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### Criminal Law and Procedure

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the use in the statute of the terms "firm, co-partnership or association" without mention of the word "corporation" could not have the effect of divesting engineering corporations of their state charters.

NORMAN S. JEAVONS

## CRIMINAL LAW AND PROCEDURE

### CRIMINAL LAW

#### *Driving While Under the Influence of Intoxicants*

In 1933 the Ohio legislature passed the Liquor Control Act<sup>1</sup> which defined "intoxicating liquor" as "all liquids and compounds containing more than 3.2 per centum of alcohol by weight. . . ."<sup>2</sup> This definition was retained when the Ohio Revised Code was enacted.<sup>3</sup> Inevitably the question arose whether this definition was applicable to Ohio Revised Code section 4511.19 which prohibits the operation of any vehicle by one who is under the influence of "intoxicating liquor." If it was applicable, he who was intoxicated on "low-power" beer could drive with impunity. In *State v. Hale*<sup>4</sup> this question was answered in the negative. Initially the court noted that the definition was preceded by the phrase "as used in the sections of the Ohio Revised Code"<sup>5</sup> — an indication that the definition was to apply to section 4511.19. (Emphasis added.) However, the court stated that the Code was not intended to change pre-existing law,<sup>6</sup> and that the original definition was to be applied "in and for the purposes of [the Liquor Control Act]."<sup>7</sup> Consequently, the court concluded that the definition was not applicable and that "low-power" beer was an "intoxicating liquor" within the meaning of section 4511.19.

In 1959 the *Hale* case was editorially criticized<sup>8</sup> on the ground that the court misinterpreted the pre-existing law through failure to consider a section of the Liquor Control Act which provided that the definition of intoxicating liquor was to be applied throughout the General Code and was not to be limited to the Liquor Control Act.<sup>9</sup> This criticism was

1. 115 Ohio Laws Pt. 2, 118 (1933) (now OHIO REV. CODE §§ 4301.01-.991).

2. 115 Ohio Laws Pt. 2, 118 (1933).

3. OHIO REV. CODE § 4301.01(A)(1).

4. 140 N.E.2d 55 (Ohio Ct. App. 1955), *appeal dismissed*, 165 Ohio St. 104, 133 N.E.2d 104 (1956).

5. OHIO REV. CODE § 4301.01(A)(1).

6. The legislature so declared its intention in OHIO REV. CODE § 1.24.

7. 115 Ohio Laws Pt. 2, 118 (1933).

8. McCrystal, *Intoxicating Liquor Under the Motor Vehicle Act*, 32 OHIO BAR 836 (1959).

9. 115 Ohio Laws Pt. 2, 154 (1933).

adopted as the basis for the decision in the recent case of *State v. Mikola*<sup>10</sup> wherein it was reluctantly held that a driver who was under the influence of "low-power" beer was not under the influence of "intoxicating liquor" within the meaning of section 4511.19. The court recognized that the result was absurd, but stated, in effect, that the absurdity was compelled by a patent legislative oversight.

However, the oversight is not as patent as it is made to appear. Indeed, had the court considered the derivation of section 4511.19 as it did the derivation of the present Liquor Control Act, a different result might well have been reached.

Drunken driving of a motor vehicle was first made an offense in Ohio in 1913.<sup>11</sup> In 1927 the statute was amended,<sup>12</sup> but without any change relevant to the problem herein discussed. The amended statute was in force in 1933. Neither it nor its predecessor prohibited driving while under the influence of "intoxicating liquor." Rather, the prohibition extended to driving while in a "state of intoxication" or "under the influence of alcohol." Thus, when the Liquor Control Act was passed in 1933, the words "intoxicating liquor," as used therein, had no counterpart in the drunken driving statute, and the driver who was intoxicated on "low-power" beer could well have been considered in a "state of intoxication."

The drunken driving statute was repealed in 1936 and a similar statute<sup>13</sup> was enacted as part of the Driver's License Law.<sup>14</sup> This statute, too, contained no reference to "intoxicating liquor," and no problem of definition existed. However, in 1941 the legislature created the problem by enacting, as part of the Uniform Traffic Act,<sup>15</sup> a statute<sup>16</sup> which overlapped, but did not repeal, the existing drunken driving statute, and which prohibited the operation of certain vehicles by persons under the influence of "intoxicating liquor." Certainly, the legislature overlooked the definition of those words in the Liquor Control Act. It could not reasonably be supposed that the legislature intended the new drunken driving statute to be governed by the definition of "intoxicating liquor" in the Liquor Control Act. Such supposition attributes to the legislature the desire to create different standards in two sections which deal with identical subject matter. Every reasonable approach to statutory interpretation dictates that the two sections be construed *in pari materia* and without reference to the Liquor Control Act. This approach would have provided

10. 163 N.E.2d 82 (Ohio County Ct. 1959).

11. 103 Ohio Laws 133 (1913).

12. 112 Ohio Laws 217 (1927).

13. 116 Ohio Laws Pt. 2, 42 (1936).

14. 116 Ohio Laws Pt. 2, 33 (1936).

15. 119 Ohio Laws 766 (1941).

16. 119 Ohio Laws 775 (1941). This is the predecessor of OHIO REV. CODE § 4511.19.

a simple solution to the problem prior to the enactment of the Revised Code. Unfortunately, no case arose until after the Code was revised. The revisers apparently recognized the duplication and it was removed. Improvidently, the revisers chose to delete the later terminology ("state of intoxication") and to retain the earlier (under the influence of "intoxicating liquor") as Ohio Revised Code section 4511.19. Thereby, the problem presented in *Hale* and *Mikola* matured. Yet, if it is true, as stated in *Hale*, that the revision effected no substantive change,<sup>17</sup> the answer today should be the same as it would have been in 1941.

That *Mikola* is wrong does not appear from just a reading of the case, and many members of the bench and bar have been perplexed by it.<sup>18</sup> Although the problem can be resolved by a close examination of predecessor statutes, legislative action is needed to put an end to doubt.

### *Embezzlement*

Essential to the common-law offense of larceny is a trespassory taking.<sup>19</sup> Therefore, as a general rule (subject to exceptions here irrelevant), if the possessor of the property consents to the defendant's acquiring possession, there can be no larceny.<sup>20</sup> To fill this gap in the law of larceny, statutes proscribing embezzlement were enacted.<sup>21</sup> Typically, these statutes apply to such categories of persons as servants, clerks, officers, and agents who, as the result of a position of confidence or trust, may have consentient possession of their employer's property.<sup>22</sup> In time, questions arose as to the scope of these categories of persons, and, in particular, as to the meaning of "agent." A common problem concerned the person who collected money for another. Early cases, adopting the technical approach of the larceny cases,<sup>23</sup> held not within the term "agent" those who were entitled to commissions out of the money collected, those who had a right to commingle the money with their own, or those who had some other interest in the money — the theory being that the money was, in part, their own and not subject to theft by them.<sup>24</sup> More recent cases are not in agreement; some hold the collector to be an

17. Note 6 *supra* and accompanying text.

18. This fact was disclosed in conversations with judges and attorneys who attended the Western Reserve University Law-Medicine Center's Institute on Alcohol Intoxication and Influence, Cleveland, Ohio, May 12-13, 1960.

19. PERKINS, CRIMINAL LAW 202 (1957) (hereinafter cited as PERKINS).

20. *Id.* at 203.

21. *Id.* at 240.

22. Note, 39 COLUM. L. REV. 1004 (1939). The Ohio provision is contained in OHIO REV. CODE § 2907.34.

23. PERKINS 189.

24. Note 22 *supra* at 1005-06.

"agent" and some do not.<sup>25</sup> In Ohio the leading case is *Campbell v. State*<sup>26</sup> in which it was held that

Where a person, *not* engaged in the business of collecting moneys for others as an *independent employment*, is employed to collect money for another, subject to his direction and control, the relation of principal and agent is thereby created. And in such case the agent may be guilty of embezzlement, although he was to receive for his services a percentage of the moneys collected.<sup>27</sup> (Emphasis added.)

But what of the person who did engage in the collection business as an independent calling? The suggestion in *Campbell* was that he was not an "agent" within the statute.<sup>28</sup> The problem lay dormant until the recent case of *State v. Lawrence*<sup>29</sup> in which the court (1) disregarded the suggestion in *Campbell*, (2) stated that the legislature used the word "agent" in the non-technical sense of one who does something for another, and (3) held that an independent collection agent was within the Ohio embezzlement statute even though he commingled funds and was entitled to a commission out of the funds collected.

The *Lawrence* case is a mixed blessing. On the one hand, it does much to strip away from the law of theft the technicalities which arose from the now anachronistic desire of common-law courts to restrict the application of capital punishment.<sup>30</sup> On the other hand, it raises a real problem of statutory construction. If the word "agent" is to have the broad, popular meaning ascribed to it, why did the legislature specify that the embezzlement statute applied also to officers, attorneys, clerks, guardians, executors, administrators, trustees, assignees in insolvency, receivers, servants, and employees?<sup>31</sup> It might be that the legislature acted out of a superabundance of caution. But it might also be that the legislature intended to treat a technical subject by using technical terminology.<sup>32</sup> At any rate, it cannot be said that the problem has been put to rest. Further delineation is necessary either by the supreme court or by the legislature.

