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Recommended Citation

Note, Residential Renewal Leases and the Ohio Statute of Conveyances: Invalidation and Subsequent Treatment, 27 Clev. St. L. Rev. 231 (1978)

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NOTES

RESIDENTIAL RENEWAL LEASES AND THE OHIO STATUTE OF CONVEYANCES: INVALIDATION AND SUBSEQUENT TREATMENT

THE OHIO REVISED CODE, in the section referred to as the statute of conveyances,¹ mandates, *inter alia*, that all leases of any interest in real property shall be signed by the lessor, attested to by two witnesses, and bear a certificate of acknowledgement subscribed to by a proper authority.² Exempted from the operation of the statute are leases for a period of less than three years.³ Thus, all leases in Ohio, even the typical form lease for a residential apartment building, must comport with the formal requirements of the statute of conveyances if they convey a term of three or more years.

Once a court has determined that such a lease fails to meet the requirements of the statute of conveyances, it must define the remaining relationship between lessor and lessee. Historically, Ohio courts have had difficulty with this definition. The recent decision of the Eighth District Court of Appeals in *Friedrich v. Matrka*⁴ is an excellent vehicle by which to illustrate the problems existing in this area of Ohio law.

I. THE PERPETUAL RENEWAL PROBLEM

In *Friedrich*, the court was confronted with a situation involving a landlord-tenant relationship created by, ostensibly, a common twelve month residential apartment lease, extending from July 1, 1971 to June 30, 1972. After occupying their apartment for approximately five months, the tenants (defendant-appellees) vacated the premises on November 30, 1971. Some eighteen months later the landlord filed suit in Berea Municipal Court seeking

¹ OHIO REV. CODE ANN. § 5301.01 (Page 1970). The Supreme Court of Ohio has labelled this section the "statute of conveyances." *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St. 2d 282, 286, 209 N.E.2d 194, 198 (1965). Nonetheless, this section of the code has been referred to as the statute of frauds. See, e.g., Note, *The Ohio Statute Of Frauds Of Conveyances And Leases Of Interests In Real Property*, 38 CIN. L. REV. 135 (1969) [hereinafter cited as *Frauds of Conveyances*]. The statute of frauds is the title reserved for chapter 1335 of the code. OHIO REV. CODE ANN. § 1335 (Page Supp. 1977).

² The statute, in pertinent part, requires that any lease: of any interest in real property must be signed by the . . . lessor, and such signing must be acknowledged by the . . . lessor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. Such signing must be acknowledged by the . . . lessor before a judge of a court of record in this state or a clerk thereof, a county auditor, county engineer, notary public, mayor, or county court judge, who shall certify the acknowledgement and subscribe his name to the certificate of such acknowledgement.

OHIO REV. CODE ANN. § 5301.01 (Page 1970).

³ OHIO REV. CODE ANN. § 5301.08 (Page 1970), provides that § 5301.01 does "not affect the validity of any lease . . . for any term not exceeding three years . . .," nor does it "require such lease to be attested, acknowledged, or recorded."

⁴ No. 37178 (8th Dist. Ct. App. Mar. 23, 1978).

damages for unpaid rentals from December 1, 1971, to June 30, 1972, as well as various cleaning and advertising expenses.⁵ Trial was eventually had on July 12, 1976, and the tenants' motion for a directed verdict was granted, the court finding that the parties' lease had not been executed in accord with the statute of conveyances.⁶ The landlord's motion for a new trial was subsequently overruled and appeal was taken to the Eighth District Court of Appeals.

The decision of the court of appeals affirmed the trial court's granting of the motion for directed verdict.⁷ In an opinion by Judge Stillman, the court ruled that the lease at issue, while providing for an initial period of twelve months, also renewed itself automatically⁸ unless either party gave the other timely notice to the contrary, and was therefore a perpetual lease.⁹ As such, the lease was subject to the statute of conveyances, and because this lease was witnessed by only one person the court declared it of no effect.

