The provisions of Ohio Revised Code §1.48, must, however, be read and interpreted in conjunction with other provisions of the code. Under Ohio Revised Code §1.47(C), for example, it is presumed that a just and reasonable result is intended when legislation is enacted.

Assuming *arguendo*, that §1.48 were dogmatically followed, so that the statute applied prospectively only, the presumption of reasonableness and justness under §1.47 would disappear, for who could honestly claim that the hypothetical Mayer family would receive justice and reasonable access to judicial relief by tacking on an additional four years of misery to the four years they had already suffered? Any other interpretation of §3105.01(K) would produce unconscionable results in divorce litigation, and improperly align Ohio with a restrictive minority of states in the area of divorce law retroactivity.

VII. DISSOLUTION OF MARRIAGE BY CONSENT: THE DREAM BEGINS AND ENDS WITH CONTRACT

History invariably shows a people to be best and strongest when the control by the state of the status of marriage is strictest, and that looseness in the matter of divorce is always a prelude to that moral decay which has caused the fall of empires and the disintegration of peoples.

Critics of divorce by agreement, as mentioned previously in the discussion of incompatibility, have long contended that the seldom-advocated reform of termination of marriage by mutual consent is too radical a departure from the legal traditions of the past. Citing as historical authority the collapse of the Roman Empire shortly after consensual divorce was adopted in Rome, they have boldly asserted that no legislature in the United States would dare enact such laws because it would open the way to complete

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296. *Ohio Rev. Code* § 1.49(E) (Supp. 1973) provides that if a statute is ambiguous, the court, in determining the intention of the legislature, may consider the consequences of a particular construction. While 3105.01(K) is not ambiguous on its face, a court of last resort in Ohio certainly ought to thoroughly consider the "Mayer" consequences in arriving at its decision. *Ohio Rev. Code* § 1.47(C) (Supp. 1973).


298. Cases and materials *supra* notes 34-71.


social anarchy. Strong reluctance to the reduction of the functions of the trial judge to "rubber stampism" has fostered continued support of this position by the judiciary. As the Ohio Supreme Court recently observed in Coleman v. Coleman

The effect which . . . [divorce] laws will have over the stability of marriage cannot be ignored, and, inasmuch as the privilege to marry would not have been granted had the state not intended such relationship to be harmonious and long standing, the state has an obligation to uphold marital harmony. Marriage is a device intended to perpetuate family groups within the larger social entities of which each marital unit is a part.

On the other hand, many legal scholars, openly hostile to the fault divorce system and adversary court proceedings, have, commencing in the late 1940's, suggested possible adoption of divorce by consent as one method of achieving uniformity of judicial decision-making at the trial court and appellate levels. Cited as authority for this view are arguments, among others, that:

1. the meaning of marriage as an institution has changed;
2. protracted divorce litigation is an economic waste;
3. the state can no longer justify, on public policy grounds, intervention in matrimonial causes; and,
4. the public and government have no right to know the reasons for the termination of a marriage, since marriage and divorce are private, individual freedoms.

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303. 32 Ohio St. 2d 155, 291 N.E. 2d 530 (1972).
304. Id. at 160-61, 291 N.E.2d at 534-35.
305. MacKenna, Divorce by Consent and Divorce for Breakdown of Marriage, 30 Modern L. Rev. 121 (1967); Redmount, Analysis of Marriage Trends and Divorce Policies, 10 Vand. L. Rev. 513 (1957); Carver, Divorce: Statutory Abolition of Marital Fault, 35 Cal. L. Rev. 99 (1947); Clark, Divorce Policy and Divorce Reform, 42 U. Colo. L. Rev. 403, 407 (1971).
It is indeed surprising that the General Assembly, when confronted with this whirlpool of conflicting thought, and despite the traditional legal conservatism of Ohio, rejected a logical option of adopting no-fault dissolution such as that enacted in bordering states, and passed a dissolution bill bearing the distinct hallmark of the philosophy outlined immediately above. In so doing, Ohio became the first state in the country to provide for non-adversary dissolution of marriage by consent of the parties!

A brief review of the statutory provisions will show, however, that the Ohio version of dissolution will not prove to be, in operation, as radical as earlier suggested. Under the new law a petition for dissolution of marriage may be filed where one of the spouses has been an Ohio resident for six months immediately prior to the filing of the same. Because the statutes contemplate non-adversary proceedings, there is no party-plaintiff under dissolution. Accordingly, for purposes of venue and service of process, both spouses are deemed to be defendants.

Dissolution proceedings are commenced by the filing of a petition and an attached, written separation agreement, both of which must be signed by the parties and counsel. The separation agreement must provide for a division of all of the property of the spouses. If there are children of the marriage who are minors, the separation agreement must also provide for custody and support of and visitation.

312. Ohio Rev. Code §3105.62 as amended, (Legislative Bulletin Supp. #3 at 102, 1974). The Ohio State Bar Association manual on dissolution suggests that all potential problems of service of process may be eliminated by having each party specifically waive service of process by indorsing a waiver form included within the petition. Such a waiver may be executed by any party over the age of twenty-one. Ohio Civ. Rule 4(D). Those under twenty-one would have to be served pursuant to Rule 4. Reference Manual for Continuing Legal Education Program, No. 89, pp. 3.30-3.36 (1974). Rule 4(D) should be amended to comply with other substantive law by reducing the age to 18.
313. Ohio Rev. Code §3105.63 as amended, (Legislative Bulletin Supp. #3 at 102, 1974). For a generalized discussion of separation agreements, see infra notes 342-63. To comply with the Ohio Statute of Frauds, Ohio Rev. Code §1335.05 (1962), the agreement must be written. For the problems created by an oral agreement, see Schiff v. Schiff, 36 Ohio L. Abs. 626, 45 N.E. 2d 132 (Ct. App. 1942). The agreement must be attached and incorporated by reference into the petition. These requirements are considered in Wierwille v. Wierwille, 34 Ohio St. 2d 17, 295 N.E. 2d 200 (1973). It would appear that the dual signature directives are mandatory and jurisdictional.
315. A minor in Ohio is a person under the age of 18. Joinder of children as parties to dissolution and divorce actions is covered by Ohio Civ. Rule 75(B)(2) (1970).
tion with the children and alimony. The agreement may be amended by the parties at any time prior to the dissolution hearing.\textsuperscript{316}

Under Ohio Revised Code §3105.64, a dissolution hearing may be conducted at any time between 30 and 90 days after the filing of the petition.\textsuperscript{317}

The statute further provides that at the dissolution hearing both of the parties shall appear before the court\textsuperscript{318} and acknowledge under oath the existence of three relevant facts:

1. that each person has voluntarily entered into the incorporated separation agreement (or amended agreement) appended to the petition;
2. that each spouse is satisfied with the terms of the agreement; and
3. that the parties seek dissolution of the marriage.\textsuperscript{319}

In other words, both the husband and wife must affirmatively acknowledge the existence of these conditions precedent. Corroborative witnesses are not required.\textsuperscript{320} If each spouse testifies in full compliance with the statute and the court approves the separation agreement (and any amendments) the court is empowered to grant a decree of dissolution, incorporating the separation agreement therein.\textsuperscript{321}

Obviously, the success or failure of a dissolution proceeding depends upon the voluntary consent and agreement of each spouse. In effect, the statutes call for an agreed substitution of contracts. First, the parties mutually agree to rescind their marriage contract. Later, a novation occurs with the execution, filing, and approval of the

\textsuperscript{316} In view of the fact that other provisions in Ohio Rev. Code §3105.62 are couched in the mandatory style, “shall”, whereas the word “may” is used with reference to amendments, it is anticipated that the courts will liberally construe the latter and permit dissolution proceedings to be continued, even beyond the 90 days mentioned in Ohio Rev. Code §3105.64 in order that additions and corrections can be completed.

\textsuperscript{317} The authors of the Bar Manual anticipated problems of interpretation of the 90 day rule, arguing that under the Supreme Court decision of Singer Sewing Machine Co. v. Puckett, 176 Ohio St. 32, 197 N.E. 2d 353 (1964), the court would hold that the time requirement would be directory, not jurisdictional. Manual, supra, note 312, at 3.36.

\textsuperscript{318} Prior to the adoption of Ohio Civ. Rul. 75(C) and 53(E) a court could not refer marriage termination proceedings to a referee. McGhee v. McGhee, 105 Ohio App. 433, 152 N.E. 2d 810 (1957). Under the new rules, a referee may conduct dissolution proceedings and motions and pre-trial discovery can be referred to him.

\textsuperscript{319} Ohio Rev. Code §3105.64, as amended, (Legislative Bulletin Supp. #3 at 102, 1974).


\textsuperscript{321} Ohio Rev. Code §3105.55(B), as amended (Legislative Bulletin Supp. #3 at 102, 1974).
separation agreement. Second, the contract of separation cannot be
given decree status, even if the parties and the court agree, unless
both parties in court affirm the rescission of the contract of marriage
by requesting dissolution.

A decree dissolving a marriage has the same effect as a decree of
divorce. With reference to the agreed division of property of the
parties, including rights of inheritance and dower, a dissolution de-
cree constitutes a final adjudication. By virtue of the statute the
court granting dissolution retains continuing jurisdictional power to
modify agreed-to provisions of the separation agreement and decree
concerning periodic alimony payments, child custody, support and
visitation. 322 Ohio Revised Code §3105.65(A) provides, on the other
hand, that the dissolution proceedings shall be dismissed if either
spouse is: (1) not satisfied with the separation agreement; or (2)
unwilling to have the marriage dissolved. Although the statute is
silent on the legal significance of a dismissal by the court it is
assumed that it would be deemed an involuntary dismissal under
Ohio Civil Rule 41, 323 unless the parties requested a voluntary dis-
missal prior to the dissolution hearing.

While little concrete benefit may be derived from an abstract
philosophical evaluation of these statutes, there are, however, a few
practical areas where the positive and negative aspects of the disso-
lution legislation merit comment. The major positive factor arises
from the totally non-adversary nature of dissolution by consent.
While it may be envisioned that dissolution may become adversary
and litigious in post-decree modification quarrels, the initial pro-
cedings contemplated compare quite favorably with the divorce for
fault cases. 324 A second positive factor flows from the speed, under
optimum conditions, with which dissolution may be brought before
the court. 325 Although it is possible for an uncontested divorce, par-
ticularly in a childless marriage, to normally be heard within the
time period contemplated for dissolution, 326 contested divorces

322. Ohio Rev. Code §3105.65(B), as amended (Legislative Bulletin Supp. #3 at 102, 1974).
323. Of course, an argument contra may be made arising from the fact that the Rule
governs adversary proceedings only.
324. See, e.g., McNamara, Should Divorce be Made Respectable?, 41 Chi. Bar. Rec. 84
(1959); Weinstein v. Weinstein, 90 Ohio L. Abs. 199, 185 N.E. 2d 55 (1962); Davidson v.
Davidson, 12 Ohio L. Abs. 337 (Ct. App. 1932) (two week trial with forty witnesses and two
thousand page transcript - 3 year marriage).
326. Assuming immediate service of process and a waiver of investigation where children
are involved, an uncontested divorce could be heard in about 50 days in Hamilton County if
the docket is open.
rarely are heard within ninety days. From a financial standpoint, there is a third advantage. Substantial savings may be realized in the reduction of courtroom appearances and hours, an amicable adjustment of property rights and other expenditures, and in the hiring of one lawyer to handle the dissolution.\textsuperscript{327} Appellate judges should be particularly pleased with these new provisions, for dissolution should substantially reduce their case loads and ease their duties of superintendence.\textsuperscript{323}

Finally, the perennial problems of fraud\textsuperscript{329} or collusion,\textsuperscript{330} raised in post-decree motions seeking to avoid the same, are weakened, if not eliminated, by the statutory requirement that both spouses testify under oath in support of the separation agreement. If fraud is then claimed and proved, criminal sanctions for perjury become available. Collusion cannot be asserted because the decree was secured by admitted agreement and the court could not have been misled.

On the other hand, there are substantial, problematical negatives produced by the new legislation. Ohio courts have consistently held that separation agreements are void and unenforceable if the parties thereto continue to live together as man and wife after the same is executed\textsuperscript{331} or resume that status after a period of separation.\textsuperscript{332} While the dissolution statutes make no mention of this common law rule or indicate that a dismissal should be ordered for non-separation, it must be assumed, because the statutes governing separation agreements were not repealed or amended in the 1974 legislation (thereby retaining the statutory source of the case law rule),\textsuperscript{333} that courts will continue to invoke the doctrine. Accordingly, dissolution should not be filed where the parties continue to live under the same roof.

\textsuperscript{327} Rose, \textit{Non-Fault Divorce in Ohio}, 31 Ohio St. L. J. 52, 56-57 (1970).
\textsuperscript{328} Linz v. Linz, 33 Ohio App. 2d 174, 293 N.E. 2d 100 (1972).
\textsuperscript{329} Block v. Block, 165 Ohio St. 365, 135 N.E. 2d 857 (1956); Meyer v. Meyer, 153 Ohio St. 406, 91 N.E. 2d 892 (1950); Mendelson v. Mendelson, 123 Ohio St. 11, 173 N.E. 615 (1929); Garber v. Garber, 28 Ohio L. Abs. 589 (Ct. App. 1938).
\textsuperscript{330} Stoutenberg v. Lybrand, 13 Ohio St. 228 (1882); Maimone v. Maimone, 55 Ohio L. Abs. 566, 90 N.E. 2d 383 (Ct. App. 1949); Campbell v. Campbell, 50 Ohio L. Abs. 9, 75 N.E. 2d 698 (C.P. 1947); Sturdevant v. Sturdevant, 11 Ohio N.P. (n.s.) 412 (C.P. 1910).
\textsuperscript{331} DuBois v. Coen, 100 Ohio St. 17, 125 N.E. 121 (1919); Tefft v. Tefft, 73 Ohio App. 399, 44 N.E. 2d 423 (1943); Smith v. Smith, 67 Ohio L. Abs. 439, 112 N.E. 2d 346 (C.P. 1953); Hughes v. Reasnor, 18 Ohio L. Abs. 449 (Ct. App. 1934); Garretson v. Garretson, 2 Ohio C. Dec. 581 (1890). \textit{But see} Lowman v. Lowman, 168 Ohio St. 1, 139 N.E. 2d 1 (1956).
\textsuperscript{332} Lucas v. Lucas, 26 Ohio L. Abs. 664 (Ct. App. 1938); Gessey v. Wakefield Bank, 3 Ohio L. Abs. 171 (Ct. App. 1924); \textit{In re} Carnathan, 27 Ohio N.P. (n.s.) 65 (C.P. 1928).
A second problem may occur in dissolution where one lawyer, while attempting to keep his client's costs at a minimum, foolishly tries to represent both spouses. Tragically, the few dollars saved by the client may be far outweighed by the attorney's defense costs.

The provisions of Canon Five of the Ohio Code of Professional Responsibility\textsuperscript{334} make it unethical, except under the most guarded circumstances, for one attorney to represent both spouses in matrimonial litigation. Without dwelling at length on the subject, it should be here noted by \textit{caveat} that many lawyers in Ohio and elsewhere have been disbarred for violations of the conflict of interest rule in divorce cases.\textsuperscript{335} The courts have been particularly strict where the lawyer drafts legal documents and procures the signatures of a person whose interests are actually or potentially adverse to his divorce client.\textsuperscript{336}

As if disbarment were not enough punishment, lawyers have found themselves, as a result of conflict of interest violations, embroiled, as parties, in costly and time-consuming civil litigation.\textsuperscript{337} Malpractice liability may arise under the conflict of interest rule.\textsuperscript{338}

A separation agreement drafted by one lawyer for both parties in Ohio is automatically and immediately "suspect," since both spouses, prior to the execution of a post nuptial agreement, are entitled to a full and fair \textit{disclosure} of all of the true assets, liabilities, and properties of the marriage and to have the benefit of the advice of independent legal counsel.\textsuperscript{339} Under the one lawyer-as-draftsman circumstance, it becomes the mandatory duty of the judge to test the validity and essential fairness of the document and to void the agreement if there has been over-reaching by a spouse.\textsuperscript{340}


\textsuperscript{335} Columbus Bar Ass'n. v. Grele, 14 Ohio St. 2d 208, 237 N.E. 2d 298 (1968); Holmes v. Holmes, 145 Ind. App. 52, 248 N.E. 2d 564 (1969); \textit{In re Carleton}, 33 Mont. 431, 84 P. 788 (1906); \textit{In re Brant}, 242 Ore. 562, 410 P. 2d 824 (1966).

\textsuperscript{336} People v. Selby, 156 Colo. 17, 396 P. 2d 598 (1964); \textit{In re Frith}, 361 Mo. 98, 233 S.W. 2d 707 (1950); \textit{In re Opacak}, 257 Minn. 600, 101 N.W. 2d 606 (1960); \textit{In re Feltman}, 51 N.J. 27, 237 A. 2d 473 (1968); \textit{In re Reed}, 207 La. 1011, 22 So.2d 552 (1945).

\textsuperscript{337} Crites v. Prudential Ins. Co., 134 F. 2d 925 (6th Cir. 1943); \textit{In re Estate of Wright}, 165 Ohio St. 15, 133 N.E. 2d 350 (1956); Adams v. Fleck, 80 Ohio L. Abs. 48, 154 N.E. 2d 794 (Ct. App. 1958).

\textsuperscript{338} Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).


\textsuperscript{340} \textit{In re Estate of Shafer}, 77 Ohio App. 105, 65 N.E.2d 902 (1944); Bastian v. Bastian,
In Brewer v. Brewer,\(^{341}\) for example, a husband discovered his wife's infidelity and forced her to admit her transgressions to both families and the wife of her lover. After extensive hazing calculated to break her spirit and will, he took her to his lawyer, dictated the provisions of a property settlement, and coerced her to sign a separation agreement. Without difficulty the court ruled that the agreement was void: there was no full disclosure of the financial picture; she lacked independent legal advice prior to signing; and the document was grossly unfair.\(^{342}\) The Indiana Court of Appeals in Holmes v. Holmes\(^{343}\) reached an identical conclusion where an alcoholic wife was taken from a state mental hospital, fed drinks, and driven to the husband's lawyer, his dictated agreement having been signed without her knowledge that he was worth roughly $250,000.00.\(^{344}\)

One final comment is in order about the inherent danger of one-lawyer dissolution. Under the new dissolution procedure the duty to provide the structure for amicable resolution of all pertinent collateral issues of the marriage rests solely with the attorney. Unlike divorce proceedings, where the judges often take an active role in hammering out specific provisions of a decree or separation agreement amendments,\(^{345}\) dissolution places no such burdens on the court.\(^{346}\) Indeed, unlike dissolution statutes in other jurisdictions,\(^{347}\)

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\(^{347}\) Ky. Rev. Stat. § 403.180 (Cum. Supp. 1974); Rev. Stat. Nebr. §42-366(2) (1974). Kentucky and Nebraska follow §306 of the Uniform Marriage and Divorce Act, which requires the court to approve a separation agreement unless it is "unconscionable." See, 18 S. D. L. Rev. 680, 685 (1973). The Family Law Section of the American Bar Association has proposed a revision of the Uniform Marriage and Divorce Act which would place an affirmative duty upon the court to determine whether the agreement is reasonable and fair. See Note, Property Maintenance, and Child Support Decrees Under the Uniform Marriage and Divorce Act, 18 S. D. L. Rev. 559, 662 (1973). This is substantially the test employed in Washington.
the Ohio version contains no stated test or criteria as judicial guidelines for validation of such agreements, other than the requirement that the separation agreement fully conform to the new enactments governing property, alimony, custody, visitation and support.

The burden of producing a good separation agreement, increased in part by time limitations, may, in some instances, be entirely too great for one person, for it is generally recognized that the drafting of a flexible and all-pervasive separation agreement is a true art. Accordingly, while an individual may be an accomplished trial practitioner and a credit to his profession, he may likewise hate office work, books and the pen. Under such circumstances shoddy or hurried draftsmanship may produce unintended ambiguities and material uncertainties sufficient in severity to render an agreement void for vagueness.

A pragmatic attorney may even attempt to avoid drafting such an agreement by filing for divorce with the hope that another lawyer will assist him in finalizing the termination package.

For many lawyers post-decree warfare over an “agreement” continues incessantly: Does “medical expense” include “orthodontia”? Are the tax angles covered in the pourover trust clauses? Does “college education” apply to a “perpetual” student? Is there a duty to continue support payments for a child who works, be-

See Rev. CODE WASH. § 26.09.070 (Pocket Supp. 1973). The General Assembly should immediately restore to the judge in dissolution proceedings an active role in evaluating the validity of separation agreements under the FLS guidelines or those utilized under prior Ohio decisions.


350. Schulman, Fault or No Fault: The Divorce Lawyer’s Dilemma, 41 J.B.A. KAN. 129 (1972); Freeman and Weihofen, Client Counseling in Negotiating the Terms of Divorce, 18 PRAC. LAW. No. 4 at 41, 47 (1972).


comes lawfully married, 355 or is fighting for his country? 356 When does a "vested remainder" vest? 357 Is "good will" of a business an asset? 358 How about "life" insurance? 359 These are some of the common problems faced in post-decree litigation. They are far less serious, however, than the results produced by ambiguity or the failure to provide for foreseeable contingencies in a separation agreement. 360

It is not surprising that experienced divorce practitioners religiously draw separation agreements with careful and conservative skill. To them a court-approved agreement, bearing the status of a decree, is the mere tip of an iceberg. They are always mindful that such agreements can become as fathomless as the ice mountain lurking below the surface in post-decree litigation. The thoughtful lawyer seeks to avoid a subsequent capsizing by insisting at the outset that lawyers sit on each side of the boat.

VIII. Jurisdiction and Venue Under Divorce and Dissolution

A. Jurisdiction

In the late 1820's the Ohio General Assembly enacted legislation which required anyone instituting a divorce action to allege and prove actual residence in Ohio. Initially, one had to prove a two year residence. 356 Subsequently, the legislature reduced the residency requirement to one year. 357

There were three fundamental reasons for the durational residency requirement. First, the "quickie" divorce would be prevented in Ohio through strict judicial enforcement of the law. 358 Second, by making the residency requirement a mandatory jurisdictional condition precedent, full faith and credit under the Constitution would be assured to Ohio divorcees in any subsequent litigation in a for-

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357. Min Young v. Min Young, 47 Ohio St. 501, 25 N.E. 168 (1890); Cox v. Cox, 20 Ohio St. 439 (1870); Davis v. Davis, 12 Ohio C.C.R. (n.s.) 9, 21 Ohio C. Dec. 136 (Ct. App. 1909); Sager v. Sager, 5 Ohio App. 489, 26 Ohio C.C. (n.s.) 522 (1916).


361. McIntyre v. McIntyre, Wright 135 (Ohio 1833).

362. 37 Ohio Laws 54 (1839); 51 Ohio Laws 379 (1853).

eign state court. Finally, there was a practical desire to fully control divorce litigation. At the outset, Ohio courts could exercise only such powers as were expressly given by statute. Public policy favoring the preservation of the institution of marriage dictated a rigid enforcement of those statutory powers. Oddly enough, the scope of the jurisdictional power of the courts was not expanded by statute to include equitable considerations until 1951. Although this statute was eliminated when the Ohio Rules of Civil Procedure were adopted in 1970, the jurisdictional power of Ohio courts, particularly in the area of durational residence, remained unaffected. Accordingly, once jurisdiction had attached, an Ohio court was empowered to exercise complete and exclusive control over the divorce.

The Ohio residency statute remained virtually unaltered from 1839 through September, 1974. Prior to amendment, the old statute, Ohio Revised Code §3105.03, provided:

Except in an action for alimony alone, the plaintiff in actions for divorce and annulment shall have been a resident of the state at least one year immediately before filing the petition. Actions for divorce, annulment, or for alimony shall be brought in the county of which the plaintiff is and has been a bona fide resident for at least ninety days immediately preceding the filing of the petition, or in the county where the cause of action arose. The court of common pleas shall hear and determine the case, whether the marriage took place, or the cause of divorce or annulment occurred, within or without the state.

364. Williams v. North Carolina, 325 U.S. 226 (1944). For cases where Ohio courts have found that Ohioans have acquired sham domiciliary residence for purposes of obtaining "quickie" divorces in foreign jurisdictions and have refused to give full faith and credit to such decrees, see: Smerda v. Smerda, 48 Ohio L. Abs 232, 74 N.E.2d 751 (C.P. 1947); Davis v. Davis, 42 Ohio L. Abs. 105, 57 N.E.2d 203 (Ct. App. 1944) (Reno); Neal v. Neal, 53 Ohio L. Abs. 329, 85 N.E.2d 147 (C.P. 1949)(Reno); In re Adoption of Francis, 49 Ohio L. Abs. 427 (C.P. 1947)(Reno). But see: Rea v. Fornan, 37 Ohio L. Abs. 135, 46 N.E.2d 649 (Ct. App. 1942); In re Estate of Sayle, 51 Ohio L. Abs. 46, 80 N.E.2d 229 (Ct. App. 1947), affg., 51 Ohio L. Abs. 33, 80 N.E.2d 221 (C.P. 1947).
The new abridged provisions of Ohio Revised Code §3105.03, effective in September, 1974, read as follows:

The plaintiff in actions for divorce and annulment shall have been a resident of the state at least six months immediately before filing the complaint. Actions for divorce and annulment shall be brought in the proper county for commencement of action pursuant to the civil rules. The court of common pleas shall hear and determine the case, whether the marriage took place, or the cause of divorce or annulment occurred, within or without the state. Actions for alimony shall be brought in the proper county for commencement of actions pursuant to the civil rules. (Emphasis added).

A comparison of both statutes prompts the conclusion that at least four major facets of the old statute have been retained in the 1974 amendment. It is observed that an Ohio court may grant a divorce or annulment to a litigant regardless of where, geographically, the marriage was contracted or the cause of action arose. Thus, once the durational residence requirement is satisfied, Ohio courts may grant divorces to anyone. The “open door” policy of the statute is paralleled in theory by the provisions of Ohio Revised Code §3105.04, which recognizes that a wife may acquire a different residence from that of her husband. This statute, in effect, abolishes the inequitable common law rule under which a woman automatically lost her domicile and acquired that of the man upon their marriage. Under the common law doctrine a wife, having fled the husband’s state because of his misconduct, could not obtain a divorce in a foreign forum for the reason that she retained his domicile.

One of the more significant aspects of the amended statute is the recodification of the jurisdictional prerequisite that the plaintiff in divorce and annulment actions be an Ohio resident for at least six

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370. Ohio Rev. Code §3105.04 (1972) was not amended as part of the 1974 legislation. It should, however, be amended to substitute the word “complaint” for “petition”.


months. It follows conversely, that neither divorce nor annulment actions may be successfully instituted or maintained by a plaintiff who is a non-Ohio resident. On the other hand, it has been settled law in Ohio for more than one hundred years that the jurisdictional residency requirements do not apply to plaintiffs who file litigation seeking alimony only. It should also be noticed that the statute nowhere mentions the "geography" of the defendant. Accordingly, the residence of the defendant, other than for service of process, is irrelevant, for jurisdictional purposes, in all three of these divorce court actions.

As a result of the geographic-jurisdictional maze perpetuated under the statute, a common pleas court has jurisdiction—once service is perfected upon the adverse party in a properly venued action—to grant alimony to a non-resident defendant irrespective of whether the plaintiff is or is not an Ohio resident, since the residency of either party is immaterial where alimony only is sought. A reading of the statutes in question shows that in divorce and annulment actions the plaintiff must be an Ohio resident. It is observed that there is no reference to domicile therein. Yet a num-

373. McIntyre v. McIntyre, Wright 135 (Ohio 1833); Jacob v. Jacob, Wright 631 (Ohio 1834); Ready v. Ready, 25 Ohio App. 432, 158 N.E.2d 493 (1927).
375. Ohio Rev. Code §3105.03 (1972), does not require proof of jurisdictional residence in alimony actions. That condition precedent was abolished in 1873. 70 Ohio Laws 258. See: Annot., 36 A.L.R. 2d 1369 (1954). The reason for the rule is that since a wife's residence may become different from the husband when she leaves, due to his aggression, it follows that his residence does not become hers if he moves without her into a foreign jurisdiction. Being a non-resident of his state she would otherwise be temporarily unable to force her husband to provide maintenance.
377. Cox v. Cox, 19 Ohio St. 502 (1869).
379. Childers v. Childers, 112 Ohio App. 229, 165 N.E.2d 477 (1959). The failure of the plaintiff in divorce and annulment actions to comply with the residency provisions must be raised immediately as a defense. Jurisdiction is waived if the issue is raised for the first time on appeal. Hepner v. Hepner, 39 Ohio L. Abs. 449, 51 N.E.2d 44 (Ct. App. 1943). Nor, generally speaking, may jurisdiction be attacked by writ of prohibition against the trial court judge. Compare State ex rel. Popovici, 119 Ohio St. 484, 164 N.E. 524 (1929); Kelley, Judge v. State ex rel. Gellner, 94 Ohio St. 331, 114 N.E. 255 (1916), with Miller v. Court of Common Pleas of Cuyahoga County, 143 Ohio St. 68, 54 N.E.2d 130 (1944). On the other hand, it has been held that an injunction lies against a party to restrain him from procuring a foreign divorce. Jones v. Jones, 17 Ohio N.P. (n.s.) 456 (C.P. 1915).
ber of Ohio courts have read this additional qualification into the statute,\textsuperscript{381} including the Ohio Supreme Court in a 1972 decision, \textit{Coleman v. Coleman}.\textsuperscript{382} Absent a change of philosophy in the future by the Supreme Court it is apparent that the plaintiff in Ohio must both plead and prove domiciliary residence.\textsuperscript{383}

The distinction between residence and domicile is critical. One may have a residence anywhere. Indeed, he may have more than one residence. But a person may have only one domicile. Geographically, the domicile of a person is the physical location where he has his true, fixed and permanent home. It is the place to which, whenever he is absent, he has the intention of returning.\textsuperscript{384}

If an individual has no permanent home or abode and his residence is transitory, domicile is virtually impossible to prove.\textsuperscript{385} Courts are forced to either stretch or ignore the facts if they wish to find that domicile exists. In a highly questionable decision, for example, an Ohio Common Pleas Court found, in \textit{Boswell v. Boswell},\textsuperscript{386} that a touring pro basketball player, who owned a licensed food business in Chicago and had been away from his family in Toledo in excess of five years, was domiciled in Ohio.

A more logical result was reached by an Ohio trial court in

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  \item \textsuperscript{382} 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972). The view in \textit{Coleman} is generally shared by courts elsewhere. \textit{See:} Rosenberg v. Rosenberg, 163 Pa. Super. 138, 60 A.2d 350 (1948);
  \item \textsuperscript{383} Barrow v. Barrow, 160 La. 91, 106 So. 705 (1925); St. John v. St. John, 291 Ky. 363, 163 S.W.2d 820 (1942).
  \item \textsuperscript{384} Prior to Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972), Ohio courts displayed marked liberality with reference to pleading durational residence. Jackman v. Jackman, 110 Ohio App. 197, 160 N.E.2d 387 (1959); Cozart v. Cozart, 22 Ohio N.P. (n.s.) 483 (C.P. 1920); Johnson v. Johnson, 6 Ohio L. Abs. 733 (Ct. App. 1928). It would seem today, however, that a divorce or annulment complaint should be explicit on this subject under Ohio Civil Rule 4. Compliance here and with the matter of proof should protect the plaintiff in the event of appeal. \textit{See Welge v. Welge, 87 Ohio App. 93, 94 N.E.2d 208 (1950).}
  \item \textsuperscript{385} Smerda v. Smerda, 48 Ohio L. Abs. 232, 74 N.E.2d 751 (C.P. 1947).
  \item \textsuperscript{387} 30 Ohio Op. 566 (C.P. 1945). \textit{And see} Hepner v. Hepner, 39 Ohio L. Abs. 449, 51 N.E.2d 44 (Ct. App. 1943). Some liberal views have been expressed elsewhere. \textit{See:} De Tolna v. De Tolna, 135 Cal. 575, 87 P. 1045 (1902); May v. May, 158 Miss. 68, 130 So.52 (1930); Heard v. Heard, 323 Mass. 357, 82 N.E.2d 219 (1948).
\end{itemize}
Baraket v. Baraket. In that case the plaintiff, a traveling salesman, moved out of the family home in Pittsburgh and took a room with his niece in Steubenville, Ohio. The court, noting that all of his financial holdings, licenses and business offices were in Pennsylvania, ruled that he had no Ohio domicile, although he in fact resided in Ohio.

In addition, the burden of proof under the statute rests exclusively with the plaintiff to establish by highly satisfactory evidence the existence of a subjective intent to be an Ohioan. An Ohio Court of Appeals held, for example, in Saalfeld v. Saalfeld, that the evidentiary burden was not met by a wife who claimed domiciliary residence existed by virtue of her "intent" and her attendance at a nursing school in Cincinnati. It is obvious, then, that claimed domiciliary residence in Ohio can neither be technical nor theoretical if a plaintiff hopes to successfully litigate the cause, for in this area geographic guesses are resolved, in the main, in favor of a contentious defendant.

For all the restrictive jurisdictional hurdles of the statute, positive and salving compensation is derived from the reduction of the time of residence from one year to six months. The 1974 amendment places Ohio with a progressive minority of states which have enacted shorter durational residency time limitations.

Since there exists no available legislative history to explain why the General Assembly passed the time amendment, one is forced to assume the reasons for the action. The first probable explanation arises from the fact that the sister states of Indiana and Kentucky have reduced their respective residency periods to six months. By following their example, the need for border-jumping and forum-shopping indigenous to transient divorce litigation is eliminated in Ohio. Secondly, the durational residency statutes have been recently attacked on a nationwide basis on the ground

388. Id.
390. Id. Particular problems may be encountered where the plaintiff is or has been hospitalized, the "capacity" to intend being at issue. See: Meyer v. Meyer, 333 Ill. App. 450, 77 N.E.2d 556 (1948); Oakes v. Oakes, 219 Ark. 363, 242 S.W.2d 128 (1951); Greene v. Greene, 309 S.W.2d 403 (Tenn. App. 1957). In this area it should be pointed out that one Ohio court applied the doctrine of estoppel against a plaintiff who, at the time he sought an Ohio divorce, also had filed in Nevada. Bassett v. Bassett, 46 Ohio L. Abs. 172, 68 N.E.2d 409 (C.P. 1946).
392. See law review articles cited supra, notes 42-151, for the statutes in those jurisdictions.
that such legislation interferes with the federal due process guarantees of free access to the courts and freedom of travel.\footnote{395. Cases cited supra, notes 118-19.} While the Ohio Supreme Court has upheld the constitutional validity of the one year residency statute,\footnote{396. Coleman v. Coleman, 32 Ohio St. 2d. 155, 291 N.E.2d 530 (1972).} there is ample authority elsewhere to the contrary.\footnote{397. Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D.C. Hawaii 1973); Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971). Indeed, a trial court in Ohio, prior to Coleman, had declared §3105.03 unconstitutional. See Monroe v. Monroe, 32 Ohio Misc. 129, 289 N.E.2d 915 (C.P. 1972).} It would appear that the 1974 amendment substantially weakens the constitutional argument.