### *Gambling*

The circumstances surrounding the commission of an offense are factors in aggravation or mitigation. If committed under certain circum-

25. Annot., 56 A.L.R.2d 1156 (1957).

26. 35 Ohio St. 70 (1878).

27. *Id.* at syllabus 3.

28. *Id.* at 75.

29. 168 N.E.2d 21 (Ohio C.P. 1960).

30. PERKINS 189.

31. OHIO REV. CODE § 2907.34.

32. This is substantially the reasoning of Justice Schaefer, dissenting in *People v. Riggins*, 8 Ill. 2d 78, 86, 132 N.E.2d 519, 928 (1956). Justice Schaefer also notes that if the defendant was guilty of one embezzlement, he was equally guilty of 500 more (he had about 500 clients), and that a legislature might not want to make the collection business so hazardous.

stances, the offense may be heinous; under other circumstances, it may well be innocuous. Legislatures, recognizing this fact, have occasionally imposed different punishments for the same offense or for similar offenses. In Ohio, for example, the defendant may be punished either as a felon or as a misdemeanor for carrying concealed weapons,<sup>33</sup> or for committing traffic manslaughter.<sup>34</sup> A similar situation prevails with reference to gambling devices. The possession of certain devices is punished as a misdemeanor by Ohio Revised Code section 2915.15. The possession of other devices is punished as a felony by section 2915.17.

Unfortunately, the legislature did a poor job of drafting, and it cannot easily be determined whether a particular gambling device is within section 2915.15 or section 2915.17.<sup>35</sup> Section 2915.15 refers to "a gambling table, or faro or keno bank, or a gambling device or machine, other than as is defined in sections . . . 2915.16. . . ." Section 2915.16, which defines the term "gambling device" as used in section 2915.17, relates to

(A) Any slot machine or any other machine or mechanical device . . . an essential part of which is a drum or reel with insignia thereon which when operated may deliver, as the result of an element of chance any money, property, or other thing of value. . . .

(B) Any machine or mechanical device . . . designed and manufactured to operate by means of insertion of a coin, token, or similar object so that when operated it may deliver, as the result of the application of an element of chance, any money, property, or other thing of value. . . .

If the sections are to be construed together, section 2915.15 includes devices which (1) are not coin-operated; or (2) involve no element of chance; or (3) return nothing of value. However, suppose that a device is coin-operated and returns free games as the result of a combination of skill and chance, as in the case of a "pin-ball" machine. Clearly it is a gambling device,<sup>36</sup> but under which section does it fall? This question was raised in *State v. Smith*,<sup>37</sup> and the answer was that section 2915.15 applies. In construing the statutes the court noted that the predecessor of section 2915.15 originally punished as a misdemeanor the possession of all gambling devices. In 1951 that statute was amended to except certain devices which were brought within the provisions of the predecessors of sections 2915.16 and 2915.17. As the court saw it, the purpose

33. OHIO REV. CODE § 2923.01.

34. OHIO REV. CODE § 4511.18 (punishment provided for in § 4511.99(A)).

35. A comparison of the statutes indicates that the legislature did not intend to impose alternate punishments for possession of the *same* device.

36. "Generally, it may be said that the elements of gambling are payment of a *price* for a *chance* to gain a *prize*." *Westerhaus v. City of Cincinnati*, 165 Ohio St. 327, 335, 135 N.E.2d 318, 325 (1956). The return of free games is considered to be a prize. *Westerhaus v. City of Cincinnati*, *supra*; *Kraus v. City of Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159 (1939).

37. 165 N.E.2d 481 (Ohio C.P. 1960).

of the amendment was to proscribe as a *felony* the possession of devices creating *substantial social harm*. Such harm, said the court, is created by devices involving no skill because the player anticipates a reward with no real effort on his part.<sup>38</sup> However, this evil does not flow from a device involving an application of skill, even though chance is also involved, and possession of such a device should be treated as a misdemeanor under section 2915.15.

In reaching its decision, the court failed to consider another possible interpretation of the statute. Section 2915.15 could be construed to exclude any device which involves an element of chance, even though skill is also involved. Whether this construction or the one adopted by the court was intended by the legislature is a question that cannot be answered. The "plain meaning" test yields no results, and further investigation is frustrated by the lack of legislative history materials.<sup>39</sup> Although the construction just suggested is not unreasonable, the court's interpretation, rooted as it is in the relationship between the severity of punishment and the nature of the offense, is to be preferred.<sup>40</sup>

### *Indecent Liberties*

Ohio Revised Code section 2903.01 provides that

No person over the age of eighteen years shall *assault* a child under the age of sixteen years, *and* willfully take indecent and improper liberties with the person of such child, without committing or intending to commit the crime of rape upon such child, *or* willfully make improper exposures of his person in the presence of such child. (Emphasis added.)

Whoever violates this section is guilty of felonious assault and shall be fined not less than five hundred nor more than five thousand dollars or imprisoned not less than one nor more than ten years, or both.

It will be noted that this statute proscribes the separate offenses of indecent liberties and improper exposure. In construing the statute, two problems arise: (1) is an assault an element of each offense or just of indecent liberties, and (2) what is the meaning of "assault"?

38. Assuming that this construction is correct, a question of fact is presented as to whether the devices in question involved an element of skill. It can be inferred from the bill of particulars, 165 N.E.2d at 482-84, that some of the devices involved chance alone.

In support of its conclusion that § 2915.15 applied, the court relied heavily on *Westerhaus v. City of Cincinnati*, *supra* note 36. In that case, the plaintiff sought to restrain the defendant from confiscating certain devices. The court held that relief was properly denied because the devices were contraband. There are statements in the syllabus and in the opinion indicating that the devices, "pin-ball" machines, were within § 2915.15. However, the statements are dicta. It was necessary to decide only that the devices were within either § 2915.15 or § 2915.16. It was not necessary to decide that they were within a specific section.

39. This shameful condition prevails in most states. POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* 48 (1956).

40. If I may lapse into the first person singular, a style often denied to the law review writer even when circumstances render it appropriate, my brief experience with "pin-ball" machines left my morals unscarred. It served to demonstrate only that I lacked skill.

Considering the first problem, it is apparent that this statute, too, is poorly drafted, and, again, that the "plain meaning" rule affords no ready answer. However, in two cases the problem was resolved in favor of the conclusion that an assault is not an element of improper exposure and that such exposure alone constitutes the offense.<sup>41</sup>

The problem of determining the meaning of "assault" presents even greater difficulties. If the act of indecent liberties is not consented to by the victim, there is, *ipso facto*, an assault,<sup>42</sup> and the word becomes surplusage. Thus, if the word is to have any operative effect, it is in a case in which the victim has consented to the act. In this situation, the English common-law view was that consent negated an assault and the offense of indecent liberties.<sup>43</sup> However, a substantial majority of American jurisdictions hold that a victim, under the age of consent as regards sexual intercourse, is also incapable of consenting to an indecent touching.<sup>44</sup> In two early Ohio cases, the English rule was applied,<sup>45</sup> but thereafter the rule was severely criticized,<sup>46</sup> and the question remained unresolved until the recent case of *State v. Dobbins*.<sup>47</sup> The defendant was found guilty of taking indecent liberties with a thirteen-year-old girl who consented to the act. On appeal to the supreme court, the defendant contended that an assault was an essential element of the offense and that it was negated by consent. The court, in affirming the conviction, effectively eliminated the word "assault" from the statute by the brief holding that the act of indecent liberties constituted the assault referred to in section 2903.01.<sup>48</sup>

The decision has much to commend it. As the court noted, it gives greater effect to the purpose of the statute to protect children from their

41. *State v. Theisen*, 94 Ohio App. 461, 115 N.E.2d 863 (1953); *State v. Green*, 84 Ohio App. 298, 82 N.E.2d 105 (1948).

42. *State v. Green*, *supra* note 41 at 301 (dictum); PERKINS 82. As used in the text above, the word "assault" includes "battery," and the same is undoubtedly true as far as the statute is concerned. Such use of the word "assault" is technically incorrect, but widespread.

43. Annot., 81 A.L.R. 599 (1932).

44. *Id.* at 601.

45. *O'Meara v. State*, 17 Ohio St. 515 (1867); *Smith v. State*, 12 Ohio St. 466 (1861). In each case it was held that an assault with intent to commit rape could not be committed upon a consenting victim because consent vitiated both rape and assault.