The threshold question, whether a lease contains a perpetual renewal clause, is of critical significance. In many cases the court's characterization of a renewal clause as either perpetual or not is determinative of the applicability of the statute of conveyances. While it may be presumed that most residential leases are for initial periods of less than three years, it seems likely that most such leases contain a provision for automatic renewal similar to that declared perpetual in *Friedrich*.¹⁰ For this reason, a review of the law regarding automatic renewal lease provisions is appropriate.

Ohio law regarding the creation of perpetual leases contains apparent contradiction. Ohio courts have long recited the old saw that the law views perpetual leases with disdain, so that in order to be given effect such a lease must reveal a clear intention to create a perpetuity.¹¹ The Ohio Supreme

⁵ The original complaint, filed August 28, 1973, prayed for damages only through May 30. On December 4, 1973, an amended complaint seeking unpaid rent through June 30, 1972, was filed. *Id.*, slip op. at 2.

⁶ Findings of Fact and Conclusions of Law at 2, *Friedrich v. Matrka*, No. 12591 (Berea Mun. Ct. Sept. 28, 1976) (Hennessy, J.).

⁷ No. 37178 (8th Dist. Ct. App. Mar. 23, 1978).

⁸ The clause characterized by the court as an automatic or perpetual renewal contained the following:

this agreement shall automatically renew itself . . . running continually for like periods, unless tenant shall give to the landlord not less than thirty (30) days written notice, prior to the expiration of the term then running of tenant's intention to terminate said tenancy at the expiration of the then existing term, or unless the landlord shall legally notify the tenant . . . of any change in the monthly rental

Id., slip op. at 3.

⁹ *Id.*, slip op. at 4.

¹⁰ The lease involved in the *Friedrich* case was a document entitled "RENTAL APPLICATION AND AGREEMENT." It was a printed form purchased from "a local legal supply house." Assignment of Error and Brief of Appellant at 4, *Friedrich v. Matrka*, No. 37178 (8th Dist. Ct. App. Mar. 23, 1978). That legal supply company is currently dispensing the same form, complete with the provision the court termed a perpetual renewal clause.

¹¹ *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943) (syllabus para. no. one); *Frank v. Flynn*, 120 Ohio App. 361, 197 N.E.2d 657 (8th Dist. 1964).

Ohio courts are not alone in their disfavor of perpetual leases. *See, e.g.*, *Levy v. Amelias*, 207 Misc. 880, 141 N.Y.S.2d 101 (Sup. Ct.), *aff'd mem.*, 1 App. Div. 2d 755, 148 N.Y.S.2d 921 (1955); *Sterle v. Galiardi Coal & Coke Co.*, 168 Pa. Super. Ct. 254, 77 A.2d 669 (1951); *King v. Wilson*, 98 Va. 259, 35 S.E. 727 (1900).

Court, in *Hallock v. Kintzler*,¹² held that a lease provision which read "that this lease may be renewed from year to year at the same rental at the option of the lessees, provided . . . that said lessee shall give thirty (30) days . . . notice . . ." ¹³ did not clearly show an intent by the parties to create a right of perpetual renewal. Mindful of the law's policy against perpetuities, the court limited the lessees to but one renewal¹⁴ on the basis of an obvious fiction that the parties to the lease in *Hallock* intended to provide for only one renewal, although the lease stated that it would renew itself "from year to year"¹⁵ provided the lessee timely notified the lessor of his intention to renew.