B. Venue

Under the terms of the former statute, proper venue in alimony, divorce or annulment cases existed, geographically, where: (1) the cause of action arose, or (2) where the plaintiff maintained a bona fide residence in one county for 90 days prior to filing.\footnote{398. Originally, in Ohio, there were no venue requirements at all. They were added to the statute shortly after the turn of this century, making thirty days the time limitation. 106 Ohio Laws 339 (1915). The period was raised to ninety days in 1951. 124 Ohio Laws 184.} More than fifty years ago, in Schmid v. Schmid,\footnote{399. 10 Ohio App. 24 (1917).} the statute was interpreted to mean that there were only two potential forums where the action could be brought and that venue could be, depending on the facts involved, properly laid in either or both physical locations.

No venue problem existed if the plaintiff, in seeking divorce or annulment, had, in addition to acquiring domiciliary jurisdiction, maintained a bona fide ninety-day residence in the county where the action was brought.\footnote{400. Bishop v. Bishop, 40 Ohio App. 493, 179 N.E. 142 (1931).} If this requirement could not be met, the only other alternative forum was where the cause of action arose. If neither existed, there was no proper venue.

While no domiciliary residence was required of the plaintiff in alimony only cases, that party had to acquire, in order to comply with the venue provisions, a ninety-day bona fide, one county residence if the cause of action did not arise in Ohio. To a limited extent, then, there had to be occasions when a plaintiff in an alimony only action needed to acquire some type of Ohio residence in order to satisfy venue.

Historically, Ohio courts have strictly construed the venue provisions. If a plaintiff left his home county to avoid "backyard" litigation and took up residence in a foreign county, such residence was not deemed "bona fide" since the move was prompted by trial strat-
egy considerations. 401 Full compliance with the ninety day period was mandatory. In Redrow v. Redrow, 402 for example, a divorce action was dismissed for improper venue where the plaintiff's most favorable testimony showed that he was one day short of the ninety days on the date the action was filed. One might gather from the foregoing that the courts in Ohio viewed the venue aspects of the statute as jurisdictional. No court so held, but the implication was there.

The tenuous status of the venue concept was clarified, however, with the adoption of the Ohio Rules of Civil Procedure in 1970. 403 Because certain of those Rules superseded the venue provisions of Ohio Revised Code §3105.03 without direct legislative amendatory action, it was held that the new venue provisions were not jurisdictional. 404 The 1974 amendments of the statute concerning venue were therefore merely an affirmation of the exclusive applicability of the Rules. However, the action of the General Assembly, in codifying the Rules by incorporation, widely broadened and liberalized the venue concept, for under Ohio Civil Rule 3(B) a plaintiff may find a proper forum in any one of five (as opposed to two) counties:

(1) where the defendant resides; 405
(2) where the defendant has his principal place of business; 406
(3) where the plaintiff resides and if Ohio is the place where the parties were living in the marital relationship, if the defendant is outside Ohio; 407
(4) where the plaintiff is and has been a resident of Ohio for at least ninety days immediately preceding the filing of the complaint; 408 or
(5) where the defendant conducted activity which gave rise to the cause of action. 409

A comparison of the old statute with Civil Rule 3(B) indicates

406. Id. 3(B)(2).
407. Id. 3(B)(7).
408. Id. 3(B)(9). For a problem decision here, see Bowers v. Baughman, 29 Ohio App. 2d 277, 281 N.E.2d 201 (1972).
409. Id. 3(B)(3).
that (1) through (3) above are entirely new avenues available to the plaintiff; that under (4) the ninety day residency has been liberalized with the elimination of the “bona fide” requirement; and that venue provision (5) remains unchanged. It can only be hoped that courts in Ohio, once cognizant of the theories behind the Rules, will apply the law in the same spirit that led to their adoption.

CONCLUSION

It has been said that no other area of law in America places greater burdens of conscience on a lawyer than his multiple roles of advisor, advocate, and conciliator in matters of divorce. To those dedicated practitioners involved in such labors the institution of marriage and the preservation of the family entity is “damnably serious business”. These professional men and women are acutely aware that fights over fiscal responsibility and the management of money, not to mention the bitter battles for the lion’s share of the assets, are the major reasons for marital breakdown. The problem may manifest itself across a wide and divergent spectrum of economics—from the bankruptcy of a debt-ridden, poverty-level couple, to the tax consequence niceties of a lucrative property settlement. The depth of the money problem is reflected by the fact that 75% of the divorces granted in Ohio in 1973 were for “gross

413. Ripper, Marriage is a Damnably Serious Business — Especially the Second Time Around, 40 Ohio Bar 291 (1967).
414. Bankruptcy is primarily a post-divorce problem. 11 U.S.C.A. §35(a)(7), as amended by Pub. L. 91-467 (1970) excludes alimony, maintenance and child support from discharge in bankruptcy. Ohio courts have equated alimony with a property division, and consequently alimony decrees and alimony agreed upon by the parties with court approval are not recognized as dischargeable in bankruptcy. See generally Reed v. Reed, 20 Ohio L. Abs. 491 (Ct. App. 1935); Collins v. Smith, 26 Ohio Misc. 231, 270 N.E.2d 377 (C.P. 1971); Kadel v. Kadel, 21 Ohio Misc. 232, 250 N.E.2d 420 (C.P. 1969); Sargent v. Sargent, 8 Ohio N.P. 238 (C.P. 1901); but see Addison v. Addison, 95 Ohio App. 191, 118 N.E.2d 225 (1953) (where a money judgment rendered against a husband in a divorce decree was held dischargeable in bankruptcy.)
The sociological causes of divorce are equally broad in range. Divorce or dissolution may be sought to relieve any number of family problems, such as: teenage, interreligious, or interracial marriage; drug addiction or alcoholism; sexual discontent or maladjustment; abused or abusive children; threatened or actual desertion by either spouse; or family "role orientation" predicaments arising from the equal rights movement. The notes

416. Of the 48,000 divorces and annulments in 1973, twenty-four thousand were granted for "gross neglect" and another eighteen thousand for "gross neglect" and "extreme cruelty". Table 33, 1973 Ohio Bureau of Vital Statistics Annual Report.


compiled by an Ohio divorce court judge on this subject[426] widen the field even further.

The problem of the emotionally disturbed or mentally ill spouse has continued to be, however, the most troublesome area in divorce litigation.[427] For example, under Ohio's system of divorce for fault, a beleaguered spouse, seeking a divorce for the past verbal,[428] physical[429] or mental[430] abuses of mate, on the grounds of "extreme cruelty" under the statute,[431] was protected from future recurrences by recourse to a restraining order[432] or criminal warrant, the issuance of which would often further fan the flames of disunion.

Generally speaking, Ohio trial courts were traditionally able to render direct and immediate services to the litigants in the economic and sociological realms by rulings on child custody, child support, visitation, alimony and property divisions. Once divorce litigation was instituted, the courts were in position to exercise some control over the future. However, these courts completely lacked statutory authority to assist emotionally distressed families on a direct basis.[433] And, for a variety of reasons, the divorce court

426. Kovachy, supra, note 65.
429. For an early and factually intriguing example of divorce for physical abuse see Jones v. Jones, Wright 245 (Ohio 1833) (where among other things, husband struck wife with gun, threw a chair at her and dragged her back from father's house).
430. See, e.g., Schaeffer v. Schaeffer, 29 Ohio L. Abs. 40 (Ct. App. 1939) (quick temper, unsociable disposition, wife said she would shoot husband if she had a gun); Campbell v. Campbell, 16 Ohio L. Abs. 613 (Ct. App. 1934), rev'd 128 Ohio St. 590, 193 N.E. 405 (1934) (husband refused to adequately heat or light home, moody and unsociable); Liedorff v. Liedorff, 67 Ohio L. Abs. 36, 113 N.E.2d 127 (C.P. 1953) (attempted suicide accompanied by prior and subsequent statements of desire to commit suicide).
432. Rule 75(I)(2) of the Ohio Rules of Civil Procedure permits the court to issue a temporary restraining order during divorce, annulment and alimony actions where it appears "that a party to the action or a child of any party is about to suffer physical abuse, annoyance or bodily injury by the other party" with or without bond. Former Ohio Rev. Code §3105.20, which the Rule supercedes, also authorized the issuance of an injunction in such circumstances. See 18 Ohio Jur.2d Divorce and Separation §174 (1972). See generally Truminger, Marital Violence: The Legal Solutions, 23 Hastings L.J. 259 (1971).
433. Raskin & Katz, "Therapeutic Approach" to Divorce Proceedings, 7 CLEV.-MAR. L. Rev. 155 (1959); Weinman, Domestic Relations Problems - For Bench and Bar, 27 Ohio Bar 233 (1944).
lawyer was basically powerless to act. Thus, only those persons or families who could afford private professional consultation and guidance and who were willing to undergo such therapy without court supervision had the potential to save themselves and their families.

Other than the power to conduct child custody investigations, conferred by statutory amendment in 1951, there was, until five years ago, no statutory directive which would permit a Domestic Relations Court to interact with an emotionally or mentally ill person or his family. In 1969 the General Assembly enacted a series of statutes which authorized, on a limited jurisdictional basis, in-court reconciliation proceedings which utilized the services of professionals within and without the court.

The 1974 legislation creates entirely new and supplemental reconciliation directives, making reconciliation proceedings, when sought by one of the spouses or directed by the court, applicable in all actions, including dissolution, in the Domestic Relations Court. Such proceedings do not, however, appear compulsory in nature. In addition, this new legislation permits the court to order the entire family to undergo medical, psychological and psychiatric examinations in child custody proceedings.

434. Fain, The Role and Relationship of Psychiatry to Divorce Law and the Lawyer, 41 CAL. ST. B.J. 46 (1966); Deutsch, Family Law Practitioner as Legal Psychiatric Worker, 48 CAL. ST. B.J. 158 (1973). From an ethical standpoint this area is particularly risky for the lawyer. See Blinick, Mental Disability, Legal Ethics, and Professional Responsibility, 33 ALBANY L. REV. 92, 106-7 (1968).

435. OHIO GEN. CODE § 8003-9, later OHIO REV. CODE §3105.08, (repealed 1971 as in conflict with Rule 75(D) of the Ohio Rules of Civil Procedure.) For general background history, see Brooks, Mandatory Investigations in Divorce Cases, 24 OHIO BAR 581 (1951); but see Raskin & Katz, supra, note 432.

436. OHIO REV. CODE § 3117.01-.08 (1972). The provisions are applicable only in counties in which the court of common pleas determines that social conditions and the number of domestic relations cases rendered the conciliation procedures necessary to a proper consideration of such cases or to effectuate conciliation of marital controversies, see OHIO REV. CODE § 3117.01.


438. Compulsory conciliation is opposed by many scholars familiar with this field. For a discussion of the merits of compulsory conciliation, see McLaughlin, Court-Connected Marriage Counseling and Divorce — The New York Experience, 11 J. FAM. L. 517, 532-5, 545 (1971); Comment, Reconciliation and the Uniform Marriage and Divorce Act, 18 S.D.L. REV. 611, 618-23 (1973) (comparison of the Uniform Marriage and Divorce Act (rev. ed. 1971) and ABA Family Law Section, Proposed Revised Uniform Marriage and Divorce Act); Foster, Conciliation and Counseling in the Courts in Family Law Cases, 41 N.Y.U.L. REV. 353, 379-81 (1966). A statute calling for compulsory conciliation unless neither party objects to waiver of its requirements was upheld in Iowa, In re Marriage of Penney, 203 N.W.2d 390 (1973). (where failure to provide for conciliation resulted in reversal of a divorce decree.) The use of the word “may” in OHIO REV. CODE §3105.091 as opposed to “shall” as in the Iowa statute, indicates non-mandatory conciliation.
Empowering the trial court to work constructively for the family entity in the psychological-psychiatric area, as well as those areas of an economic or social nature, constitutes one of the more significant aspects of the 1974 legislation. These provisions, when combined, in totality, with the reforms in the structure of the Ten Commandments of fault, the passage of two new no-fault divorce amendments, and the creation of dissolution by consent, a truly unique approach to marital termination, should substantially reduce the emotional trauma of litigation and, hopefully, enable the courts and counsel to save countless recoupable marriages. Having now abandoned the Dark Ages of divorce, there is every hope that Ohioans may now move forward with greater knowledge of their problems through therapeutic resolution of marital disputes.
PHOTOGRAPHS IN THE COURTROOM "GETTING IT STRAIGHT BETWEEN YOU AND YOUR PROFESSIONAL PHOTOGRAPHER"

Marvin S. Flower*

INTRODUCTION

As both a working professional photographer and a law student the author has had numerous occasions to observe the making and handling of photographs as evidence or as support material for investigation or settlement. It is one thing to study the case law and treatise materials related to photographic evidence and quite another to make the actual graphics for possible use in court. Although modern photographic materials and automatic cameras make photography simple, the making of complete and proper photoevidence is no elementary matter.

It is rare to find a professional photographer studied in the law and making a speciality of forensic practice. The Professional Photographers of America is the recognized national association of the profession; its 1972 Directory of Qualified Photographic Studies lists only thirty members qualified in evidence work. The Evidence Photographers International Council, E.P.I.C., is the worldwide organization of law enforcement and civil workers in forensic photography. While membership is not limited by skill or other qualification, its very specialization precludes members who are not, to a major extent, involved in photoevidence. Of the over three hundred E.P.I.C. members, only thirteen are also qualified by the Professional Photographers of America. Of those, only one is known to this writer to hold the L.L.B. degree, and only three (outside the field of law enforcement) to specialize exclusively in photographic evidence. From this quick survey it would appear difficult indeed for an attorney to handily obtain a photographer who could provide the graphics and verification required without considerable coaching on his part.

It is evident that the attorney is going to have to communicate extensively with his photographer if the resulting exhibits are going to be "competent, relevant and a fair representation" of the subject. Additionally, the requirement for authentication or verification

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must be established and documented in sufficient depth to support introduction at bar. Lastly, if the photographer is to give opinion testimony, he must pass the tests of expertise appropriate to the jurisdiction involved. It is to these problems, in the context of general scenes and photographs of persons, that this paper is addressed. That it may help the lawyer bridge a communication and experience gap and at the same time give the working photographer a better understanding of his attorney-client's special problems are the author's goals.

I. Historical Perspective

The first reported use of a photograph in an appellate case is *Luco v. United States*, where photos of a document of title were sent up with the trial record. The opinion of Justice Robert C. Grier included words which were to add impetus to the increasing use of photographs in the century to follow.

More to the point of this discussion was the use of photographs of a cellar, showing holes in the walls allegedly caused by the defendant, in *Cozzens v. Higgins*, an action in trespass. But it is to Kung Chiu Fu-Tse (Confucius) that the roots of forensic photography must attach, for it was to this Chinese philosopher and teacher of the fifth century B.C. that the classic, "One picture is worth a thousand words" is attributed. And not to be outdone by his illustrious ancestor, Chow Ch'ung, in 24 A.D., is reported to have said, "One hundred hearing not equal one seeing."

Notwithstanding an impressive background in philosophy, the history of photographic evidence in modern litigation has been rocky and, on the whole, unmarked by uniform application of the rules of evidence or law. Courts and judges disagree on the admissibility of photographic evidence; and it is within their discretion to admit or deny photographs. However, some general rules do evolve from the case studies. It is well settled law, for example, that a photograph may be received in evidence if it is relevant to an issue and properly verified. The question of relevancy turns not on the

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1. 64 U.S. (23 How.) 692 (1859).
2. 42 N.Y. (3 Keyes) 206, 33 How. Pr. 436 (1866).
5. For an in-depth treatment of the historical use of photography in evidence, see C. Scott, *Photographic Evidence* (2d ed. 1969). (Professor Scott's three volume treatise on the subject is hereinafter cited as Scott).
6. 2 Scott 309.
186 NORTHERN KENTUCKY STATE LAW FORUM [Vol. 2

photograph itself but on the subject matter thereof, for the photograph is no more than a graphic presentation of its subject. In State ex rel. State Highway Commission v. Cone,\(^8\) Judge Hunter said, "In final analysis the decision (as to the relevancy of a photograph rests on the principles of relevancy of the fact or facts pictured and not on the propriety of evidencing a relevant fact by a photograph. If the fact to be evidenced . . . is itself not admissible, it cannot be proved by photography or otherwise."\(^9\) It is an abuse of discretion, and therefore error for the trial court to reject relevant photographs when this rejection would be prejudicial to the party offering them.\(^9\)

Historically, the law is a profession of words; thus a natural reluctance by lawyers to focus the limelight on graphics is understandable. Yet if one will concede that the purpose of evidence is to portray facts to the trier of facts, it follows that any and every method of factual presentation is potentially valid when laid upon a proper foundation. Educators and psychologists have long recognized that increased learning takes place with multi-sensual stimulation — the combination of sight and sound. From its modest beginnings in 1839 by Jacques Daguerre, through development in two world wars, to today's advanced materials in monochrome and color, photography offers a welcome addition to effective advocacy. Precedent abounds in case law and treatise alike to permit the proper introduction of photographic evidence.\(^10\)

Not only must the modern trial lawyer be studied in the requirements for introduction of his own photographs, he must also be sufficiently knowledgeable about photography to frame specific objections to the introduction by opposing counsel of deceptive or misleading exhibits. A general objection to a photograph as simply misleading, deceptive or inflammatory is not sufficient to warrant its exclusion from evidence.\(^11\) Even though a number of cases recognize that an experienced, trustworthy and disinterested photogra-

\(^8\) 338 S.W. 2d 22 (Mo. 1960).
\(^9\) 1. Id. at 27.
\(^9\) 9. Scottish Union & National Ins. Co. v. McKone, 227 F. 813 (8th Cir. 1915) (photo of fire damaged house excluded—error because it would have materially contributed to the evaluation of the house); People v. Murata, 161 Cal. App.2d 389, 325 P.2d 947 (1958) (condemnation case—excluded photos would have shown land was subject to flooding and hence reflected its value); McCarthy v. Stephens, 338 Mass. 791, 155 N.E.2d 805 (1959) (slip and fall case—error to exclude photos of locus in quo where other testimony confirmed fairness of depiction).
COURTROOM PHOTOGRAPHY

photographer can produce reliable evidence, the courts also take judicial cognizance that in unskilled or biased hands photography can produce misleading, or at least, confusing results. While jurisdictions differ as to the extent of documentation required to support a photographic exhibit, the basic requirements of verification (or authentication) of the fairness of the representation apply to all. In order that the exhibit meet whatever judicial test be applied, including statutory requirements where appropriate, complete documentation at the time the photographs are made is essential. It is in this historical and judicial framework that the relationship between the two professionals involved in the photoevidence process will be approached in this article.

II. ATTORNEY AND PHOTOGRAPHER: COMPETENT, RELEVANT, AND MATERIAL

The words are classic, recognized immediately as the framework governing the rules of evidence. Photographic evidence must meet precisely the same standards for admissibility as do other forms of evidence and, because of its particular nature and potential for emotional impact, it must meet these tests scrupulously to avoid the risk of error in the court's proceedings. These tests are examined with the admonition that satisfaction of these tests requires the cooperative effort of both advocate and photographer.

The necessity for competency surrounds the entire making of the photograph. What has been also termed "reliability" is in fact the ability of the exhibit to present a fair and accurate representation of the subject. Most photographs will be offered into evidence to supplement or enhance information gained from descriptive testi-

12. Beardslee v. Columbia Tp., 188 Pa. 496, 41 A. 617 (1898) (where photographs were judicially recognized as of a high order of accuracy); Fenelon v. State, 195 Wis. 416, 217 N.W. 711 (1928), ("(the) instruments used are capable of the most perfect reproduction.") Contra: Porter v. Buckley, 147 F. 140 (3rd Cir. 1906) ("In inexperienced hands photographs may misrepresent their originals."); Heimbach v. Peltz, 384 Pa. 308, 121 A.2d 114 (1956) ("A given condition may be photographed from different angles to produce conflicting views."); Steinke v. Oshkosh, 159 Wis. 124, 149 N.W. 715 (1914) ("There is a good amount of jugglery practiced in photography.") The subject of the attorney's knowledge of the art is treated extensively in Scott; for a comprehensive discussion of the basic photographic principles, see Fischmiller, Technical Preparation and Exclusion of Photographic Evidence, 8 Gonzaga L. Rev. 292 (1973).

13. E.g. Wis. Stat. §270.202 (1969) (requiring, inter alia, that the position camera distance from the object photographed, and direction in which the camera was pointed be noted on the exhibit). See also, Biunno, The Interdisciplinary Exchange Between Lawyers and Experts, 13 Jurimetrics J. 21 (1972).


15. Hughes & Cantor 36.
mony; thus, once admitted, they are the equal in law, no more or less, of other forms of proof. There is no presumption that a photograph is what it purports to be and a showing of its accuracy, reliability, or competency as a proof is its only visa for admissibility. This verification of the photograph as a "fair representation" of the subject must be accomplished by testimony of the photographer himself or a witness to the photography. In the use of black and white photographs that representation would have to be stated, "... except for color", or in words to that effect. (Where the exhibit is in color it follows that the color must be of sufficient accuracy to portray the facts in question.)

Photographs have been admitted into evidence on the barest of verification. Even amateur work verified by a youth who took the pictures has been admitted. Mostly, however, such photographs have been rejected by the courts on either technical grounds (e.g., dim, blurred, etc.) or because of inadequate verification. Far more frequently the courts have recognized professionally-made photographs, and have mentioned this fact in opinions. Of equal importance to the qualifications of the photographer are his interests or prejudices; it is far too easy to try to "help" the client by making the photographs misleading or inflammatory. Such photographs, despite their being professionally made with the best of intentions, invite refutation testimony and argument as to competency. Further, it is not error for the court to admit such testimony or allow the argument, with the likely result that the photographs will be excluded. Much, of course, would depend on the ability and knowledge of opposing counsel. One authority has gone so far as to say, "Unless the attorney knows the effect upon a photograph of (1) Camera. . . .(placement). . . ., (2) lens focal length, (3) camera angle or viewing perspective, (4) lighting. . . ., (5) use of filters, (and) (6) negative cropping, he is derelict in his preparation of a case for trial.

16. Dillon v. Evansville Refining Co., 127 F.2d 13 (7th Cir. 1942); Cunningham v. Fair Haven & W. R.R., 72 Conn. 244, 43 A.1047 (1899).
**DATA SHEET**

Job Nr. 740416  
Client Self  

Dt. Ordered 16 Apr 74  

How "  
Rep. P or D?  

Dt. Needed 7 May 74  
Ins. Co.  

Deliver To  
Bill To  

Media B & W XX  
Color Print  
Slide  

Tvl Time 0:12  
Loc Time 0:15  
Mileage 2.1  

Client's Instructions: Photograph night scene in series of increasing exposures from 1/2 second to show that scene may be rendered in several ways, depending on exposure. Print so middle negative in contact strip seems 'representative' of view. To be Fig 3 in article on photoevidence. Print on 8½x11 paper, black border OK. For left edge binding.

Date Photo'd 16 Apr 74  
Out 2115  
Back 2142  
Tot. Time 0:27  

Photographer MSP  
Assistant None  

Location High and Poplar Sts, Oxford, OH. View from NE corner looking SW  

Camera 4X5  
2X3  
RB 67  
2X2  
35mm  

Film EK Plus-X  
Developer EK D-76, 1:1  
Adjustment Minus 20% dev.  

Weather Clear night darkness  

Lighting Street lights and passing cars  

Roll Nr. 1  

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Remarks: Figure 1
which involves photographs.\textsuperscript{23} The photographer best serves his client when he approaches the task at hand mindful of the requirement that he is portraying fact, not prejudice, and that he will likely defend his position under oath.

To satisfy the requirements of competency by verification it is essential that the photographer make accurate and detailed notes during the actual photographing. Never should he rely on memory, but should record data for each photograph taken.\textsuperscript{24} Just as jurisdictions differ on the admissibility of photographs, so among photographers are there differences in the depth of documentation made for the client at the time the photographs are made.\textsuperscript{25} The particular vehicle for recording this data is immaterial so long as the information can be retrieved and provided to the attorney and ultimately to the court if called for. This writer has found that a small pocket portable tape recorder provides the best means of making these records, especially under conditions of inclement weather or when working rapidly, as at the scene of an accident. The date for each exposure is then transferred to permanent records and filed. The tape, of course, may be reused. But it is not these records that are used to verify the resulting photographs; rather it is the photographer's testimony based on them. A pocket-sized check list is used in the field to insure that each appropriate element is recorded and to keep the data in logical sequence for subsequent typing. A sample of such a record is shown in Figure 1, together with comment on its use. The form is a composite of Professor Scott's suggestions and those cited in the Journal of Evidence Photography.\textsuperscript{26} As can be seen, the top portion also serves the photographer's business needs.

The relationship between the "Job Number", "Frame" and "Time" portions deserves comment. It is common practice to simply number each photograph in the sequence taken, adding, perhaps, a prefix to identify the client. While this practice can serve the portrait or commercial photographer well, it has pitfalls for the forensic professional. Most likely not all of the exposures made will be printed or used in court; some may be better or weaker views, "bracketing" exposures, or simply experiments.\textsuperscript{27} A sequential num-

\textsuperscript{24} 1 SCOTT 141; The Interdisciplinary Exchange Between Lawyers and Experts, supra note 13.
\textsuperscript{25} 2 J. EVIDENCE PHOTOGRAPHY Nr. 2 at 4-10 (Apr. 1970).
\textsuperscript{26} Supra notes 24 and 25.
\textsuperscript{27} "Bracketing" is a method of insuring proper exposure by making several exposures
bering system as marked on the back of the prints and visible to the opposing attorney would open the door to questions of missing prints in the sequence. While these exposures may properly be only work product or cumulative materials not intended for evidence, such questions cast doubt on the competency of the offered exhibits. The preferred method is to translate the sequence or frame numbers to time-of-day as expressed on a 24-hour clock. Prefaced by the job number, or a year-month-day group, a series of exhibits may carry the following identifying numbers: 7404161127, 7404161236, 7404161304, etc. If asked, the attorney or photographer can truthfully say that the last four digits represent the time of day the photographs were taken, and no more. Avoid, as a plague, sequential numbering on potential photoevidence exhibits.28

Proper completion of the data record requires that the photographer be more than just a picture-taker. He, or an assistant, must be equipped to make the necessary distance measurements, compass readings of camera direction (at least outdoors), camera tilt and height determinations, and so forth. He should, if necessary to the clarity of his notes, make any sketches required and file these with the data sheets, as work product. When the processing is completed the photographer should note any deviations from the standard or normal recommended processing method. In jurisdictions that require it, the photographer should obtain affidavits attesting to the method of color processing from his sub-contracting laboratory, if his film is not processed in his own plant.29 Rather than confuse both judge and jury with chemical technical information not at all relevant to the competency of the photograph, most jurisdictions accept the statement that the film was processed according to the manufacturer’s instructions.30

One last item is worthy of attention in the area of competency, and that is the marking of the subject before photographing it.31 Such markings are distinguished from posed re-enactments.32 Examples here include tapes or rulers as measuring devices, levels to

above and below the indicated settings. The technique is often used in uncertain lighting conditions, as in the making of the negatives for figure 3.

30. Id.
32. The subject of posed and reconstructed evidence is extensively covered in Annot., 19 A.L.R.2d 877 (1951) and in Shafer, The Use of Posed Photographs of Movable Objects or Persons at the Time of an Accident, 47 Kentucky L.J. 117 (1958).
indicate out-of-plumb conditions, or spot markers or arrows to show important locations; all of these imaged in the scene at the time of photography. The use of measuring devices in the picture does not render the exhibit inadmissible.\textsuperscript{33} Quite the contrary, at least one court has expressed the need for markings showing accurate size of the object in dispute, a hole in which a pedestrian stepped.\textsuperscript{34} Likewise, a direction indicator may be placed within the camera’s field of view and thus incorporated in the photograph, if to do so will make the exhibit more understandable.\textsuperscript{35} The photographer, or other person placing such a marker, would be expected to verify its orientation, if questioned.\textsuperscript{36} Such a marker should be of sufficient size and contrast to be easily seen in the finished prints; this would vary with the magnitude or scope of the scene being photographed. The author has used arrows from six inches to nine feet in size, and an ordinary hiker’s compass for orientation.

The use of object markers or indicators is more questionable, as some courts (erroneously) consider their use as “posing” a photograph.\textsuperscript{37} The marker would have to be properly explained, usually by a witness to the accident or incident in question, not by the photographer, and when so explained the majority of courts allow such photographs in evidence.\textsuperscript{38} It is, of course, quite possible that the position of the marker itself, rather than the simple use thereof, may be in dispute; indeed, such could be the crux of the case. Where this arises the photograph may still be admissible as one witnesses’ testimony to the correctness of placement, even though other witnesses disagree.\textsuperscript{39} To avoid whatsoever any conflict with the possible concept that the court will hold a markered photograph as “posed”, and thus inadmissible, the marker should have no graphic relationship whatever to the object depicted. A simple alpha or numeric designator on a plain card, or a flag, or even a person (not depicting where a human being was located) may be utilized.\textsuperscript{40} The important

\textsuperscript{33} Norwood Clinic v. Spann, 240 Ala. 427, 199 So. 840 (1941); People v. Jenko, 410 Ill. 478, 102 N.E. 2d 783 (1951); Great Atlantic & Pacific Tea Co. v. Lyle, 49 Tenn. App. 78, 351 S.W.2d 391 (1961).

\textsuperscript{34} Arkansas Power & Light Co. v. Marsh, 195 Ark. 1135, 115 S.W.2d 825 (1938).

\textsuperscript{35} Hommes’ Admr. v. Chesapeake & O. Ry., 268 Ky. 203, 104 S.W.2d 431 (1937).

\textsuperscript{36} Id.

\textsuperscript{37} Carroll v. Krause, 280 Ill. App. 52 (1935); 2 Scott 390-91.

\textsuperscript{38} Wilson v. State, 255 Ala. 12, 53 So.2d 559 (1951); Swart v. City of Boston, 288 Mass. 542, 193 N.E. 360 (1934).


\textsuperscript{40} Hall v. State, 78 Fla. 420, 83 So. 513 (1919) (using a paper marker); Louisville & N.R.R. v. Cross, 205 Ala. 626, 88 So. 908 (1921) (using a flag as a marker); Willis v. Pennsylvania
thing for both photographer and attorney to keep in mind is that
the marker be just that - a marker. No attempt should be made to
use similar-to-fact objects unless it is intended to portray a posed
re-enactment. A variety of markers and measuring devices are
shown in Figure 2. Note that the advertising on the common yards-
ticks has been covered with contrasting (and colored) tape to in-
crease visibility and eliminate any question of commercialism.

Efforts to enhance barely visible marks, such as blood and skid
marks on macadam, present a special challenge. While courts have
admitted photographs where such marks have been painted, limed
over or chalked in by the photographer, the better practice is to
photograph the scene as it naturally exists and then emphasize the
desired areas.\footnote{R.R., 269 F.2d 549 (4th Cir. 1959) (wherein a person was pointing) (excluded on other
grounds).} Not surprisingly, this is one area where color photog-
raphy may be a major improvement over monochrome. While blood
or skid rubber will blend with a medium gray background, or appear
simply as mud or dirt, their distinctive characteristics show up very
well in color.\footnote{41. Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765 (1930); Een v. Consolidated Freight-
ways, 220 F.2d 82 (8th Cir. 1955).} In any event, the photographer or “artist” must be
prepared to testify to the extent of his enhancement, the method
used, and, most importantly, that the method was applied in a
manner so as not to conceal or emphasize facts; applied, in other
words, disinterestedly. No “theory of the case” should influence
such markings.\footnote{R.R., 269 F.2d 549 (4th Cir. 1959) (wherein a person was pointing) (excluded on other
grounds).}

The issue of relevancy revolves around the fact that most pho-
to evidence is offered to supplement, illuminate or enhance testimo-
nial evidence. Here the role of the photographer may be thought of
as minimal unless he is so completely familiar with the case as to
know of forthcoming testimony and to contribute to its portrayal.
Often, at the time the photographs are made, not even the attorney
is sufficiently into the case to have laid out his trial tactics, and
hence does not know exactly what will be needed. There is a natural
reluctance to order more photographs than overall views of an acci-
dent scene, or an exposure or two of a personal injury client. Like-
wise, many professional photographers shy away from pushing their
wares on a buyer for fear of overselling him and losing his confid-

41. Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765 (1930); Een v. Consolidated Freight-
ways, 220 F.2d 82 (8th Cir. 1955).
42. HUGHES & CANTOR, 718-19.
Ohio App. 528, 182 N.E. 598 (1931) (where the court rejected enhanced photographs offered
in evidence).
A variety of marking devices, a data board after Scott and incorporating color patch samples and the standard 18% gray card manufactured by the Eastman Kodak Co., and a small color test patch on a flexible clamp are shown. The three-sided spot markers, made of Masonite, are labeled: A, 1, O; B, 2, X; C, 3, Y; D, 4, Z to provide sufficient variety for a series of photographs of a given location. The rope handles permit the whole lot to be carried by a couple of spare fingers. The yardsticks are foot-marked on one side for horizontal viewing, on the other for vertical measurement. The six inch arrow is backed with magnetic tape so that it may be attached to any ferrous surface such as an automobile fender to indicate point of impact. The soup cans are not part of the kit!

By incorporating industry standards in the form of Kodak’s color patch set and gray card, the data board can also be used to establish color verification standards in the actual photography should it be necessary to defend the color accuracy of a photoevidence exhibit.
ence. What may be lost instead is the case; "for want of a nail" applies to advocates as well as to generals. Often the photographer can suggest additional photographs based on his own experience, his study, or by just considering the subject and asking himself, "What would I want to know (see) about this if I were on the jury?" His very detachment may be of value here, for this test of relevancy in the early states of preparation is subjective. If the area in question is one of interest, if it is an area about which a witness would be permitted to testify, then it probably is worthy of examination through the camera lens. It is this writer's experience that, more often than not, the wish is later expressed that more or different photographs had been made. Night accident scene versus a daytime view, pre- and post-surgery exposures of an accident victim, close-up details such as an automobile serial number and enhanced versus unenhanced skid marks are examples of this dilemma, as is color rendition, if it would contribute to the information content of the evidence. Confidence and communication between attorney and photographer are the keys to making these decisions.

The materiality of photoevidence is often interwoven with the relevancy issue. Clearly, where the photographs depict issues other than those in dispute they are immaterial to the issue. To simplify matters somewhat for this discussion, let it be enough to say that objection on the basis of materiality is often predicated on accumulation of evidence. While photographs need not be excluded on the basis of numbers alone, when the photographs are simply cumulative of a jury view or of oral testimony they may well be excluded on that ground. If the question boils down to one of numbers of exposures to be taken, of accepting or rejecting a particular work print for possible enlargement, then clearly it is better to err on the side of excess rather than dearth, for potential exhibits can always be discarded as trial tactics are formed. The converse is seldom true in view of the time between the cause of action and the litigation itself. The classic example is the case of the personal injury victim whose injuries and scars have all but healed by the time the cause

45. HUGHES & CANTOR 56. In Ch. III of this new work Professor Hughes delves extensively into the jural-philosophical distinctions between relevancy and materiality.
comes to trial: today's painful ovoid swelling of the anterior aspect of the distal portion of the ventral of an upper extremity will be just a bruised elbow in two years.