46. *Snyder v. State*, 92 Ohio St. 167, 110 N.E. 644 (1915). The court held that the offense of assault was included within the offense of consensual sexual intercourse with a minor. In so holding, the court limited *O'Meara* and *Smith* to their precise facts. The result in these two cases has been changed by statute. OHIO REV. CODE § 2905.04 makes it an offense to attempt to have sexual intercourse with a consenting minor. By-passing the question of whether an assault and an attempt differ (see *Fox v. State*, 34 Ohio St. 377, 380 (1878)), it can be said that young girls are now protected against their own curiosity or ignorance regarding acts which do not culminate in intercourse but which are indecent.

47. 171 Ohio St. 40, 167 N.E.2d 916 (1960).

48. The court sidestepped *O'Meara* and *Smith* by the simple statement that they were not controlling.



own ignorance or misguided curiosity. Further, there is now an equivalence between the offense of indecent liberties and the offenses of carnal knowledge<sup>49</sup> and attempted carnal knowledge;<sup>50</sup> consent is no defense to any one of the three crimes. And there is reason for the equivalence: why ignore consent in the case of attempted or consummated intercourse and give it effect in the case of indecent liberties? But did the legislature intend equivalence? If so, why did it use the word "assault"? These questions, ignored by the majority were raised and discussed in Judge Taft's dissenting opinion.<sup>51</sup> An additional question is raised by a comparison of the punishments for carnal knowledge, attempted carnal knowledge, and indecent liberties. Upon conviction of carnal knowledge, the defendant "shall be imprisoned in the penitentiary not less than one nor more than twenty years, or *six months in the county jail or workhouse.*"<sup>52</sup> (Emphasis added.) For attempted carnal knowledge the punishment is one to fifteen years with the alternate misdemeanor punishment.<sup>53</sup> However, the punishment for indecent liberties is a fine of \$500 to \$5,000 and/or imprisonment. There is no alternate misdemeanor punishment. Thus, there is some room to speculate that the legislature deemed the offense of indecent liberties more serious than the other two offenses.<sup>54</sup> Since consent and the circumstances attending it may well afford substantial mitigation, the argument is available that the legislature did not intend to impose liability for consentient indecent liberties. On the other hand, the carnal knowledge statutes do not provide for the possible alternate punishment of a fine, a provision contained in the indecent liberties statute. Hence, there is available the counter-argument that the statute was intended to include consentient indecent liberties and that the provision for a fine would be operative primarily in such cases. The decision in *Dobbins* has resolved the problem without clarifying it.

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49. OHIO REV. CODE § 2905.03.

50. OHIO REV. CODE § 2905.04.

51. Split decisions on questions of statutory interpretation frequently manifest the most subtle judicial reasoning. That reasoning is briefly stated. The legislature, in enacting the carnal knowledge statutes, specified that consent was no defense. The legislature did not do so in the indecent liberties statute; to the contrary, it used a word inconsistent with consent. When the legislature enacted the indecent liberties statute in 1921, the relationship between consent and assault was well defined and unquestioned. (This latter assertion is incorrect. See note 46 *supra*, and accompanying text.) Presumably, the legislature knew how to circumvent the relationship, if it wanted to, because it did so by enacting § 2905.04 proscribing attempted carnal knowledge. There ought to be a law covering consentient indecent liberties, but the legislature has not enacted one. Judge Taft may well be right, in which case the legislature was asleep at the switch, a phenomenon not unheard of. *State v. Dobbins*, 171 Ohio St. 40, 44, 167 N.E.2d 916, 919 (1960) (dissenting opinion).

52. OHIO REV. CODE § 2905.03.

53. OHIO REV. CODE § 2905.04.

54. Note that both carnal knowledge statutes, notes 52 and 53 *supra*, specifically provide that "the court may hear testimony in mitigation or aggravation of such sentence," a provision absent from the indecent liberties statute.

*Possession of Narcotics*

Ohio Revised Code section 3719.17 prohibits the procuring of a narcotic drug under specified circumstances. Section 3719.15 excepts from the operation of section 3719.17 medicinal preparations which contain not more than two grains of opium in one fluid or avoirdupois ounce. In *Folenius v. Eckle*<sup>55</sup> the question was whether paregoric is a narcotic within the above sections. The court of appeals, on a petition for a writ of habeas corpus, judicially noted that paregoric contains 1.82 grains of opium per fluid ounce, and held that it was not a narcotic drug within the statutory definition. Accordingly, the indictment, which specified that the accused procured paregoric, failed to allege an offense, and the petitioner was discharged from confinement.

*Some Miscellaneous Constitutional Problems*

The following cases, considered in detail in the section on *Constitutional Law*,<sup>56</sup> are referred to briefly herein because of their interest to the student of criminal law.

In *State v. Mapp*<sup>57</sup> the defendant was convicted of possessing books and pictures known to be obscene in violation of Ohio Revised Code section 2905.34. The defendant rented a room in her home to X who used it for a short time. When the defendant learned that X was not going to use the room for the balance of the rental period, she decided to use the room for her own purposes, and, in packing the lodger's effects for temporary storage, found obscene books and pictures. She did not use these in any way, apparently only storing them in her home. A majority of the Ohio Supreme Court held that section 2905.34 was an unconstitutional infringement of freedom of speech and press to the extent that it prohibited bare, knowing possession with no purpose to convey, exhibit, or publish. However, the court of appeals had held the statute constitutional, and, since the majority in the supreme court did not comprise six judges, as required by the Ohio Constitution for reversal in such cases,<sup>58</sup> the majority's decision was frustrated.

Another aspect of *Mapp* concerned Ohio's inclusionary rule regarding illegally obtained evidence. Although a majority of the court adhered to the rule, Judges Bell and Herbert dissented from applying it. It should be remembered that the rule is judge-made and, with changes in the composition of the court, could be judge-abrogated in the future.

55. 109 Ohio App. 152, 164 N.E.2d 458 (1959).

56. See discussion in *Constitutional Law* section, pp. 467-74 *supra*.

57. 170 Ohio St. 427, 166 N.E.2d 387, *prob. juris. noted*, 81 S. Ct. 111 (1960). See also discussion in *Constitutional Law* section, p. 470 *supra* and in *Evidence* section, p. 520 *infra*.

58. OHIO CONST. art. IV, § 2. There is no evidence that this requirement gives rise to better decisions of constitutional issues.

The constitutionality of section 2905.34 was also considered in *City of Cincinnati v. King*.<sup>59</sup> Here, the defendant was found guilty of violating Cincinnati's anti-obscenity ordinance which does not require scienter.<sup>60</sup> He then moved for a judgment of acquittal notwithstanding the verdict and for a new trial. In part, he contended that the ordinance was invalid because it proscribed as a misdemeanor the same conduct proscribed as a felony by section 2905.34. The court, however, held that section 2905.34, rather than the ordinance, was unconstitutional. In so holding, the court noted section 3767.01 which excepts from the provisions of section 2905.34 "any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department." The court held that this section was an improper delegation of power to administrative officials, that it was unreasonably discriminatory, and that it invalidated section 2905.34 with reference to newspapers, magazines, and other publications.

The verdict in *King* was returned shortly before the United States Supreme Court, in *Smith v. California*,<sup>61</sup> struck down an anti-obscenity provision which did not require scienter. The motions in *King* were heard after the *Smith* decision was announced, and the defendant relied on *Smith* in asserting that the ordinance was unconstitutional. However, the court determined as a matter of fact that the defendant had knowledge of the contents of the publication in question, and held that the defendant was foreclosed from raising the scienter issue. In so holding, the court failed to consider whether the ordinance could or should be interpreted as requiring scienter. Further, the court purportedly considered only the constitutionality of the ordinance as applied, failing to consider the constitutionality of the ordinance on its face. Moreover, inadequate attention was given to the fact that the jury was not instructed on the element of scienter. The court summarily dismissed the point by stating the rule that a party cannot complain of an omission in instructions if he did not call the matter to the attention of the court in time to correct the error.<sup>62</sup> The correctness of the *King* decision is highly doubtful.

An interesting decision, particularly from the motorist's standpoint, is *State v. Gunningham*.<sup>63</sup> The defendant was charged with exceeding

59. 168 N.E.2d 633 (Ohio Munic. Ct. 1960). See also discussion in *Constitutional Law* section, p. 471 *supra*.

60. CINCINNATI, OHIO, CODE OF ORDINANCES § 901.13.

61. 361 U.S. 147 (1959).

62. It is to be questioned whether this rule was ever intended to apply to a case in which the court omitted to instruct on an essential element of the offense.

63. 168 N.E.2d 552 (Ohio Ct. App. 1960). See also discussion in *Administrative Law and Procedure* section, p. 444 *supra* and in *Constitutional Law* section, p. 472 *supra*.

the sixty-five mile per hour speed limit established for the Ohio Turnpike by the Ohio Turnpike Commission pursuant to a general delegation of authority in Ohio Revised Code section 5537.16. The trial court held that section 5537.16 was an unconstitutional delegation of legislative authority in that the legislature had failed to specify standards for rule-making. Accordingly, it was held that the affidavit, which alleged a violation of Turnpike Rule 2.3, failed to state an offense. However, on appeal the decision was reversed. The court, relying on the practical necessity of delegating to an administrative body the power to fix speed limits to meet changing conditions, held that section 5537.16 was as definite as circumstances would permit, and that it was constitutional.