Several years prior to the *Hallock* decision, the Circuit Court of Cuyahoga County in *Swetland & Sons Co. v. Bronx Realty Co.*,¹⁶ had summarily dismissed a claim that a lease provision granting the lessee an option to renew the initial three year term for a second period of three years did not bring the lease within the purview of a statute requiring attestation and acknowledgment of leases for periods greater than three years.¹⁷ The view taken by the court in *Swetland* represents perhaps the most extreme judicial stance. There, no issue as to perpetual leases existed because the renewal option was not an extension of the term of the original lease. In essence, the lease and the renewal were separate agreements.¹⁸

The direction of these decisions seems to indicate that the courts will make every attempt to limit the effect of automatic renewal clauses. Nonetheless, in more recent decisions Ohio courts have not been reluctant to find the "clear intention" deemed necessary to characterize a lease renewal as perpetual. For example, the Cuyahoga County Court of Appeals, in the 1964 case of *Frank v. Flynn*,¹⁹ held that a renewal provision strikingly similar to that in *Hallock* constituted a perpetual lease. The provision read, "this agreement

¹² 142 Ohio St. 287, 51 N.E.2d 905 (1943).

¹³ *Id.*, at 288, 51 N.E.2d at 905.

¹⁴ This result is not unique to Ohio. See, e.g., *Barr v. March*, 20 Chest. 262, 61 Pa. D. & C.2d 588 (C.P. Chester County 1972) (involving a renewal of a ten year lease); *Lawson v. West Virginia Newspaper Pub. Co.*, 126 W. Va. 470, 29 S.E.2d 3 (1944).

¹⁵ 142 Ohio St. at 288, 51 N.E.2d at 905. See text at note 13 *supra*.

¹⁶ 17 Ohio C.C. (n.s.) 249 (1910), *aff'd mem.*, 86 Ohio St. 313, 99 N.E. 1134 (1912).

¹⁷ The court found no reason "for holding that the demise of the term is invalidated by annexing thereto a conditional agreement to lease the property for an additional period." 17 Ohio C.C. (n.s.) at 250.

¹⁸ The court in *Swetland* failed to characterize the renewal involved as either perpetual or not. This issue was foreclosed by its determination that the lease and the renewal stood separately. Had this reasoning been applied in *Friedrich* the lease would not have fallen under the purview of the statute of conveyances.

Some years ago, courts made a distinction between a lease renewal and a lease extension. The rule was that a lease extension was a continuation of the original lease agreement, whereas a provision for a renewal, if exercised, created an entirely new agreement. See, e.g. *Stout v. Tobias*, 27 Ohio App. 113, 160 N.E. 874 (6th Dist. 1927). If this distinction were still maintained, leases for less than three years with a renewal provision would not be subject to the statute of conveyances. Leases for less than three years with a similar option labelled "extension" would be subject to the statute of conveyances. The Ohio Supreme Court repudiated the distinction in *Corvington v. Heppert*, 156 Ohio St. 411, 414-15, 103 N.E.2d 558, 560 (1952). For further discussion see 21 Cn. L. Rev. 311 (1952), in which it is stated that "better reasoned decisions have followed the weight of authority in this country in refusing to recognize any distinction between extension and renewal options." *Id.* at 312.

¹⁹ 120 Ohio App. 361, 197 N.E.2d 657 (8th Dist. 1964).

shall automatically renew itself . . . continuously for like periods, unless tenant shall give . . . thirty days' written notice . . . or unless the landlord shall legally notify tenant to vacate. . . ." ²⁰ Predictably, the court paid homage to the law's historic disapproval of perpetual leases but found this language to clearly indicate an intention to create a perpetuity. ²¹

In 1961, the Athens County Court of Appeals considered a lease for an initial one year term and with a provision for renewal "thereafter on a year to year basis until terminated by the lessees by one month's notice in writing to the lessors thirty days prior to . . . any succeeding year." ²² This renewal, the court held, created a perpetual lease.

While the renewal provision in *Hallock* may appear nearly identical to these found to create a perpetual lease, one distinction does exist. The Athens County Court of Appeals placed much significance upon the fact that the lease in *Hallock* expired by its own terms ²³ unless the tenant timely notified the landlord of his intention to renew. ²⁴ The leases found to contain perpetual renewals, however, continued in force from year to year unless the tenant timely notified the landlord of his intention to terminate the lease. ²⁵ Thus, a perpetual lease is one that renews itself unless the tenant stops it, while a non-perpetual lease is one that ends unless the tenant renews it. ²⁶

²⁰ *Id.* at 362, 197 N.E.2d at 658. The original term of the lease was for twelve months.