The area of materiality, like that of relevance, is worthy of communication between attorney and photographer. The questions always to be answered are simply: "How can I most effectively communicate to the jury; how can I keep the jurors' interest; what can be displayed which will reinforce their interest and maintain their attention?"

An area worthy of consideration by attorney and photographer is the use of photographs of demonstrative evidence presented in court. Large objects presented to the jury—maps, blackboard illustrations and the like—may never see the light of the jury room deliberations or preservations for the record unless the presenting attorney has sufficient foresight in his trial preparation to arrange for them to be photographically preserved at the time of presentation. Such photographs can be professionally made during a few moments of recess and processed (in monochrome, at least) overnight for subsequent use. Further, a new Polaroid Corporation product, Type 105 P/N Pack Film, affords the modern attorney an instant black and white print in \( 3 \frac{1}{4} \times 4 \frac{1}{4} \) size for immediate use, and his photographer a high quality negative for which to make enlargements for the trial record.

While similar materials have been available to the large camera user for a number of years, the introduction this year of Type 105 P/N provides the same outstanding flexibility to the user of small professional cameras such as the Hasselblad and Mamiya RB 67, and the Polaroid cameras in the 300-and 400-series. The latter utilize the full image size while the Hasselblad images \( 2 \frac{1}{4} \)" square and the RB 67 images \( 2 \frac{3}{4} \)" square on Polaroid. An adapter is available for use in larger cameras.

III. COLOR: CONSIDERATIONS AND CAPABILITIES

Passing mention has already been made of the use of direct color photography in the courtroom. The decision to use color rests in

48. HUGHES & CANTOR 277.
49. Id.
50. 5 Closeup Nr. 1, (Polaroid Corp., 1974).
51. Id.
52. "Direct color" refers to the several color photographic processes, e.g., color slide or color print via the production of an in-camera color negative similar to black and white photography. Excluded are colored photographs which are artist's adaptations in oil color applied to a monochrome print.
the consideration of several factors, not the least of which is the increased costs. On the average, the same photograph in color, as a print for direct viewing (rather than as a transparency slide for projection) costs approximately five times as much as its monochrome brother. The reasons for this increased cost are several: the materials themselves are more expensive by about the same factor, the time required to make an accurate color print is considerably longer than for a black and white print, and the capital investment involved is on the order of ten times greater than that required for a darkroom limited to black and white printing. Likewise, under conditions often encountered in forensic work the skill and training required of the photographer and his color technician greatly exceed those needed to do the job in monochrome.

For reasons of investment and overhead many of the country's leading photographers utilize the services of a professional color laboratory on a contract basis. Such labs process all the color slide or negative materials, make proof or work prints as needed, and prepare the finished photographs exactly to the attorney's and photographer's specifications — for a price! The reader should not confuse such services with those performed by the corner developer. Whereas an 8x10 print might be advertised for ninety-five cents to the Sunday snapshotter, more than one professional lab charges fifteen dollars for the print alone, exclusive of mounting or spraying. To this must be added the finishing services performed by the photographer, as well as his usual costs of doing business. Nonetheless, the expense involved in professional color photoevidence is small indeed, and should be absolutely secondary to the attorney's most important consideration: information content.

That color is capable of portraying more information, more clearly, to the minds of judge or jury can be readily appreciated from the following examples. In black and white rendition, dried blood looks like dirt or mud, scar tissue appears as simple depressions in the skin surface, paint scrapings from a blue automobile may not even show up on the green or light brown fender of a second car, 

53. At this writing one outstanding forensic professional, E.P.I.C. member Herbert McLaughlin of Arizona Photographic Associates (Phoenix), quotes $17.50 per color exposure plus $25.00 for the first 8 x 10" print, compared to $8.50 for black and white including the first print. These prices are in addition to the usual hourly and mileage rates. 6 J. EVIDENCE PHOTOGRAPHY Nr. 1 at 10 (Jan. 1974).

54. The price quoted is that of a laboratory in Dayton, Ohio, one of the few in the U.S. specializing in matched color printing, Aero Ektachrome and infra-red product processing and sensitometric testing and evaluation. Similar prices prevail among the better labs in the east, southwest and far west. Proofing or work print prices are less.
blood vessel damage in human tissue fades to imperception, and many burn injuries appear simply to be covered with medication. The human experience is one of color; color photography is in common usage throughout our society and everyday news in color via television is de rigueur for your jurors. Whether important information can be better presented by color photography should be the attorney's first and most seriously considered question. For simplicity, approach the question as if divided into two parts, each of potentially equal importance. Is color, in and of itself, an issue in this case? Will color better convey evidence of a related issue, such as damages or pain and suffering?

Related to considerations of the evidentiary value of color photographs are the two most often expressed objections to its use—gruesomeness and emotional inflammation. Certainly no decision as to the use of color should be made without carefully weighing these factors if human injury or suffering are involved. Neither gruesomeness nor emotional impact (whether portrayed in color or black and white) is itself a bar to admissibility if the photographs meet the tests of competency, relevancy and materiality. Indeed, there is authority that color photographs present no special problems and are admissible on the same grounds as those in monochrome.

Color photoevidence offers one additional ground for challenge not applicable to a black and white exhibit; that is, the color rendition itself. If the exhibit is so unrealistic as to mislead or portray falsely the subject in issue it goes without saying that the picture should be rejected. The implication, supported abundantly by case law, is that not only must the photograph as a graphic representation be sufficiently authenticated but so also must the color representation itself. Further, if the photographs are intended to depict relative light values, such as the intensity of street lighting, the additional factor of a photograph's inability to portray this singular fact may well be raised in objection. "Photographs can demonstrate light

55. Hughes & Cantor 718-35. While the color plates reproduced in this new treatise do not do justice to author-photographer Cantor's professionalism, it is the first extensive use found of color reproductions in a serious work on the subject.


57. Commonwealth of Kentucky Dept. of Highways v. Williams, 317 S.W. 2d 482, 484 (Ky. 1958) (an eminent domain proceeding).


directions, patterns and sources, but there is no known photographic process than can accurately demonstrate the amount of light (falling on a subject).” For a graphic illustration of this deficiency, albeit expressed in monochrome, see Figure 3, wherein a night scene is imaged for a variety of exposure times and printed to a variety of subjective interpretations. Query? Which image is a “fair representation” of this scene? To some extent this problem can be solved, on a subjective basis at least, by using the Polaroid camera and film. In this use the photographer first must make instant pictures of the scene until he obtains one that is a fair representation of the light-shadow relationship as he, or another witness, sees the scene. He then makes one or more conventional negatives of the area and uses the “approved” Polaroid print as a guide and standard for that scene during the printing process. However, for exact measurements of light levels a lighting engineer should be employed.

Such exhibits must not be so colorful “as to detract attention... from the issues in the case.” The rule generally applies to cases in which there is risk of emotional hostility, sympathy or prejudice; risk of diverting inquiry into collateral matters; or that excessive court time will be consumed in handling the exhibit. This latter situation is often encountered where the objection is raised that the exhibit is cumulative.

While the admissibility of color photographs is not necessarily contingent upon faultless reproduction of color, this aspect is worthy of mention, if only to avoid unnecessary attack by the opposition and the resulting confusion in the mind of the trier of fact. Under many situations in which the evidence photographer finds himself, it is quite easy to establish beyond contest that the color image is an acceptable rendering of the subject. He need simply provide a standard, within the picture area, to which the resulting print or slide may be compared. Such standards are available at nominal cost from the Eastman Kodak Company, and are intended for just this application. Should the scope of the view being photographed

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depicting the intensity of lighting in a shop area excluded because time exposure could have distorted the light and shadow relationships).

60. Courtney, Effective Use of the Evidence Photographer, 17 Practical Lawyer 4, at 37 (1971).
61. Id. at 38.
63. Hughes & Cantor 265.
64. Kodak Color Control Patches, 7” size (product [Q-13) or 14” size (product [Q-14),
The small Kodak color test patch, together with a gray scale and a portion of the industry standard 18% gray board is shown mounted on a clamp and flexible arm for small object color photography. The test patch colors are, left to right, green, yellow, primary red, magenta, violet, cyan, white, 3-color (brown), and black. The colors have been selected as representative of those inks commonly used in photomechanical reproduction.
preclude introduction of such a standard, it may be photographed separately under identical lighting conditions and be made available for argument should the question of color fidelity be raised in court. A version of this standard is shown in Figure 2 incorporated in the author's data board; a smaller arrangement of the seven inch scale is shown in Figure 4, there attached to a flexible arm and clamp to permit use with even the smallest photo-evidence subject. A properly exposed and processed color exhibit evidencing this standard in an innocuous position (as at the edge of the print) dispels any objection on the grounds of technical inaccuracy. Likewise, inclusion of the standard makes the printing process itself easier and affords the photographer a check on his equipment and techniques, whether or not the final print includes the color patch.

One of the problems facing photographers working in direct color is the possibility of loss or damage to film in transit to the processing laboratory. It is customary for unexposed film to be mailed, and for this purpose most professional labs supply pre-paid mailing labels. But one result of their use is that additional insurance is seldom purchased on the film; and even if it were, insurance does nothing for the attorney whose pictures are lost, possibly forever. As an example, consider pre-surgery photographs of a personal injury client, the realization of loss or damage occurring after the corrective operation. Assuming no negligence existing in packaging and mailing, the photographer would not be liable for subsequent loss in the mails. Likewise, should color film be damaged during processing, the processor would most likely escape liability by contract as a specific disclaimer is usually printed on the package provided for the film or in the price schedule from which the photographer works. In the only case discovered where a photographer was able to obtain judgment for the full extent of damages, the processing was done absent a contract disclaimer. As a result, the disclaimer is now so widely used that no professional photographer can be heard to say he was unaware of it.

In situations where the opportunity for re-photographing the subject will not exist, this writer has used a method of "insurance" that is practically foolproof. Simply make two exposures of every view on

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either two rolls of film or the two sides of each sheet film holder. This requires two camera bodies for 35mm, or two interchangeable backs for roll film equipment, or sufficient film holders to duplicate the photography. One roll (or one sheet from each film holder used) is processed, the other stored in the freezer for use if needed. The expense is quite small, being only the cost of the film, and the extra time involved is minimal compared to the possible consequences should the only exposures be lost or damaged.

Despite modern advances, color film technology fails to render a scene accurately under two widely encountered conditions, fluorescent tube lighting and mercury-vapor street lighting. The reason is that these sources of light are discontinuous; that is, although they may appear normal to the eye, the spectrum of the light itself does not embrace all the colors to which the film is sensitive. Usually, absent correction by way of filters on the camera lens, both will be depicted over-green as a result of the absence of a red component in the light source. While filtering during the photography can correct somewhat for this deficiency, the resulting exhibits should be thoroughly explained in this regard during verification. The attorney requesting available light color photography under these lighting conditions should be prepared to accept less than perfect results, and, further, be prepared to delve into the necessary direct examination upon introduction into evidence. Photography under standard fluorescent or mercury-vapor lighting opens for the opposition a Pandora's box — it will pay well to have a hefty hammer and a few strong nails available! The growing popularity of sodium-vapor street lighting poses the same problem, with the color-shift in the other direction.

No present day color process is permanent. This fact poses the final consideration to be included in the attorney's deliberations regarding the courtroom use of color photographs. The available

68. In view of this admonition the perceptive reader may well wonder how such beautiful color photographs of indoor scenes are produced for advertising usage in the leading magazines. Not all fluorescent tubes are discontinuous in the red, only those in general lighting use. There is available at much greater cost a full spectrum tube. Backed by commercial requirements, and afforded sufficient time and assistance the commercial photographer simply replaces all the existing tubes with those of photographic quality prior to making the picture. Further, the author acknowledges the existence of the Tiffin Co.'s FL-D and FL-B filters; they are a great help but not a cure-all for the discontinuous spectrum problem posed by fluorescent light.
color print materials available from the major manufacturers are as stable as most ink printing methods. This element of long-term color stability is important for the attorney facing a protracted cause-trial-appeal calendar that may extend over several years. If color materials are selected for evidentiary use, the photographer providing them should be advised of the possible longevity requirement and be requested to prepare the exhibits accordingly. At the minimum the prints should be sprayed with one of the chemically neutral, optically clear sprays made for this purpose, and the better practice would be to provide a rigid mount for each print and a cover of suitable material during storage. The prints should be ordered incrementally as needed: first the original photography and proof or work prints, then less expensive enlargements for use in settlement discussions as necessary, and, finally, if the issue goes to trial, the trial set and record prints. By this means, not only are initial costs reduced but the important exhibits are produced last and as a group, all at one time. In many cases, the intermediate requirements may be adequately met with black and white prints from the color negatives. There is no deception in this, since a color negative may, for most reasonable purposes, be used to print onto ordinary enlarging paper. The author has found this to be a very desirable first stage compromise between the costs of color photoevidence and the immediate needs of his attorney-clients.

Color provides an important information link in the chain of graphic evidence. Properly prepared, fully verified and accepted into evidence, it can enhance the proponent’s presentation of fact quite beyond its relative cost. The attorney using color photos, professionally prepared, need have no qualms about acceptability on technical grounds.

IV. Some Finishing Touches

The attorney can fairly expect of his photographer professional support in two areas: 1) the photographic products themselves, and

70. It is the nature of color printing that the first print from a negative or slide is the most expensive because of the color balancing test required to produce it. Hence, where a number of prints of the same negative are required, each matching the others in color and density, as in a trial set, it is most economical to have them made at one time, irrespective of any previous requirement for single work prints. Only by this procedure can it be assured that all prints in the set will match.

71. For sophisticated purposes a special pan (all color) sensitive enlarging paper is available affording more accurate color rendition in a monochrome print from a color negative original. In pre-trial exploration the extra effort and consequent cost is seldom necessary. Likewise, the impact of showing a black and white print and being able to state, “Of course, we have this exhibit in full color if needed” may well be an advantage in negotiation.
2) verification of the photographs as a fair representation of the subject. Further, he can reasonably expect testimony regarding any measurements made during the photography, handling of the equipment involved, and the relative accuracy of the color process, if used. Additionally, if the photographer can be qualified as an "expert witness" he may perform valuable collateral service to prove facts through opinion testimony derived from photo-evidence or to impeach opposition exhibits less carefully prepared than his own. Even absent this qualification, in many jurisdictions he may assist the attorney during cross-examination by suggesting revealing lines of inquiry and technically proper phrasing of questions pertaining to cross-examination.

The attorney's first need is for work prints from which to make an initial selection of possible exhibits on which to mark any instructions or notation regarding cropping and printing. Work prints, whether in color or black and white, can be prepared by contract printing (the resulting print is the same size as the original negative - a "contact sheet" as in figure 3 or by enlargement to any convenient size. Where 35mm equipment was used for the photography, some enlargement of the work prints is desirable except perhaps for file records of the information contained in the photographs.

This writer submits that two sets of work prints are appropriate at this early state, a contact sheet for file and a set (contact or enlargement) for handling, discussion and marking. If the original photography was in color, the file set may be in color and the working prints in inexpensive monochrome enlargements. In many cases the advantages of using Polaroid Type 105 P/N film outweigh the added expense, and the work prints are generated during the actual photography and are available immediately for any necessary comment and remake.

The question of ownership of the negatives arises more often in forensic photography than in portrait or general commercial work. It is well settled law that, absent prior agreement, the negative is the property of the photographer and the image — more correctly the right to use the image — is vested in the client. The need of an attorney to preclude compromise of his work product is under-

72. "Cropping" means to print less than the full negative in the final photograph e.g., a 2 1/4" square negative would need cropping to be printed fully onto 8 1/2 x 11" paper, as for a court record.

standable, and without a genuine level of communication between photographer and client the question of security of the original image is properly raised. Professional photographers are understandably reluctant to release their negatives, because they represent "stock in trade" for their livelihood. Thus negatives are normally retained in file by the photographer to be used only at the request of his client.

More to the point of rights in the image is the question of publication. A technical publication is unavoidable during the processing of color materials because the work on the photographs is bound to involve several individuals — negative inspectors, printing equipment operators and technicians, quality control specialists, and shipping personnel. This involvement by others than the photographer and his attorney must be accepted in view of the nature of the color process, and should be no cause for concern if a reputable color laboratory, serving only professional photographers, is utilized to process the work. The same would be true for color slide transparencies processed by the Eastman Kodak Company. If absolute security is required, as might be desired in a patent application, all of the processing should be done by the photographer even if this denies the use of color materials.

The attorney has every right to demand no other publication or use of the photographs without written release. This right is so well recognized among forensic professionals that it is stated in a model code of ethics for the Evidence Photographers International Council. In support of this position the Council permits work to be especially done for application to the Fellowship Program rather than compromise actual exhibits made for court.

After the attorney has selected from the work prints those he intends to use as court exhibits, two questions remain to be answered: 1) What size is best to use, and 2) how many of each will be needed? The element of the size of the final prints may depend as well on two factors: 1) What is the court's standard size for appeal record, and, 2) at what nominal distance will the prints be viewed?

The appreciation of true perspective in a photographic print of a

74. The right applies equally to photographs of things as well as of persons when the photographs were made under contract: Lawrence v. Ylla, 184 Misc. 807, 55 N.Y.S.2d 343 (1945).

75. Senger, Ethics 4 J. Evidence Photography 1, at 6 (1972).

76. 4 J. Evidence Photography 2, at 10 (1972). Twenty exhibits must be prepared for critical judging by a panel of recognized experts from the civil and law enforcement fields in order to qualify as an E.P.I.C. Fellow.
three-dimensional subject is obtained only when the print is viewed at the proper distance from the eye, this distance being based on the taking of lens focal length and the degree of magnification (enlargement), if any. This distance is the product of focal length and magnification: $D. = F. \times M.$ 77 For example, a general scene photographed with the Mamiya RB 67's 3½ inch normal lens, giving an image 2 ¼ x 2 ¾ inches in size, enlarged approximately four times to an 8 ½ x 11 inch print size, should be viewed at a distance of about 14 inches. Had a 35mm camera with a two-inch normal lens been used, the negative would be enlarged eight times to reach the 8 ½ x 11 inch size, and the print should be viewed from about sixteen inches for the impression of normal perspective in the subject. According to opthalmological tests, the average person holds an object or reading material about 15 inches from his eyes, and this is now accepted as normal viewing distance for individually handled exhibits. 78 If greatly enlarged prints are to be used for display and demonstration evidence, it is important to take the anticipated viewing distance-focal length-enlargement formula into consideration at the time the photographs are taken.

The much maligned wide-angle lens is often used in evidence photography, and the resulting exhibits are often attacked as being distorted. In reality, the attack can be sustained only when the print is improperly made for the method of viewing employed. For example, suppose a photograph is made with the 50mm (2") wide-angle lens for the Hasselblad camera. The 2¼" square negative, if enlarged seven and one-half times to a long print dimension of about sixteen inches will provide distorted viewing at normal distance. The angle of view included in the picture would be 75° as compared with the normal angle provided by the normal lens of approximately 50°. Likewise, the 150mm (6") telephoto lens been used, for an angle of view of 29°, to reach out for an inaccessible object in the field, a print for normal viewing distance would be only about six inches square. Either exhibit, viewed from any other than the normal reading distance, would appear distorted; likewise, making a uniform size print from both negatives (say 8½ x 11") would be a distortion.

The normal lens for any camera is that lens which gives a field of view approximately equal to that of human vision, 40° to 50°. For any such lens, on any camera size, a print 8½ x 11" is quite appro-

78. Id.
This writer submits that, for exhibits intended for viewing by a single individual at a time, the 8½ x 11 inch paper size should be used. Where the proper image size is less, as in the telephoto lens example, the image should, for convenience, handling and professional appearance, be printed on 8½ x 11 paper with the requisite wide borders.

There are two occasions on which the exhibit will be viewed or handled by more than one person at a time. The first is the case where a photograph is to be used in front of the entire jury, as would be a blackboard or chart. The same formula applies; if the viewing distance is to be a nominal ten feet the print from a camera equipped with its normal lens should be approximately ninety inches in its largest dimension in order that it depict proper perspective. Such an exhibit would be very costly and difficult to handle, of course, and is mentioned here only to give the reader some idea of the problem involved in presenting photo-evidence of scenes or places in their proper perspective. Where perspective is not an element of proof, as in a document reproduction or personal injury, the problem can be solved on more realistic terms using smaller prints, perhaps in the 30 x 40 inch size. It would still be desirable to provide smaller prints for the jury's use during deliberation.

The second instance of application of larger prints is where it is desired to provide the jurors with prints for viewing while listening to testimony. Rather than give each juror an individual print for normal viewing — a costly and self-defeating proposition at best — the better practice is to provide prints of appropriate size to be held by one juror and viewed by those immediately next to him. By this means the natural tendency of people to maintain interest in cooperative effort works to the attorney's advantage. For a viewing distance in the 18 to 24 inch range, a 14 inch print (from a camera using its normal lens) will appear in approximately proper perspective to the three jurors viewing it. It can be argued that two of them will be seeing the picture from the side, not from the centered point of view of the camera itself; however, this truth may well

79. Id. Specifically, the following exact sizes apply: 35 mm negative, 50 mm lens, print size 7 ¼ x 11 ½; 2 ¼" square negative, 80 mm lens, print size 11 ¾ square; 4 x 5" negative, 165 mm lens, print size 10 x 12". Examples assume use of the full negative in making the prints.
80. Such a print, 72 x 90", in color, would cost upwards of $800 excluding the costs of the photography involved. Considering the limitations of color films, the original negative would have to have been made on 4 x 5" film, another added cost element.
81. 2 Scott 302.
be outweighed by the interest generated by this method of presentation. Corresponding prints for the court, opposing counsel and the trial record would, of course, be sized for the single viewer. Cropping should be done so that each size print includes precisely the same information content, to preclude any objection based on differences in the prints. 82

From this discussion the forward-looking trial advocate can quickly determine the quantity needed of each photo-evidence exhibit he plans to use in court. Those that are to be handled by court or jury should be mounted on card stock or photographic mounting board to prevent damage and present a completely professional appearance. 83 For the trial record this writer submits that light-weight paper in the 8 1/2 x 11 (or 8 1/2 x 14, if appropriate to the jurisdiction) inch size is most easily handled by the reporter. By proper cropping during enlargement, a border for binding can be retained without greatly abusing the proper viewing distance concept. 84

The question of what is an “Expert Photographic Witness” has been raised time and again in both photographic and legal circles. At best, at the time of this writing, the answer varies with the jurisdiction involved, and encompasses the scope from “fully knowledgeable of general photography” to “expert in all phases of photographic art and science.” 85 The lesser standard, and in this writer’s opinion the far more rational, is based on the standards accepted for expert testimony in the arts, trades and crafts, e.g., construction, plumbing, brokerage, etc. 86 “There are, in general, two types of experts. . . first, those who are trained in a scientific discipline ( . . . physicians, physicists. . . ); (and) second, those who possess extensive practice experience and skill. . . .” 87 From this point of view the photographic expert is quite simply, “A person who knows more than the ordinary person about the photographic process.” 88

At the opposite pole, the qualification of expert photographic witness is viewed as requiring expertise in all artistic and scientific

82. Id.
83. Id. at 285.
86. Id.
89. Supra, note 29.
phases of the work. In the words of attorney-photographer Benjamin J. Cantor, the expert is:

[One who is] in a position to answer accurately any and all questions posed to him pertaining to all phases of photography — color, black and white, infra-red, stereo photography, motion pictures, or any other photographic speciality. He should also have a full and complete knowledge of optics, physics, mathematics and chemistry as they relate to the entire field of photography. . . During the course of a trial instances may arise where photographs which have been introduced into evidence by the opposing attorney are questioned as to whether or not they have been retouched or the subject distorted. Such a situation would necessarily require an expert in photography with a scientific background to offer his expert opinion pertaining to the doctoring of the photographic prints and negatives, the effect of using lenses of various focal lengths, the different types of filters, the diverse films and chemical formulae and other such factors which are related to the production of a photograph. (Emphasis added.)

Irrespective of which point of view is adopted (absent rules of court on the subject), the offering attorney should have available an up-to-date curriculum vitae on his photographer, including professional qualifications, awards, publications, if any, and platform presentations before peer groups. Both the Professional Photographers of America and the Evidence Photographers International Council have qualification systems especially worthy of inclusion in the record.

CONCLUSION

The propriety of admissibility and the utilization of the full potential offered by photographic evidence requires the dedicated effort of professionals, expended in an atmosphere of confidence and mutual understanding. While the costs need not be great in terms of the overall trial effort, the monies expended should buy nothing less than the best the market-place has to offer. More than the photographic product is involved; the element of communication between attorney and his photographer may well play a decisive role in the success of the project. The money-saving suggestions offered are but one writer's view of how the legal profession can be best served by the "the beautiful art". Regardless of the costs of the

90. Hughes & Cantor 740-41.
91. The subject of qualifying the expert witness is well treated in Ch. 9, Direct Examination of Witnesses, supra note 88, and, to a lesser extent in 9 Am. Jur. Proof of Facts Photographic Evidence 147-223 (1961).
exhibits themselves, the photographer must always keep in mind that he is a professional among professionals, expecting a fair return for his time, knowledge, investment and materials, and so give no less than the best within him. And if this writer has caused the advocate to take a second and perhaps deeper look at the forensic specialist, then his intent at the onset has been fulfilled.
LANDLORD-TENANT REFORM IN OHIO

Robert E. Haley*

I. INTRODUCTION

The passage of the Ohio Amended Substitute Senate Bill 103 represents a compromise of three vastly different landlord-tenant reform measures which were proposed to the 110th General Assembly of 1973-74. Although the various sponsors—ranging from the Ohio Association of Real Estate Boards to the Ohio Tenants Union—offered widely divergent views on the competing interests of landlords and tenants, each appeared to support the growing nationwide trend toward comprehensive reform of the principles governing landlord-tenant relationships.

The need for landlord-tenant reform has become critical in the past several years, with so much of the nation’s attention focused on urban housing problems and the concomitant social unrest so familiar to American cities. Governments have responded with massive spending in the areas of rent subsidy, public housing construction and rehabilitation, yet the urban cores of many cities remain virtually uninhabitable. Even regulatory solutions such as rent control and housing codes have been ineffective in bringing about change, largely because the central figure—the tenant—has

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1. Blumberg, The Ohio Struggle with the Uniform Residential Landlord and Tenant Act, 7 CLEARINGHOUSE REV. 265 (1973). There were no committee notes published in conjunction with the passage of the Act.
2. Id., 265-66.
4. Congress and the Supreme Court have observed that elimination of slums is an urgent national issue:

The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government. Frank v. Maryland, 359 U.S. 360, 371 (1959). The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family. 42 U.S.C. § 1441 (1970).
been powerless to force the landlord to comply. In this connection the tenant faced two problems: he lacked the means for representation, and even if he got it, the law heavily favored the landlord.

The law of property has common law origins which, although suitable for the needs of an agrarian society, render it wholly inadequate in a more urbanized, sophisticated society. The purpose of a lease in a rural society is to convey the possession of property to the tenant, whose primary interest is farming the land, not obtaining shelter.

In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance...

Ironically, however, the rules governing the construction and interpretation of "predominantly contractual" obligations in leases have too often remained rooted in old property law.

The net effect of this traditional property law view was to protect the landlord from legal compulsion to accord his tenants the relatively fair and equal treatment now required, for example, in commercial and labor relationships. As long as tenants were denied effective legal remedies, landlords were under no pressure to subordinate their paramount financial interests to the goals of the rest of society. Consequently, modern landlord-tenant reform is calculated to create a balance between two important considerations: the need on one hand to create greater tenant rights and stimulate greater tenant participation in urban rehabilitation, and on the other hand the need to preserve the fundamental property interests of landlords.

6. Id.
8. One commentator has suggested that the popular image of the landlord as a metaphor of evil—corrupt, racist and unscrupulous—has resulted from the potential for exploitation created by the legal imbalance between landlord and tenant. See P. Martin, The ILLHOUSED - CASES AND MATERIALS ON TENANT'S RIGHTS IN PRIVATE AND PUBLIC HOUSING, 1016-17 (1971).
II. SCOPE AND APPLICATION

The Act, which was effective November 4, 1974, is intended to apply to residential, not commercial, landlord-tenant relationships. Certain classes of residential tenancies are exempt, such as those involving prisons, halfway houses, hospitals, hotels and orphanages. Farm residences furnished in connection with the rental of a minimum of two acres of land for cultivation are also excluded. Boarding schools, where the cost of room and board is included as part of the tuition, are exempt, but not housing approved by state or private colleges and universities. Although the basis for distinction is not free of doubt, it appears that “boarding schools” contemplates primary and secondary educational facilities alone. Only private, not state, college and university dormitory housing is covered, except that tenants may not withhold rents by means of court escrow deposits. Also exempt are dwellings furnished to agricultural laborers as defined in recent amendments to Revised Code Chapter 3733.

The Act governs all species of oral and written leases, referring to them collectively as “rental agreements.” The “tenant” is considered to be any “person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others.” Evidently, the legislature was not content to restrict the duty of landlords to those who are actually parties to a rental agreement, since protection is also afforded to those who were contemplated as occupants at the time of the making of the agreement. The provisions governing “landlords” apply to the owner and his sublessors and agents, as well as to assignees or transferees of the right to receive rents.


The Act itself amends Chapter 1923 of the Revised Code by adopting procedural reforms of the forcible entry and detainer laws. In addition, a new chapter, Chapter 5321, was enacted to provide a body of substantive law where previously none existed outside of judicial application of common law. To the extent that the Act does not expressly condition the tenant's duty to pay rent on the landlord's duty to maintain habitable premises, it does not sanction rent strikes or other collective measures where there is a suspension or diminution of rental payments. There are no provisions for rent controls, and in most cases the landlord may increase rent as he sees fit.

The Act contains no criminal penalties or civil causes of action for the state. Damages are set relatively low, limited with one exception to actual damages plus attorneys' fees. Actions will be brought under existing Ohio court procedures, as the Act does not provide for special housing or landlord-tenant courts. Similarly, there is no provision for furnishing specialized legal counsel for indigents.

The transition to Ohio's new landlord-tenant law presents two potential problems. First, the Act does not set forth the extent to which its provisions will govern those leases which were contracted for or entered into prior to the Act's adoption. There should be little confusion, however, since the substantive rights and remedies apply without regard to private contractual terms. The most troublesome

19. This represents a rejection of the approach to landlord - tenant reform adopted by courts in the District of Columbia. In Brown v. Southall Realty Co., 237 A. 2d 834 (D.C. App. 1968), the court held that where a rental unit, at the time the lease was entered into, was in violation of health and safety codes, the lease was void and unenforceable on the theory that the contract was illegal. The lease being void, the landlord could not claim rents due under it.

20. Rent increases in retaliation for a tenant's bona fide exercise of substantive rights are prohibited. See infra, at note 117.

21. Ohio Rev. Code § 5321.16 (C) (1974). This section provides double damages plus attorneys' fees where the landlord fails to comply with his obligations relative to security deposits.


23. See Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 434-35 (1934). The Supreme Court held that the states possess authority to safeguard the vital interests of their people, and in doing so "[i]t does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.'" See also Benjamin v. Columbus, 167 Ohio St. 103, 116, 146 N.E. 2d 854, 883 (1957). "It is well settled that the provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contracts, cannot affect the police power. In other words, the exercise of the police power cannot be headed off by the making of contracts reaching into the future."
aspect of transition promises to arise with respect to the Act's relationship with municipal landlord-tenant ordinances. The legislature attempted expressly to pre-empt all local laws purporting to govern "those rights and obligations of parties to a rental agreement" regulated by the Act.4 This unusual declaration is open to constitutional challenge under Ohio home-rule powers, since it is arguable that municipalities have a paramount interest under the state-wide concern doctrine in dealing with landlord-tenant relationships. Each municipality faces its own unique housing problems, and it could be that there is no compelling need for state-wide uniformity as to justify total pre-emption.

III. THE LEASE—CONTRACT OR CONVEYANCE?

Before adoption of the Act, Ohio, like the majority of states, considered the lease of residential property as primarily a conveyance of land, not a contract between the buyer and seller of services. This interpretation has its roots in English common law, where the law of landlord and tenant developed well before contract law. As a result of this historical basis in property law, "the law of landlord and tenant is sadly confused by the fact that the legal concept is a hermaphrodite, a combination of property and contract." The lease itself has long been subject to the law of contracts as regards the construction and effect given to specific terms which govern the parties' relationship as lessor and lessee. The performance of conditions and promises which precede the execution of the lease, the requirement of a writing in certain cases, the capacity of the parties to deal, and the remedies available for breach of covenants in a lease have been subject to contract doctrine since the earliest days of common law. The influence of contract law

27. 3 G. Thompson, Commentaries on the Modern Law of Real Property § 1110 (repl. 1959).
28. Id.
32. At common law, a lease by a married woman was not binding on her. See Johnston v. Jones, 12 B. Mon. 326, 51 Ky. 326 (1851). Similarly, infants were restricted in the making of leases, though they were not absolutely void. See L. Jones, supra note 29, at § 92.
failed to extend much beyond this transitory lessor-lessee relationship, even though worded in the sense of a bargain and sale. Once the lessee's estate came into being by delivery of possession, property law governed the new relationship of landlord-tenant.34

Under the property law approach, once the landlord delivered the right to possession and performed all conditions precedent as set forth in the lease, he was relieved of all duty to the tenant and was thereafter protected by the doctrine of *caveat emptor*.35 A major exception to this rule was the covenant for quiet enjoyment, which was implied by the law as arising from the landlord-tenant relationship, not from the lease itself.36 But beyond this, the landlord owed no duty to maintain the premises nor did he warrant their condition.37 Accordingly, once the landlord delivered the right to possession, and thereafter refrained from asserting his paramount title, he had performed his part of the bargain and was entitled to receive rents. This *quid pro quo* theory, called the doctrine of independent covenants, provided "that the covenants to a lease are independent of each other and that a breach by one party of his covenant or obligation does not excuse the other party from continued performance of his obligation."38 This had the effect of forcing the tenant to pay rent even if the landlord was in violation of a specific obligation imposed by the lease. The tenant's only remedy in such a case was a contract action for damages, which in no way suspended his property law duty to pay rent, nor justified abandonment. The requirement of continued payment of rent remained uninterrupted until the tenant was put out of possession, either by the acts of the landlord, or by expiration of the lease.39

Although the effects of the doctrine of independent covenants have been recently upheld by the United States Supreme Court in *Lindsey v. Normet*,40 some courts41 have recognized that the basic

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34. See 3 G. THOMPSON, supra note 27, at §§ 1029, 1032.
35. L. JONES, supra note 31, at § 576.
40. 405 U.S. 56, 68 (1972). The Court in *Lindsey* effectively precluded any role for the federal judiciary in the substantive area of landlord - tenant law.
41. See, e.g., Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Brown
assumptions of property law fail to "accord with the legitimate expectations of the parties and the standards of the community." By introducing more modern concepts of contract law in the interpretation of leases, they have construed residential leases much like any other contract. By imposing implied warranties of fitness and habitability similar in substance to those of the Uniform Commercial Code, these courts have abrogated the common law doctrine of independent covenants and have interpreted lease covenants as mutual, dependent and reciprocal agreements.