An analogous problem was presented in *City of Cleveland v. Baker*.<sup>64</sup> The defendant, a sidewalk evangelist, was convicted of violating Cleveland Ordinance section 13.0941 which provides that

It shall be unlawful for persons having no occupation or business at the places hereinafter named, to congregate upon or occupy the sidewalks, or at the corners of any street of the city, or in such manner as to occupy the sidewalks in front of any dwelling or place of business in the city, or in such manner as to occupy the sidewalks in Monumental parks or other public parks of the city, or in front of any place of worship or amusement. And it shall be and is hereby made the duty of the police force of the city to prevent such gatherings or occupation of sidewalks and street corners, and to arrest persons found violating the provisions of this section. Whoever violates any provision of this section shall, on conviction thereof, be fined in any sum not exceeding fifty dollars.

On appeal, the ordinance was held unconstitutional. Although recognizing the right of a city reasonably to regulate the use of its sidewalks, the court stated that the ordinance granted to the police the absolute discretion to prevent any gathering of persons. The ordinance was said to be so broad that it encompassed lawful conduct, and so vague that men of ordinary intelligence would have to guess at its intended meaning. The ordinance contained no standards to guide law enforcement officers.

### *Defenses of Entrapment and Duress*

In *State v. Good*<sup>65</sup> the defendant was convicted of illegal possession for sale and illegal sale of narcotics.<sup>66</sup> On appeal, he contended that the court erred by failing to instruct the jury on the defenses of entrapment and duress. However, the conviction was affirmed by a divided court primarily on the ground that the evidence did not warrant the instructions.<sup>67</sup>

64. 167 N.E.2d 119 (Ohio Ct. App. 1960). See also discussion in *Constitutional Law* section, p. 474 *supra*.

65. 110 Ohio App. 415, 165 N.E.2d 28 (1960), *prior opinion by equally divided court*, 110 Ohio App. 415, 169 N.E.2d 468 (1959).

66. OHIO REV. CODE § 3719.20.

67. On this point the judges were in bitter conflict, and the opinion affords insight into some of the not-always-hidden persuaders lurking in the decision-making process. The ma-

The importance of the case lies not in the court's evaluation of evidence, but in the subtle relationship between the defenses of duress and entrapment. Suppose that the record discloses evidence relevant to some, but not all, of the elements of duress. In the absence of other evidence, the defense fails, and an instruction is not required. But can the evidence relating to duress be considered on the entrapment issue? No, said the majority,<sup>68</sup> and thereby it ignored the basic concept of exculpation for want of volition which underlies both defenses. To ignore this concept and the evidence relevant thereto is to give inadequate consideration to the question of whether the totality of the evidence and the inferences reasonably to be drawn from it, considered in a light most favorable to the defendant, reaches that *minimal* point at which an instruction is required.

## CRIMINAL PROCEDURE

### *Indictment*

In 1959 the Ohio legislature enacted Ohio Revised Code section 2941.021 which permits a defendant to waive indictment as to any offense not punishable by death or life imprisonment. The purpose of this section is to afford a speedy trial to one who intends to plead guilty and who otherwise might have to wait several months for the return of a true bill.<sup>69</sup> This beneficial purpose was ignored by a court of common pleas which, in *State v. Centers*,<sup>70</sup> held that the statute was unconstitutional. The court stated that the Ohio constitutional requirement of indictment in all felony cases<sup>71</sup> was mandatory, jurisdictional, a matter of public interest, and, therefore, non-waivable.

In Ohio, there is authority for permitting a defendant to waive rights

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jority, emphasizing the insidious effect of traffic in narcotics, and making the questionable assertion that "the safety of the public is the primary consideration of all agencies of law enforcement," 110 Ohio App. at 430, 165 N.E.2d at 38, virtually refused to draw from the facts any inferences favorable to the defendant. The refusal is singularly at odds with the rule, recognized by the majority, that an instruction should be given if there is any evidence, which, considered in a light most favorable to the defendant, raises the issue. The dissenting judge deemed irrelevant the evils of narcotics, and was not at all reluctant to draw inferences favorable to the defendant. The disputed facts are too complicated to be discussed in detail herein. Suffice it to say that the dissenting judge has the better of the argument.

68. "[The defendant's] testimony in a number of places suggests that he acted in fear because of the many references to the 'gun' said to have been carried by . . . [the police informer]. Such references could have application only to a claim of duress and could have no application in support of a claim of entrapment." 110 Ohio App. at 425-26, 165 N.E.2d at 35.

69. In small counties the grand jury meets infrequently. In large counties, where crime is more prevalent, quick return of a true-bill may be prohibited by a backlog of cases. *Cleveland Plain Dealer*, Dec. 25, 1959, p. 18, col. 1.

70. 162 N.E.2d 925 (Ohio C.P. 1959). See also discussion in *Constitutional Law* section, p. 473 *supra*.

71. OHIO CONST. art. I, § 10.

guaranteed to him by the Ohio Constitution.<sup>72</sup> There is similar authority regarding the United States Constitution.<sup>73</sup> However, a problem exists in balancing the individual's desire to waive a right against society's interest in maintaining it. It has been asserted that if society's interest is but peripheral, waiver should be permitted; conversely, if society's interest can be regarded as paramount, waiver should not be permitted.<sup>74</sup>

Courts are not in agreement regarding waiver of indictment.<sup>75</sup> Certainly, the grand jury system permits the community, through selected representatives, to exercise some control over over-zealous prosecutors. To this extent there exists a valid public interest in maintaining the indictment. However, the grand jury, particularly in a metropolitan area, is overworked and cannot devote adequate time to considering each case before it. Consequently, the public interest is not effectively served. Further, only the accused who intends to plead guilty will seek to waive indictment. The accused who intends to plead not guilty will not give up the chance of a no-bill. These facts lend cogent support to the argument that section 2941.021 is constitutional, and it is hoped that appropriate emphasis will be given to them when the Ohio Supreme Court ultimately resolves the issue.<sup>75(a)</sup>

### *Speedy Trial*

The Ohio Constitution grants to a defendant the right to a speedy trial.<sup>76</sup> Is this right violated when the state delays almost thirty months in taking action against one who by affidavit has been accused of a crime and who during that period has been in the state penitentiary for another crime? Yes, said the court in *State v. Waites*.<sup>77</sup> It is of no consequence that the defendant has been imprisoned for another offense.<sup>78</sup> Further, if both offenses are known to law enforcement officials at the time of the

72. *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 134 N.E. 786 (1921) (trial by jury).

73. *Patton v. United States*, 281 U.S. 276 (1930) (trial by jury); *Trono v. United States*, 199 U.S. 521 (1905) (double jeopardy).

74. 67 HARV. L. REV. 344 (1953), criticizing *United Press Ass'n v. Valente*, 281 App. Div. 395, 120 N.Y.S. 2d 174 (1953), *aff'd*, 308 N.Y. 71, 123 N.E.2d 777 (1954) (press association held without standing to attack order excluding public from courtroom).

75. *Barkman v. Sanford*, 162 F.2d 592 (5th Cir.), *cert. denied*, 332 U.S. 816 (1947) (waiver permitted; FED. R. CRIM. P. 7(b), providing for waiver, held constitutional); *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949), *cert. denied*, 339 U.S. 923 (1950) (all rights guaranteed by state constitution may be waived); *People ex rel. Battista v. Christian*, 249 N.Y. 314, 164 N.E. 111 (1928) (public interest precludes waiver).

75(a). After the above comment was written, the Ohio Supreme Court, in *Ex parte Stephens*, 171 Ohio St. 323, 170 N.E.2d 735 (1960), upheld the constitutionality of § 2941.021, two judges dissenting. The majority was of the opinion that the statute did not deprive the accused of any right; it merely gave him an option to demand or waive indictment. See also discussion in *Constitutional Law* section, p. 473 *supra*.

76. OHIO CONST. art. I, § 10.

77. 163 N.E.2d 195 (Ohio Munic. Ct. 1959).

78. *Shafer v. State*, 43 Ohio App. 493, 183 N.E. 774 (1932).

first trial, the delayed second trial deprives the defendant of the chance of concurrent sentences and subjects him to consecutive sentences.<sup>79</sup> Not only is this an infringement of the defendant's rights, the court stated, it is also a usurpation of the powers of the court and parole board under the indeterminate sentence law.<sup>80</sup>

The constitutional provision for a speedy trial has been supplemented by statute. Ohio Revised Code section 2945.71 provides that if an incarcerated accused is not tried within two terms after the term in which he is charged by indictment or information, he shall be discharged unless he has caused the delay. Section 2945.72 effects a three-term limitation in the case of an accused who has been released on bail. If during the third term there is not enough time to try the accused, he shall either be tried at the next term or be discharged. Section 2945.73 adds the following exception:

When application is made for the discharge of a person under section 2945.71 or 2945.72 of the Revised Code, if the court is satisfied that there is material evidence for the state which cannot be had, that reasonable effort has been made to procure it, and that there is just ground to believe that such evidence can be had at the next term, the cause may be continued and the prisoner remanded or admitted to bail. . . .