²¹ The court stated that renewal clauses which seemingly create perpetual renewals will only be construed as creating a right to a single renewal when "by reason of ambiguous or equivocal language, a doubt exists as to the intention of the parties." *Id.* at 363, 197 N.E.2d at 659.

²² *President of the Ohio Univ. v. Athens Livestock Sales, Inc.*, 115 Ohio App. 21, 22, 179 N.E. 2d 382, 383 (4th Dist. 1961).

²³ See text accompanying note 13 *supra*.

²⁴ The *Frank* court relied upon this distinction, citing *President of the Ohio Univ.*, 120 Ohio App. 361, 363-64, 197 N.E.2d 657, 659 (8th Dist. 1964) (quoting *President of Ohio Univ. v. Athens Livestock Sales, Inc.*, 115 Ohio App. 21, 179 N.E.2d 382 (4th Dist. 1961)). The court stated that the renewal there in question, by its own language, continued the lease "automatically . . . unless terminated by an affirmative act." 120 Ohio App. at 363, 197 N.E.2d at 659. *Cf. Hoff. v. Royal Metal Furniture Co.*, 117 App. Div. 884, 103 N.Y.S. 371, *aff'd mem.*, 189 N.Y. 555, 82 N.E. 1128 (1907) (tenant required to give one day notice of intention to renew; held, tenant allowed unlimited renewals).

²⁵ In *Frank* and *Friedrich*, cases involving similar modern form leases, both the tenant and the landlord had the ability to terminate the lease.

²⁶ The classification of a lease as perpetual or nonperpetual most often arises when either the landlord evicts the tenant or the tenant vacates the demised premises, is sued by the other, and raises as a defense the invalidity of the lease due to its nonconformance with the statute of conveyances, *i.e.*, that it has not been signed, witnessed, or notarized. In this context, the cases of *Gelman v. Holland Furnace Co.*, 59 Ohio L. Abs. 539, 92 N.E.2d 704 (Ct. App. 9th Dist. 1948), and *People's Building, Loan & Savings Co. v. McIntire*, 14 Ohio App. 28 (1st Dist. 1921) are often cited to support a contention that a particular lease is perpetual, and therefore subject to the statute. See, *e.g.*, *Frank v. Flynn*, 120 Ohio App. 361, 365, 197 N.E.2d 657, 660 (8th Dist. 1964); *Brief of Appellee* at 5, *Friedrich v. Matrka*, No. 37178 (8th Dist. Ct. App. Mar. 23, 1978). However, it should be pointed out that these cases are not determinative of cases involving the form lease automatic renewal provision at issue in *Frank* and *Friedrich*. The leases involved in both *Gelman* and *People's Building, Loan & Savings Co.* had an initial term of one year with an option allowing the lessee to renew from year to year for a fixed number of years; the option in *Gelman* was for five years, that in *People's Building, Loan & Savings Co.* was for four. Thus, in these cases the only issue was whether the option operated to extend the term of the initial demise, see text at notes 16-18 *supra*; if it did, the leases were obviously subject to the provisions of the statute relating to leases for periods greater than three years.

At issue with perpetual or automatic renewals is not only whether the option extends the term of the original demise, but if so, for what period of time. See text accompanying note 15 *supra*.