The Ohio forcible entry and detainer statute was a codification of the theory of independent covenants. Prior to the Act, a forcible entry and detainer action was a summary procedure intended only to affect the question of possession, and the tenant was barred from asserting any claims arising out of the landlord's breach of covenants in the lease. The Act itself is silent on the question as to whether or not the respective obligations imposed on the parties are to be treated as mutual and dependent, rather than independent conditions of performance. The legislature gave some consideration to a specific statement abolishing the doctrine of independent covenants, but in the final enactment no clear-cut pronouncement was made. It appears that such a provision would have been unnecessary, since the effect of the enumeration of statutory duties and remedies is to make clear when, and to what extent, noncompliance by the complaining party can be raised as a defense.

Support for the proposition that all Chapter 5321 duties are mutual and dependent is found in the amendments to Chapter 1923, where the Act states that "[a]ny defense to an action under Chapter 1923 of the Revised Code may be asserted at trial." Prior to the Act there were, practically speaking, no defenses to forcible entry


43. Id.
44. UNIFORM COMMERCIAL CODE §§ 2-314, 2-315; OHIO REV. CODE §§ 1302.27, 1302.28 (1968).
45. OHIO REV. CODE Ch. 1923 (1968).
47. 24 O. Jur. 2d Forcible Entry and Detainer § 2 (1957).
and detainer beyond a showing that rents had indeed been paid. But with this amending language, the Act permits the tenant to avoid an eviction decree by alleging landlord noncompliance with statutory duties. The liability for rents, however, is not thereby discharged.

Accordingly, if the landlord has made a claim for rents past due and seeks eviction, the tenant may counterclaim for damages resulting from landlord noncompliance, and all claims will be heard in one proceeding. If both parties prevail on their respective claims, the court will thereupon award a net judgment. By the terms of the Act, the success of the eviction cause depends on whether the tenant still owes rent after judgment, not on whether the amount of rent to which the landlord is entitled exceeds the amount awarded to the tenant as damages. In the majority of cases, the amount of rent outstanding will most likely exceed the actual damages of the tenant. In order to defeat the eviction, it is therefore essential that the tenant be awarded a reduction in rent for the period of occupancy during which rents were not paid, and that the courts require that all rents due and becoming due be paid into the court registry before the hearing. Since the court is given discretion in determining whether or not to require such rent deposits, the tenant is never assured of avoiding eviction unless he has substantial damages. A landlord to whom eviction is more important than the assurance of collecting withheld rents will naturally be loath to move the court to require such deposits, since the Act suggests that the tenant may not necessarily make rent deposits as of right.

The Act has the effect, therefore, of abolishing the doctrine of independent convenants except as to the duty to pay rent. Although the tenant is not in every case bound to pay rent directly to the landlord, the amount of rent which has been withheld is applied as a set-off against whatever the landlord owes the tenant. There are several additional provisions which evidence this intent. First, the Act does not specifically deal with rent payment as an affirmative

50. 24 O. Jur. 2d Forcible Entry and Detainer § 14 (1957). A tenant was not, however, entirely precluded from asserting defenses, even if no answer was filed. Schmidt v. Hummell, 81 Ohio App. 167, 73 N.E.2d 806 (1947).
duty under Chapter 5321, nor does it alter the right to bring an action for nonpayment. Thus, the duty to pay rent still arises only by contract or by operation of law as under previous law, and not by statute. In addition, if the tenant is not current in rental payments at the time he initiates escrow deposits, the landlord may compel release of all funds. Although the tenant’s action is not thereby dismissed as to the claim for damages, the effect is to segregate the right to receive rents from the performance of landlord duties.

The Act introduces several other important concepts of modern contract law in addition to the reciprocity of conditions. Chief among these is the section on unconscionability, which is worded in nearly identical terms as Uniform Commercial Code section 2-302 as codified in Ohio. The UCC unconscionability provisions have been limited exclusively to the sale of goods, and the doctrine of unconscionability has heretofore been unavailable to avoid or modify a lease of residential property in Ohio. Case law in other jurisdictions which have relied on section 2-302 to avoid the consequences of oppressive and unjust lease provisions appear to have adopted it by analogy, applying the same standards as used in sales and lease contracts. As a means of expanding available tenant remedies and counteracting the immense bargaining advantages of landlords, the provisions on unconscionability will probably have significant impact.

In addition to this general prohibition of unconscionable leases and clauses, the Act denies legal recognition to four specific types of lease clauses. These include waivers of procedural and substan-
tive statutory protections, warrants of attorney to confess judgment, tenant assumption of landlord attorneys' fees, and exculpatory or indemnity clauses. Each of these could well be challenged under the unconscionability clause. However, their express prohibition will eliminate the need for litigation, and serve to protect against judicial tampering with the Act's intent and purpose. The prohibition against waiver applies both to oral and written agreements, subject to the exception that a landlord may agree to assume a responsibility expressly placed on the tenant by other sections of the Act.

By prohibiting the enforcement of warrants of attorney to confess judgment, the Act in effect expands on recent amendments to Revised Code section 2323.13, which abolish cognovit notes in all consumer transactions involving goods and services. Among the most odious examples of landlord overreaching and oppression, confession of judgment clauses subject the tenant to judgment without notice or the opportunity to present a defense.

Another manifestation of the grossly unequal bargaining positions of landlord and tenant are lease provisions which impose upon the tenant the obligation of paying his landlord's attorneys' fees. The Act denies the enforcement of such clauses whether the agreement to pay the other party's attorneys' fees is on the landlord or the tenant. That such a clause does not create an enforceable obligation has been the position of Ohio courts for some time. The underlying policy had been that the payment of attorneys' fees "is in the nature as a defense to an action for nonpayment of rent or eviction. The Uniform Residential Landlord and Tenant Act, [hereinafter cited as to URLTA], for example, goes further than the Ohio Act by permitting the tenant to recover in addition to his actual damages, an amount up to three month's rent and attorneys' fees where the lease contains any one of these prohibited clauses. See National Conference of Commissioners on Uniform State Laws, URLTA § 1.403 (b) (1972).

72. See 50 Chi.-Kent L. Rev. 482, supra note 64. In D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 188 (1972), the Court held that while confession of judgment clauses are not a per se violation of the Fourteenth Amendment, wherever there is great disparity in bargaining power and the waiver is not knowingly and intelligently made, due process can be invoked to avoid enforcement of the clause. Architectural Cabinets, Inc. v. Gaster, 291 A. 2d 298, 300 (Del. Sup. Ct. 1971), held that a cognovit note is void and unenforceable where the elements of unfair surprise and unconscionable oppression exist within the meaning of UCC § 2-302.
73. Gibbons, supra note 3, at 375.
of a penalty levied against the lessee because of his failure to pay the rental obligation," and not that the tenant was at a bargaining disadvantage. The right to receive attorneys' fees may now arise as a proper item of damages, but never by contract of the parties.

Another relic of common law abrogated by the Act is the force and effect given exculpatory and indemnity clauses. Exculpatory clauses, which expressly exempt the lessor from liability for his or his servant's negligence toward the lessee, and indemnity clauses, which provide for the lessor's protection from liability for acts of negligence causing injury to third persons, had been held valid by Ohio courts as not against public policy per se.

When taken together, the ban against contractual waiver of rights, exculpatory clauses, agreements to pay attorneys' fees and warrants of attorney to confess judgment evidence a strong legislative policy against landlord overreaching and fundamental unconscionability, and serve to imply a requirement of good faith dealing among the parties. Although the Act contains no express good faith requirement analogous to Uniform Commercial Code section 1-203, the adoption of these other concepts of modern contract law has substantially the same effect.

IV. Statutory Landlord and Tenant Duties

The heart of the Act is sections 5321.04 and 5321.05, where the respective duties of the landlord and the tenant are set forth. The tenant has always been liable in Ohio for acts which constitute waste, and even in the absence of an express agreement he has the duty to return the premises in substantially the same condition as when he took possession, except for ordinary wear and tear. The landlord, however, was under no duty whatsoever to provide habitable premises for his tenant. Consequently, the parties were free

75. Id. at 512, 176 N.E. at 669.
76. See Ohio Rev. Code §§ 5321.02 (B), 5321.04 (B), 5321.09 (D), 5321.15 (C), 5321.16 (C)(1974).
78. A recent Sixth Circuit Court of Appeals decision held that an exculpatory clause was invalid as against public policy in Ohio in view of the Ohio Building Code. See American States Insurance Co. v. Hannan Constr. Co., 392 F. 2d 171 (6th Cir. 1968).
81. See supra, note 37.
to create duties by express provisions in the lease. This generally worked to the sole advantage of the landlord, whose remedy under the doctrine of waste was the only other form of protection. Now, however, the landlord is bound to an enumerated warranty of habitability, and the tenant is obligated to a higher standard than the mere avoidance of waste.

(a) Tenant Duties.

Tenants are required to keep their premises clean and sanitary, free of trash and garbage, and are liable for intentional or negligent damage to all appliances, plumbing, and electrical fixtures. They must comply with all requirements imposed upon them by applicable housing, health and safety codes. Unlike the tenant, the landlord’s cause of action is not limited to those acts of noncompliance which materially affect health and safety. However, courts will probably imply such a limitation. In recognition of the landlord’s need to have access to his property in order to comply with his statutory duties, the Act prohibits the tenant from “unreasonably” withholding consent to enter the premises for legitimate purposes of repair, decoration, alteration or improvement.

The tenant is also required to “conduct himself and require all other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors’ peaceful enjoyment of the premises.” In the absence of express language, it is assumed that this is a duty owed by the tenant to the landlord, and possibly by one tenant to other tenants. But the question arises as to whether the landlord owes a duty to his tenants generally to insure the peace and civility of the premises. Under prior law, the landlord was bound to a warranty of quiet enjoyment, but even under the doctrine of constructive eviction he could not be held in breach for the acts of third parties unless they were acting under his authority or sanction. In such a case, the tenant’s only remedy was a criminal complaint or a suit for damages against a fellow tenant, and then only where the conduct rose to the level of actionable

90. State v. George, 34 Ohio St. 657 (1878).
One possibility under the Act is to construe the landlord's duty to "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition" so as to create in him legal accountability for the social disruption caused by annoying, loud or otherwise undesirable neighbors. By inferring this particular landlord duty from the language of the Act, the law would make the absentee landlord more responsible for the welfare of his tenants and perhaps more selective in deciding to whom he should rent.

By prescribing a minimum standard of conduct which will justify eviction, the Act protects tenants from the enforcement of harsh rules and regulations which are commonly included in rental agreements. It could be argued that rules and regulations which set a higher standard of conduct would be unenforceable under section 5321.06, which states that "[a] landlord and a tenant may include in a rental agreement any terms and conditions ... that are not inconsistent with ... Chapter 5321." Under this construction, only conduct which would disturb a neighbor's peaceful enjoyment would be grounds to evict.

While the Act does not place a duty per se on the tenant to pay rent, it nevertheless continues in existence the provision permitting a landlord to bring a forcible entry and detainer action when the tenant is in default. Subject to the discretion of the court, the landlord may still claim for rent past due in the forcible entry and detainer proceeding, or bring a separate action on the lease.

(b) Landlord Duties.

By creating statutory landlord duties, the Act has the effect of sweeping away the most inequitable deficiencies in the doctrine of caveat emptor. Prior to the Act, the landlord was under no duty to the tenant beyond putting him in full possession of the property. But with the creation of a warranty of habitability, the Act abrogates caveat emptor to the extent that the tenant now has a statu-

96. See R. Powell, supra note 29, at 222 [1].
97. The implied warranty of habitability is created in express terms: "A landlord who is a party to a rental agreement shall ... make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." Ohio Rev. Code § 5321.04 (A)(2)(1974).
not justify the relatively extreme step of terminating the rental agreement.

(c) Retaliatory Conduct.

If the statutory imposition of landlord duties is to be effective, the landlord must be prevented from evicting a tenant who attempts to exercise his rights. Repairs and improvements made as the result of complaints to housing authorities would avail the tenant nothing if the landlord could retaliate with summary eviction. Similarly, attempts at group action in the form of tenants’ unions and organized rent strikes or other forms of collective action would never be supported if tenants were to be intimidated with threats of rent increases and eviction.\(^\text{112}\) At common law the landlord could terminate a month-to-month tenancy at will.\(^\text{113}\) He was never called upon to justify his motives for termination or for discriminatory rent increases. In short, he was fully protected by the doctrine of *caveat emptor*, and was under no obligation of good faith dealing toward his tenants.

Before the movement for reform of landlord-tenant law resulted in statutory solutions to the problem of retaliatory conduct, only a few courts were persuaded that a landlord’s motives for eviction were subject to question.\(^\text{114}\) Ohio courts were not among these.\(^\text{115}\) In a moderate approach to the retaliatory eviction problem, the Act

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112. In the leading retaliatory eviction case of *Edwards v. Habib*, 397 F. 2d 687, 700-01 (D.C. Cir. 1968), the court addressed this point, saying:

The housing and sanitary codes . . . indicate a strong and pervasive congressional concern to secure for the city’s slum dwellers decent, or at least safe and sanitary, places to live. Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations . . . . To permit retaliatory eviction . . . would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington . . . . There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make, . . . but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid.

113. Gladwell v. Holcomb, 60 Ohio St. 427, 54 N.E. 473 (1899); Strong v. Schmidt, 15 Ohio C.C. 293, 18 O.C.D. 551 (1897). Under the Act, the landlord as well as the tenant may refuse to renew a periodic tenancy upon giving notice as specifically provided. See *Ohio Rev. Code* § 5321.17 (1974).


proscribes certain landlord actions that provide evidence of retaliatory intent. These include increasing the tenant's rent, decreasing services that are due the tenant, or bringing or threatening to bring a forcible entry and detainer action. The tenant is protected from retaliation for the exercise of certain rights granted under the Act, as where he files a complaint with a government agency alleging landlord violation of a building, housing, health or safety code, where such violation materially affects health and safety. Protection is also afforded in a case where the tenant complains to the landlord for failure to perform statutory duties. And if the tenant joins with other tenants for the purpose of negotiation or dealing collectively with the landlord, the landlord may not retaliate. If the landlord takes retaliatory measures against the tenant, the tenant may elect one of two remedies under Chapter 5321. He may bring an action to recover the premises as though he were wrongfully evicted and collect damages plus attorneys' fees, or he may simply terminate the rental agreement. If the landlord brings a forcible entry and detainer action, retaliatory eviction is a complete defense, unless the tenant has held over beyond the termination of a weekly or monthly tenancy.

There are, however, certain major restrictions on the availability of retaliatory conduct both as a defense and as a cause of action. Unlike several other landlord-tenant statutes, the Act does not expressly create a rebuttable presumption of the landlord's retaliatory intent. Without the presumption, the tenant has the burden of

117. An important limitation on rent increases as evidence of retaliatory intent is set forth in § 5321.02 (C):

Nothing . . . shall prohibit the landlord from increasing rents if rent is increased to reflect the cost of improvements installed by the landlord in or about the premises or to reflect an increase in other costs of operation of the premises.
119. Ohio Rev. Code § 5321.02 (A)(2) (1974). The tenant is required to give such notice before bringing an action for damages or termination of the rental agreement. See § 5321.07 (A) (1974).
121. Ohio Rev. Code § 5321.02 (B) (1974). In either case the tenant has a cause of action for certain instances of landlord misconduct as outlined in § 5321.15.
124. See URLTA, supra note 65, at § 5.101 (b) [evidence of a complaint within one year before the alleged act of retaliation creates a presumption of landlord retaliation]; Cincinnati, Ohio, Ordinance No. 314-1973, § 871-9 (a)(4)(B)(1973) [six months]; American Bar Foundation, Model Residential Landlord-Tenant Code (Tent. Draft 1969) [six months]. Such statutory presumptions only arise where the tenant has complained prior to the alleged retaliatory action.
coming forth with evidence proving his landlord's intent. In most cases, the tenant will have difficulty showing the causative link between the exercise of his rights and the landlord's subsequent conduct.\(^\text{125}\) Since the essence of retaliatory intent is the subjective volition of the landlord, it would seem to work no great hardship on the landlord to require him to affirmatively show a good faith, \textit{bona fide} justification for his action.

Another deficiency of the Act's retaliatory eviction section is that tenant complaints to housing authorities must be for violations which "materially affec[t] health and safety."\(^\text{126}\) It would appear from the very wording of the statute that a complaint by a tenant involving a violation which does \textit{not} materially affect health and safety would justify retaliation by the landlord. Unless this section is liberally construed so as to require only good faith on the tenant's part, he will be "forced to guess at his peril whether a defect constitutes a violation."\(^\text{127}\) This, coupled with the heavy burden of proof, could well destroy the willingness of many tenants to make complaints or raise the defense of retaliatory conduct. Consequently, while the Act creates the right, it does not provide sufficient inducement to stimulate tenant action.

Notwithstanding the retaliatory eviction provisions, the Act permits a landlord to bring a forcible entry and detainer action in four specific cases. First, if the tenant is in default in the payment of rent the landlord may bring a suit in retaliation.\(^\text{128}\) Secondly, if "[t]he violation of the applicable building, housing, health, or safety code that the tenant complains of was primarily caused by any act or lack of reasonable care by the tenant, or by any other person in the tenant's household, or by anyone on the premises with the consent of the tenant," retaliation is justified.\(^\text{129}\) Third, if compliance with the applicable building, housing, health or safety code would require alteration, remodeling or demolition of the premises which would effectively deprive the tenant of the use of the dwelling unit, eviction is protected.\(^\text{130}\) This latter situation protects the landlord from liability to a tenant whose eviction was caused by the necessity


\(^{126}\) \textit{Ohio Rev. Code} § 5321.02 (A) (1) (1974).

\(^{127}\) \textit{See supra} note 125, at 947.

\(^{128}\) \textit{Ohio Rev. Code} § 5321.03 (A)(1)(1974). Nonpayment is no bar to tenant maintenance of an action to recover other damages arising out of landlord noncompliance with the Act. \textit{See} § 5321.03 (B).


to make extensive repairs, or where the structure is no longer habitable, in which case the landlord is under no duty to undertake extraordinary measures to comply with the applicable code.

Finally, the landlord may bring a forcible entry and detainer action notwithstanding the retaliatory conduct provisions in a case where the tenant has held over his term. Thus, when the rental agreement expires, the landlord's refusal to renew does not constitute retaliation, regardless of his motive. The extent to which the defense is available to a tenant on a monthly or weekly tenancy where notice of termination has been given prior to initiation of forcible entry and detainer is unclear. The Act provides that a landlord may refuse renewal by giving 7-day notice in a week-to-week tenancy, or 30-day notice in a month-to-month tenancy. If the Act is construed to preclude the defense of retaliation in such a case, a landlord who keeps his tenants on a weekly or monthly basis may retaliate at will. The clear intent and purpose of the Act, however, is to extend protection against retaliation to all tenants, regardless of the length of their terms. Any other construction could cause the Act to run afoul of the equal protection clause of the federal constitution, which prohibits discrimination based on unreasonable distinction. Tenants on short-term rental agreements cannot be said to have any less interest in the enforcement of landlord duties under the Act or under municipal housing codes than those on a long-term basis, especially when they do not necessarily bargain for a weekly or monthly tenancy. Accordingly, the defense of retaliation should only be denied where the rental agreement has expired by its express provisions. Where a tenant is on a weekly or monthly tenancy, however, retaliatory termination should be actionable.

V. Tenant Remedies

(a) In General.

Before passage of the Act, Ohio tenants who were faced with poorly maintained buildings and uncooperative landlords could do one of two things: either move out when the tenancy expired, or wait for action by housing authorities. But where a tenant has no better remedy than merely to turn his back on the problem or rely on the generally acknowledged inefficiency of municipal housing code enforcement, the public interest in improving the available housing

134. See supra note 100.
stock is poorly served. Thus, the problem facing Ohio legislators was two-fold: first, there was the need to reform the inequities created by the *caveat emptor* rule controlling the landlord-tenant relationship; and second, a way had to be found to prevent further deterioration of public housing. The Act responds to both aspects of the problem. It assures greater equity within the landlord-tenant relationship by furnishing new tenant rights, and it also creates a mechanism for private civil enforcement of government housing codes.

(b) *Grounds; Procedure.*

Tenants have two ways of getting a landlord into court. One is to initiate rent withholding;135 the other is to cease paying rents and thus force the landlord to bring an action under the forcible entry and detainer statutes.136 In choosing between the two, one important consideration is that under rent withholding the landlord has a better chance of avoiding economic hardship since he may be able to compel release of rents held in escrow.136.1 By simply suspending rent payments, however, the tenant may exert more pressure on the landlord to settle, since the court has no power under the Act to release any funds which have been deposited in a forcible entry and detainer action.

The tenant’s right to bring an action arises (1) if the landlord fails to perform a contractual or statutory duty; (2) if the tenant “reasonably believes” the landlord has failed to fulfill any such obligation; or (3) if “a governmental agency has found that the premises are not in compliance with building, housing, health, or safety codes which apply to any condition of the residential premises that could materially affect the health and safety of an occupant.”137 The first of these makes failure to comply with the duties enumerated in section 5321.04 or contained in the rental agreement actionable by the tenant. The second evidently protects the tenant where he has made a good faith, albeit unfounded, allegation that the landlord has breached such a duty. As to code violations, the tenant may bring an action either where he himself alleges such a violation, or where there has been a finding by a government agency that such a violation exists. The tenant’s right to allege such a violation stems from the specific statutory duty of the landlord to comply with the

136. See supra notes 52-55.
136.1. See *infra* at notes 162 et seq.
By also making a government finding of noncompliance actionable by the tenant, the Act tacitly acknowledges the tendency of governmental enforcement to be inadequate protection of the tenant's health and safety. Only those violations "that could materially affect health and safety" may be alleged. Obviously, the tenant only has an interest in the building's condition vis-a-vis his personal health and safety, and trifling irregularities in building design or other de minimis noncompliance will not justify avoiding the rental agreement. Since the overall purpose of the Act is reform, the courts will undoubtedly interpret this phrase liberally.

Before the tenant may resort to legal process for relief, he must give notice in writing to the landlord, "specifying the acts, omissions, or code violations which constitute noncompliance." Such notice is effective if "sent to the person or place where rent is normally paid." Although the requirement of a writing will be burdensome on the unsophisticated tenant who, after all, stands to gain the most from landlord-tenant reform, it would seem that the landlord has a strong interest in being adequately advised of specific complaints, so that he has every opportunity to respond by making repairs.

Once the landlord has received tenant notice of noncompliance, he has a reasonable time, "considering the severity of the condition and time necessary to remedy such condition, or within thirty days, whichever is sooner" to comply. If the landlord fails to comply, and provided the tenant is current in rental payments, the tenant may thereafter elect a remedy. His first option is simply to terminate the rental agreement and vacate the premises. Assuming he has sufficient grounds to terminate, the tenant has a defense to a landlord action for rents due for the balance of the rental period. If, however, the tenant elects to remain on the premises in order to seek satisfaction for the landlord's noncompliance, he may either deposit his rent with the clerk of courts and thus force the landlord to initiate suit, or he may bring an action himself by "apply[ing]
to the court for an order directing the landlord to remedy the condition." 148

(c) Rent Withholding

By simply depositing his rent in a court escrow account without filing a complaint, 147 the tenant is able to avoid the costs of an action until it appears that the landlord intends to contest the allegation of noncompliance. In many cases this procedure will force the hand of an intransigent landlord who, deprived of his income, will be more likely to settle with the tenant and make the requested repairs. Where the landlord feels he has adequate grounds to contest the use of escrow deposits, he himself must bring the action. 148 But if the tenant is not content to wait for the landlord to act on his own, he may apply to the court for an order directing the landlord to remedy the condition. 149 As a part of this action, the tenant may deposit his rent in a court escrow fund, seek an additional order reducing his rent until the landlord remedies the condition, and/or apply for an order to use the rent so deposited to remedy the condition himself. 150 At all times, the court has the power to require the tenant to deposit rents in a court escrow account as they fall due during the pendency of the action, 151 even if the action is in forcible entry and detainer. 152

The Act's rent withholding scheme is an alternative to the statutory repair and deduct provisions found in some proposed landlord-tenant acts 153 and state codes. 154 Under these self-help repair and

152. Ohio Rev. Code § 1923.061 (B)(1974). Unlike the rule in some other jurisdictions, the Act does not require the tenant to post with the courts a sum equal to rents unpaid when he asserts a defense to an action for possession based on nonpayment of rent. The landlord is adequately protected since he can join and amend a complaint seeking rents due in addition to the action for possession under the specific provisions of § 1923.081. In an interesting line of cases, courts in Washington, D.C. have ruled that the requirement of posting rents into the court registry as a condition to asserting a defense to an action for possession does not amount to a penalty on the statutory right to raise defenses, even though it does constitute an assurance of the solvency of the defendant. See Bell v. Taintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970); Cooks v. Fowler, 459 F.2d 1269 (D.C. Cir. 1971). In a summary action, the United States Supreme Court affirmed a federal district court ruling that a similar procedure under New York state law is constitutional. Vallis v. Lefkowitz, ___ U.S. ___, 95 S.Ct. 216 (1974).
153. See URLTA § 4.103 (a) [self-help without escrow where the reasonable cost of repairs is less than $100, or half the periodic rent, whichever is greater]; Model Residential Landlord-Tenant Act § 2-206 [repair and deduct available if landlord fails to respond to notice within two weeks].
deduct statutes, the tenant is commonly allowed to deduct up to two months' rent to cover the cost of making repairs during a given period. Such self-help statutes offer a direct, though limited, means of obtaining landlord compliance without the inevitable delays of going to court for judgment. While it offers a similar type of remedy, the Act interposes procedural disadvantages which threaten to neutralize the effect otherwise assured by self-help. In the first place, the rent withholding approach exposes the tenant to increased health and safety risks by delaying landlord compliance until the court has heard the parties, and issues an order. In addition, self-help serves to encourage landlord compliance, since the cost of tenant repairs would likely be higher than if the landlord contracted to do the work himself. Furthermore, since the Act places the burden of going to court on the tenant rather than the landlord, many tenants will either terminate their rental agreements or simply endure landlord noncompliance rather than undertake the expense and anxiety of a court action. The legislative interest in promoting tenant enforcement of substantive rights is far better served by self-help in the case of relatively minor noncompliance by the landlord.

Another significant restriction on tenant access to escrow rent withholding and the right to termination is the non-applicability of these provisions to "any landlord who is a party to any rental agreements which cover three or fewer dwelling units." Consequently, the tenant who has received written notice of the fact that his landlord owns fewer than four rental units has no remedy under the statute. In the absence of any other such limitation in the Act, it appears that the landlord still owes the tenant all of the enumerated statutory duties. As a result, this large class of tenants is left simply


155. The Act does provide a measure of protection for the tenant with respect to serious conditions existing during the pendency of the proceedings. Section 1923.15 permits the court to dispatch a health or housing officer to report on the conditions to the court. The court may then order the condition remedied or take other appropriate action. Delay, however, is only thereby mitigated, not eliminated.


158. Ohio Rev. Code § 5321.07 (C)(1974). It is unclear from the language of the statute whether the landlord is obligated merely to disclose the fact that he owns fewer than four rental units, or whether he must further inform the tenant of the significance of that fact with respect to the tenant's statutory remedies.
with an action for damages, and can do nothing in the way of affirmative action to compel landlord compliance. On the one hand it seems equitable to protect a small participant in the rental market from losing the use of rental income, but where the Act permits the landlord to apply for release of funds during pendency for the purpose of meeting certain financial obligations, he would seem to be adequately protected. Perhaps the legislature felt that such special treatment of small operators was justified in the belief that such landlords, many of whom may live on the premises, take more interest in their property and are less likely to deny essential services and maintenance than larger ones. While this may be true in some cases, it fails to take into account the tenant's paramount right to decent housing, and the increased opportunity for personal animosity and hard feeling to enter into the picture when the parties deal at such close range. While small-scale individual enterprises should be encouraged, there seems to be little justification for isolating them from full liability. One possibility for eliminating this exclusion is for municipalities to devise enforcement procedures to deal specifically with the exempt class of landlords under Ohio home-rule powers.

(d) Disposition of Escrow Funds.

Whenever a tenant deposits his periodic rents with the court, the Act requires that the clerk send written notice to the landlord and his agent, if any. Once he receives notice that rent due him has been deposited with the court, the landlord has several grounds upon which to force release of the funds. He may apply to the clerk for release on the ground that the condition specified in the notice given by the clerk has been remedied. If the tenant gives written notice to the clerk that such condition has indeed been remedied, the clerk shall release the rent less costs. Where the landlord

161. In this regard § 5321.19 is pertinent: No municipal corporation may adopt or continue in existence any ordinance that is in conflict with Chapter 5321. of the Revised Code, or that regulates those rights and obligations of parties to a rental agreement that are regulated by Chapter 5321. of the Revised Code. The provisions of Chapter 5321. of the Revised Code do not preempt any housing, building, health, or safety codes of any municipal corporation.
165. Escrow costs are set at 1 per cent of the amount of rent deposited. See Ohio Rev. Code § 5321.08 (D)(1974).
cannot secure tenant stipulation, he may assert the same grounds to the court, which will decide the question at trial. The landlord may also avoid an action or compel release of the rents in a case where the tenant failed to give him the written notice of complaint required prior to commencement of escrow deposits, or if the tenant was not current in his rent payments at the time such escrow deposits were initiated. Alternatively, the landlord may apply to the court for release if he can show that there was no violation of a statutory duty as alleged, or that the conditions complained of were caused by the tenant himself. In any case, a showing of intentional tenant bad faith will be grounds to dismiss the complaint, whereupon the court will award damages, costs and attorneys' fees to the landlord.

The use of escrow deposits is an important tactical device for the tenant in that it gives him an effective means of achieving an otherwise unavailable economic advantage over the landlord. By denying the landlord the use of rental income, tenants who join together can use mass rent withholding to force powerful corporate landlords into compliance with statutory housing standards. But while the Act creates this tactical device, it thereafter takes away some of its most important tactical advantages. The Act provides that during the pendency of the action, the landlord may apply for a partial release of the rents deposited in escrow “for payment of the periodic interest on a mortgage on the premises, the periodic principal payments on a mortgage on the premises, the insurance premiums for the premises, real estate taxes on the premises, utility services, repairs, and other customary and usual costs of operating the premises as a rental unit.” In deciding whether to grant such a motion, the court must “consider the amount of rent the landlord receives from other rental units in the buildings of which the residential premises are a part, the cost of operating those units, and the costs which may be required to remedy the condition” alleged by the tenant.

By thus allowing the landlord to avoid the financial hardships which might result, the Act reduces rent withholding from an effective source of tenant bargaining power to merely an irritating incon-

venience for the landlord. Although it is reasonable to protect the landlord from financial disaster so as to prevent rent withholding from being used as economic blackmail, there should be stiffer guidelines to determine when the court may disburse funds during pendency. The decisive factor should be the imminence of financial loss, so that the tenants will be assured of having the maximum advantages which rent withholding offers. But since the Act permits release of funds to cover the "customary and usual cost of operating the premises," which presumably would even cover executive salaries and bonuses, the landlord can be spared of all immediate injury, as well as any inducement to meet tenant demands. In addition, the court need only assess the landlord's need for funds based on the income being realized from the particular premises where rent is being withheld. In the case of a large corporate landlord, the fact of substantial income from other rental interests will have no effect on the court's decision. This provision strikes hard against the cause of tenant unions, since the larger the amount of rent withheld, the easier it will be for landlords to compel its release. On the other hand, landlords who would prefer not to have their financial records made public as the result of tenant use of discovery will wisely avoid this procedure.

Courts in other jurisdictions have taken a strict approach toward the question of release of withheld rents, permitting it only where the landlord demonstrates convincingly so dire a need for relief that ultimate financial loss is a certainty. But since the Act obviously intends easy access to withheld rents, it is unlikely that so tough a standard will be adopted by Ohio courts.

(e) Constitutionality.

The rent escrow provisions of the Act promise to be fertile ground for litigation in light of recent United States Supreme Court deci-

175. Cooks v. Fowler, 459 F. 2d 1269, 1277 (D.C. Cir. 1971). The court went on to state a general rule:

The court cannot justify a turnover to a landlord of any portion of the deposited fund actually in dispute, but neither can it justify retention in the registry of the court of a portion as to which the tenant's ultimate liability to pay is crystal clear and the landlord's immediate need is extreme. And while alteration of the fundamental character of the protective arrangement as a security rather than a collection device is not merely for the asking, the court's basic responsibility to do equity between the parties leaves a small, sharply circumscribed area in which a turnover of some part of the fund might be vindicated.
sions construing due process requirements in state prejudgment replevin procedures. In *Fuentes v. Shevin*\(^{176}\) and *Mitchell v. W.T. Grant Co.*,\(^{177}\) the Court considered the constitutionality of state statutes dealing with creditor repossession wherein state officials are authorized to seize property before the debtor is given notice and an opportunity to be heard. While the factual context of these cases is dissimilar to the landlord-tenant situation, the principles which they enunciate are likely to be determinative of the due process issues which are raised by the Act.\(^{178}\) To the extent that the clerk of courts is authorized to receive and hold rents falling due under a rental agreement\(^{179}\) without prior notice, hearing or application before a court, the constitutionality of the Act is open to serious question.

The due process requirements of notice and hearing as articulated in *Sniadach v. Family Finance Corp.*\(^{180}\) and *Fuentes* are prerequisites only to a taking of property by the state, or where there is substantial state action in a private relationship.\(^{181}\) The requirement of state action for coming within the purview of the Fourteenth Amendment\(^{182}\) could possibly be met by challenging the Act under the authority of *Shelley v. Kraemer*\(^{183}\) and *Fuentes*. The denomination of a clerk of courts to act as the depository and escrowee of money falling due under a private contract, who thereafter causes notice to be served on the landlord and exacts a fee for his services,\(^{184}\) is arguably state action in the due process context. On the other hand, the receipt of escrow deposits can be viewed as a case where the private party only "receives some sort of benefit or service . . . from the State, or . . . is subject to state regulation in any

\(^{176}\) 407 U.S. 67 (1972).


\(^{178}\) The applicability of the due process requirements as set forth in *Fuentes* has been acknowledged by an Ohio Appellate Court. See *Lloyd v. Sweeney*, No. 7497 (Lucas Co. Ct. App., March 29, 1974).


\(^{181}\) Adams v. Southern California First National Bank, 492 F. 2d 324, 328 (9th Cir. 1973).

\(^{182}\) U.S. CONST. amend. XIV.

\(^{183}\) 334 U.S. 1 (1948).

\(^{184}\) Ohio Rev. Code § 5321.08 (A)(1974).

\(^{185}\) Ohio Rev. Code § 5321.08 (D)(1974).
degree,"186 and therefore the clerk serves merely a ministerial role. Rent escrow is not, however, a situation where the state has merely enacted into statutory form what had been a previously existing private remedy.187 Rather, the escrow procedure is an integral part of the statutory scheme for the enforcement of substantive rights,188 and is the exclusive means of invoking the equitable powers of the court.189 Consequently, the role of the clerk of courts is quite possibly one where "the impetus . . . is private," and where the state has "significantly involved itself."190

What particularly troubled the Court in Fuentes was the fact that under the Pennsylvania prejudgment replevin statute then before it, the party seeking the writ was not obligated to initiate a court action once the chattel had been seized, nor was he required to formally allege that he was lawfully entitled to possession.191 The Fuentes court found that this statutory scheme violated the due process clause of the Fourteenth Amendment.192 The Court reiterated this view of the Pennsylvania statute in Mitchell, saying that where the debtor is "left in limbo to await a hearing that might or might not eventually occur,"193 there is insufficient protection "to minimize the risk of error of a wrongful . . . possession by the creditor,"194 and thus afford adequate procedural due process.