The operation of sections 2945.71 and 2945.72 and the relationship between these sections and section 2945.73 were considered in the recent case of *State v. Cunningham*.<sup>81</sup> The defendant was indicted for burglary during the April 1956 term and was released on bail. No action was taken on his case during the terms of September 1956, January 1957, April 1957, and September 1957. During the January 1958 term, the defendant moved to quash the indictment on the ground that he had not been brought to trial within three terms as required by section 2945.72. The motion was denied pursuant to section 2945.73, and the case was continued to the April 1958 term. Thereafter, the case was continued to the September 1958 term, apparently because there was not enough time to try it. After his conviction, the defendant appealed, contending that he had been deprived of his constitutional and statutory rights to a speedy trial. The court of appeals reversed on both grounds.<sup>82</sup> On appeal by the state to the supreme court, the decision was reversed in an opinion unexplainedly limited to the statutory issue.

The court first considered whether the defendant was entitled to discharge, without specifically applying for it, following the third term of

79. *State v. Milner*, 149 N.E.2d 189 (Ohio C.P. 1958); see Culp, *Criminal Law and Procedure, Survey of Ohio Law — 1958*, 10 WEST. RES. L. REV. 373, 385 (1959).

80. OHIO REV. CODE ch. 2965.

81. 171 Ohio St. 54, 167 N.E.2d 897 (1960).

82. The decision is unreported.

non-action. Relying on two early cases,<sup>83</sup> the court held that section 2945.73 contemplates action by the defendant to secure his discharge under sections 2945.71 and 2945.72. Accordingly, an automatic discharge did not result from the failure to try the defendant during the April 1957 term. This conclusion having been reached, it followed that, during the January 1958 term, the trial court, upon the required showing, properly invoked section 2945.73 and continued the action until the April 1958 term. However, the crucial question was whether there could be a subsequent continuance. Again relying on an early case,<sup>84</sup> the court held that the continuances provided for in sections 2945.72 (for want of time) and 2945.73 (to obtain material evidence), were not mutually exclusive, and that a continuance for want of time could be granted even though a continuance to obtain material evidence had previously been granted.

Although *Cunningham* merely restates existing Ohio law, a substantial question is raised by the court's failure to consider the constitutional issue. The right to a speedy trial is basic to a fair administration of criminal law. An accused whose case is not disposed of with reasonable speed is consigned to a sort of limbo. Social contacts are made embarrassing; business opportunities must often be passed up. The alternatives are either to "jump bail" or to wait. Eventually the accused may demand an immediate trial.<sup>85</sup> If, at this point, the prosecution requests a continuance to obtain material evidence under the conditions set forth in section 2945.73, a further delay is probably justified. But thereafter the case should be given priority over all other cases except previously delayed criminal cases which have been set for immediate trial. To excuse further delay by the plea of "crowded docket" is to permit inadequate judicial machinery inadequately administered to take precedence over constitutional rights.

By its failure to consider the constitutional issue, the court has inarticulately superimposed the statutory right and its restrictions on the constitutional right and has, unfortunately, diluted the latter.

### *Voir Dire*

A code of criminal procedure is a complex creation, a composite of hundreds of sections which declare that certain things be done in a certain

83. *Erwin v. State*, 29 Ohio St. 186 (1876); *Ex parte McGehan*, 22 Ohio St. 442 (1872).

84. *Johnson v. State*, 42 Ohio St. 207 (1884).

85. In a majority of jurisdictions, an accused, by failing to demand an immediate trial, waives his right. Annot., 57 A.L.R.2d 302, 326 (1958). A minority of jurisdictions has adopted a contrary rule, *id.* at 334, thereby avoiding penalizing the accused for what is often the ignorance or indolence of counsel. Ohio's position is not well defined. Those cases which require a demand deal only with the *statutory* right. *State v. Cunningham*, *supra* note 81; *Ex parte McGehan*, *supra* note 83; *State v. Suspirata*, 71 Ohio App. 500, 50 N.E.2d 270, *appeal dismissed*, 141 Ohio St. 456, 48 N.E.2d 468 (1943). However, it has been held that a demand is not a necessary prerequisite to exercising the state *constitutional* right. *Shafer v. State*, *supra* note 78; *State v. Milner*, *supra* note 79.



manner. Suppose that a section is violated without immediate objection by the defendant. Thereafter the error is called to the attention of counsel and an objection is made. Is it untimely? Has a waiver been effected because counsel was not sufficiently alert? If not, is a premium placed on indolence or inexperience? If the defendant appeals, is it necessary that he make a showing of prejudice, or will prejudice be presumed? Does it make any difference whether the statute grants to the defendant a right which a court might characterize as "basic" or "jurisdictional"? And how are such characterizations arrived at?

Put these questions in a fact setting. A statute provides that prospective jurors be sworn before examination. However, the provision is not followed and the prospective jurors are examined without oath. A jury is selected, sworn, and the trial proceeds. Opening statements are made, and the prosecution calls nineteen witnesses. On the third day of trial, the judge realizes the error and asks defense counsel to waive it. He refuses. The judge then asks defense counsel to consent to discharging the jury and to starting the trial anew. Again, he refuses. The trial continues, the defendant is found guilty, and he appeals, assigning as error the court's failure to follow the statutory procedure.

How will a court of review approach the problem? Perhaps the question is inartfully phrased. In what ways can a court of review approach the problem? The simple answer is that it can do so in a number of ways as is suggested by the questions posed above. Often a court will fail to state these questions. But it answers them, or at least some of them, and thereby it indicates its approach and the factors relied upon as a basis for decision. "Factors" is the key word. The so-called basic right, the jurisdictional element, the necessity for showing prejudice, the reluctance to permit a party to rely upon his own failure to act can all be factors of decision.

Once the decision has been made, how can it be critically evaluated? It may be subject to criticism on the ground that the relevant factors were not considered. But suppose they have been considered. Is the critic stymied? Not necessarily. He can disagree with the answer to a particular factor-question. He can, for example, deem basic or jurisdictional that which the court says is not. But, although he may be able to muster some historical weapons, empirically he is out in the cold. To take another tack, he can disagree with the weight accorded a particular factor, but the factor-weighting process is not very productive. Thus, although not completely blocked, the critic finds his work frustratingly unincisive and not a little carping.

This low-order jurisprudential essay accurately portrays the problems confronting him who would comment on the recent case of *State v.*

*Glaros*.<sup>86</sup> The facts of the case are substantially as set out above.<sup>87</sup> The decision, by a sharply divided court, was that the error was waived by counsel's failure immediately to raise the issue.<sup>88</sup> Initially, the majority relied upon what might be labelled a "control" or "fair-play" factor. The error occurred in the presence of defense counsel; it was within his control to call it to the attention of the court and to have it rectified at the outset. Having failed to do so, said the majority, he cannot be permitted to seek the advantage of a favorable verdict and, at the same time, to disclaim the onus of an unfavorable one.<sup>89</sup> Next, the majority, relying upon Ohio Revised Code section 2945.83(E) (harmless error), asserted that the defendant, by failing to show that any juror had made a false statement, had failed to show prejudice resulting from the error. The defendant countered with the argument that the error was of such a nature that a showing of prejudice was not necessary. In parrying, but not meeting, this contention, the majority noted several cases from other jurisdictions holding that a waiver was effected by counsel's failure to raise the issue before voir dire.<sup>90</sup> The majority also noted several Ohio cases requiring a showing of prejudice in other situations.<sup>91</sup> Finally, the majority, dealing with the "basic rights" factor, put it aside by stating that only a statutory prerogative was involved in the case at bar.<sup>92</sup>

The dissenting judges viewed the statutory prerogative as a basic

86. 170 Ohio St. 471, 166 N.E.2d 379 (1960). See also discussion in *Evidence* section, p. 520 *infra*.

87. The statute involved is OHIO REV. CODE § 2945.27.

88. A similar result has been reached in a civil case. *In re Appropriation of Easement for Highway Purposes*, 108 Ohio App. 432, 162 N.E.2d 190 (1958), *appeal dismissed*, 169 Ohio St. 314, 159 N.E.2d 451 (1959); see also Sonenfield, *Evidence, Survey of Ohio Law* — 1959, 11 WEST. RES. L. REV. 379, 384 (1960).

89. A number of cases were cited by the majority, almost all of which concerned counsel's failure to complain of an omission in instructions. See, e.g., *State v. Tudor*, 154 Ohio St. 249, 95 N.E.2d 385 (1950); *Rucker v. State*, 119 Ohio St. 189, 162 N.E. 802 (1928).