Applying these principles to the Ohio Act, it appears that a similar constitutional infirmity exists. Under § 5321.07, a tenant who has notified the landlord of noncompliance with statutory duties has a choice of remedies, one of which is to simply deposit his rent with the clerk of courts.195 There is no requirement that a complaint be filed, or that the tenant in any way allege such landlord noncompliance as will justify withholding rents. To say that there is an alternative procedure196 which expressly preconditions rent deposits on the filing of a complaint, does not seem adequate to redeem this apparent constitutional deficiency. Furthermore, the Act contains

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188. See supra notes 144-46.
189. See supra at notes 150-52. Equitable power may also be invoked by the tenant in a forcible entry and detainer action. See Ohio Rev. Code § 1923.15 (1974).
191. Id. at 75-79.
192. Id. at 96.
194. Id.
no provision furnishing an opportunity for “immediate” relief. In order to contest the escrow rent withholding the landlord must first file a complaint and possibly wait 60 days or more before the action will be heard. Moreover, if the landlord has failed to provide written notice containing his, or his agent’s name and address at the commencement of the term, the Act deems that his right to receive notice from the clerk has been waived and notice is not required to be sent.

Under the Fuentes doctrine as it has evolved in the Mitchell case, the due process clause requires that prejudgment deprivation of property statutes must be so tailored as to insure that the affected party is “not at the unsupervised mercy of the [movant] and court functionaries.” What is required is a system which protects such party’s interests where property rights secured under the Fourteenth Amendment are most vulnerable. Although there is no absolute constitutional right to notice and hearing, there must be “measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking” by state action. The fact that the Ohio Act permits a tenant to withhold rents and thereby deprive the landlord of his property rights without prior notice or hearing, does not render it unconstitutional per se. Furthermore, simply because the Act does not provide for judicial control of the escrow process from beginning to end is not determinative. While the state statute with which Mitchell was concerned required the authorization of a judge at the outset, the Court did not consider such a measure constitutionally mandatory.

Whether or not the same standards which determine the due process requirements in debtor-creditor replevin actions will also control landlord-tenant rule withholding has not been judicially decided. What particularly distinguishes the two fact situations is

202. Id. at 1902.
203. Id. at 1905.
204. The requirement of notice in § 5321.07 (A), (B) is intended to advise the landlord of his noncompliance, and is not notice of the fact that rent withholding has been initiated. See supra at notes 140-41.
205. Mitchell v. W.T. Grant Co., ___ U.S. at ___, 94 S.Ct. at 1905. The Court stated that judicial control is “one of the measures” which will minimize the risk that due process will be assured.
206. Courts in several jurisdictions have considered due process questions in escrow deposit statutes. However, these were all decided prior to the May, 1974 decision in Mitchell. See
that in the debtor-creditor context, the creditor is both the moving party as well as the party claiming a paramount property interest. In the landlord-tenant situation, however, the tenant—who is otherwise the "debtor" figure—is only the movant, and not a party who claims an interest in the thing being seized.207 The significance of this lies in the fact that the tenant has simply a prior interest in the rental monies and not an interest concurrent with that of the other party as in the case of personal property subject to the claims of a creditor. Thus what is really being seized by the clerk of courts is the landlord's right to possession of rents during pendency, not his ultimate interest therein.208 Since Mitchell mandates a consideration of the "impact on the debtor,"209 it is arguable that in the landlord-tenant context, the escrowee affords adequate "protection against loss or damage . . . pending trial on the merits."210 The initial hardship is further mitigated since notice is generally sent to him immediately upon initiation of escrow deposits,211 and since the landlord has access to judicial supervision on a motion to compel release of the funds.212 In addition, the landlord who is subject to rent withholding is hardly "an uneducated, uninformed consumer with little access to legal help,"213 and there is little likelihood that the summary seizure of rental monies "may go unchallenged."214 Accordingly, the position of the landlord is clearly distinguishable from that of the defaulting debtor, whose need for the protections required by Mitchell is considerably greater than the landlord's. In


A Toledo, Ohio, ordinance providing for escrow deposits was held unconstitutional by a state appellate court, however the procedures which that court considered were substantially different from those in the state act. The ordinance enabled a municipal health inspector to placard residential premises which were found to be "unfit for rental purposes," whereupon the tenant could be required to deposit all rent into the escrow account of the Board of Health. The tenant was thereafter entitled to remain on the premises for an additional six months, during which time the landlord could request a hearing but was denied the use and income from his building. The court based its finding of unconstitutionality on the Fuentes decision. Lloyd v. Sweeney, No. 7497 (Lucas Co. Ct. App., March 29, 1974).

207. This is true to the extent that the rents due or falling due during pendency are either returned to the landlord, or applied as a set-off in his favor. See supra at notes 51-55.

208. The ultimate interest of the landlord is secured to him at all times, since the rent due or falling due during pendency is either returned to him or applied as a set-off in his favor. See supra at notes 51-55.


210. Id.

211. Ohio Rev. Code § 5321.08 (A) (1974). This right to receive notice may be waived.


214. Id.
any case, the escrow deposit procedure is designed to provide security for the landlord by assuring him of a satisfied judgment. This is readily distinguishable from prejudgment replevin situations, since seizure in that case is intended to protect and benefit only the creditor, not the debtor.

VI. LANDLORD REMEDIES

(a) Termination.

Prior to the enactment of the Bill, Ohio law gave the landlord a variety of devices by which he could terminate a rental agreement. Most of these were exercised by means of landlord exploitation of his superior bargaining position. The landlord commonly included forfeiture\textsuperscript{215} and surrender\textsuperscript{216} clauses, a reservation of the power to terminate,\textsuperscript{217} restrictions against subletting,\textsuperscript{218} and other conditions of performance in his leases. The Act put strict limitations on the landlord's power to impose contractual terms which give him the power to terminate. The general prohibition of unconscionable leases\textsuperscript{219} and waivers of statutory rights\textsuperscript{220} restrict the landlord's resort to private contractual remedies. In addition, periodic tenancies on a weekly or monthly basis can only be terminated by giving advance notice to the tenant of at least seven or thirty days respectively.\textsuperscript{221}

Before the landlord can evict for a tenant's noncompliance with statutory duties, he must terminate the rental agreement.\textsuperscript{222} He is required to deliver a written notice to the tenant setting forth the acts and omissions which constitute noncompliance, and stating that the rental agreement will terminate upon a specific date not less than thirty days after receipt of the notice.\textsuperscript{222} If the tenant fails to remedy the conditions contained in the notice within the prescribed time, the rental agreement terminates.\textsuperscript{224} The Act does not, however, require such thirty day notice if the landlord's action is based on noncompliance with contractual duties pursuant to a written rental agreement.\textsuperscript{225}

\textsuperscript{215} See 33 O. Jur. 2d Landlord and Tenant § 415 (1958).
\textsuperscript{216} Id. § 451.
\textsuperscript{217} Id. § 405.
\textsuperscript{218} Id. § 403.
\textsuperscript{221} Ohio Rev. Code § 5321.17 (1974).
\textsuperscript{222} Ohio Rev. Code §§ 1923.02 (H), 5321.11 (1974).
\textsuperscript{223} Ohio Rev. Code § 5321.11 (1974).
\textsuperscript{224} Ohio Rev. Code § 5321.11 (1974).
\textsuperscript{225} A comparison of § 1923.02 (H) and (I) reveals that notice is only required by the former.
(b) Eviction.

In a case where the tenant refuses to acknowledge the termination, the landlord's remedy is to bring an action in forcible entry and detainer. Under early Ohio law, an alternative was the notorious self-help remedy of eviction by means of tenant lock-out. In recent years this method has met with considerable court resistance which has had the effect of all but abolishing it. The Act specifically does. It provides that "[n]o landlord of residential premises shall initiate any act, including termination of utilities or services, exclusion from the premises, or threat of any unlawful act, against a tenant, or a tenant whose right to possession has terminated, for the purpose of recovering possession of residential premises." A landlord violation of these provisions is actionable by the tenant.

Within three days before commencing a forcible entry and detainer action, the landlord is required to give notice to the tenant that an action is about to be brought. The notice must include specific language advising the tenant of the gravity and possible consequences of a forcible entry and detainer judgment. Likewise, every summons issued by the court is required to contain a similar warning, complete with an admonition to seek counsel. At any time during the proceedings, the court may order a health or housing agency to inspect the premises to determine whether any condition of noncompliance raised by the pleadings warrants the issuance of a protective order for the tenant. The court may order the conditions corrected, forbid the re-rental of the property, and/or award damages to the landlord for the reasonable cost of correcting such conditions where caused by the tenant.

226. The right to enter and evict without legal process was recognized where the landlord could do so without breach of peace. See Hines v. Miller, 32 Ohio N.P.(n.s.) 71 (C.P. 1934); Smith v. Hawkes, 2 Ohio Dec. Reprints 733 (C.P. 1862).
227. See, e.g., Edwards v. C.N. Investment Co., 27 Ohio Misc. 57, 61, 272 N.E. 2d 652, 655 (Mun. Ct. 1971), the court noted that:
   It is difficult to imagine a more volatile situation from which extreme violence could be reasonably anticipated than the surreptitious removal of a man's home, whether it be a rented one or a mortgaged one . . . . The opportunity for violence in this case, however, was enhanced by the fact that plaintiff claims he lost numerous revolvers and other firearms among the goods taken from his apartment.
Once the action is begun, the tenant may counterclaim for any amount he may recover under the rental agreement or under substantive law. Likewise, the landlord may join actions for rent past due and for other damages under a rental agreement. The court is directed to use its discretion in permitting landlord joinder of claims, however, and may continue them where good cause is shown by the tenant. This expansion of the forcible entry and detainer action to include counterclaims and joinder represents a radical departure from previous Ohio law. Formerly, forcible entry and detainer was a summary action, designed only to affect the question of possession. Tenant suits for specific performance or breach of contract were not permitted to be asserted as counterclaims. The Act's reform of forcible entry and detainer will avoid multiplicity of suits and the resulting financial burden on the tenant which was an effective deterrent to bringing actions in the past.

(c) Landlord's Lien: Distress.

Under Ohio law the parties to a lease are permitted to create a lien upon the chattels of the tenant to secure for the landlord the payment of rents due under the lease. The Act does not address itself to the question of the validity of express landlord liens. The doctrine of distress, however, is abolished. At common law, distress was a remedy for the collection of rent, enabling the landlord to seize personal property on the premises as security for the tenant's liability for rent. Although there is no direct holding on point, Ohio case law has long presumed that the remedy of distress is unavailable.

The Act provides that no landlord may "seize the furnishings or possessions of a tenant, or of a tenant whose right to possession has

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235. OHIo REV. CODE § 1923.061 (B)(1974).
237. OHIo REV. CODE § 1923.081 (1974), which provides:
"For the purposes of this section, good cause includes the request of the defendant to file an answer or counterclaim to the claims of the plaintiff or for discovery, in which case the proceedings shall be the same in all respects as in other civil cases. If, at the time of trial, the defendant has filed an answer or counterclaim, the trial may proceed on the claims of the plaintiff and defendant."
238. See supra note 46.
239. Id.
240. Metcalfe v. Fosdick, 23 Ohio St. 114 (1872); Cooperider v. Myre, 37 Ohio App. 502 175 N.E. 235 (1930). The provisions of Uniform Commerical Code Article 9 (Chapter 1309 of the Ohio Revised Code) have not been construed to govern liens created by residential leases in Ohio. See 48 O. Jur. 2d (Part 2) Secured Transactions § 17 (1966).
terminated, for the purpose of recovering rent payments.”

Pursuant to a court order of eviction issued in satisfaction of a forcible entry and detainer judgment, the landlord, once put in possession by an enforcing officer, may remove the tenant’s chattels from the premises. This right, however, is subject to the rule under prior Ohio law that the tenant has a reasonable time after the expiration of a tenancy to remove his property. Before he does so, the landlord’s duty is that of a bailee, and he is liable in damages to the tenant for a failure to use reasonable care. After the reasonable period has elapsed, the presumption of abandonment will arise.

(d) Security Deposits.

Rental agreements customarily provide for a deposit by the lessee of a sum to serve as security for the payment of rent or for performance of other covenants in the lease. Upon default in the payment of rent, or where there has been waste, the landlord under previous law was entitled to deduct the amount owed him and return the rest to the tenant. The Act continues to recognize this contractual landlord remedy, with the addition of certain equitable measures designed to safeguard the tenant’s rights. It provides that upon termination of the tenancy, any security held by the landlord may be applied to the payment of past due rent and to damages sustained by the landlord as a result of tenant noncompliance with his statutory duties. Each deduction is required to be itemized and described by the landlord in a written notice which, together with the balance remaining after deductions, must be delivered to the tenant within thirty days of termination. In order to receive such notice and refund, the tenant must furnish a forwarding address in writing. If the landlord fails to comply with his duty, the tenant may recover double damages and attorneys’ fees. In addition,

246. Id.
247. Id.
249. The Act does not, however, distinguish between security deposits and rents paid in advance, such as where the tenant pays the last month’s rent at the beginning of the term. Given the broad, ambiguous definition of “security deposits” in section 5321.01 (E) of the Act, however, rents in advance would seem to be within the provisions relating to security deposits.
where the security deposit is in excess of $50 or one month’s rent, whichever is greater, the excess must bear interest at the rate of 5% per annum, computed and paid annually by the landlord if the tenant remains for six months or more. 254

Before the Act, tenants were commonly exploited by landlords who withheld security deposits with the knowledge that tenants would waive their rights because the expense of legal process would invariably exceed the amount in dispute. 255 The object of the legislature in this area was to insure the proper administration of security deposits by means of procedures designed to encourage tenant pursuit of legal remedies. Overall, however, the Act appears weak by comparison to other statutory schemes. There is no ceiling on the amount which can be required as a security deposit, 256 nor are the damages as attractive to tenants as they might otherwise be. 257 The provision for accrual of rent promises only paltry return on the amount, since in most cases interest will accumulate only on the excess above one month’s rent, if indeed there is any excess. Evidently, the Act was intended merely to discourage excessive security deposits rather than furnish tenants with a meaningful capital return. Furthermore, there is no requirement that security deposits be placed in a separate account or in escrow so as to protect tenants from possible landlord insolvency or conversion. Beyond assuring equitable disposition of security deposits following termination, the Act does not regulate to any significant extent the landlord’s use of such funds during the tenancy. 258

VII. CONCLUSION

The Act goes far in recognizing the areas in which reform is most sorely needed. It acknowledges landlord exploitation of tenants by


A recent suit alleging that a landlord, as a pattern of business, wrongfully withheld security deposits was decertified as a class action by a Franklin County, Ohio Common Pleas Court. See Grubbs v. Rine, 39 Ohio Misc. 67, 315 N.E. 2d 832 (C.P.1974).

256. Contra, URLTA § 2.101 (a) [limited in amount to one month’s periodic rent].

257. Contra, proposed Ohio H.B. 796 (1974) [providing treble damages plus attorneys’ fees]; The Model Residential Landlord and Tenant Code [willful retention of security deposits is a misdemeanor].

258. In an interesting variation on the theme of security deposits, a municipality in New Jersey passed an ordinance in 1972 requiring landlords to deposit in a city fund a certain sum of money to be held in trust for the benefit of each particular owner. The money is thereafter used by the municipality to eliminate or alleviate emergency conditions as reported by tenants. If the sum spent by the city exceeds the amount on account, the city may sue as upon a tax lien. See Blumberg, The Landlord Security Deposit Act, 7 CLEARINGHOUSE REVIEW 411 (1973).
means of one-sided lease provisions, indiscriminate eviction and misuse of security deposits, and it obligates landlords to put and keep rental facilities in repair so that the state's housing stock will improve. Essential to the full realization of these objectives, however, are swift and efficient tenant remedies. In this respect, the Act is weak—it creates the rights, but not the most effective remedies.

In the rent withholding provisions, for example, the Act requires written notice, formal application to the clerk, plus a full court hearing before a tenant may obtain relief. Had the repair and deduct concept been adopted, immediate relief for relatively small problems would be available without the expense of retaining counsel and filing papers, not to mention the inevitable court delays. Even if rent withholding is undertaken, landlords have virtually unrestricted access to the funds, so that tenants united in action are denied the economic parity crucial to success.

Heretofore, tenant resort to legal action was discouraged by the fact that most claims were of great personal, but little monetary value. The Act does not adequately correct this injustice, since the financial burdens of court action are not entirely removed by providing only actual damages plus reasonable attorneys' fees. There is simply insufficient inducement to encourage tenants to prosecute their claims. Besides, the landlord can avoid much of the effect of increased tenant rights by bringing an eviction action on the basis of tenant breach of contract duties, as opposed to breach of statutory duties. Since there is no requirement of thirty-day notice as in the case of an action based on noncompliance with statutory duties, only three days notice is needed before the action is filed. It is possible that rental agreements will hereafter provide for more extensive tenant assumption of obligations as to give landlords maximum opportunity to elect this method of eviction. The tenant is, however, protected by the defense of retaliatory eviction (assuming he can meet the burden of proof) and by the prohibition of unconscionable leases.

With the constitutionality of rent escrow procedures subject to question, it is not certain whether the Act will survive review by the courts. If it does, however, the Ohio tenant will fare far better under the Act than he ever has. He will be able to counterclaim and assert defenses to forcible entry and detainer actions; force compliance with housing and safety laws; have protection against retaliatory eviction; and will be entitled to damages to prevent bogus forfeiture of security deposits. The net result of the Act should be to balance
the equities to the point that landlords will realize that compliance with housing laws and fair treatment of tenants is the most economical course of action.
SHAREHOLDER DERIVATIVE ACTIONS: A GENERAL SURVEY WITH OBSERVATIONS

John A. Lloyd, Jr.*
and
Thomas P. Mehnert**

While shareholder derivative actions belong generically to the class action species, they possess certain identifiable characteristics which make them a breed considerably apart. In recent years we have witnessed the proliferation of derivative actions, primarily securities cases. Like class actions, derivative actions are controversial and much of the law governing them is in a state of growth and turmoil. This presentation will not deal with the social utility of derivative actions, but will attempt to describe their essential elements and the procedural matters of which trial practitioners who prosecute and defend them should be aware.

The scope of this work is necessarily general. While an effort will be made to cover the most significant aspects of derivative litigation, there is much worthwhile material which time and space cannot accommodate. Preparation of a truly comprehensive work on derivative actions must be left to the academicians. The trial bar is too busy to undertake the task.

I. THE DERIVATIVE ACTION: WHAT AND WHY; DERIVATIVE AND CLASS ACTIONS DISTINGUISHED

A derivative suit is an action by a shareholder to enforce a right which belongs to the corporation. The origin of such suits was explained as follows by Mr. Justice White in the recent case of Ross v. Bernhard:

The common law refused . . . to permit stockholders to call corporate

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managers to account in actions at law... The remedy made available in equity was the derivative suit, viewed in this country as a suit to enforce a corporate cause of action against officers, directors and third parties.\(^3\)

Illustrative of those causes of action which are derivative are those to enforce a contract between the corporation and a third party,\(^4\) to recover corporate assets,\(^5\) to enjoin corporate managers from committing an ultra vires act,\(^6\) and to challenge the issuance of stock for little or no consideration,\(^7\) excessive salaries or stock options,\(^8\) the diversion of a corporate opportunity,\(^9\) mismanagement,\(^10\) secret profits,\(^11\) or the unlawful purchase by a corporation of its own securities.\(^12\)

In recent years a flood of derivative actions charging illegal activities by corporate managers in violation of federal and state securities statutes have inundated the courts. Illustrative of these are Surowitz v. Hilton Hotels Corp.,\(^13\) charging that the officers and directors had defrauded the corporation of several million dollars by engaging in stock manipulations in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Delaware General Corporation Law; Cannon v. Texas Gulf Sulphur,\(^14\) in which inside directors were charged with purchasing the corporation's shares for their own gain using secret knowledge of large mineral discoveries, in violation of Section 10(b) of the Securities Exchange Act of 1934; Newman v. Stein,\(^15\) alleging that the sale to the public of a controlling block of stock of the Dreyfus Corporation, adviser and principal underwriter of the Dreyfus Fund, Inc., constituted a sale of a fiduciary office for personal gain in violation of the Investment Company Act of 1940; and Mills v. Electric Auto-Lite Company,\(^16\) in which it was alleged that the proxy statement issued

\(^{12}\) Illustrative of those causes of action which are derivative are those to enforce a contract between the corporation and a third party, to recover corporate assets, to enjoin corporate managers from committing an ultra vires act, and to challenge the issuance of stock for little or no consideration, excessive salaries or stock options, the diversion of a corporate opportunity, mismanagement, secret profits, or the unlawful purchase by a corporation of its own securities.

3. Id. at 534.
8. Smith v. Dunlap, 269 Ala. 97, 111 So.2d 1 (1959); Teren v. Howard, 322 F.2d 949 (9th Cir. 1963).
in connection with the merger of Auto-Lite into Mergenthaler Linotype Company contained material omissions in violation of Section 14(a) of the Securities Exchange Act of 1934.

*Mills,* which also involved allegations of common law fraud and an allegation that the merger was *ultra vires* under Ohio law, illustrates the way in which most derivative actions which allege violations of federal law include pendent claims of violations of state common law principles concerning fiduciary duty and fraud. Moreover, many suits combine derivative claims with shareholder claims which are class claims exclusively; such class claims are made where the breaches and violations complained of relate to duties which the corporate managers owe to shareholders directly as distinguished from those which run to the corporate entity itself, and where relief may be obtained by the stockholders directly instead of indirectly through the corporation.

Illustrative of the types of claims which shareholders may have against their corporation directly, as distinguished from on its behalf derivatively, are claims to compel the corporation to declare a dividend, to enjoin a proposed merger or consolidation, to put the corporation into receivership, or to recover for fraud practiced upon the plaintiff and other stockholders.

Corporate mismanagement resulting in a diminution in the value of the corporation's shares could seem to injure the shareholders as a class. Yet it has been frequently held that an action for depression in the value of shares caused by mismanagement is derivative and must be brought on behalf of the corporation.

Rather than risk a dismissal, the careful practitioner may well be advised to bring an action both derivatively and as a class suit if it appears that the shareholders may have sustained an injury that cannot be cured by a recovery on behalf of the corporation.

II. PROCEDURAL RULES CONCERNING DERIVATIVE ACTIONS

Federal Rules of Civil Procedure

Rule 23.1

DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right

which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Ohio Rules of Civil Procedure
Rule 23.1

DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought by one or more legal or equitable owners of shares to enforce a right of a corporation, the corporation having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and, if necessary, from the shareholders and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders in such manner as the court directs.

Derivative actions are governed by the federal and state procedural rules and, as will be seen, in some tangential respects by the statutes of various states. The differences between the federal and state rules should be noted.

Most derivative actions have, up to now, been filed in federal courts. Why has this been so? The following probable reasons suggest themselves:
(a) federal judges, in the main, are more conversant with such actions than are state judges;
(b) most derivative actions are based, at least in part, on alleged violations of federal rights;
(c) many derivative actions have diversity jurisdictional bases;
(d) federal courts incline heavily toward circumventing state-imposed security-for-cost impediments, and thus the federal forum is the preferred one even where jurisdiction is somewhat strained;
(e) discovery rules have historically been more liberal in federal than in state practice; and
(f) federal courts have evidenced a willingness to award substantial attorneys' fees to the successful plaintiff's counsel.

III. Classic Derivative Allegations

The well drawn derivative complaint tracks the rule and contains all of the essential elements. It contains, in the same or substantially similar rhetoric, the following allegations:

This action is filed by plaintiff individually, on behalf of --- for its benefit and the benefit of its shareholders as a shareholders' derivative action to enforce rights and causes of action of --- which should be enforced by said corporation, but on which said corporation refuses to act because it is being prevented from so doing by the majority of the Board of Directors of ---, consisting of the individual defendants herein, which refuses to allow --- to take such action, as the same would be against said individual defendants and their personal self interest. No formal demand has been made on the Board of Directors of --- because the majority thereof are individual defendants and because therefore such demand would have been and would be in vain and futile, as the actions of such defendants are actions which are complained of herein.

If the action is brought in a federal court, the complaint should also contain the following allegation:

This action is not a collusive one to confer jurisdiction on a court of the United States which it would otherwise not have.

If the action is one where a demand on the shareholders is required, appropriate allegations should be added to the complaint.

IV. Essential Elements of Derivative Claims and Special Problems Inherent Therein

(A) The plaintiff was a shareholder or member at the time of the transaction of which he complains or his share or membership thereafter devolved upon him by operation of law.

Who is a shareholder for purposes of satisfying the requirement
of share ownership? The answer lies in applicable substantive law.\textsuperscript{22} One of several beneficiaries of an active trust which held stock in a corporation was deemed not a shareholder entitled to maintain a stockholders’ action.\textsuperscript{23} A warrant holder did qualify as a shareholder under the Investment Company Act of 1940.\textsuperscript{24} Ohio Rule 23.1 states that an equitable owner of shares may bring a derivative action, and it is clear that in a proceeding under our state rule the plaintiff need not be a holder of record. The federal cases have reached the same result.\textsuperscript{25} An individual stockholder of a corporation which is a holding company holding stock of operating corporations may maintain a derivative action for the benefit of the operating corporation.\textsuperscript{26} Such an action is known as a “double derivative” action.

There is authority also for the right of the following individuals to bring derivative actions: owners of stock held in street names;\textsuperscript{27} pledgees of stock;\textsuperscript{28} parties who have been induced by fraud to transfer legal title to others;\textsuperscript{29} legatees of stock who have only equitable title thereto.\textsuperscript{30}

What about the status of the person who became a shareholder after the inception of the wrong complained of but before it was completed? Under the “continuing wrong theory” plaintiffs are able to qualify to bring suit with reference to the wrong if they obtain ownership status at any time the alleged wrong may be considered still in effect.\textsuperscript{31}

What are the rights of a person who sold his shares by inadvertence and purchased more for the purpose of bringing suit? The Fifth Circuit, in Bateson v. Magna Oil Corp.,\textsuperscript{32} held that a stockholder who sold his shares by inadvertence and then purchased more for the purpose of filing a long-planned derivative action had standing to maintain the action under Rule 23.1. In a recent case involving violations of Rule 10b-5 under the Securities Exchange Act of 1934 in connection with a corporate merger, the Tenth Circuit held that a person who owned shares in the extinguished corporation and had

\textsuperscript{25} Gallup v. Caldwell, 120 F.2d 90 (3d Cir. 1940).
\textsuperscript{26} Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944).
\textsuperscript{27} Brassch v. Goldschmidt, 41 Del.Ch. 519, 199 A.2d 760 (Ch. 1964).
\textsuperscript{30} Hurt v. Cotton States Fertilizer Co., 145 F.2d 293 (6th Cir. 1944).
\textsuperscript{31} Palmer v. Morris, 316 F.2d 649 (6th Cir. 1960); Gluck v. Unger, 202 N.Y.S.2d 832 (Sup.Ct. 1960).
\textsuperscript{32} 414 F.2d 128 (5th Cir. 1969).
a right to exchange them at any time for shares of a successor corporation, was an owner for purposes of this rule."  

(B) The action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

This essential derivative allegation is principally of historical significance. Prior to 1875, except for a one-year period from February 13, 1801 to March 8, 1802, federal courts had no jurisdiction over cases arising under the Constitution, laws or treaties of the United States, in the absence of diversity. It was not an uncommon practice among those who wished to invoke the jurisdiction of the district courts to create diversity jurisdictional grounds by inducing an out-of-state shareholder to bring a derivative action in a federal court on behalf of his corporation against whomever the managers of that corporation wished to sue. Accordingly, the original rule required verification of the non-collusive character of the proceeding. The rule is still with us and must be complied with.

(C) The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority, and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Since the claim which is asserted in a derivative action is one which belongs to, and ought to be asserted by, the corporation in the first instance, the plaintiff must satisfy the court that he is bringing the action only because the corporation, itself, will not bring it. It is the spirit of this requirement that a shareholders' suit is to be resorted to as a last alternative, and that the corporation must be given every opportunity to sue in its own name. A shareholder whose demands upon the corporation had been refused but who was issued an invitation to attend a meeting and discuss the matter, which invitation the shareholder did not accept, was not permitted to sue. In Smith v. Chase & Baker Piano Mfg. Co., the court remarked, "It would seem that complainant desired litigation more than an adjustment of existing trouble."  

How much of an effort plaintiff must make to obtain relief from the corporation has been the subject of considerable judicial discussion. In the leading case of Hawes v. Oakland, the court said:

33. deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1970).
34. 197 Fed. 466 (E.D. Mich. 1912).
35. Id. at 470.
36. 104 U.S. 450 (1882).
He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court.\textsuperscript{37}

Under circumstances where a demand would be futile, it may be dispensed with if the reasons for not making it are clearly stated. An empty allegation of futility is not enough, however.\textsuperscript{38} In \textit{Liboff v. Wilson},\textsuperscript{39} demand was excused where a majority of the directors had participated in the challenged transaction. Demand is almost always excused where a majority of directors are the alleged wrongdoers, and the same logic applies where a majority is controlled by defendants; but more than mere conclusory allegations of control are required.\textsuperscript{40} A federal court has recently observed that a demand against an individual who was president, director and dominant stockholder requesting that he bring an action to force himself to repay his salary to a corporation would be futile.\textsuperscript{41}

What about the requirement of a demand upon shareholders, "if necessary"? As Professor Moore says, "This reservation is inserted since a demand upon the shareholders, unlike the demand upon the directors, is intertwined with the substantive law of corporations dealing with the power of the shareholders to ratify 'fraud.'"\textsuperscript{42}

The circumstances which require that plaintiff make a demand for corporate action, as a condition to bringing a derivative suit, are usually those involving closely held corporations in which the shareholders have a chance to force the corporation to institute the action. In those numerous situations where such a demand would be demonstrably a vain act, however, the requirement is a nullity. As the Second Circuit said in \textit{Gottesman v. General Motors Corp.}:\textsuperscript{43}

\begin{quote}
\ldots the combination of DuPont's sizeable ownership of General Motor's stock, the number and diffusion of the relevant state law of the shareholders as a body to prosecute this action renders a demand on these shareholders unnecessary in the instant case.\textsuperscript{44}
\end{quote}

\textbf{(D) The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.}

\begin{footnotes}
\item 37. \textit{Id.} at 460, 461.
\item 39. 437 F.2d 121 (5th Cir. 1971).
\item 42. 3B J. \textsc{Moore}, \textit{Federal Practice} \S 23.1.19 (Perm. Ed. 1970).
\item 43. 268 F.2d 194 (2d Cir. 1969).
\item 44. \textit{Id.} at 197.
\end{footnotes}
The element of fair and adequate representation is found in both Rule 23 and Rule 23.1. The requirement has usually been defined to mean that the plaintiff must be interested enough in the action to prosecute it forcefully, and the attorney must be qualified and experienced. As Judge Medina put it in Eisen v. Carlisle & Jacquelin, \(^{45}\) "the parties' attorney must be qualified, experienced and generally able." \(^{46}\)

The requirement of adequate representation has to do with factors other than the ability of counsel, however. In Congress of Social Security v. Commissioner, \(^{47}\) a class was disallowed because the named plaintiff was not a member of it. This appears to be the present rule. In Kaufman v. Dreyfus Fund, Inc., \(^{48}\) in which a shareholder of four mutual funds attempted to bring an action on behalf of shareholders of sixty-five funds, the court limited the action to the four funds in which the plaintiff owned shares.

Further, the representative of the class must not be antagonistic to the class. As stated by the district court for the District of Columbia in Shulman v. Ritzenberg, \(^{49}\) in which defendants had submitted statements from forty-seven of the approximately fifty-three class members which indicated that they did not wish to be represented in the action:

In order for a party to fairly and adequately protect the interests of a class, he may not hold interests which conflict with those of the class whom he would represent. While a court should not find such conflict and dismiss the class action merely because every member of the class might not be enthusiastic about the maintenance of the lawsuit, necessarily a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation. \(^{50}\)

Consider also Schy v. Susquehanna Corp., \(^{51}\) in which a stockholder brought an action to enjoin a pending merger between Susquehanna and another corporation on the ground that Susquehanna had issued a false and misleading proxy statement in violation of the Securities Exchange Act of 1934. After the action was filed 80% of the Susquehanna stockholders voted in favor of the issuance of stock to be used in the merger. In view of the overwhelming endorsement...

\(^{45}\) 391 F.2d 555 (2d Cir. 1968).
\(^{46}\) Id. at 562.
\(^{48}\) 434 F.2d 727 (3d Cir. 1970).
\(^{50}\) Id. at 207.
\(^{51}\) 419 F.2d 1112 (7th Cir. 1970).
ment of the merger, the district court held that the interests of the class members were clearly antagonistic to those of plaintiff and that the plaintiff could not represent the members of the class adequately and fairly.\footnote{See also Hannsbury v. Lee, 311 U.S. 32 (1940); Carroll v. American Federation of Musicians, 372 F.2d 155 (2d Cir. 1967).}

Particular attention should be paid to the 1971 opinion of the Sixth Circuit in \textit{Nolen v. The Shaw-Walker Company}, wherein it was held that because it appeared that the minority shareholder's action was controlled by a person who was an officer of another corporation and that the purpose of that person in urging maintenance of the action was to force a merger of the defendant corporation with the other, plaintiff did not fairly and adequately represent the interest of the shareholders.

\begin{enumerate}
\item[(E)] \textbf{The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.}
\end{enumerate}

It is a truism that it is far easier to begin a derivative or class action than to end it. At what stage of the proceeding does the above-quoted rule apply? In general, and with few exceptions, it applies from the time the action is filed. As the California Supreme Court stated in \textit{LaSala v. American Savings & Loan Assoc.}:\footnote{449 F.2d 506 (6th Cir. 1971).}

When a plaintiff sues on behalf of a class, he assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain. Even if named plaintiff receives all the benefits that he seeks in the complaint, such success does not divest him of the duty to continue the action for the benefit of others similarly situated.\footnote{5 Cal.3d 864, 489 P.2d 113, 97 Cal. Rptr. 849 (1971).}

In \textit{Clarke v. Greenberg}, the New York Court of Appeals applied the same principles to derivative actions:

The very nature of the derivative suit by a stockholder-plaintiff suing in the corporation's behalf suggests the application of the fiduciary principle to the proceeds realized from such litigation whether received by way of judgment, by settlement with approval of the court, which presupposes stockholders' approval, or by private settlement and discontinuance of the action at any stage of the proceeding. Such action, we have held, belongs primarily to the corporation, the real
party in interest . . . and a judgment so obtained, as well as the proceeds of a settlement with court approval, belongs to it and not the individual stockholder plaintiffs. 57

This, then, is the rationale for the rule governing settlement or compromise of derivative actions. The extent of the notice of the proposed dismissal or compromise lies within the sound discretion of the trial court. Before the agreements and notice are reduced to writing, however, many hours will be spent among counsel and with the court in hammering out terms which all parties regard as fair.