The majority's comment regarding speculation on the outcome of the case would have more weight if, as in *Hilton & Dodge Lumber Co. v. Ingram*, 135 Ga. 696, 70 S.E. 234 (1911), the issue were raised after verdict. Further, the speculation argument rests upon the tacit assumption that counsel was immediately aware of the error but did not make it known. On the facts of *State v. Glaros*, *supra* note 86, there is no basis for the assumption. True, counsel's refusal to waive the defect and to consent to a mistrial indicates that he was playing both ends against the middle. But why not? The issue was one of first impression in Ohio criminal law. And, indeed, when it was finally resolved, three judges agreed with counsel. On the converse of the "control" point, see *Doyle v. State*, 17 Ohio 22 (1848) in which a *grand* juror was unqualified, an error which the defendant could not raise at the time it occurred. It was held that the error was jurisdictional and that it could be asserted at the trial by a plea in bar.

90. See, e.g., *Commonwealth v. Ware*, 137 Pa. 465, 20 Atl. 806 (1890).

91. See, e.g., *State v. Moon*, 124 Ohio St. 465, 179 N.E. 350 (1931) (trial court failed to instruct jury not to consider the possible punishment); *Warner v. State*, 104 Ohio St. 38, 135 N.E. 249 (1922) (trial court failed to instruct jurors regarding their conduct while separated); *Tingue v. State*, 90 Ohio St. 368, 108 N.E. 222 (1914) (judge was absent during part of final argument).

92. That part of the statute requiring the administration of an oath was enacted in 1957. 127 Ohio Laws 420 (1957).

right. Asserting that the legislature intended to give the defendant full protection against the possibility of false statements, the minority concluded that the jury was not properly impaneled. Regarding the defendant's failure to show prejudice, the minority was satisfied with the possibility of unknown challenges for cause.

Thus, an issue of first impression has been resolved in an opinion which affords some insight into the decisional process.<sup>93</sup>

### *Bench Trial — Conduct of the Court*

Prior to the presentation of evidence, a judge will frequently admonish the jurors to keep an open mind and not to form an opinion until the case is concluded. This admonition is of obvious importance in an adversary system. An evaluation of a witness' testimony must embrace not only direct and cross-examination but also the testimony of other witnesses. What appears to be a strong case for the plaintiff may be dissipated by the defense's case; and an apparently strong defense case may be demolished by rebuttal evidence. In view of these statements, the case of *State v. Kicak*<sup>94</sup> must be regarded as shocking. The defendant was convicted in a bench trial of indecent liberties. After the direct examination of one of the prosecution's witnesses,<sup>95</sup> the court stated

I think that's enough, and make your cross-examination short, I believe this child. I don't want to put her under any further torture, I believe her and that's that. Just don't be, — you handle her right.<sup>96</sup>

On appeal, the defendant contended that the judge had made up his mind as to the defendant's guilt and that it was useless to present the defense's case.<sup>97</sup> However, the court summarily dismissed this contention with a citation to *Crosby v. State*.<sup>98</sup> In *Crosby*, during direct-examination of the defendant, the judge, who was the trier of fact, stated that he did not believe the defendant. The court held the statement not to be prejudicially erroneous. It is questionable whether *Crosby* was correctly decided. As-

93. An issue not resolved is whether the trial court could have declared a mistrial. Absent the consent of both parties, the only possible ground for mistrial is found in OHIO REV. CODE § 2945.36(A) which gives the judge the discretionary authority to declare a mistrial for "accident." The minority was willing to regard the error as an accident within this provision. In addition, it was stated that because the jury was not properly impaneled, the court had the inherent power to declare a mistrial. Is this statement at odds with the oft-repeated statement that there is no common-law criminal procedure in Ohio?

94. 168 N.E.2d 768 (Ohio Ct. App. 1959), *cert. denied*, 362 U.S. 949, *rehearing denied*, 364 U.S. 855 (1960).

95. It is not clear from the opinion whether the witness was the complainant or her sister.

96. *State v. Kicak*, *supra* note 94 at 768.

97. The defense did, in fact, present its case which included the defendant's testimony of denial. The opinion does not indicate the extent of the cross-examination of the prosecution's witness. Nor does the opinion indicate whether the defendant argued that the trial court infringed upon the right to cross-examine.

98. 9 Ohio L. Abs. 55 (Ohio Ct. App. 1930).

suming that it was, it is easily distinguishable. A statement that the trier of fact does not believe a particular witness does not necessarily preclude the presentation and reasoned consideration of other testimony. However, a statement that the trier of fact believes a key witness for the prosecution does effectively preclude a dispassionate evaluation not only of the cross-examination of that witness, but also of contradictory testimony adduced by the defense. The court should have held that the statement was prejudicial error.

### *Evidence — Presumptions*

In the era of the automobile, law enforcement officers have special problems: the traffic policeman cannot, on foot, pursue the motorist who speeds or who commits some other moving violation; the benefits of pursuit by vehicle may be outweighed by attendant dangers; and, in the case of a stationary violation, the policeman is seldom present when the offense is committed. These problems make it difficult for the prosecution to prove an essential element of the traffic offense — the identity of the driver.

Common experience dictates that, in a substantial majority of cases involving private, passenger vehicles, the driver is the owner. Of course, this statement has no all-inclusive validity, and not infrequently the driver is a relative or friend of the owner. Nevertheless, the force of common experience and the desire not to impose an unreasonable burden on the prosecutor have led some courts and legislatures to adopt the inference, from proof of ownership, that the owner is the driver.<sup>99</sup> By such a method, the City of Columbus has sought to facilitate the prosecution and conviction of stationary violators. The Columbus Traffic Code section 2151.06 provides that

If any vehicle is found upon the street . . . in violation of any . . . ordinance of this city, regulating the stopping or standing or parking of vehicles, and the identity of the driver cannot be determined, the owner or person in whose name such vehicle is registered shall be held prima facie responsible for such violation.

In *City of Columbus v. Webster*<sup>100</sup> the constitutionality of this ordinance was sustained as against the contentions (1) that it was in conflict with general state law;<sup>101</sup> (2) that it created a rule of evidence; and (3) that it derogated from the presumption of innocence.

With reference to the first contention, the court noted that the legislature has granted to municipalities authority to regulate the stopping,

99. Comment, 33 MICH. L. REV. 1231 (1935); 34 TEXAS L. REV. 939 (1956).

100. 170 Ohio St. 327, 164 N.E.2d 734 (1960). See also discussion in *Evidence* section, p. 519 *infra*.

101. See OHIO CONST. art. XVII, § 3.

standing, and parking of vehicles.<sup>102</sup> The court concluded that municipalities also had the power to enforce such regulations. With reference to the second and third contentions, the court summarily stated that the ordinance did not create a rule of evidence and that it did not affect the presumption of innocence.<sup>103</sup>

No argument was made that the statute created an unreasonable presumption. Had it been made, the court could have disposed of it easily. In determining whether a presumption is unreasonable, the oft-stated test is whether there is a rational connection between the fact proved and the fact presumed.<sup>104</sup> In view of what has already been said regarding common experience, it can hardly be doubted that the court would have found a rational connection between the proof of ownership and the presumption of identity.

In sustaining the constitutionality of the ordinance the court has aligned Ohio with a majority of the jurisdictions which have considered the problem or a variation thereof,<sup>105</sup> and the court has put to rest any question of the constitutionality of such an ordinance as related to parking. However, other questions remain. First, what is the nature of the presumption; is it a conclusive presumption or merely a permissible inference? It is generally held that only a permissible inference may be drawn.<sup>106</sup> The use of the words "prima facie" in the Columbus ordinance would dictate the same result. This conclusion is buttressed by the court's reliance upon *City of St. Louis v. Cook*<sup>107</sup> in which it was emphasized that the ordinance there in question created but a permissible inference.

Second, in the absence of statute or ordinance, can the inference be drawn? The courts of other jurisdictions are not in agreement,<sup>108</sup> and

102. OHIO REV. CODE § 4511.07(A).

103. Neither of these statements is completely true. In effect, the ordinance creates a rule regarding the sufficiency of evidence for purposes of withstanding a motion for a directed verdict of acquittal. Also, it derogates from the presumption of innocence which applies to the issue of identity, *i.e.*, it is presumed that the defendant did not do the act charged. However, all of this is hardly significant in a state which permits the prosecutor to comment upon the accused's failure to take the stand. OHIO CONST. art. I, § 10. On the interesting question of whether the presumption of innocence applies to minor traffic offenses, see Note, 47 J. CRIM. L., C. & P.S. 64 (1956).

104. *Tot v. United States*, 319 U.S. 463 (1943).

105. The cases are collected in Annot., 49 A.L.R.2d 456 (1956). A valuable treatment of these cases is to be found in 34 TEXAS L. REV. 939 (1956).

106. 34 TEXAS L. REV. 939, 940 (1956).

107. 359 Mo. 270, 221 S.W.2d 468 (1949).