In considering the technique of settling derivative actions, Judge Friendly's comment in Allegheny Corp. v. Kirby, 58 is worth noting:

Once a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend their joint handiwork... 59

The linking of arms is necessary not only in obtaining the court's approval but in defending the settlement against the potential attacks of objectors.

The perils of attempting to circumvent the rule calling for approval and notice in connection with the settlement of class and derivations are substantial. A considerable appreciation of this may be derived from an examination of cases where counsel endeavored to elude these requirements. 60

V. INHIBITING FACTORS FOR PLAINTIFFS

(A) Security-for-Cost Requirements

Principal among the impediments which have been constructed to insulate corporate managers against the excesses of derivative litigation are the so-called "Security for Expenses" statutes which have been enacted in New York, New Jersey, Maryland, Wisconsin, Pennsylvania and California. The New York statute provides:

In any action specified in section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), unless the plaintiff or plaintiffs hold five percent or more

57. Id. at 149, 171 N.E.2d 444, 445.
58. 333 F.2d 327 (2d Cir. 1964).
59. Id. at 347 (dissenting opinion).
of any class of the outstanding shares or hold voting trust certificates
or a beneficial interest in shares representing five percent or more of
any class of such shares, or the shares, voting trust certificates and
beneficial interest of such plaintiff or plaintiffs have a fair value in
excess of fifty thousand dollars, the corporation in whose right such
action is brought shall be entitled at any stage of the proceedings
before final judgment to require the plaintiff or plaintiffs to give
security for the reasonable expenses, including attorney's fees, which
may be incurred by it in connection with such action and by the other
parties defendant in connection therewith for which the corporation
may become liable under this chapter, under any contract or other-
wise under law, to which the corporation shall have recourse in such
amount as the court having jurisdiction of such action shall deter-
mine upon the termination of such action. The amount of such secu-

When are such statutes enforced in federal proceedings and when
are they not enforced? The United States Supreme Court, in Cohen
v. Beneficial Loan Corp., held that such statutes were substantive
and, under the Erie doctrine, would be applied in diversity cases.
In derivative cases where the substantive claim is federal, rather
than state-created, state security-for-expense statutes are not con-

Thus, in the vast majority of today's derivative cases, such
statutes are no hindrance to plaintiffs.

(B) Notice; When Required and How Given

The only notice requirement in Rule 23.1 relates to compromise
and dismissal. But this is not all there is to the matter. The exigen-
cies of the case may require notice to the shareholders prior to settle-
ment and dismissal, and in certain cases at more than one stage.
Illustrative of the type of notice that courts frequently require in
protracted shareholder litigation is the notice required by the Dis-

Over plaintiff's objections, the District Court
ordered that notice be given to all shareholders for the purpose of
obtaining a specific list of class members and having each designate

64. 396 U.S. 375 (1970).
the particular recovery he was seeking. It is most instructive to note the District Court's observations on page 3 of its memorandum opinion and order:

Moreover, it is within sound judicial discretion to require that notice be given at various stages of the litigation "for the protection of the members of the class or otherwise for the fair conduct of the action," Fed. R. Civ. P. 23(d), even where the action is derivative only.45

In a derivative action involving a major corporation, the cost of giving adequate notice to all the shareholders may be considerable, if not prohibitive. Nonetheless, it is significant that in the recent case of Eisen v. Carlisle & Jacquelin,46 the Supreme Court held that the plaintiff must bear the burden of notifying approximately six million class members of the pending litigation, including mailing written notice to 2,250,000 class members who could be identified by name and address. Although such costs may be recovered if the plaintiff is successful, the Eisen case should be given careful consideration by any attorney who is considering a derivative action on behalf of one of the Fortune 500 giants.

VI. INHIBITING FACTORS FOR DEFENDANTS

(A) Erosion of attorney-client privilege

In derivative actions there are virtually no restrictions upon plaintiffs' discovery rights since the plaintiff is acting for the corporation. In 1970, in Garner v. Wolfinbarger,47 the traditional privilege shielding a corporation against disclosure of confidential communications made to its attorney was stripped away so as to require the corporation to disclose advice given by the attorney concerning a stock issue and related matters in a stockholders' action charging fraud in violation of the federal and state securities laws. The Fifth Circuit's entire opinion is recommended reading. The Court stated:

Part of the managerial task is to seek legal counsel when desirable, and obviously, management prefers that it confer with counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders.48

But it went on to observe:

... [I]t must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders.49

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47. 430 F.2d 1093 (5th Cir. 1970).
48. Id. at 1101.
49. Id.
The Court concluded its opinion with the following expression:

In summary, we say this. The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its shareholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

There are many indicia that may contribute to a decision or presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the stockholders; the nature of the stockholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons. The court can freely use in camera inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality in trade secret and other cases where the impact of revelation may be as great as in revealing a communication with counsel.70

(B) Indemnification Problems

The corporate officer or director named as defendant in a derivative suit has reason to be concerned about whether the corporation has the legal right to defray the costs of his defense or contribute funds to the settlement of the claims against him. The issue of indemnification in derivative actions has more ramifications than this presentation can touch upon. However, corporate counsel should be aware of the problems indemnification in such actions presents.

Effective September 30, 1974, the Ohio indemnification statute was amended to refer specifically to derivative actions.71 An Ohio

70. Id. at 1103, 1104.
corporation may agree to indemnify a director, trustee, officer, employee or agent against any expenses, including attorneys' fees, incurred in connection with the defense or settlement of a derivative action if it is determined that he acted "in good faith and in a manner he reasonably believed to be in the best interests of the corporation." If the director is adjudged to have been negligent, he may be indemnified only if the court determines that such indemnification is proper. If the director is successful on the merits, he is entitled to indemnification as of right. Expenses may be advanced by the corporation provided that the director agrees to repay such amount if he is ultimately found not to be entitled to indemnification. Although the foregoing provisions can be incorporated in a corporation's articles or regulations, it is not clear whether indemnification can be provided in a case where the director has not acted in good faith or where he has been adjudged to have been negligent and the court has refused to order indemnification. Finally, the statute makes it clear that a corporation may purchase insurance indemnifying its directors against liability even when the corporation would not otherwise be empowered to directly indemnify the director.

New York's indemnification statute also refers specifically to derivative claims and provides that a director or officer sued in an action seeking judgment in favor of the corporation may be indemnified for expenses "except in relation to matters as to which [he] . . . is adjudged to have breached his duty to the corporation". However, expenses for which indemnity is authorized do not include an amount paid in settlement of the action or expenses incurred in defending a threatened action, or an action settled without court approval.

Under Delaware law, indemnification is available regardless of the type of proceeding involved provided the indemnitee "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation[]." If the proceeding is an "action or suit by or in the right of the corporation" indem-

nification can extend only to "expenses (including attorneys' fees) actually and reasonably incurred . . . in connection with the defense or settlement of such action or suit . . ."  

It should be noted that the Securities and Exchange Commission has expressed the view that agreements indemnifying officers and directors for liabilities arising under the Securities Act of 1933 are against public policy and unenforceable.  

Although the courts have not embraced the S.E.C.'s position, it does pose a serious threat for officers and directors who have relied upon state indemnification statutes or corporate legislation to protect them from personal liability.

(C) Availability of Jury Trial

One of the advantages defendants were considered to enjoy in derivative actions until recently was that of not having their liabilities determined by juries. This advantage has been taken from them by the United States Supreme Court in *Ross v. Bernhard,* as to those causes of action for which the corporation would be entitled to a jury trial if it brought the action in its own right.

Prior to *Ross* it had been the rule that a derivative action was entirely equitable in nature and no jury was available to try any part of it. But, in *Ross,* in an opinion by Mr. Justice White, the Supreme Court modified this rule, flatly stating:

We reverse the holding of the Court of Appeals that in no event does the right to a jury trial preserved by the Seventh Amendment extend to derivative actions brought by the stockholders of a corporation. We hold that the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury.

The Court pointed out that "it now seems settled in lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present." The same rule will hereafter apply to derivative action plaintiffs.

VII. Fees in Derivative Actions

The question of under what circumstances, on what theories, and in what amounts fees should be assessed, has been and will continue

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85. *Id.* at 532, 533.
86. *Id.* at 534.
to be, the subject of much heated and protracted litigation. This is understandable. The successful derivative action or class action is, more often than not, the work product of many able lawyers, hammered out through countless days and sleepless nights, stretching into months and even years. The issues which have been litigated have commanded exhaustive discovery and research. Counsel’s office may be piled high with exhibits, transcripts and briefs. Many thousand man-hours may have gone into the work product. And yet, despite this effort, years may pass before any fees are actually awarded or paid.

Defense counsel have undergone the same tedious process of investigating, trying, and briefing the case. Among broad-gauged counsel on both sides personal friendships have matured and tempers have from time to time flared. In all probability, regardless of the outcome of the litigation on the merits, both sides still cling to the conviction with which they began - that they were right. This is usually the background from which the second round of the lawsuit, the dispute over attorneys’ fees, emerges.

Time will not permit a detailed analysis of the hundreds of cases involving attorneys’ fees which have been examined by the writers. However, some of the basic principles can be considered.

First, the plaintiff must be successful. If a decision on the merits is rendered for the defendant, no attorneys’ fees will be awarded to plaintiff’s counsel.

Second, the action must have conferred a benefit upon the corporation. In most instances, the benefit conferred will be a measurable economic benefit, such as the recovery of a fund for the corporation or the cancellation of a corporate debt. However, in Mills v. Electric Auto-Lite Company, the Supreme Court recognized that fees could be awarded for the enforcement of a statutory policy, such as the federal proxy rules, on the theory of “corporate therapeutics”. To quote from Mr. Justice Harlan’s decision,

In many suits under § 14(a), particularly where the violation does not relate to the terms of transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate sufferage leads to the conclusion that, in vindicat-

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87. Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959).
ing the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders... Private stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. 91

Third, the plaintiff must establish that his efforts caused the benefit to be conferred upon the corporation. Although fees may be awarded in a mooted case where it appears that the pendency of the litigation caused the corporation to take certain action, 92 if that action would have been taken even in the absence of the suit, attorneys' fees will not be granted. 93

Assuming that the plaintiff can establish that his efforts conferred a benefit upon the corporation, what are the standards to be applied in awarding attorneys' fees? In Milstein v. Werner, 94 the following elements were noted:

Derivative suits... require the initiative of shareholders to commence the suit, and the probable level of compensation for attorneys as a practical matter directly affects the ability of shareholders to exercise such initiative. Thus, fee allowances in this area should be viewed as an incentive, as much as a just reward for services performed... And the benefit for a corporation often obtained through such a suit requires that the incentive be sufficient... although not so excessive as to foster mere strike suits...

In the case of In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931), the Court listed the relevant elements to be considered in determining an attorney's fee. Although that case arose in a bankruptcy context, these elements can well be adapted and applied to the present situation:

(1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing...

Of these factors, most significant is the benefit conferred... That the litigation ended by settlement rather than by going through the

91. Id. at 396.
uncertain results of a trial may be considered in assessing the value of the services though avoidance of uncertainty of achieving benefits does not obviate a generous award in the presence of a favorable settlement . . . Nor does the fact that the settlement does not create a present or even an actual fund from which payment will be made prevent a substantial fee. If the suit has produced a significant benefit for the corporation, the corporation fairly may be charged with the costs of litigation . . .

To enable the Court to factor the element of time into the fee equation, the moving party must supply complete and accurate time sheets . . . Estimates of the parties and impressions of the Court do not provide an adequate substitute.

The elements of novelty on difficulty of the matters involved, the skill employed, and the reputation of the lawyers at the bar, while requiring subjective assessments, can be evaluated by a Court which closely supervised and observed the progress of the case . . .

In cases where a tangible financial benefit has been produced, perhaps the most popular theory for awarding fees is the "salvage" theory espoused by Professor Hornstein. Under this rationale, the successful plaintiff is entitled to a fee award based upon a percentage of the fund produced. The "salvage" theory has run into some serious resistance in several recent decisions, and it provides little or no guidance in cases where tangible economic benefits have not been produced, such as cases involving "corporate therapeutics".

In a case now pending before the Sixth Circuit, involving a substantial award of attorneys' fees, a novel question was posed concerning the fees to be awarded where the litigation produced both a "therapeutic" benefit and a financial detriment for the corporation. The shareholder who witnesses the loss of a substantial corporate opportunity may not be consoled by the knowledge that a statutory policy has been vindicated.

VIII. A WORD OF CAUTION

As the legal and financial communities know, derivative and class actions have generated much controversy in recent years. Amended Rules 23 and 23.1 have been hailed by consumer groups and share-

95. Id. at 549, 550 (citations omitted).
holders action specialists and condemned by entrenched interests and their kept lawyers. Our purpose is neither to praise nor to condemn such litigation sociologically, but to indicate to the trial lawyer what he should expect to encounter in managing it.

Shareholder derivative actions will not provide the plaintiffs' personal injury bar with a viable alternative to what has been, or may be, taken away by virtue of no-fault legislation. As counsel who have handled both types of cases, these writers can state without fear of contradiction that class and derivative litigation, on a scale that ensures probable long-term success, requires skill, resources and time substantially in excess of that which is necessary for the conduct of successful personal injury practice.

On the other side of the coin, the shareholder action need not be, and, indeed, will not be, a significant long-term deterrent to corporate growth and responsible corporate management. The evidence is beginning to mount that the courts have begun to curtail the abuses produced by the first wave of plaintiff enthusiasm engendered by Amended Rules 23 and 23.1.

If restraining influences are needed in order to protect well-intentioned corporate managers from the burdens of irresponsible shareholder litigation, such influences should not take the form of artificial restraints such as security-for-cost statutes which can penalize the small shareholder with the meritorious case, but of enhanced judicial knowledgeability and decisiveness. The shareholders and the managers of corporations sometimes suffer more from the prolongation of the derivative suit than from the ultimate resolution of it. While these writers acknowledge that expedition is not the chief end of the judicial process, courts should develop an awareness that justice delayed, particularly in shareholder litigation, can be justice denied for all concerned.

A final word of caution to the plaintiffs' bar seems in order. The road to success in litigation of this kind is paved with the promise of extraordinary financial rewards. Yet the road is long and hard and financial success is often years away, frequently illusory, and very hard won. If you decide to embark on an excursion in such litigation, be prepared to spend many years and many thousands of dollars in the course of trying to win, and, further, be prepared not to win at all.
The threshold question for asserting a claim under the Jones Act is whether the injured party is a seaman within the purview of that statute. Although undefined in the Act itself, three touchstones of seaman status have become almost universally adhered to by the courts: (1) that the vessel was in navigation; (2) that the worker had a more or less permanent connection with the ship; and (3) that the worker's function was primarily to aid in navigation.

Whether an employee, who would otherwise qualify without doubt as a seaman, maintains that status while his ship is ice-bound over the winter was decided affirmatively in Noack v. American Steamship Company. The vessel in that case was a Great Lakes self-unloading bulk cargo ship, which had been laid up over the winter due to the ice and cold of the Great Lakes region. At the time

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*EDITOR'S NOTE: In this issue of the Northern Kentucky State Law Forum, we publish our first Sixth Circuit Review. We plan to devote a section of each succeeding issue to a review of recent decisions of the United States Court of Appeals for the Sixth Circuit, and may in the future devote an entire issue to such a review.

While we will attempt to select what we feel are the most important of the Court's decisions of the previous term, we concede that there may be other decisions that deserve equal note. It is only hoped that our selections prove to be beneficial to the practicing attorney, to the courts and to academia.

It is realized that case reviews invite opinion and opinion invites disagreement. But if this section is the occasion for some thought in a given area, we feel that the Review will have been worthwhile.

1. 46 U.S.C. § 688, entitled "Recovery for injury to or death of seaman" provides that: any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

2. 491 F.2d 937 (6th Cir. 1974). A companion case handed down four days after the principal case is Sweeney v. American Steamship Company, 491 F.2d 1085 (6th Cir. 1974). In this latter decision, the injury occurred while the ship was being dismantled in anticipation of the winter season, but the same result was reached in both cases.
of the accident which was the source of this litigation, it was being fitted out for the upcoming 1971 sailing season.

The plaintiff was a veteran seaman, whom the defendant shipowner had employed as a "wiper" aboard the vessel, and whose duties included wiping up grease and oil from the decks of the ship.\(^3\) Moreover, Noack had appropriate seaman's papers, was a union member, had worked for this shipowner for over twenty-five years, and was employed only on the vessel.\(^4\) Thus his "permanent connection with the ship" was not at issue. Whether his function was "primarily to aid in navigation" was an issue only insofar as this third element of seaman status overlaps with the first, as set out above.\(^5\)

The injury occurred when the plaintiff slipped into an opening on the deck while he was engaged in cleaning out bilge in the lower engine room.\(^6\) The opening was created when Noack himself and his co-worker Chapman removed a steel deck plate to obtain access to the area where the bilge had accumulated. As Chapman scraped together the refuse and put it into pails, Noack in turn would carry the filled pails to the cargo hold, where he deposited the bilge. The mishap came about when he slipped on the deck and fell into the opening created by removal of the plate in his pathway to the cargo hold.\(^7\)

Plaintiff brought suit under the Jones Act, which gives to seamen or their personal representatives a right of action against the employer for negligence. Additionally, there was alleged a breach of the warranty of the seaworthy condition of the boat under the General Maritime Law.\(^8\) The jury returned a verdict in the amount of

3. 491 F.2d 937, 938.
4. Id. at 939-40.
5. A sampling of the decisions which have applied the three tests of seaman status includes the following: Noack v. American Steamship Company, supra, at 939; Cox v. Otis Engineering Company, 474 F.2d 613 (5th Cir. 1973); Whittington v. Sewer Construction Company, Inc., 367 F. Supp. 1328, 1329 (S.D. W. Va. 1973); Klarman v. Santini, 363 F. Supp. 910 (D.C. Conn. 1973). See also the often-cited opinion of Offshore Company v. Robinson, 266 F.2d 769,779 (5th Cir. 1959), which combined the three tests into two functional and less talismanic tests.
6. 491 F.2d 937, 938.
7. Id. at 941.
8. See Dixon v. United States, 219 F. 2d 10, 13-15 (2nd Cir. 1955) for a concise history of the doctrine of seaworthiness, and the distinction between it and negligence. In Lusich v. Bloomsfield Steamship Company, 355 F.2d 770 (5th Cir. 1966), the court of appeals affirmed the directed verdict on the issue of negligence, but remanded for jury determination of the issue of seaworthiness. See also Spearing v. Manhattan Oil Transportation Corp., 375 F. Supp. 764 (S.D.N.Y. 1974), where the court explains that prior notice by the owner of the ship's defect is not an element of unseaworthiness, but on the other hand, proximate cause is a necessary element.
$150,000, which was reduced to $75,000 against the shipowner-employer, as a result of the maritime rule of comparative negligence. In affirming, the Sixth Circuit Court of Appeals held that it was not clear that the jury had erred in finding (1) that the vessel was in navigation, and (2) that the accident was not caused by the plaintiff's own breach of duty to his employer. Also, the defendant appealed on an issue of damages, which the appellate court resolved in favor of the plaintiff. The remainder of this Note will treat more fully these three issues.

**VESSEL IN NAVIGATION**

A trickle of reported cases had involved the question whether a vessel is in navigation for Jones Act purposes, two of which had been decided by the Sixth Circuit and it must have been heartening for a while to American Steamship Company's counsel that the two decisions were favorable to the respective defendants. In *Antus v. Interocean S.S. Co.*, the injured worker had been a member of the ship's crew during navigation season and was paid off after the last trip, but he remained on board with the rest of the engineer's department for the purpose of laying up the vessel over the winter. As opposed to the monthly salary he was paid while on voyages, plaintiff was paid on an hourly basis for this "after-end" work. The court of appeals affirmed the district court's finding that he was not a seaman because "instead of doing this work in preparation for navigation, the men were preparing the vessel for winter quarters". Moreover, the plaintiff was not engaged in maritime work when he was injured, nor was it persuasive that he had been a member of the crew.

The Sixth Circuit was confronted with the issue again in *Nelson*
v. Greene Line Steamers.16 There an excursion steamer, the Delta Queen, was tied up for the winter at the defendant’s wharf. Nelson and a few other crew members were retained over the winter to prepare the vessel for the subsequent excursion season. He was paid on an hourly basis and was not required to sleep on the boat. While working on the paddle wheel, under the supervision of the Captain, chipping off rust in preparation for painting, he fell into the Ohio River and drowned.17 The court affirmed the District Judge’s findings, although made on a motion to dismiss for lack of jurisdiction,18 because all the facts were before the court and there was no dispute over the facts. Rather the conflict was over the proper inference to be drawn from them. Judgment on those facts was affirmed because the Judge’s conclusion, *inter alia*, that the vessel was not in navigation was not clearly erroneous.

The finding in the Nelson case was consistent with the United States Supreme Court conclusion in Desper v. Starved Rock Ferry Company,19 in which case the court affirmed the reversal of the district court’s finding that the plaintiff was a seaman. On the date of the accident, he had been engaged in cleaning and painting his employer’s fleet of sight-seeing motorboats, which had been blocked up on land for the winter season.20 The court said:

> The many cases turning upon the question whether an individual was a “seaman” demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of the injury. The facts in this case are unique. The work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a “seaman.” The boats were not afloat and had neither captain nor crew. They were undergoing seasonal repairs, the work being of the kind that, in the case of larger vessels, would customarily be done by exclusively shore-based personnel. For a number of reasons the ships might not be launched, or he might not operate one. To be sure, he was a probable navigator in the near future, but the law does not cover probable or expectant seamen but

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16. 255 F.2d 31 (6th Cir. 1958).
17. *Id.* at 32-33.
18. The issue of seaman status must be distinguished from the *in limine* issue of maritime jurisdiction, which has two elements: place and maritime nexus. Thus for admiralty jurisdiction to attach, the injury must have occurred on navigable waters (with some exceptions) and the activity which the injured party was engaged in must have a significant connection with traditional maritime activity. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), where the Court renounced maritime jurisdiction over a plane crash on Lake Erie.
20. *Id.* at 188.
seamen in being. It is our conclusion that while engaged in such seasonal repair work Desper was not a “seaman” within the purview of the Jones Act. The distinct nature of the work was emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent’s death. All had been “laid up for the winter.”

If Desper was intended by the court to stand for the proposition that a vessel laid up over the winter is not, as a matter of law, a vessel in navigation so as to qualify workers injured on it as seaman, such a proposition was not to be longlived.

For soon after Desper, there was a transition from court to jury determination of seaman status and whether a vessel was in navigation became a question for the trier of facts, whose finding was conclusive unless clearly erroneous. The transition was first visible in the Supreme Court’s 1955 decision in Gianfala v. Texas Co. In this case the plaintiff was a driller who had been injured while working on a barge above an offshore oil field. The Fifth Circuit, relying on Desper, had faithfully attempted to apply the standard legal tests mentioned above. As to the requirement of a vessel in navigation, the court of appeals could find no evidence here supporting that characterization since the barge was held to the sea floor by water in its hold, and was moved at most once a year. The court, moreover, found no permanent connection with the vessel and, as to navigational duties, could discover nothing beyond the fact that, in those rare occasions when the barge prepared to move, the plaintiff turned a valve to pump out the sea water. The Fifth Circuit accordingly reversed the jury’s award of damages under the Jones Act. The Supreme Court in turn reversed in a per curiam opinion and restored the jury award. In the process it necessarily accepted the jury’s characterization of this combination of facts as compliance with the legal tests of seaman status.

Two years after Gianfala, in Senko v. LaCrosse Dredging Corp., the Supreme Court made explicit what had been implicit in

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21. Id. at 190-91.
22. However, one of the rationales on which Desper was pitched has continuing vitality; namely, that a worker is not a seaman if injured while engaged in seasonal repair work (work not usually done by a “seaman”) on a ship that is “laid up for the winter”. The Court concluded from this, in McDonald v. United States, 321 F.2d 437 (3rd Cir. 1963), that a worker engaged in deactivating a vessel preparatory to its being placed in reserve fleet is not engaged in work usually done by a seaman. Id. at 440. The same conclusion was drawn in West v. United States, 256 F.2d 671 (3rd Cir. 1958), although the worker in that case was engaged in reconditioning a vessel that had been in “the moth-ball fleet”. The result in both cases was that the worker could not maintain an unseaworthy claim.
23. 350 U.S. 879, rev’g per curiam 222 F.2d 382 (6th Cir. 1955).
Gianfala. To say that the facts in Senko were borderline is putting it mildly. Claimant was a handyman who usually worked on shore, but because he sometimes did an occasional maintenance job on a swamp dredge a jury finding that he was a seaman and crew member was allowed to stand—even though the injury itself occurred on shore. The dissent observed that "his connection was not with the vessel but with the construction gang. He had no duties connected with navigation; in fact he had never been on the dredge when it was pushed from one location to another, and never even saw it moved . . . . [His duties were] about as nautical as measuring the depth of a natural swimming pool under construction in marshy ground."25 The majority said, however, that a "jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."26

If any doubt remained after Senko as to the finality of jury findings on seaman status it was stamped out in a succession of subsequent Supreme Court decisions. In the following year, the court had two occasions to reaffirm the Senko rule. Grimes v. Raymond Concrete Pile Co.27 had reached the court in the form of an affirmance of a directed verdict for the defendant in a Jones Act suit brought by a pile-driver operator on a radar tower in the ocean. The respondents were engaged in the construction of a "Texas Tower" about a hundred miles east of Cape Cod. This was a structure affixed to the ocean floor by three caissons, rising to a triangular metal platform sixty feet above the sea. Plaintiff had lived in the tower as it was towed to sea and assisted in keeping it in safe tow. After the tower had been anchored in place, plaintiff was sent to a nearby materials barge on a tug and on his return to the tower by means of a Navy life ring was injured when the ring struck the rig's pilot house. The trial court directed a verdict for the defendant on the mistaken ground that the Defense Bases Act, incorporating the Longshoremen's Act, provided plaintiff's exclusive remedy even if he was a crew member. The First Circuit correctly pointed out that this was an error, since the Defense Bases Act also incorporates the Longshoremen's Act exclusion of crew members, but went on to conclude that it would be "perfectly futile" to remand, since there was no evidence of crew member status anyway. The court accordingly let the directed verdict stand. The First Circuit particularly empha-

25. Id. at 376-77 (dissenting opinion).
26. Id. at 374.
27. 356 U.S. 252 (1958), rev'd per curiam 245 F.2d 437 (1st Cir. 1957).
sized that, as a matter of law, a permanently stationed radar tower could not be a "vessel" but that, even if it were, the plaintiff had no "more or less permanent connection" with it.\textsuperscript{28} But the Supreme Court, citing \textit{Gianfala} and \textit{Senko}, held that the plaintiff's evidence "presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel."\textsuperscript{29}

A week later, in another \textit{per curiam} opinion, \textit{Butler v. White-man},\textsuperscript{30} the Supreme Court again reversed a directed verdict for the defendant and sent the case back for a jury trial. Respondent owned a barge and tug which were moored to his wharf on the Mississippi River. Decedent was a laborer who did odd jobs around the wharf on an hourly wage basis. On the morning of his death he had been engaged in cleaning the rig's boiler. There was some evidence that the tug was a "dead ship", and no steam had been raised on it for over a year; but decedent's work was connected with rehabilitation of the tug in anticipation of a Coast Guard inspection and a return to service. The trial court ruled that all of the elements of a Jones Act case were missing: (1) the tug was not in navigation; (2) decedent had no navigational duties and was not a seaman or member of the crew; and (3) in any case there was no evidence of negligence. Decedent had last been seen alive running across the barge to the rig, but the circumstances of his drowning were unexplained. The plaintiff's theory was that the defendant had been negligent in not providing a gangplank between the barge and the tug. On this record, the Supreme Court held that there was a sufficient evidentiary basis on which to send the case to the jury on all three issues.\textsuperscript{31}

It was against this background that \textit{Noack v. American Steamship Co.}\textsuperscript{32} was decided.\textsuperscript{33} The rather antique Sixth Circuit opinion

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  \item \textsuperscript{28} Id. 245 F.2d 437, 440.
  \item \textsuperscript{29} 356 U.S. 252, 253.
  \item \textsuperscript{30} 356 U.S. 271 (1958), \textit{rev'g per curiam} Harris v. Whiteman, 243 F. 2d 563 (5th Cir. 1957).
  \item \textsuperscript{31} Id. 243 F.2d 567.
  \item \textsuperscript{32} 491 F.2d 937.
  \item \textsuperscript{33} \textit{See} Bodden v. Coordinated Caribbean Transport, Inc., 369 F.2d 273 (5th Cir. 1966), where the plaintiff had been employed to aid in putting the defendant's vessel into operating condition after having been taken out of service. Since he had signed shipping articles for the vessel's upcoming voyage, was living on board at the time of his injury, and was subject to ship discipline, the Court held, in an opinion almost identical to the principal case, there was a substantial fact issue whether vel non the vessel was in navigation, which issue precluded a summary judgment. Both \textit{Noack} and \textit{Bodden} demonstrate that the three elements of seaman status, though they must each be present, must also be analyzed in conjunction with one another. \textit{See also} Mrov v. Dravo Corp., 429 F.2d 1156 (3rd Cir. 1970), where there was held to be a question of fact for the jury whether the vessel was in navigation while tied to the defendant's dock during a strike of its masters, pilots, engineers, and maids.
\end{itemize}
of Antus v. Interocean S.S. Co.\textsuperscript{34} was not considered controlling. In effect, the court held it was out-dated by Desper, which was cited in Noack for its dictum that determinations of seaman status depend largely on the facts of the particular case, rather than for its holding that a boat operator who was hired to overhaul the boats during the spring was not, as a matter of law, a seaman within the purview of the Jones Act.\textsuperscript{35}

But it was the later case of Butler v. Whiteman, supra, that the Noack court found dispositive.\textsuperscript{36} It pointed out that the facts of the case before it presented a more compelling basis for a jury finding of seaman status than were present in Butler.\textsuperscript{37} Referring also to its earlier decision in Nelson v. Greene Line, supra, the court pointed out "that it is the extraordinary case where the evidence permits only one conclusion concerning the claimant's status as a seaman. In Nelson, we affirmed the district court's findings as not being clearly erroneous."\textsuperscript{38}

The court's opinion continued on in explanation of the obvious about-face which its decision represented from earlier cases that applied literally the "in navigation" requirement. The court gave this explanation:

We recognize that while Courts in the past have applied a technical, narrow view of what constitutes a vessel in navigation or the status of a seaman, today the Courts are applying a broad view consistent with the trend to provide a liberal interpretation to remedial legislation such as the Jones Act.\textsuperscript{39}

It is interesting that the court cited as authority for its liberal construction such decisions as Gianfala, Senko, and Grimes.\textsuperscript{40} This is more explicit recognition that seaman status is conclusive with the trier of fact so that injured workers will more readily find compensa-

\textsuperscript{34} 108 F.2d 185.
\textsuperscript{35} 491 F.2d 937, 939.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 940. But there seems to be a recent trend in the direction of the court deciding, where appropriate, the question of seaman status as a matter of law. This trend is most evident in the Fifth Circuit, where a large preponderance of the admiralty cases are heard. Lewis v. Roland E. Trego and Sons, 501 F.2d 372 (4th Cir. 1974); Brown v. ITT Rayonier, Inc., 497 F.2d 254 (5th Cir. 1974); Cox v. Otis Engineering Co., 474 F.2d 613 (5th Cir. 1973); Burns v. Anchor-Wate Company, 469 F.2d 730 (5th Cir. 1972); Hartzfelds v. Travelers Insurance Company, 369 F. Supp. 955 (W.D.L.A. 1974).
\textsuperscript{39} Id.
\textsuperscript{40} Id. These decisions are ordinarily cited for the rule that the jury's finding on the issue of seaman status is not to be overturned if it has any reasonable basis in the evidence. The citing courts are not ordinarily so explicit in recognizing that the policy behind the rule is to favor the injured workers. See note 41, below.
tion than the Supreme Court has itself admitted. At any rate, the Noack decision, by distinguishing between the rule and its policy, may be intimating that the Sixth Circuit will forego the principle that seaman status is almost invariably a jury question in cases where the policy of assuring a liberal remedy is not at stake. Such a case, for example, may arise where the injured worker is arguably a seaman but more realistically is a beneficiary of the Longshoremen and Harborworkers' Compensation Act. In such a case, the choice is between two remedial acts. Consequently, neither the policy of liberality is at stake nor is there a determination at issue which can as readily be made by a jury as by an experienced court.

The Employer's Negligence Versus The Employee's Breach of Duty

American Steamship also contended on appeal that the district court improperly instructed the jury on the issue of Noack's contributory negligence. It argued that the accident occurred as a result of the plaintiff's failure to perform his duties as a wiper. It cited Reinhart v. United States as authority for distinguishing between contributory negligence on the one hand, which in maritime law merely reduces the amount recoverable by a plaintiff, and breach of a duty to one's employer on the other hand, which precludes recovery altogether, if such breach was the sole proximate cause of the accident. The principle for which Reinhart was invoked was most felicitously expressed by then Circuit Judge John M. Harlan in Dixon v. United States, where he explicated

... the firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship. Their result turns really not upon any question of "proximate cause", "assumption of risk" or "contributory negligence", but rather upon the employer's independent right to recover against the

41. The benefits of the Longshoremen and Harborworkers' Compensation Act are available only to those covered workers who are not "members of the crew". This phrase has been construed as synonymous with the term seaman as it is used for Jones Act purposes, to insure that the acts are mutually exclusive. Swanson v. Marra Bros. Inc., 328 U.S. 1 (1946); Barrios v. Louisiana Construction Materials Company, 465 F.2d 1167, 1161 (5th Cir. 1972). In Brown v. ITT Rayonier, Inc., 497 F.2d 234, 236, the court noted: "... we recognize that our decision on appellee's Jones Act claim contributes to the continuing process of defining the boundary between Jones Act and Longshoremen and Harborworkers' Compensation Act coverage. We think that this consideration militates against appellee's Jones Act recovery."

42. 491 F.2d 937, 941.
43. 457 F.2d 151 (9th Cir. 1972).
44. 219 F.2d 10 (2nd Cir. 1955).
employee for the non-performance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work.45

Reinhart involved an unseaworthy claim that arose when plaintiff stepped through a hole in the flooring of a darkened hold. As Chief Mate, his duties included overseeing safe working conditions on the vessel. Although he knew that the flooring was damaged, Reinhart traversed the empty hold, shining his flashlight on the side of the hold rather than at his feet. The court held that his failure to correct the damage to the flooring and to provide adequate lighting constituted a breach of his contractual duty to the defendant, and that no accident would have occurred but for this breach.46

The court in Noack countered this same line of defense by reiterating evidence introduced at trial from which the jury could have reasonably concluded that at the time of Noack's injuries his duties did not require him to clean up the grease and other foreign substances on the deck. In addition, the jury's answers to special interrogatories submitted to it indicated it did not think the plaintiff's injuries were caused by his failure to perform his duties as a wiper. On the other hand, there was sufficient evidence of contributory negligence, such as the failure to replace the deck plate which left an opening perilously close to the pathway Noack chose; and obviously the jury was persuaded by this evidence. Such a conclusion, the court of appeals declared, was neither against the weight of the evidence nor clearly erroneous.47

Calculation Of Future Loss Of Earnings

American Steamship attacked the plaintiff's testimony regarding the computation of his loss of future earnings as inconsistent with the measure of such damages as promulgated in previous Sixth Circuit decisions.48 Loss of future earnings due to the wrongful act of another may be recovered, according to Imperial Oil, Ltd. v. Drlik,49 if they are proven with reasonable certainty and are not merely speculative in character. The amount recoverable is a function of the earning capacity of the injured person before and after the accident.