108. Note 106 *supra*. The author indicates that, with reference to illegal parking, some courts have permitted the inference, while others have not. As to other traffic offenses, courts are reluctant to permit the inference. In *People v. Hildebrandt*, 308 N.Y. 397, 126 N.E.2d 377 (1955), a speeding case, the court refused to permit a common-law inference even though the court had previously sustained a statutory inference in a parking case. *People v. Rubin*, 284 N.Y. 392, 31 N.E.2d 501 (1940). For arguments that the inference should be permitted in both cases, see 31 N.Y.U.L. REV. 847, 848 (1956).

there is a paucity of authority in Ohio. In a civil case it was indicated that the inference could be drawn.<sup>109</sup> But in two lower-court criminal cases there was a difference of opinion.<sup>110</sup>

Finally, it must be asked whether sound policy underlies the ordinance. The answer involves a balance of the interests of the individual against the necessity for effective law enforcement. In this regard, several factors should be considered. It can be argued against such ordinances that they make it easier for the prosecution to prove its case, an approach which is not consonant with traditional concepts of Anglo-American criminal jurisprudence. On the other hand, these ordinances are generally limited to minor traffic offenses<sup>111</sup> with minimal punishments and little or no social stigma. Further, the identity of the driver is generally within the particular knowledge of the owner-defendant, and it may well be unrealistic to place the traditional burden of proof on the prosecutor. Moreover, if the driver is not the owner, it is likely that he is a relative or close friend, and it is unlikely that he will remain silent and subject the owner to prosecution. On balance, therefore, it seems that such ordinances are supported by sound policy.

### *Verdict — Polling the Jury*

In most states, by constitutional provision, statute, or common law, the defendant has a right to poll the jury following the announcement of a verdict of guilty.<sup>112</sup> In Ohio, the right is provided for by Ohio Revised Code section 2945.77 which states that

Before the verdict is accepted the jury may be polled at the request of either the prosecuting attorney or the defendant. If one of the jurors upon being polled declares that said verdict is not his verdict the jury must further deliberate upon the case.

The purposes of polling the jury are to ascertain whether the requisite number of jurors have concurred in the verdict and to afford any juror the opportunity further to consider the verdict and to dissent from it.<sup>113</sup> The juror is asked, "Is this your verdict?"<sup>114</sup> If the juror's answer is evasive or qualified, he can be directed to answer yes or no.<sup>115</sup> If his

109. *Renner v. Pennsylvania R.R.*, 103 N.E.2d 832, 836 (Ohio Ct. App. 1951), *aff'd sub nom.* *Kyes v. Pennsylvania R.R.*, 158 Ohio St. 362, 109 N.E.2d 503 (1952).

110. *Burke v. Cincinnati*, 27 Ohio N.P. (n.s.) 589 (C.P. 1929) (inference could be drawn); *McCarthy v. City of Cincinnati*, 27 Ohio N.P. (n.s.) 362 (C.P. 1928) (inference could not be drawn). It is stated in *Burke*, *supra* at 591, that *McCarthy* was affirmed in an unreported decision.

111. *But see* PA. STAT. ANN. tit. 75 § 1212 (1960) which applies the presumption to all violations of the motor vehicle code.

112. 5 WHARTON, CRIMINAL LAW & PROCEDURE §§ 2142-43 (Anderson ed. 1957). On the polling of juries in civil cases, see Annot., 71 A.L.R.2d 640 (1960).

113. 5 WHARTON, *op. cit. supra* note 112, § 2142.

114. *Ibid.*

115. *Ibid.*

ultimate answer is yes, further inquiry is inadmissible.<sup>116</sup> If his ultimate answer is no, the jury will be directed to deliberate further.<sup>117</sup>

The primary problem arising from polling the jury strikes at the very heart of the jury system and relates directly to the conduct of human beings who are called upon to decide a controversy. Suppose that eleven jurors agree on a verdict of guilty. The remaining juror is then subjected to pressure. He is a holdout, and his doubts are easily characterized by the majority as unreasonable. It is his fault that the jurors who have reached agreement must remain in close quarters away from their homes and businesses. In such circumstances, it is not difficult to succumb, to abandon a position theretofore earnestly defended, and to give reluctant assent to the verdict. But what happens when the jurors return to the courtroom and are polled individually? The reluctantly assenting juror is now confronted by the accused whose guilt he still doubts. He is exposed to public view, and, in a tense situation, must publicly declare his verdict of guilty. He may do so without qualms; or he may succumb to the new pressure and dissent from the verdict; or, mindful of his prior assent, perhaps afraid that a flat dissent will now provoke the wrath of his colleagues or the judge and result in unknown trouble, yet torn by conscience, he may register a mild assent, one so hedged by attempted explanations that his verdict is difficult to ascertain.

Such was the situation presented in the recently reported case of *State v. Brown*.<sup>118</sup> One juror, in tears, stated that she had assented to the verdict because she was "the only one left."<sup>119</sup> Forced to give a direct answer, she stated "Yes, but I have told you —."<sup>120</sup> She was permitted to make no further explanation, and her verdict of guilty was accepted. On appeal, the judgment was reversed. The court stated that although it was not proper to permit a juror to explain his vote, there should be no doubt in a criminal case that an affirmative vote is given. On the facts, it appeared to the court that the juror was desirous of changing her verdict and that she was not given an opportunity to do so. In reaching its decision, the court distinguished the case of *Emmert v. State*<sup>121</sup> on the ground that the jurors there ultimately answered in the affirmative and expressed no desire to change their verdict even though they indicated that they had assented so as not to be holdouts. *Emmert* is an example of reluctant assent which remains an assent. *Brown* is an example of assent so reluctantly given that it becomes, at the very least,

116. *Ibid.*

117. OHIO REV. CODE § 2945.77.

118. 110 Ohio App. 57, 168 N.E.2d 419 (1953). It is not known why the report was delayed for seven years.

119. *Id.* at 58, 168 N.E.2d at 420.

120. *Ibid.*

121. 127 Ohio St. 235, 187 N.E. 862 (1933).

attempted dissent. It is the tacit holding of *Brown* that an attempted dissent vitiates the verdict of guilty. The holding strikes a nice balance between the necessity for rules of law and the recognition that these rules, which relate to human conduct, must be interpreted in the light of human conduct.

### *Sentence*

A defendant, by means of one act, or in the course of a single transaction, may commit several offenses. In such a case, the following questions arise: (1) may the defendant be charged with each offense; (2) if so, may he be convicted of each offense; and (3) if so, may he be sentenced for each offense? Ohio Revised Code section 2941.04 answers the first and second questions by stating that the defendant may be convicted of "two or more different offenses connected together in their commission, or different statements of the same offense." Regarding sentence, it is clear in Ohio that if, by a single act, the defendant kills or injures multiple victims, he commits separate offenses and may be sentenced for each one.<sup>122</sup> Beyond this rule, there is no agreement. Suppose that the defendant, during a single transaction, and by a concatenation of several acts, commits separate offenses. If a court chooses to emphasize the *several* acts and the *separate* offenses, multiple sentences will be permitted.<sup>123</sup> On the other hand, if the court chooses to emphasize the *single transaction*, multiple sentences will not be permitted.<sup>124</sup> This latter approach was adopted in the recently reported case of *State v. Weed*<sup>125</sup> in which the defendant was sentenced for (1) possession of explosives with intent to use them for an unlawful purpose,<sup>126</sup> (2) possession of the same explosives and placing them on another's property without his consent,<sup>127</sup> (3) possession of the same explosives and attempting to use them to the injury of another's property,<sup>128</sup> and (4)

122. *State v. Martin*, 154 Ohio St. 539, 96 N.E.2d 776 (1951) (traffic manslaughter); *State v. Sharier*, 93 Ohio App. 191, 112 N.E.2d 551 (1952) (failure to provide for four children); in some states it is held that the unlawful, unintentional killing of multiple victims is but a single act of manslaughter. See 21 U. CINC. L. REV. 492 (1952).

123. *State v. Trunzo*, 137 N.E.2d 511 (Ohio Ct. App. 1956) (burglary, larceny, forcible opening of a safe); *Wyatt v. Alvis*, 136 N.E.2d 726 (Ohio Ct. App. 1955) (burglary, larceny). In the *Wyatt* case the court confused separate transactions with separate offenses. It correctly concluded that there were separate offenses; it incorrectly concluded that there were separate transactions.

124. *State v. Greeno*, 89 Ohio App. 241, 101 N.E.2d 259 (1950), *appeal dismissed*, 155 Ohio St. 589, 99 N.E.2d 613 (1951) (defendant could not be convicted of both aiding in the issuance of checks with intent to defraud and obtaining automobiles with the same checks — larceny by trick).

125. 110 Ohio App. 186, 169 N.E.2d 39 (1954). It is not known why the report was delayed.

126. OHIO REV. CODE § 3743.25.

127. *Ibid.*

128. *Ibid.*



malicious destruction of property.<sup>129</sup> On appeal, the court held that but one transaction was involved and that the defendant could be sentenced only for the most serious offense.<sup>130</sup>

The result in these cases is said to depend upon whether one offense requires proof of the same facts as does the other. If so, multiple sentences are prohibited; if not, they are permitted. This evidentiary test derives from the state constitutional proscription against double jeopardy<sup>131</sup> and from the "same evidence" test which is used to determine whether the defendant has twice been put in jeopardy for the *same offense*.<sup>132</sup> The problem of double jeopardy is not without relevance in this area even though separate trials are not involved. Suppose, for example, that the defendant, in a single trial, is charged with and convicted of both a greater inclusive offense and a lesser included offense. Obviously these offenses arise from the same conduct; and just as obviously the defendant has twice been placed in jeopardy for the same offense — the lesser included offense. Thus, in the recent case of *State v. Johnson*<sup>133</sup> it was held that the defendant could not be convicted of both possession for sale and bare possession of the same narcotics.<sup>134</sup>

However, to overemphasize the double jeopardy problem and its concomitant evidentiary test, to use the test in cases in which double jeopardy is not an available defense, is to ignore criteria which are more consonant with the purposes of criminal law: whether the defendant has demonstrated by his acts that he is a dangerous person, who may need extended rehabilitation, and whether society needs the protection afforded by multiple sentences. Blind adherence to the evidentiary test results in permitting multiple sentences merely because they are not precluded on grounds of double jeopardy, even though multiplicity may serve no purpose.<sup>135</sup>

129. OHIO REV. CODE § 2909.01.

130. The court was divided as to the offense for which the defendant should be sentenced. One judge, on the basis of his evaluation of the criminal acts involved, was of the opinion that the defendant should be sentenced for malicious destruction of property, the punishment for which offense cannot exceed imprisonment for seven years. OHIO REV. CODE § 2909.01. However, the majority deemed the most serious offense to be the one carrying the heaviest penalty — any one of the possession offenses which, under OHIO REV. CODE § 3743.25, are punishable by imprisonment from one to twenty years.

131. OHIO CONST. art. I, § 10.

132. See *Duvall v. State*, 111 Ohio St. 657, 146 N.E. 90 (1924).

133. 165 N.E.2d 814 (Ohio Ct. App. 1960).

134. Although not mentioned by the court in *State v. Weed* note 125 *supra*, the offense of possession of explosives and attempting to use them to the injury of another's property includes the offense of possession of the same explosives with intent to use them for an unlawful purpose.

135. See *State v. Benjamin*, 102 Ohio App. 14, 132 N.E.2d 761, *appeal dismissed*, 165 Ohio St. 455, 135 N.E.2d 765 (1956), in which it was held that the defendant could be convicted *and sentenced* for maiming by destroying an eye and the *same* maiming by means of a caustic substance. The *Benjamin* case, it should be noted, does not involve separate acts and a single

In view of the disparity in case law and the unwarranted emphasis on concepts of double jeopardy which, as applied, avail the defendant nothing, it is time for a re-evaluation of the problem by legislative and judicial authority.

### *Judgment — Collateral Estoppel*<sup>136</sup>

In *State v. Braskett*,<sup>137</sup> the defendant, charged with failure to provide for his minor child, moved for a blood test to determine paternity.<sup>138</sup> In a prior action for failure to support the same child, the defendant had pleaded guilty. Consequently, the state argued that the issue of paternity, previously determined by the defendant's plea, could not be relitigated. In upholding this contention, the court noted that all of the elements of collateral estoppel were present.<sup>139</sup> The question, however, was whether collateral estoppel applied to criminal proceedings, and the court held that it did, ignoring prior Ohio cases which cast doubt on the matter.<sup>140</sup>

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transaction. Rather, it involves separate statements of the same offense proscribed by one statute, OHIO REV. CODE § 2901.19. In this regard, there is a factual similarity between *Benjamin* and *Weed*, in that *Weed* involved three offenses of unlawful possession of explosives all of which offenses are prohibited by OHIO REV. CODE § 3743.25. However, note that the maiming offenses carry different punishments. Maiming by putting out an eye is punishable by imprisonment from three to thirty years. Maiming by means of a caustic substance is punishable, at the discretion of the court, by a maximum of life imprisonment. OHIO REV. CODE § 2901.19. *State v. Benjamin*, *supra*, should be compared with *In re Benjamin*, 100 Ohio App. 455, 137 N.E.2d 298 (1955). The latter case arose on petition for a writ of habeas corpus filed in Franklin County where the petitioner was incarcerated. In point of time, it preceded the appeal in *State v. Benjamin*, *supra*, which took place in Cuyahoga County. In the habeas corpus case, the court, in dictum, stated that because the offenses arose from the same act, the defendant should have been convicted of and sentenced for but one offense. The court's statement with reference to conviction is wrong. OHIO REV. CODE § 2941.04 permits multiple convictions. The court's statement with reference to sentence is clearly to be preferred to the holding in *State v. Benjamin*, *supra*. It is interesting to note that in the decision on appeal the court makes no reference to the prior statements, by another court, in the habeas corpus case.

136. For an excellent analysis of Ohio criminal cases dealing with res judicata and collateral estoppel, see Note, 12 WEST. RES. L. REV. 402 (1961).

137. 162 N.E.2d 922 (Ohio C.P. 1959).

138. A blood test is provided for in OHIO REV. CODE § 2317.47. If the motion for a blood test is properly made, denial is prejudicial error. *State v. Snyder*, 157 Ohio St. 15, 104 N.E.2d 169 (1952).

139. The doctrine of collateral estoppel applies only to those issues actually litigated in the former action. All that is required is identity of parties. It is not necessary that the same cause of action be present. Collateral estoppel is to be distinguished from res judicata. The latter doctrine applies not only to issues actually litigated but also to issues that could have been litigated. The required elements are identity of parties and cause of action. *State ex rel. Ohio Water Service Co. v. Sanitary Dist.*, 169 Ohio St. 31, 157 N.E.2d 116 (1959).

140. *Duvall v. State*, 111 Ohio St. 657, 146 N.E. 90 (1924); *Patterson v. State*, 96 Ohio St. 90, 117 N.E. 169 (1917). Each case involved a commingling of the issues of collateral estoppel and double jeopardy. The court, in each case, evinced a decided reluctance to apply collateral estoppel in a case in which the defense of double jeopardy failed because the offenses were not the same. However, identity of offenses is not an element of collateral estoppel. *State ex rel. Ohio Water Service Co. v. Sanitary Dist.*, *supra* note 139. In general, on the

The *Braskett* case appears to be the first Ohio decision in which it is expressly held that collateral estoppel applies to criminal proceedings. The holding is in accord with those of other jurisdictions, both state<sup>141</sup> and federal.<sup>142</sup>

### *Post-Trial Motions — New Trial*

Ohio Revised Code section 2945.79 provides for the granting of a new trial "when new evidence is discovered material to the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial." On its face, this provision is broad. However it has been considerably narrowed by the judicially engrafted requirement that a new trial should be granted only if there is a strong probability that the new evidence will change the result in the case, and if the new evidence is neither cumulative nor impeaching.<sup>143</sup> Some limitation is necessary to avoid the granting of a new trial in a case in which the newly discovered evidence could not reasonably affect the result. But whether the limitation should extend beyond this point is open to serious question, particularly in view of the concept of reasonable doubt which underlies Anglo-American criminal law. Assuredly, the limitations relating to cumulation and impeachment are unnecessary. The basic problem concerns the effect of the new evidence rather than some label attached to it.<sup>144</sup>

Ultimately, attention must shift from the verbalization of the rule to its application. Therein are the strengths and weaknesses of the rule to be ascertained. In this regard, *State v. Kicak*,<sup>145</sup> already commented upon,<sup>146</sup> is illuminating. The defendant was convicted, on bitterly conflicting evidence, of taking indecent liberties with a thirteen-year-old girl.<sup>147</sup> After the trial, the complainant allegedly was heard to say, just

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relationship between collateral estoppel and double jeopardy, see Gershonson, *Res Judicata in Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12 (1957).

141. *Commonwealth v. Ellis*, 160 Mass. 165, 35 N.E. 773 (1893); *People v. Majado*, 22 Cal. App. 2d 323, 70 P.2d 1015 (1937) (in both cases, defendant was estopped from relitigating the issue of paternity); Annot., 147 A.L.R. 991 (1943).

142. *Sealfon v. United States*, 332 U.S. 575 (1948).

143. *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947); *State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319 (1917).

144. It is true, of course, that in many cases the cumulative or impeaching nature of the new evidence will be a substantial factor in a conclusion that the new evidence does not have the desired effect. But it is more important to note that this "truth" is not all-inclusive, and imagination can suggest numerous cases in which cumulative or impeaching evidence would almost certainly result in an acquittal.

145. 168 N.E.2d 768 (Ohio Ct. App. 1959), *cert. denied*, 362 U.S. 949, *rehearing denied*, 364 U.S. 855 (1960).

146. Note 94 *supra* and accompanying text.

147. The defense was that the complainant's unwed mother was attempting to "shake down" the defendant.