45. Id. at 16-17.
46. Supra, n. 39, passim. This principle was first introduced into maritime law in the case of Walker v. Lykes Bros. S.S. Co., 193 F.2d 772 (2nd Cir. 1952). See Jussila v. Sause Bros. Ocean Towing Co., Inc., 512 F.2d 795 (Or. 1973), where the court observes that there has been a mixed reaction to what has come to be known as the Walker doctrine. Id., at 797.
47. 491 F.2d 937, 941-942.
48. Id. at 942.
49. 234 F.2d 4 (6th Cir. 1956).
In a series of cases that arose in the wake of the sinking of the ship Cedarville, the Sixth Circuit crafted these fundamental guidelines into formulae for computing the loss of earning capacity with as much precision as the subject matter allows. The formulae assume that "[d]uring one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years". Secondly, the best evidence of earning capacity is the individual's actual earnings history. The skeletal formula for cases of personal injury consists in determining what the claimant's annual earning power would have been but for the injury; then deducting what it will be thereafter; multiplying the result by claimant's work life expectancy; and discounting the product to the present value.

Normal annual earning capacity, sans injury, is a projection of the claimant's earnings record. But the parties are entitled to take "into account all available data relevant to wage adjustment". Projection of past earnings is not the rule, however, in cases where there is evidence of special circumstances indicating an ability to rise beyond the claimant's prior level of employment.

Before any amount will be awarded, there naturally must be proof of diminished earning capacity. The existence of some condition must be shown, proximately resulting from the injury, which limits the claimant's opportunities for gainful employment. In the Cedarville cases, the awards for loss of earning capacity were vacated on appeal, because the evidence showed that the claimants increased their earnings in the years following the incident. There was no evidence, moreover to support the contention that their earnings would have increased to an even higher level but for the injuries.

In Noack, the employer contended that plaintiff's economic expert should not have been permitted to calculate the loss of future earnings. 

51. 436 F.2d 1256, 1269.
52. Id. at 1270. Sweeney v. American Steamship Company, 491 F.2d 1085, 1090 (6th Cir. 1974), the companion case to Noack, involved computation of loss of future earnings in a wrongful death case.
53. 436 F.2d 1256, 1290.
54. Id.
55. Id.
56. 479 F.2d 489, 494, 500.
earnings by applying labor contract wage rates to the average number of days which Noack worked over "the past five year period." 57 Defendant objected to the use of the labor contract. The calculation of diminished earning capacity had to be confined to the record of past earnings, as the defendant read the Cedarville cases.

The court responded that it was presented with an unusual situation in the case at bar. First, the plaintiff was hired prior to the accident at a lower job rating (a "wiper") and pay scale than he had held with the same company during his previous years of employment. The employer's position was that his earnings history would yield a lower base for projected normal earnings than the current contract rates introduced by plaintiff, and that such a measure was prescribed in the Cedarville cases.

Secondly, the court found from the record no special circumstances indicating an ability to rise above the lower level at which plaintiff was hired. Such a finding would seem to fortify defendant's position. But on the contrary, the court's affirmance of the trial court's award made clear that the Cedarville rules are not inflexible, particularly in unusual situations and when there is little empirical data to establish normal earning capacity.

The court reached the correct result, although unwarranted by the earlier cases, because flexibility is a necessity for doing justice in those cases, for example, where the claimant is a young wage earner who has recently entered the employment market without possessing unusual employment opportunities, and in cases of wage earners with a recent history of intermittent unemployment or temporary periods of wage setbacks. So long as there is some empirical data available to corral within limits an admittedly prophetic endeavor, the wrongdoer should not have the advantage, particularly when the injury occurs within the jurisdiction of the maritime law, 58 by the application of an unbending principle.

RICHARD G. MEYER

57. 491 F.2d 937, 942.
58. Cf. Sea-Land Services, Inc. v. Gaudet, 94 S.Ct. 806, 816 (1974) where the Court invokes the "humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."
ENVIRONMENTAL LAW—COURT'S DISCRETION IN GRANTING INJUNCTIVE RELIEF—MOTIONS TO INTERVENE BY CONSERVATION GROUPS AND PROPERTY OWNERS—Ohio ex rel. Brown v. Callaway, 497 F.2d 1235 (6th Cir. 1974).

Pursuant to the Flood Control Act of 1938, authorizing construction of flood control reservoirs in the Ohio River basin, Congress appropriated funds for the construction of two reservoirs, the Caesar Creek Lake Project in Warren County, Ohio and the East Fork Reservoir Project in Clermont County, Ohio. After land acquisition had begun, but prior to construction, the National Environmental Policy Act (NEPA) became effective. In accordance with section 102 of the Act, the Corps of Engineers for the United States Army circulated to state and federal agencies for comment, draft Environmental Impact Statements (EIS) for both projects. Thereafter, the Corps prepared and filed with the Council on Environmental Quality a seven page final EIS on Caesar Creek and a five page final EIS on the East Fork Project.

2. Ohio ex rel. Brown v. Callaway, 497 F.2d 1235, 1237 (6th Cir. 1974). Although first proposed in 1938, the two dams were shelved during the post war period, and then reconsidered in the wake of the severe flooding of the Little Miami River in 1959. Editorial, A Big Dam Mess, Cincinnati Post, Aug. 8, 1974, at 8, col. 2.
3. 497 F.2d 1235, 1237-38 (6th Cir. 1974). The Corps began construction on the Caesar Creek Project on August 30, 1971 and was originally scheduled for completion in December, 1975. It consists of an earth and rock dam and four saddle dams, with a separate spillway that will be cut through the valley wall. The project will create a large slack-water pool of fluctuating dimensions which will inundate up to seventeen and one-half miles of the Caesar Creek Valley. The East Fork Project was begun on May 16, 1970, and was originally scheduled for completion in December, 1976. It, too, will consist of an earth and rock dam, with similar saddle dams and concrete spillway. Both projects are intended to help control floods, improve water supply and water quality and create new recreational features. Ohio ex rel. Brown v. Callaway, 364 F. Supp. 296, 297 (S.D. Ohio 1973).
5. Id. § 4332. Section 102 specifically requires all federal agencies to:
   . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:
   (i) the environmental impact of the proposed action,
   (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
   (iii) alternatives to the proposed action,
   (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
   (v) any irreversible and irrevocable commitments of resources which would be involved in the proposed action should it be implemented . . . .
6. 497 F.2d 1235, 1237 (6th Cir. 1974).
7. Id. at 1237-38.
On July 19, 1973, the State of Ohio, contending that the environment of the project areas would be adversely affected if the two projects should continue, filed an action in district court seeking injunctive relief. The complaint alleged that, by commencing construction without filing adequate Environmental Impact Statements, the Corps had violated the National Environmental Policy Act (NEPA). It also alleged that the Corps had violated, among other federal statutes, the Federal Water Pollution Control Act Amendment of 1972.

On the same day, certain environmental groups and property owners filed motions to intervene as of right pursuant to Rule 24(a)(1) of the Federal Rules of Civil Procedure, and 33 U.S.C. § 1365(b)(1)(B), as well as Rule 24(a)(2), and by permission pursuant to Rule 24(b). The district court, after conducting hearings to determine whether a preliminary injunction should issue against the Corps, and whether motions to intervene should be granted, issued an opinion and order granting only part of the injunctive relief requested.

Finding that the Environmental Impact Statements filed by the Corps did not comply with the requirements of NEPA, and that future contracts would have a substantial impact on the environment, the district court ordered the Corps to resubmit updated EIS and enjoined it from executing additional contracts and from any other construction activity which would alter the natural environment of the project area. However, the district court refused to enjoin three contracts already awarded, both because it felt the environmental damages incidental to the contracts had already occurred, and because it felt that equitable considerations prohibited penalizing the contractors, who were innocent parties to the controversy.

8. Id. at 1238. It was found that the conversion of a free-flowing stream into an impounding lake behind a dam and spillway requires "the stripping of land, the excavation of approximately 11,000 acres of topsoil and subsoil, the destruction of wildlife habitat, the construction of coffer dams and work roads, the siltation of streams, the flooding of substantial areas of land and other significant alteration of the environment. Each project is also expected to have a substantial impact on traffic, land use, and local development."

9. Id. n. 2. The State of Ohio filed two nearly identical complaints, one challenging the Caesar Creek Project and the other the East Fork Project. The district court consolidated the cases.

11. See 497 F.2d 1235, 1238 (6th Cir. 1974).
13. 497 F.2d 1235, 1238 (6th Cir. 1974).
15. Id.
16. Id. at 299. The three contracts were for the construction of an office and shop building...
In addition, the lower court denied all motions to intervene because judgment had been reserved as to the Corps' violation of the Federal Water Pollution Control Act Amendments of 1972. Therefore, that Act was not yet involved, and movants could not avail themselves of the Act's unconditional right to intervene. Moreover, the district court felt the intervenors were adequately represented by existing parties.

The State of Ohio filed an appeal from the partial denial of the preliminary injunction with the Sixth Circuit Court of Appeals. It contended that the district court, having determined that the Corps had not complied with section 102 of NEPA by its failure to file adequate impact statements, had no discretion to exercise and was therefore required to issue the injunction requested.

The court rejected the State of Ohio's contention, adopting instead the Corps' theory that complete compliance with NEPA has never been "the kind of precondition to agency action as would justify an automatic injunction" and immediate cessation of all work was not required. The court held that "the determination that an EIS is inadequate does not divest a court of discretion to permit specified further project activity."

Accordingly, the court limited its review to the question of whether the district court abused its discretion in denying part of the relief requested by the State of Ohio. Finding that the district court correctly considered whether the State of Ohio had established

and outlet works, dam and spillway at the Caesar's Creek Project, and the construction of a dam and spillway at the East Fork Project.

17. 497 F.2d 1235, 1239 (6th Cir. 1974).
18. Id.
19. Id. at 1240. In its brief, Ohio argued that "compliance with the National Environmental Policy Act is a mandatory condition precedent to the construction of the Caesar Creek and East Fork Projects which has not been satisfied." See Brief for Appellant at 7. Arguing that the partial injunction allowing continuation of certain construction as well as land acquisition defeats the congressional mandate in NEPA, Ohio relied heavily on the Tellico dam case, Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d. 1164 (6th Cir. 1972).

In concluding its argument, Ohio contended:

The District Court in the instant case has failed to enjoin construction of the Caesar Creek and East Fork projects in spite of the clear mandate of Tellico. The hollow victory awarded the State of Ohio below is likely to result in the pro forma compliance with NEPA which this Circuit described in Tellico as an 'empty gesture'.

20. Brief for Appellee at 8a. In its brief, the Corps argued that the fundamental principle of equity that the issuance of a preliminary injunction rests with the sound discretion of the trial judge was not altered by the passage of NEPA.
21. 497 F.2d 1235, 1240 (6th Cir. 1974).
22. Id.
23. Id.
the four prerequisites for the equitable relief requested, the court reviewed the rationale of the district court in denying the full injunction. The district court had found that, although the State of Ohio would succeed on the limited issue of the inadequate EIS, it had not established that it would succeed in compelling abandonment of the project. Therefore, in balancing the consequences to all interested parties, the district court determined that a complete injunction would substantially harm the three contractors because they had committed their resources, both human and natural, to the projects and that by permitting them to continue the construction, the environment would not be significantly impaired. The court concluded that the public interest would not be served by restraining these three contracts. With little comment, the court went on to hold that the district court had not abused its discretion, and affirmed the order.

Although the only question on appeal concerned the denial of the requested injunctive relief, and not the adequacy of the EIS, the State argued that the fact of such inadequacy having been shown, a full injunction should issue as a matter of law and should not be subject to the discretion of the district court. To this extent, the State misinterpreted the present trend of the law.

In Aberdeen and Rockfish R.R. Co. v. Scrap, Chief Justice Burger stated:

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.

24. Id. at 1241. The court listed these as follows: "(1) that a substantial question is at issue; (2) that there is a possibility of success on the merits; (3) that a balancing of injuries to the parties requires preliminary injunctive relief; and (4) that the public interest would be served by such preliminary relief." See also Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972).
25. 497 F.2d 1235, 1241 (6th Cir. 1974).
26. Id.
27. Id.
28. Id.
29. Id.
30. See Brief for Appellant at 12.
32. Id. at 1217-18.
Also, in *Environmental Defense Fund, Inc. v. Froehlke*, the district court stated:

Once it is conceded that the Congress did not create a mandatory right to injunction for a NEPA violation, it becomes clear that general principles of equity are applicable and that application of those principles to this new type of case controls the exercise of the Court's discretion under the circumstances.

The Sixth Circuit in the instant case left no doubt that, in fashioning injunctive relief under NEPA, the trial court's decision in balancing the interests involved would not be reversed, absent a showing of an abuse of discretion.

In an earlier case, *Environmental Defense Fund v. Tennessee Valley Authority*, the Sixth Circuit affirmed a district court's decision granting plaintiff's motion for a preliminary injunction against any further construction activity on the Tellico Dam Project until an adequate environmental impact statement was filed. But even here, where the circumstances required comprehensive injunctive relief the district court balanced equitable considerations and excepted road surfacing, map making and reporting activities from the injunction.

In *Scherr v. Volpe*, the Seventh Circuit affirmed a broad injunction based on an inadequate EIS. However, it prefaced its review by saying that "[a]bsent a clear abuse of discretion, the normal course of wisely committing this balancing process to the district judge will not be disturbed."

Also, in *Lathan v. Volpe*, the Ninth Circuit, while holding that full relief was required to enjoin the acquisition of land in a low income urban area in a highway construction project, balanced the equities involved and permitted hardship acquisitions by the state.

While it is true, as the State of Ohio contended, that in the *Environmental Defense Fund, Scherr*, and *Lathan* cases, the circumstances did require nearly total injunctive relief, the district court's discretionary powers in granting or denying the relief requested was never contested. The State of Ohio may have met with more success on appeal had it argued instead

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34. Id. at 356.
35. 466 F.2d 1164 (6th Cir. 1972).
36. Id. at 1171.
37. 466 F.2d 1027 (7th Cir. 1972).
38. Id. at 1030.
39. 455 F.2d 1111 (9th Cir. 1971).
40. Id. at 1126.
that the district court abused its discretion in not granting a total injunction. Since the impact statements were so grossly deficient of information regarding the actual effect which the projects would have on flood levels downstream, on water quality and water flow, as well as information with which a reasoned choice of alternatives could be analyzed, the district court, by its own holding, did not have sufficient information before it to conclude that the State would be unsuccessful in compelling abandonment of the project. If there had been a possibility that a new EIS would dictate another course of action, the two contracts for dam construction should not have been permitted to continue. Any economic harm to the innocent contractors could have been passed on to the Corps of Engineers through an increased contract price, in the event that the projects were determined to be beneficial in the new EIS.

All the applicants for intervention appealed the district court's denial of motions to intervene as of right under Rule 24 (a)(1) and (a)(2), and permissively under 24 (b). In its denial under 24 (a) (1), the district court held that neither the property owners, the conservation groups, nor the Ohio Contractors Association had an unconditional right to intervene since "any discussion of a reservoir not already in existence, and therefore not able to meet any existing Ohio water quality control standards, is at best speculative and not before the Court at this time."

On appeal, it was argued that Rule 24 (a)(1) entitles a party to

41. Editorial, A Big Dam Mess, Cincinnati Post, Aug. 8, 1974, at 8, col. 1. It has been alleged that flood waters along Caesar Creek during past floods would have been reduced only a couple of feet by the project; at East Fork, several feet at most; and flood waters in Cincinnati would barely be reduced at all.
42. Moncrief and Mong, Officials Call Two Dams 'Bad Projects', Cincinnati Post, Aug. 3, 1974, at 4, col. 3. There is a danger of seriously degraded water throughout the reservoirs, as in the downstream areas, caused by both the pollutants from agricultural runoff in the watershed and animal waste and effluents (treated waste) from surrounding towns and the proposed recreational parks.
43. Editorial, supra note 41, at 8, col. 2. Although the Bureau of Sport Fisheries and Wildlife of the U.S. Department of the Interior requires each dam to provide a downstream release of 100 cubic feet per second from April through October, the Corps can promise only 43 to 86 cubic feet per second at Caesar Creek and from 41 to 84 at East Fork.
44. Moncrief and Mong, supra note 42, at 4, col. 3. Such alternatives might include flood plain regulation, flood proofing or a "dry dam", a structure which impedes the flow of the stream only at times of high water. See Brief for Appellant at 18. It has been estimated that the cost of acquiring all the land within an environmental corridor the entire length of the region, from the northern boundary of Warren County to the intersection of the Ohio River would be only $35 million, as compared to the more than $100 million estimated to complete the projects as they are now planned.
45. 497 F.2d 1235, 1241 (6th Cir. 1974).
46. Id. at 1241-42.
intervene as of right when a statute of the United States confers an unconditional right of intervention. Since the State of Ohio, in its complaint, had alleged that the Corps was violating the Federal Water Pollution Control Act Amendments of 1972 by continuing construction the movants argued that they were entitled to the unconditional right to intervene provided in that statute. Movants further argued that since the alleged violations of the FWPCA Amendments were not dismissed and, therefore still in issue, the district court erred in finding that the issue of noncompliance was "speculative."

The court reversed the district court's order denying intervention stating that it was reluctant to prohibit persons challenging expected violations of water quality standards until the reservoirs were actually constructed where it was alleged that the present plan for construction would necessarily cause such a violation. In addition, it held that the Corps' failure to obtain a determination from the Administrator of the United States Environmental Protection Agency of the need for, value of, and impact of water storage for water quality control, as required by 33 U.S.C. § 1252 (b)(3), was not, as the district court had determined, "speculative."

The court, therefore, held that Section 1365 (b)(1)(B) of the FWPCA Amendments confers upon any citizen an unconditional right to intervene under Rule 24 (a)(1) in an action brought by a state to enforce the Act. The term "citizen", the court said, is defined by the Act as "a person or persons having an interest which

47. Brief for Intervening Appellants (conservation groups and landowners) at 6. Rule 24 (a) of the Federal Rules of Civil Procedure provides "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene."

48. Count 4 of the Complaint charged that the Federal Water Pollution Act Amendments of 1972, 33 U.S.C. §1251 et seq., required defendants to comply with all water quality standards applicable to the streams and that impounding these waters would violate these standards by increasing the nutrient content, altering water temperature and the present qualities of the water, all in violation of the FWPCA Amendments. See Brief for Intervening Appellants at 6-7.

49. 33 U.S.C. §1365 (b)(1)(B)(1972) provides that: "... No action may be commenced... if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States... to require compliance with the standard, limitation or order, but in any such action in a court of the United States any citizen may intervene as a matter of right."

50. Brief for Intervening Appellants at 8-9. Movants argued that "Absent a hearing on the merits of the case, which the August 14th hearing for a preliminary injunction certainly was not, any allegation is speculative."

51. 497 F.2d 1235, 1242 (6th Cir. 1974).

52. Id.

53. Id.
is or may be adversely affected". Also, the court found that all three intervenors had an interest to confer standing: the property owners, by the fact that they own the property which is subject to condemnation for the projects; the conservation groups, by their members' use and enjoyment of the property that may be adversely affected; and the contractors' association, by certain of its members' interest in proceeding without delay to complete their contracts with the Corps.

In disposing of the appeal by its holding that movants were entitled to intervention under Rule 24 (a)(1), the court did not decide whether the group should have been permitted to intervene under Rule 24 (a)(2) or Rule 24 (b).

The question of a citizen's right to intervene under Section 1365 (b)(1)(B) was one of first impression for the Sixth Circuit. In fact, this section of the FWPCA Amendments of 1972 has had little testing in any court prior to the instant case. In one of the few cases in other jurisdictions concerning itself with intervention under this section, the motion for intervention was denied. In Stream Pollution Control Board of the State of Indiana v. United States Steel, Inc. the court held that, in addition to the fact that the subject of the suit was the violation of a standard promulgated prior to the 1972 Amendments and, thus not based upon effluent standards promulgated pursuant to the Amendment to which the right of intervention would attach, intervenor simply did not assert the requisite interest. In his motion for intervention, intervenor alleged an interest in the waters as the source of his drinking water and forms of recreation, as well as allegations as to the threat to his family's health. In dismissing the motion, the court said:

The interest which the movant has alleged in this case is basically no different than that of thousands of other citizens. The interests of such members of the general citizenry in this case is represented by the Attorney General of this State who has the statutory duty and authority to do so. There is no suggestion here that the representation of such interests by the Attorney General of Indiana is [in] any manner inadequate.

But in the instant case, the court was persuaded by the movants'
argument that the requisite interest existed, that the challenged action would cause them sufficient "injury in fact" and that their interests would be inadequately represented by the State. By holding that movants could avail themselves of the right to intervention under Section 1365 (b)(1)(B) and Rule 24 (a)(1), the court has set a significant precedent.

G. ROBERT HINES

Charles Ray, his wife and his daughter, received serious injuries in a head-on collision with an uninsured motorist. At the time of this accident, Mr. Ray had in effect a separate policy of insurance on each of the three automobiles owned by him. One of these policies applied to the car in which Ray and his family were riding when the collision occurred.

The policies were issued by State Farm Mutual Insurance Company (hereinafter State Farm) and the provisions of the policies, including those for uninsured motorist coverage, were identical.\(^1\) Ray and his family, plaintiffs-appellee as “insureds” under each of the policies, brought suit in district court seeking, \textit{inter alia}, a declaratory judgment that they were entitled to aggregate or “stack” the uninsured motorist coverages from the three separate policies.\(^2\) In response to appellees’ motion for partial summary judgment, the district court entered an order to allow “stacking” of the uninsured motorist coverages. State Farm then petitioned the Sixth Circuit for leave to appeal from the order and this petition was granted.\(^3\) The Sixth Circuit, paralleling arguments set forth by State Farm,\(^4\) reversed the district court and held: “\ldots that the clear language of the policies excluded the possibility of ‘stacking’ the uninsured motorist coverages, and that those exclusions are effective under Ohio law.”\(^5\)

In arriving at its decision, the court first examined the language\(^6\) within the contracts of insurance themselves. It found this language

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1. Ray v. State Farm Mutual Automobile Ins. Co., 498 F.2d 220 (6th Cir. 1974). The uninsured motorist clause in each policy provided limits of $15,000 per person and $30,000 per accident. Aggregated, the policies provided uninsured motorist coverage of $45,000 per person and $90,000 per accident.

2. \textit{Id.} at 221. It should be noted here that appellees had previously obtained default judgments against the uninsured motorist totaling $167,000.

3. \textit{Id.} The matter was before the court of appeals on interlocutory appeal, the district court having certified that its order involved a controlling question of law as to which a substantial ground for difference of opinion existed and that an immediate appeal would advance the litigation.

4. \textit{Id.}

5. \textit{Id.} at 225.

6. \textit{Id.} at 222. The uninsured motorist section of the policies provided that State Farm agreed:
clear and unambiguous in not extending uninsured motorist coverage to the insureds when they occupy a motor vehicle owned by one of them that is not described in the declaration section of the policy. Thus, the policy which described the vehicle involved in the collision definitely provided uninsured motorist coverage. However, the coverage provided under the other two policies was not applicable because the involved vehicle was not an "owned motor vehicle" under either of them.

The law in Ohio governing construction of contracts of insurance is well settled. Where the meaning of the language used in a contract of insurance is doubtful, uncertain or ambiguous, the language will be construed strictly against the insurer. Conversely, "[w]hen words used in a policy of insurance have a plain and ordinary meaning, it is neither necessary nor permissible to resort to construction unless the plain meaning would lead to an absurd result." When the court construed the contract language to be clear and unambiguous, it found "stacking" to be excluded under the policies. At issue here was the effectiveness of the exclusion clause under Ohio law. The basis of this challenge was Ohio Rev. Code §3937.18.

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle .... (Emphasis the policies).

A relevant exclusion which immediately followed read:

THIS INSURANCE DOES NOT APPLY:

(b) to bodily injury to an insured while occupying or through being struck by a land motor vehicle owned by the named insured or any resident of the same household, if such vehicle is not an owned motor vehicle .... (Emphasis the policies).

7. Id.
8. Id. The policies defined "owned motor vehicle" as "the motor vehicle or trailer described in the declarations."
11. 498 F.2d 220, 222 (6th Cir. 1974).
12. Id.
13. Ohio Rev. Code §3937.18 (1965) reads in pertinent part:
(A) No automobile liability ... policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be ... issued ... unless coverage is provided therein ... for the protection of persons ... legally
which requires insurance carriers to offer uninsured motorist coverage in every motor vehicle liability policy issued.\textsuperscript{14} This statute had been used in several cases to successfully invalidate various exclusion clauses by which insurance companies attempted to restrict liability under their uninsured motorist coverage.\textsuperscript{15} These cases\textsuperscript{16} shaped and enunciated a public policy in Ohio, i.e. "[p]rivate parties are without power to insert enforceable provisions in their contracts of insurance which would restrict coverage in a manner contrary to the intent of the statute."\textsuperscript{17} The question before the circuit court was whether the exclusions in the State Farm policies did create restrictions which would indeed violate the legislative intent behind §3937.18 of the Ohio Rev. Code.\textsuperscript{18}

Although the court of appeals had the benefit of three Ohio appellate decisions bearing directly on the question of "stacking,"\textsuperscript{19} the Ohio Supreme Court had never addressed itself to the issue.\textsuperscript{20} It was clear therefore, that the court of appeals had to determine how the Ohio Supreme Court would rule if faced with this particular case.\textsuperscript{21}

Any examination of the Ohio law in this area requires discussion

\begin{footnotesize}
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\item The minimum limits to be offered were increased to $12,500 per person, $25,000 per accident in 1970. \textit{See} Ohio Rev. Code §4509.20 (1970).
\item 15. \textit{See} Kinkead v. Buckeye Union Ins. Co., 276 N.E.2d 673 (Ct. App. 1970) (the defendant insurance company was not permitted to reduce its uninsured motorist coverage by the amount which it had paid to its insured under med-pay coverage; the policy restriction which allowed this reduction was contrary to the purpose of Ohio Rev. Code §3937.18 and therefore unenforceable). \textit{See also}, Bartlett v. Nationwide Mutual Ins. Co., 33 Ohio St.2d 50, 294 N.E.2d 655 (1973) (the Ohio Supreme Court held that a policy provision attempting to reduce the amount payable under uninsured motorist coverage because of receipt of Workmens' Compensation benefits was unenforceable as against public policy in light of Ohio Rev. Code §3937.18.)
\item 18. 498 F.2d 220, 222 (6th Cir. 1974).
\item 20. 498 F.2d 220,223 (6th Cir. 1974).
\item 21. \textit{Id}.
\end{itemize}
\end{footnotesize}
of Curran v. State Automobile Mutl. Ins. Co.\textsuperscript{22} Plaintiff, Mary Curran, sustained personal injuries as a passenger in an automobile which collided with an uninsured motor vehicle. Three co-passengers were injured in addition to Mrs. Curran, and a fourth was killed. Western Casualty & Surety Company, the insurer of the accident vehicle, agreed to pay $20,000 to the injured passengers. This amount represented the policy limit for injuries sustained by two or more persons due to a single accident with an uninsured motorist. At the same time, plaintiff had in effect a policy issued by defendant, State Automobile Mutual Insurance Company, which provided uninsured motorist coverage to her in the amount of $10,000 per person and $20,000 per accident.\textsuperscript{23} The defendant disclaimed liability by virtue of the "other insurance" provisions within the policy.

These provisions limited the defendant's liability when the insured is injured while occupying an automobile not owned by him. The defendant's policy states that the uninsured motorist coverage:

shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.\textsuperscript{24}

After exploring the statutory purpose of Ohio Rev. Code §3937.18,\textsuperscript{25} the supreme court stated that the statute "should be construed liberally."\textsuperscript{26} Thus the insurer was not permitted to avoid liability for uninsured motorist protection by including a clause repugnant to the statute.

A close examination of Curran reveals that public policy demands an interpretation of Ohio Rev. Code §3937.18 which will "protect persons injured in automobile accidents from losses which, because of the tort-feasor's lack of liability coverage, would otherwise go uncompensated."\textsuperscript{27} There is nothing in Ohio law which suggests that Ohio Rev. Code §3937.18 and Ohio Rev. Code §4509.20 prohibit stacking of insurance policies, or place any limit on the total amount

\textsuperscript{22} Id. The district court and both parties in Ray relied heavily upon the Curran decision in urging their respective positions.

\textsuperscript{23} The amount of uninsured motorist coverage required under Ohio Rev. Code §4509.20 had not yet been raised to $12,500 per person and $25,000 per accident.


\textsuperscript{25} Id. at 38, 266 N.E.2d at 569.

\textsuperscript{26} Id.

\textsuperscript{27} Id.
a victim may recover as a result of the negligence of an uninsured motorist. Recovery of less than policy limits will occur only where there is an effective policy exclusion or full recovery by the insured of the actual loss.

The decision of the supreme court in *Curran* interprets Ohio Rev. Code §3937.18 in relation to the particular facts of that case. However, a general observation concerning this interpretation can be made, and this observation must be considered in any later interpretation of the statute by either a state or federal court. In its liberal construction of the statute, the supreme court allowed a recovery by Mrs. Curran which totaled an amount greater than the limits of her own policy. Thus despite the exclusion within her policy, she would receive her pro-rated share of proceeds from the accident vehicle's insurer plus proceeds from her own insurance up to the policy limits. The court was not limited or restrained simply because a minimum amount of uninsured motorist coverage was required under Ohio Rev. Code §4509.20. The pertinent facts before the court were an injury caused by an uninsured motorist and an insurance policy for which premiums were paid and which seemed to exclude recovery because other insurance was available. The exclusion fell because the court would not permit the insurance company to limit its liability in the face of a public policy designed to protect citizens from injuries caused by uninsured motorists.

Following the *Curran* case, three separate Ohio appellate courts wrestled with the "stacking" issue. These decisions were discussed by the Sixth Circuit Court of Appeals in the *Ray* opinion. In the first case the Ohio appellate court made no mention of Ohio Rev.

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30. The Ohio Supreme Court has specifically rejected any implication that an injured party may pyramid separate uninsured motorist coverage in order to recover more than the actual loss. See *Curran* v. State Automobile Mutual Ins. Co., 25 Ohio St.2d 39, 266 N.E.2d 566, 569 (1971).

31. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

32. Of course the amount of recovery here is determined by the nature of the injuries suffered by the insured. In the case of Mrs. Curran, these injuries were clearly greater than the total amount recoverable under both policies.

33. Cases cited note 19 supra.

34. 498 F.2d 220, 223 (6th Cir. 1974).

35. *Hurles v. Republic Franklin Ins. Co.*, 39 Ohio App.2d 118 (1973). In this case one policy issued to the plaintiff insured two vehicles. Uninsured motorist coverage was afforded for each automobile, and separate premiums were charged. Plaintiff was involved in an accident with an uninsured motorist while driving one of the vehicles, and he alleged injuries and damages.
Code §3937.18 and its public policy considerations. The question was decided primarily on basic contract principles and for this reason is suspect in light of Curran. The facts in the second case were similar. Here the plaintiff had uninsured motorist coverage on two vehicles. A single policy provided the insurance for both vehicles, but there were separate premium payment provisions. The court refused to allow stacking because of a clause which required the policy terms to be applied separately to each vehicle. The public policy of Ohio with respect to Ohio Rev. Code §3937.18 was held to be satisfied because the insurance contract provided uninsured motorist coverage with minimum limits corresponding to Ohio Rev. Code 4509.20. Weemhoff v. Cincinnati Ins. Co. was the last Ohio appellate case on "stacking" to be decided prior to Ray. After reviewing the Hurles and Nichols decisions, the court found "stacking" inappropriate. Once again the policy provided a single uninsured motorist coverage for vehicles insured thereunder. It is interesting to note that the United States Court of Appeals in Ray commented on dictum from Weemhoff which suggested that had there been two separate policies issued, one for each automobile, plaintiffs would have been entitled to "stack" coverages. The Ray court rejected this assumption and found no significant difference between a single policy with separate premium provisions for several automobiles and separate policies issued to one insured for each of several automobiles.

The United States Court of Appeals raised an interesting question while commenting on the State Farm policy at issue in the Ray case. The court began by observing that uninsured motorist coverage generally follows the insured persons rather than the vehicle. Thus an insured is covered while a pedestrian, while an occupant in the vehicle of a third person or even while on horseback! Because

in excess of the policy limits of $12,500/$25,000. The insurance company conceded coverage on the involved vehicle for $12,500/$25,000, but would not permit its insured to "stack" the uninsured motorist coverage for the second vehicle. The court agreed with the insurance company and found in its favor.

37. 498 F.2d 220, 223 (6th Cir. 1974).
38. No. 73A419 (Ct. App. Franklin Co., Ohio, Mar. 26, 1974).
39. 498 F.2d 220, 223 (6th Cir. 1974).
40. Id. at 225.
41. Id. at 223.
42. An exception occurs when the insured occupies a non-owned vehicle as defined by the policy. See note 6 supra. In this case the exclusion would deny coverage which normally would have been provided under the policy terms.
43. In each situation an insured is subject to injuries due to the negligence of an uninsured motorist.
no exclusion within the State Farm policy applied to an insured injured under these circumstances, an argument could be made in favor of "stacking" several owned policies.

Such an argument acquires additional strength when one studies the relationship between the coverage provided under several owned policies and the premiums charged for such policies. For example, consider the case of Ray where the insured had three separate policies with identical provisions. Any one of these policies alone would cover the insureds while occupants in a non-owned automobile or when walking on the street, et cetera. The addition of a second or third policy could not increase the insurance company's exposure in this respect. Therefore under these circumstances it would seem difficult for the insurance company to deny a "stacking" claim unless the premiums on policies #2 and #3 were reduced.

A resolution to this question in Ohio and a determination as to whether a "liberal" construction of Ohio Rev. Code §3937.18 should invalidate "owned vehicle" exclusions must await further action by the Ohio Supreme Court.

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44. See Ringenberger v. General Accident Fire & Life Assurance Corporation, 214 So.2d 376, 377 (Fla. Dist. Ct. App. 1968). Here the insured sought to stack the uninsured motorist coverage on his two automobiles after being injured while a passenger in a non-owned vehicle. The premium on the second vehicle was less than the premium on the first. The court found the lesser premium to be consideration for the coverage provided with respect to accidents involving the additional automobile. (As in Ray, this coverage was excluded under the first policy). At the same time, this reduced premium reflected the fact that there was no increased exposure from accidents while the insured was occupying a non-owned automobile, et cetera.

45. The writer uses this term to describe exclusions such as that found in Ray. See note 6 supra.

On November 15, 1973, one Samuel Jordan filed a class action suit with the United States District Court for the Northern District of Ohio, challenging the apportionment system for the State of Ohio. Named as defendants were state officials and officials of the Mahoning County Board of Elections having responsibility and authority for devising and implementing the apportionment scheme for the state. The court's jurisdiction was invoked pursuant to the fourteenth and fifteenth amendments to the United States Constitution under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and upon application of the plaintiff, a three-judge court was convened pursuant to 28 U.S.C. § 2281 to consider the issues.

The apportionment plan challenged by the plaintiff was unanimously declared unconstitutional by the panel, and after submission of a new plan and hearings thereon, the revised plan was approved by the district court on March 13, 1972. Following the success of their action, counsel for the plaintiff filed applications for reasonable attorneys' fees and expenses. In the absence of any objection from the named defendants, the district court granted the motion and ordered the defendants, in their official capacities, and as the persons responsible for apportionment in the State of Ohio, to pay the plaintiff's attorneys fees. No appeal was taken from this order.

After eight months of resistance and refusal to comply with the order, the court directed that the fees and expenses be taxed as costs attendant to the litigation and began enforcement of the judgment upon the plaintiff's writ of fieri facias. Execution proceedings were terminated after the defendants caused the payment of the costs. No objection was raised by the defendants prior to the ordering of fees or prior to the taxing of fees and expenses as costs. No appeal was taken by the defendants from either order.

2. Id.
3. Id. at 703-704.
4. Id. at 704. The amounts requested totalled $27,272.65.
5. Id.
6. Id.
7. Id.
8. Id.
On February 22, 1973, the defendants filed a motion under Rules 60 (b) (4) and (6), of the Federal Rules of Civil Procedure, seeking to vacate both the court's order awarding fees and its order taxing fees and expenses as costs attendant to the litigation. The district court denied the defendants' motion for a stay of execution on the grounds that the plaintiff's litigation efforts were in the very highest public interest resulting in an immeasurable benefit to the citizens of the state, and that the amounts requested as fees and expenses were entirely reasonable for the services performed by counsel. On June 12, 1973, the district court denied the defendants' Rule 60 (b) motion, holding that its judgments were not void under the eleventh amendment, and that res judicata barred further inquiry into the issues raised.

The defendants appealed the overruling of their motion to the Sixth Circuit Court of Appeals.

The Sixth Circuit framed the issue thus:

...the case before us presents a singular, although by no means simple, issue: Does a federal court have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C. § 1983 to vindicate constitutional rights?

The three-judge Sixth Circuit panel found that a federal court does not have the power to award attorney fees against a state and reversed the district court.

The plaintiff urged, and the Sixth Circuit agreed, that the United States Supreme Court decision in Hall v. Cole would permit an award of attorney fees where plaintiff's successful litigation confers a substantial benefit on the members of an ascertainable class. However, the Sixth Circuit noted that "implicit in the Supreme Court's holding was the fact that the class benefit theory can only be employed where a court has the requisite jurisdiction to make such an award."

The eleventh amendment to the United States

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9. Rule 60 - Relief from Judgment or Order
   a) Clerical mistake
   b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.
   On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . 4) the judgment is void, . . . 6) any other reason justifying relief from the operation of the judgment.
10. 500 F.2d at 704.
11. Id. at 705.
13. Id. at 5.
14. 500 F.2d at 706.
15. The eleventh amendment provides that:
Constitution has "been found to be the embodiment of the doctrine of sovereign immunity. The sovereign immunity of the state is, then, a limitation of federal judicial power, that is, on the constitutional grant of jurisdiction to the federal courts." At no time did the State of Ohio waive its sovereign immunity in the instant case. The Supreme Court of Ohio has specifically held that the state is immune from an award of attorney fees unless consented to by a two-thirds majority vote of the General Assembly.

Plaintiff argued that the state may not invoke its sovereign immunity when it is guilty of a violation of rights guaranteed by federal laws or the United States Constitution. He cited Sims v. Amos as controlling. The Sims case involved a reapportionment suit directed at the governor, attorney general, secretary of state and legislators of the state of Alabama. As in the instant case, a three judge district court awarded attorney fees to the successful plaintiff on the basis of the class benefit rationale. The U.S. Supreme Court summarily affirmed the award of attorneys' fees.

Subsequent to the Supreme Court's summary affirmation in Sims, the Second, Fifth and Ninth circuits held that the eleventh amendment is not a bar to the taxing of attorney fees as costs to be paid by the state in actions involving a redress for violation of constitutional rights.

Approximately four months prior to the Sixth Circuit's decision in Jordan, the United States Supreme Court announced its decision in Edelman v. Jordan.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

16. 500 F.2d at 706.
18. In Grandle v. Rhodes, plaintiff brought suit to enjoin the illegal expenditures of state highway funds for a preliminary study in connection with contemplated construction of a parking garage. His request for attorney fees was denied pursuant to Article II Sections 22 and 29 of the Ohio Constitution, which require specific authorization by the General Assembly before public funds may be expended. The Sixth Circuit recently rejected plaintiff's argument that the states' sovereign immunity had been waived by the Attorney General's consent to the award of attorney fees citing Grandle v. Rhodes as controlling. 43 U.S.L.W. 216 (10-22-74).
20. Id.
22. Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974).
24. Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).
In a 5 - 4 decision Mr. Justice Rehnquist, writing for the majority in *Edelman*, noted:

This case, therefore, is the first opportunity the court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion.26

The Sixth Circuit read the *Edelman* opinion as being dispositive of the issue before it, noting that the eleventh amendment prohibits the awarding of attorney fees against unconsenting sovereign states.27 Prior to the Sixth Circuit's opinion in *Jordan* the Third Circuit had also denied the awarding of attorney fees against unconsenting states, citing the *Edelman* decision as controlling.28

Recognizing the eleventh amendment as a jurisdictional bar to federal judicial action, the Sixth Circuit overruled the district court's order denying the Rule 60 (b) motion on the grounds of *res judicata*. A void judgment is no judgment at all and is totally without legal effect.30 Additionally, Rule 60 (b) does not prevent a litigant from making a direct attack upon the judgment before the court that rendered it.31

It is submitted that the issue of whether or not the eleventh amendment bars the taxing of attorney fees as costs, to be paid by an unconsenting state, was not laid to rest by the Supreme Court's decision in *Edelman*.

Neither the Supreme Court's summary affirmance of *Sims v. Amos* nor any case holding similar thereto was mentioned in the *Edelman* opinion. Judge Gibbons, ruling in *Skehan v. Board of Trustees, Bloomsburg State College*, attributed the court's omission to inadvertence. Was the omission due to inadvertence or was it by design?

The plaintiff in *Edelman* brought a class action suit against the Illinois officials administering the federal - state programs of Aid to the Aged, Blind and Disabled (AABD). He sought injunctive and

26. Id. at 1359.
27. 500 F.2d at 709.
28. Skehan v. Board of Trustees, Bloomsburg State College, _ F.2d ___ No. 73-1613 (3rd Cir., filed May 3, 1974).
29. 500 F.2d at 709.
33. ___ F.2d ___ No. 73-1613 (3rd Cir., filed May 3, 1974).
34. ___ U.S. at ___, 94 S.Ct. at 1351.
declaratory relief against the aforementioned officials, contending they were violating federal laws and denying equal protection of the laws by following state regulations that did not comply with the federal time limits within which the participating states had to process and make grants with respect to the AABD applications.\textsuperscript{35} The district court issued a permanent injunction requiring the officials to follow the time limits set out in the federal regulations and to remit all benefits wrongfully withheld over a period of 3 years.\textsuperscript{36} The state appealed, claiming that the eleventh amendment barred that portion of the district court's opinion which awarded retroactive benefits.\textsuperscript{37} The Supreme Court held the award of retroactive benefits was in violation of the eleventh amendment.\textsuperscript{38} Mr. Justice Rehnquist in \textit{Edelman} relied on the Court's prior decision in \textit{Ex parte Young}\textsuperscript{39} in upholding that portion of the district court's order granting prospective injunctive relief:

\begin{quote}
Ex parte Young was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in Ex parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.\textsuperscript{40}

Mr. Justice Rehnquist went on to say that "as in most areas of the law, the difference between the type of relief barred by the eleventh amendment and that permitted under \textit{Ex parte Young} will not in many instances be that between day and night."\textsuperscript{41} In most cases involving prospective injunctive relief, "state officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct."\textsuperscript{42}
\end{quote}

\textsuperscript{35.} \textit{Id.} at 1352.
\textsuperscript{36.} \textit{Id.}
\textsuperscript{38.} \textit{U.S. at ______}, 94 S. Ct. at 1363.
\textsuperscript{39.} 209 U.S. 123 (1908).
\textsuperscript{40.} \textit{U.S. at ______}, 94 S.Ct. at 1356.
\textsuperscript{41.} \textit{Id.}
\textsuperscript{42.} \textit{Id.} at 1358.
The mere fact that the state of Illinois would have to expend funds from its state treasury did not in and of itself violate the eleventh amendment. The violation occurred when state funds were expended “as a form of compensation to those whose applications were processed on the slower time schedule.” Compensation to those people was tantamount to awarding damages “from a past breach of a legal duty on the part of the defendant state officials.”

The granting of attorney fees is not “a form of compensation” to be awarded to all members of the class who benefit from a finding that a state official has breached a legal duty owing to them. Attorney fees are a part of the costs of litigation, the taxing of which is permitted against the states. “Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young.”

It is doubtful that Mr. Justice Rehnquist’s failure to mention the Sims v. Amos decision, and the cases holding therefrom, can be attributed to inadvertence. The issue of awarding attorney fees for a violation of 42 U.S.C. § 1983 in the Edelman case only formed a basis for federal jurisdiction. There was no determination that the state action was unconstitutional under the fourteenth amendment. The state’s action was found to be in violation of the Social Security Act.

If the post Civil War Amendments are “to serve as a sword, rather than merely a shield, for those whom they were designed to protect,” the Supreme Court will have to face the question often asked: to what extent, if any, has the states’ eleventh amendment sovereign immunity been limited by the enactment of the fourteenth amendment?

The Edelman court informs the states that if they are found to have violated federal regulations pertaining to the disbursement of federal-state welfare funds they need not compensate those persons illegally deprived of benefits.

The Sixth and Third Circuits have read Edelman as telling those persons who have had benefits illegally withheld that if they wish to sue the state for its illegal activities they must do so with their

43. Id.
44. Id.
46. ___ U.S. at ___, 94 S.Ct. at 1358.
48. ___ U.S. at ___, 94 S.Ct. at 1361.
49. ___ U.S. at ___, 94 S.Ct. at 1356.
own funds. *Edelman* has “close[d] the door on any money award from a state treasury in any category.”

Who has sufficient means to take on the sovereign in litigation involving the redress of alleged constitutional violations? Will violations go unchallenged? If the sword has been in fact wrenched from the hands of potential litigants it has been done so in an opinion whose true ramifications are concealed in an argument aimed at maintaining the integrity of state fiscal policies.

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50. 500 F.2d 709.

The United States District Court for the Northern District of Ohio, Western Division, found defendants guilty of gambling offenses. Defendants were charged with violating 18 U.S.C. §1955 and 18 U.S.C. §2, concerning the handling of bets on sporting events by telephone. Two separate wiretap orders were issued by a federal judge, along with a “pen register” order.1 Title III of the Omnibus Crime Control and Safe Street Acts of 19682 details the procedure for obtaining the proper authority to intercept wire communications. The court of appeals, in reversing the district court, found that the Executive Assistant to the Attorney General had authorized the first wiretap application,3 in violation of 18 U.S.C. §2516 (1).4 Relying on United States v. Giordano5 the court of appeals held that evidence obtained from an interception order based on these procedures6 was obtained in violation of that Act.

In obtaining the second wiretap order, there was substantial compliance with all the necessary requirements and pertinent case law.7 But, the court of appeals reasoned, all evidence obtained under that

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1. A pen register is a mechanical device which is attached to a particular telephone line and registers all telephone numbers which are dialed from that line. It also records the number of rings on incoming calls. In any event, it does not record the incoming calling number, whether any call was completed nor does it record any conversation. United States v. Wac, 498 F.2d 1227, 1230 (1974).


3. The first wiretap order was issued along with the “pen register” order on November 22, 1971.

4. The pertinent part of the statute reads as follows: “The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction . . . .”


6. The variation from §2516 (1) is the fatal error. This case follows Giordano, in that this section of the code does not give the Attorney General the power to delegate the authority granted by this section to his Executive Assistant but only to Assistant Attorneys General. Assistant Attorneys General are appointed with the advice and consent of the Senate, while his Executive Assistant is appointed strictly by the Attorney General himself. There have been a rash of cases where Sol Lindenbaum, the Executive Assistant has in fact approved applications. The government contends, in all of these situations, that he was the “alter ego” of the Attorney General and that they have satisfied the statutory requirements. 498 F.2d 1227, 1230.

7. The second wiretap order was issued on December 8, 1971, and followed the procedure described in United States v. Chavez, 94 S.Ct. 1849 (1974), and United States v. Martinez, 498 F.2d 464 (6th Cir. 1974).
order was also obtained in violation of the statutes. The second wiretap order was not literally an extension order, but a significant portion of the supporting affidavit filed with the second application contained information obtained pursuant to the first order. And since this information was relied upon by the applicant, and considered by the issuing judge, it was deemed to be "essential in fact" to the granting of the second order.

All evidence obtained in violation of the statutes was held to be inadmissible because of the exclusionary rule which is part of the Act in question. The words "derived therefrom" contained in that section extend the right of exclusion beyond evidence directly obtained. The court of appeals said that it appeared to be a codification of the "fruit of the poisonous tree" doctrine. This doctrine and the connection between the results of the first order and the reliance on those results in support of the second application made all evidence obtained pursuant to both orders subject to suppression, as being derived from the illegal initial order.

Defendants appealed during a time of conflict among the various circuits with respect to the construction of the provisions of 18 U.S.C. §2516 (1).

The major argument presented upon appeal concerned the ad-

8. If it was an extension order, then Giordano would apply and all communications intercepted pursuant to such an extension order would be inadmissible, since it would be evidence derived from the communications invalidly intercepted pursuant to the initial order. 498 F.2d 1227, 1231.

9. 498 F.2d 1227, 1231.


Whenever any wire or communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.


"Evidence directly obtained" would be all evidence obtained under the first wiretap order only, being the only evidence obtained directly from an illegal order. 498 F.2d 1227, 1232.


First: the evidence did not show that their gambling operations had any effect on interstate commerce. The court of appeals relied on United States v. Aquino, 336 F. Supp. 737 (E.D. Mich. 1973) which is based on Perez v. United States, 402 U.S. 146 (1971) and United States v. Darby, 312 U.S. 100 (1941). It was held to be constitutional in that it dealt with a class of activities which has an effect on interstate commerce.

Second: that the presumption created therein is without a rational basis. The court already rejected this argument in two earlier decisions, United States v. Palmer, 465 F.2d 697 (6th Cir.), cert. denied, 409 U.S. 874 (1972); and United States v. DiMario, 473 F.2d 1046 (6th Cir.), cert. denied, 412 U.S. 907 (1973).
missability of wiretap evidence obtained under the initial order. It had been shown, on a pre-trial motion to suppress evidence, that Sol Lindenbaum, Executive Assistant to the Attorney General, had affixed the initials of the Attorney General to a memorandum authorizing the application. The critical issue presented is whether this procedure conforms with the statutory requirements of 18 U.S.C. §2516 (1).

The Second Circuit, in United States v. Pisacano, held that it does conform. In that case the application “went, in regular course to Mr. Lindenbaum, who . . . made recommendations to the Attorney General, and, on occasion and with the Attorney General’s authority, has acted on the latter’s behalf.” The request in Pisacano was one where the Executive Assistant to the Attorney General affixed the Attorney General’s initials “on the basis of his knowledge ‘of the Attorney General’s actions on previous cases, that he would approve the request if submitted to him’”. It was pointed out in Pisacano that responsibility for such authorization would be assumed by the Attorney General, in any case. Therefore, the Attorney General would remain politically responsible by honoring his name which would be affixed to all authorizations.

The Sixth Circuit had yet to rule on this question, but the great weight of authority seemed to be that these authorization procedures did not meet the statutory mandates of 18 U.S.C. §2516 (1). It appears that the intent of Congress was to centralize the authority to approve wiretap applications. This intent is shown by the Senate debate on the Crime Control Act. Although 23 U.S.C. §510 does

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Third: that the presumption is a “watering down” of the Fourth Amendment requirements of probable cause. This is based on an invalid and incorrect assumption. The probable cause to issue a warrant can not be based on these statutory presumptions alone. The presumption is that the dollar take is in excess of $2,000 in any single day. There still must be probable cause to issue the warrant. United States v. Polite, 334 F. Supp. 1318, 1323 (S.D.N.Y. 1971). In Wac, there was sufficient information to establish probable cause without reference to the statutory presumptions.

15. Id. at 263.
16. Id.
17. Id.
permit delegation of authority by the Attorney General to any other
officer, employee, or agency of the Justice Department, the intent of
Section 2516(1) is meant to limit and centralize this approval proce-
dure.

The construction of this section is the reason the Supreme Court
recently granted certiorari in the Giordano case. In citing that stat-
ute the Supreme Court stated that the Executive Assistant is not a
specially designated Assistant Attorney General. They held that the
statute, "fairly read, was intended to limit the power to authorize
wiretap applications to the Attorney General himself and to any
Assistant Attorney General he might designate. This interpreta-
tion of the statute is also strongly supported by its purpose and
legislative history".20 Being bound by this decision, the court of
appeals, in reversing the district court, found that the statutory
procedures were not followed and that "the communications over-
heard pursuant to the first order were 'unlawfully' intercepted, a
ground for a motion to suppress under §2518 (10)(a)(i)".21

The next question presented upon appeal dealt with the second
wiretap order.

In obtaining the second wiretap order in this case the Justice De-
partment followed the procedure described in United States v.
Chavez, 94 S.Ct. 1849, (decided May 13, 1974) and United States
v. Martinez, # 73-1740, 498 F.2d 464, (6th Cir. decided June 18, 1974)
... since the Attorney General did in fact personally approve
the request from a field attorney, there was substantial compliance
with the statutory requirements.22

Giordano held that all communications which were intercepted pur-
suant to the extension order, even though validly obtained, were
subject to suppression, since they were evidence derived from the
communications invalidly intercepted pursuant to the original
order.23 In Giordano the second wiretap order was an extension of
the first order and thus governed by 18 U.S.C. §2518 (1)(f). But in
Wac, the second application was not literally for an extension.24 So
Giordano did not apply, and the results of the first order included
in the application for the second order were not "essential in law"
to the granting of the second order.

22. Id.
23. 18 U.S.C. §2518 (1)(f) makes it mandatory to set forth the results of the previous order
in the application for an extension order. It makes conversations already intercepted "essen-
tial, in fact and law" to any extension of the intercept authority. 498 F.2d 1227, 1231.
24. It added a new suspect and added several new telephones.
However, the affidavit filed with the second application did contain substantial excerpts from the communications intercepted pursuant to the initial order. This information was not only relied upon by the applicant but was considered by the district judge who granted the second order. Thus, the court of appeals held the “results of the first order to be ‘essential in fact’ to the granting of the second order.”\textsuperscript{28} Being “essential in fact”, the issuance of the second order could not stand solely on information obtained outside of the purview of the first order. Facts obtained pursuant to the first order are needed, indeed essential, in order to sustain the amount of probable cause needed for the issuance of such order.

Thus, all communications intercepted through orders, held to have been obtained without the requisite statutory requirements, or issued in reliance upon invalidly intercepted information, are communications that have been obtained in violation of 18 U.S.C. §§ 2510-2520. Since this evidence was obtained in violation of these sections, 18 U.S.C. § 2515 will apply and exclude such evidence at trial.

As a final note, there may be a problem in the future concerning the implementation of 18 U.S.C. § 2515, the so-called exclusionary rule for illegal wiretap evidence. The Supreme Court may eventually do away with rules such as these. Gelbard v. United States\textsuperscript{24} has upheld the §2515 exclusionary rule, but that was a 1972 decision.

Judge, later Justice Cardozo is the most often quoted, but he seemed to be ahead of his time. In 1926 he made an effort to do away with such rules, by stating that the “pettiest peace officer would have it in his power. . .to confer immunity upon an offender for (his) crimes. A room is searched against the law, and the body of a murdered man is found. . .The privacy of the home has been infringed, and the murderer goes free.”\textsuperscript{27}

In 1972, the dissent of Chief Justice Burger seemed to predict that Justice Cardozo’s view will soon be the law of the land. “Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings . . . [He does] not propose, however, that we abandon the suppression doctrine until some alternative can be developed.”\textsuperscript{28}

\begin{tabular}{l}
25. 498 F.2d 1227, 1231. \\
26. 408 U.S. 41 (1972). \\
27. People v. Defore 242 N.Y. 13, 150 N.E. 585, 588 (1926). \\
\end{tabular}
More recently, an indication of the possible future of the exclusionary rule is provided by the case of Schneckloth v. Bustamote. The Supreme Court reversed the federal court of appeals, who found in favor of the defendant. There was a serious challenge to the validity of the rule by Justice Powell in his concurring opinion.

The exclusionary rule has occasioned much criticism, largely on the grounds that its application permits guilty defendants to go free and law-breaking officers to go unpunished. The oft-asserted reason for the rule is to deter illegal searches and seizures by the police, Elkins v. United States, 364 U.S. 206, 217 (1960); Mapp v. Ohio, 367 U.S. 643, 656 (1961); Linkletter v. Walker, 381 U.S. 618, 636 (1965); Terry v. Ohio, 392 U.S. 1, 29 (1968). The efficacy of this deterrent function, however, has been brought into serious question by recent empirical research. Whatever the rule's merits on an initial trial and appeal - a question not an issue here - the case for collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released.

Finally, in United States v. Calandra the Supreme Court in 1974 held that the exclusionary rule of the Fourth Amendment did not apply to grand jury proceedings, because it would unduly interfere with the effective discharge of grand jury duties.

It seems that the move to abolish the exclusionary rule is inevitable and the question presented in Wac may soon become meaningless.

ROBERT E. TAYLOR

30. Id. at 267 (footnotes omitted).
BOOK REVIEWS


Drawing from the rich and varied history of the American judiciary, both before and after Watergate, these two authors come to one dismal conclusion. "The system almost guarantees incompetence," states Jackson; Ashman sees an "overabundance of incompetent, or corrupt or, at least, easily influenced judges."

Jackson and Ashman are of differing — almost opposing — temperaments and reach their conclusion through quite different means. Judges attempts to chronicle the broad spectrum of the American judicial scene today: the good and bad, the mediocre, the justices of the peace and of the Supreme Court. Jackson interviewed in depth a variety of judges from New York to West Virginia to Colorado, patiently watched them at their work, and gathered an almost unwieldy amount of anecdotal material about their habits, opinions, and intellects. One feels that he enjoyed all this and is almost loathe to come to the conclusion that our system is bad and that many of the judges in it are prejudiced, corrupt, or just stupid.

Ashman, on the other hand, begins with that premise. He feels that "judicial pollution" is no longer an occasional factor in our courts, but a situation so widespread that strong public interest must be aroused to save our system of justice. He is not, however, optimistic. Ashman lists, in his fast-paced, no-nonsense style, judge after judge who has been impeached, disbarred, or accused and is still sitting on the bench; he details offenses ranging from bribery and extortion to shoplifting and a variety of morals charges. He documents the existence of a "black-robed Mafia." Ashman's bias is so obvious that he cannot be faulted for it; his concern leads him to strong, pointed — but not undue — criticism.

Both Ashman and Jackson discuss the various systems for selecting judges in the United States, and although both agree that there must be change, neither offers a strong new system. Jackson feels that hope lies with the individual judge — his character, motivation, and training. He strongly emphasizes the importance of the judge's personality and the effect his power has on his actions and opinions. Ashman advocates the use of state legislatures in screening judicial candidates, with open elections on that level, and a rotating schedule for the Supreme Court whereby a justice would sit
for eight years and then return to the district courts. Each author discusses the successes of the Missouri Plan, in which judges are chosen by the governor from a list drawn up by a commission, and later go before the voters on a non-contested retention ballot.

*Judges* and *The Finest Judges Money Can Buy* both brief Nixon’s relations with the Supreme Court, the former attempting to present a balanced, fair view and the latter caustic and cutting. Each helps to develop a picture of justice in America that cries for idealistic dedication to the true spirit of law coupled with realistic reform.

**Ruth W. Klippstein**
Since New Deal days it is sometimes difficult to realize that there were and are such things as conservative Democrats. There were, and are, and the Honorable John W. Davis was one of them. This book depicts the life and times of one of America’s finest lawyers, John William Davis. The author, William H. Harbaugh, a professor of history at the University of Virginia, has given Mr. Davis sympathetic treatment, and in readable style has etched the life of this great attorney who in later years was to devote much of his life to public service.

It is ironic that the first case argued by Davis before the United States Supreme Court was a civil rights case in which, as Solicitor General, he succeeded in knocking out election laws in Oklahoma preventing Negroes from exercising their right to vote. Yet, in his last case before this august body in 1954, he lost a civil rights case involving the momentous school segregation issue. It is easy to picture this tall, gaunt man in that final moment of defeat at the hands of the court before which he had argued on 140 separate occasions.

For John W. Davis time had passed him by in the whirlwind of fast-moving events. One gets the impression from Professor Harbaugh that Mr. Davis always wanted to put on the brakes to social progress. This esteemed lawyer could not see the role of government except in the broad outlines of national security in the pre-1933 years when the best government was one that governed least. Mr. Harbaugh clearly delineates that, despite the glory and fame that came to John W. Davis by reason of his excellence in the law and his public service, including his service as Solicitor General and later as Ambassador to the Court of St. James, Davis’ life was beset with tragedy and cruel disappointment. Seeing his political party rejecting the principles of state sovereignty, Davis later repudiated the party of Franklin Delano Roosevelt and helped charter the ridiculous Liberty League that fought against New Deal reforms. Early in his legal career he sobbed as his young wife died in childbirth. Later he was to be denied an appointment to the federal bench by President Woodrow Wilson, and then the greatest defeat of all, for having been selected as the standard bearer of the Democratic Party in 1924 on the 103rd ballot, Davis went down to defeat to Calvin Coolidge by over seven million votes when the liberals deserted the party to support the progressive candidate Bob La Follette of Wisconsin.

In this book, Professor Harbaugh answers the question: Why was
John W. Davis a great lawyer? Davis only went to law school for one year, graduating from Washington and Lee in 1895, but he also systematically studied law in his father’s law office as an apprentice. Professor Harbaugh quotes Davis’ legal contemporaries: “Davis had a fine, discriminating knowledge of the law. This, together with his power of close reasoning made him a born advocate.”

Harbaugh’s book contains some interesting anecdotes about Supreme Court figures. One wishes there could have been more. Professor Harbaugh tells of one interesting sidelight when Davis was defending the constitutional right of President Taft to set aside oil lands for purposes of conservation and national security, in which decision Justice Day, a McKinley Republican, dissented vigorously. After Day read his opinion strongly dissenting from the court majority which sustained the Government’s position, Day scrawled a note in pencil and sent it down to Davis at the Counselor’s table: “And you, a Jeffersonian Democrat, have done this thing.” Solicitor General Davis smiled wryly, “I should have answered Day,” he wrote that night, “that my lapse from virtue was due to the duty of defending Republican presidents.”

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A question frequently asked of lawyers by well-meaning laymen is, "How can you defend a person, in good conscience, who has confessed to you that he is guilty?" The answer will vary according to the lawyer, but it is not difficult for the experienced member of the bar. This question posed quite a dilemma in 1840 for Charles Phillips, a brilliant London barrister who was defending Benjamin Courvoisier for the alleged murder of Lord Russell. Professor Mellinkoff, who has been at the University of California in Los Angeles since 1965, spent more than a third of the book in discussing Courvoisier's trial in detail to show how the dilemma came about.

At the beginning, there is a fifteen-page introduction in which the image of a lawyer is pictured, as seen by laymen, in its worst light. The beginning law student who reads only the introduction might conclude that collecting garbage would be a much more honorable profession than the law. Needless to say, the problem has found a satisfactory solution since the time of Phillips. A chapter is devoted to the solutions which have developed in the English Bar and in the American Bar in the intervening years.

St. Thomas Aquinas is quoted as saying that one who knowingly defends an unjust cause without doubt sins grievously. Although it may not have been said the way he meant it, the better view would be that the lawyer who defends an unjust cause and condones perjury would sin grievously.

The chapter on how far a lawyer may go in defending a guilty client is particularly interesting. Is it a duty of a lawyer who firmly believes a witness he is cross-examining is absolutely truthful to use every means at his disposal to confuse or discredit the witness? Professor Mellinkoff gives thought-provoking attention to this question.

A chapter is devoted to a belief in the client's cause and how this might affect the modus operandi of a lawyer's defense of his client. This matter now is resolved by the Code of Professional Responsibility. DR 7-106(C)(4) prohibits a lawyer from expressing his personal opinion as to the justness of the cause he is representing.

No more may a Serjeant Buzfuz, as quoted by Charles Dickens in The Pickwick Papers, open his case by saying that never in the whole course of his professional experience has he approached a case with feelings of such deep emotion, but that he was buoyed up and
sustained by a positive certainty that the cause of his much-injured client must prevail.

In his conclusion, Professor Mellinkoff quotes the policy of The Law Society, the organization of English solicitors, with respect to revealing confidences. Although the quotation may be taken out of context, one may wonder if it would be acceptable to a committee on ethics of any bar association in the United States.

*The Conscience of a Lawyer* is a very readable book. It is recommended for the lawyer, the law student, and the layman.

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Professor Gilmore’s slim volume reads easily, provided that the reader has studied contracts in a course which employed a Langedellian casebook. To be sure the book is a touched up version of lectures delivered by Professor Gilmore at the Ohio State University Law School. It might be thought that material designed for oral delivery must defer to law review articles for in-depth analysis. The author would disprove such an assumption. The same readability found in his celebrated treatise, Security Interests in Personal Property,¹ is found in The Death of Contract. While the former discusses a relatively narrow aspect of contract law, the latter roams historically over the entire field. It concludes with telling comments on the progressive merger of contract into tort from whence it came one hundred years ago.

It is rare indeed when a first rate intellect is housed in the same mind with a first rate communicator. It is rarer still when someone like Professor Gilmore can sum up the field of secured transactions or contract law generally and not write in that convoluted style so characteristic of legal writing in law reviews and treatises. Law review writing must remind many readers of nineteenth century scholarly writing in the German language. Then, scholars worked consciously to construct long sentences that were like grammatical puzzles. They were technically correct but counterproductive because the reader had to decipher his native German language before he could even consider the author’s ideas. Those scholars were embarrassed if their prose was easy to read. Professor Gilmore apparently is not.

In the Introduction we learn that most of the work in getting the lectures ready for publication consisted of preparing the notes. These notes are collected at the end of the book rather than at the foot of each page. The reader can enjoy communication with the author, unbroken by the constant temptation to look to the bottom of the page and break the train of thought. Would that all footnoting came at the end. The writer recalls a conversation with Professor Arthur Leff about the footnotes to his widely cited article, Unconscionability and the Code—The Emperor’s New Clause,² in which he said he tried to do the footnotes as a running commentary which could be read with amusement. He had pity on the reader and

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so does Professor Gilmore. The notes contain several mini-essays such as the succinct observation that the holder in due course doctrine was already obsolete when it was “preserved like a fly in amber both in the N.I.L. and in its successor, Article 3 of the Uniform Commercial Code.”

One direction of thought provoked by the book is into the past. It is wonderful to have in print a thoroughly entertaining guide to the origins of our traditional first year contracts course. Most readers know bits and pieces of the history. Professor Gilmore describes the early felt need of Justice Joseph Story for codification of the law of commercial contracts. The answer came decades later like a bolt from the blue from Professor Langdell, resulting in the eventual enshrining of certain cases. These cases are discussed in detail for their unremarkable quality before they became enshrined in the casebooks and taught as though their rules were perfectly good substitutes for a code. The cases, among them Dickinson v. Dodds, Stilk v. Myrick, Foakes v. Beer, Raffles v. Wichelhaus, Paradine v. Jane, and Hadley v. Baxendale, masked a huge body of other cases which indicated that no such rules were advocated by the courts. Holmes did not let that bother him; he put his own interpretations on some cases in The Common Law (1881) and they stuck. The casebooks soon contained mostly chestnuts, cases to be read for their immutable principles of law. Williston assembled authority for these principles by selecting supporting cases but in the wings Corbin was preparing to explode the myth of immutability.

Perhaps the Restatement of Contracts (1932) was the high water mark of the movement to preserve case law pure and unsullied with codification. But even during its drafting the insertion caused by Corbin of Section 90 on “promissory estoppel” was like the crack in the plaster that indicated the house was coming down. Articles in law reviews followed which dealt severe blows to the sanctified symmetry of the collected cases, importantly The Reliance Interest in Contract Damages and Bargaining in Good Faith and Freedom of Contract.

4. 2 Ch.D. 463 (C.A.1876).
6. 9 App.Cas. 605 (H.L.1884).
If we can say anything critical, it is that the author failed to give us his ideas on how contract law can be taught in the future, given the continuing disintegration of the set principles that used to hold the course together. Law schools are presently using casebooks which have not broken new ground fast enough. There seems to be an attempt to inject sections from Article 2 of the Uniform Commercial Code into all casebooks, but even with one foot in the future the other remains planted firmly on the supposedly timeless wisdom of some immutable case law. It is even worse if these same cases are presented like straw men to be ridiculed as meaningless in following casenotes. Supposedly the student receives his ration of “thinking like a lawyer” (reconciling irreconcilable cases) while the teacher remains comfortable with the friendly old cases and what remains of the conventional wisdom. It appears to be so painful to break completely from these cases that perhaps we will continue playing games with them, trying to make them say something modern. For example, must we keep torturing cases on private lifetime care contracts to make them say something about the more likely institutional care contracts that a retiree might enter into?

One of the most unusual aspects of Karl Llewellyn’s book, *Cases and Materials on the Law of Sales* (1930), is that it contains mostly cases decided during the ten years prior to publication date. The book was influential as a scholarly work but was not adopted widely for student use. The break with the past was evidently too sharp.

Without the study of legal history, detection of mistaken dogma would be difficult. The American Bar Foundation has recognized the need for such study with its Legal History Fellowship Program. But meaningful as the study of legal history is, historic cases should not be buried in contracts textbooks and made to stand for propositions that hold true in all types of contracts. Perhaps it is all too recently that contracts for the sale or hire of horses were studied by first year law students when in fact they should have been more properly studied by advanced students and scholars as legal history or in an elective for students who have jobs waiting for them on horse farms.

What is needed in contracts teaching is more emphasis on the practical differences in subclasses of contracts. In an attempt to oversystematize the law we neglect to isolate major subclasses with their separate problems: personal service contracts, contracts in-

volving the sale of goods, and contracts involving the sale, lease and construction of real estate, the latter being subclasses unto themselves. Then we compound the confusion by failing to point out that for each subclass there are distinct commercial and consumer aspects and that we are not compelled to reconcile these aspects with one body of rules. Ironically, the courts seem to be moving inexorably toward a fusion of tort and contract theory in the products liability area. But even here we must not rush into print with ideas on how to make strict liability rules seem uniformly applicable to all kinds of contractual relations. We are told by Professor Gilmore that that kind of simplistic contract law is dying. Let us hope it is. We do not need it.

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