While courts have adeptly distinguished away the impact of *Hallock*, the *Swetland* decision has simply been ignored. Its citation in a brief before the Supreme Court of Ohio in 1952 evoked the terse comment that "it has been cited and relied on in but one case before the Court of Common Pleas of Montgomery County; . . . Courts of Appeals of Ohio have not considered it as of controlling significance."²⁷

The result, then, is that leases containing automatic renewal provisions are treated as perpetual leases and, as such, must comply with the requirements of the statute of conveyances. Inasmuch as many, if not most, of the residential leases in use in Cuyahoga County contain a provision for automatic renewal,²⁸ the consequences for noncompliance with the statute of conveyances should be of widespread interest.²⁹

II. NONCOMPLIANCE—DEFINING THE REMAINING RELATIONSHIP

After declaring the lease involved in the *Friedrich* case to be of no effect, the Cuyahoga County Court of Appeals faced the necessity of defining the relationship existing between the landlord and tenants.

The court first examined the landlord's contention that its decision in the *Frank* case should be determinative of the outcome in *Friedrich*.³⁰ After invalidating the lease as a perpetual lease not in compliance with the statute of conveyances, the *Frank* court had declared the remaining tenancy to be yearly. That court supported its conclusion by citation to the syllabus of *B. & O.R.R. v. West*³¹ which holds, *inter alia*, that entry and payment of rent under a void lease for a term of years at an annually established rental creates a yearly tenancy, subject to all of the covenants of the lease except duration.³² The *Friedrich* court found *Frank* inapplicable because the lease in *Frank* contained "no mention of monthly rental payments,"³³ and the *Friedrich* lease had no reference to an established annual rental figure.

After finding that *Frank* was not controlling, the court concluded that "the nature of a tenancy will be determined by the nature of the rental payments."³⁴ Since the tenants paid rent monthly, the tenancy created was from month-to-month. The implications of this decision are obvious. Tenants in this state who are under leases containing an automatic renewal

²⁷ 156 Ohio St. 411, 416, 103 N.E.2d 558, 561 (1952).

²⁸ Not only does the standard form "RENTAL APPLICATION AND AGREEMENT" sold by the Ohio Legal Blank Co. contain the provision for automatic renewal, but reference to the standard lease forms employed by the owners of two large apartment complexes reveals that these, too, contain the automatic renewal provision. The apartment owners are Associated Estates Corp. and Multi-Management Inc.

²⁹ While the Associated Estates Corp. lease contained a reserved rent for the sixteen month period of the lease, the Multi-Management Inc. lease did not. The leases examined were not executed in compliance with the statute of conveyances.

Attorney Roger Heller, experienced in the practice of landlord-tenant law, has stated that many of the leases he encounters have automatic renewal clauses, but few comply with the statutory requirements. Interview with Attorney Roger Heller, in Cleveland (Apr. 20, 1978).

³⁰ *Friedrich v. Matrka*, No. 37178, slip op. at 4-5 (8th Dist. Ct. App. Mar. 23, 1978).

³¹ 57 Ohio St. 161, 49 N.E. 344 (1897).

³² *Id.* at 161, 49 N.E. at 344 (syllabus, para. no. one).

³³ No. 37178, slip op. at 5 (8th Dist. Ct. App. Mar. 23, 1978).

³⁴ *Id.*

clause without provision for a reserved annual rent, which leases have not been executed in compliance with the statute of conveyances, may well be holding merely as month-to-month tenants.

Due to the potentially resounding impact of the *Friedrich* decision, further analysis of the court's reasoning and of the current state of the law in Ohio is necessary.

Very early Ohio cases reflect the view that the residential relationship created by invalidation of a lease is merely a tenancy at will, a relationship either party may terminate at any time.³⁵ However, acts by the parties in furtherance or recognition of a rental agreement may cause a court to imply a periodic tenancy.³⁶

If the actions of the parties are sufficient to create a periodic tenancy, the court must define its length. This inquiry centers around the agreement for payment of rent. Over seventy-five years ago the Ohio Supreme Court, in *B. & O. R.R. v. West*,³⁷ announced that when a tenant enters and pays rent under a defectively executed lease containing an annually reserved rent, "a tenancy from year to year is created, and continues so long as he enters upon a new year, until the end of the term; and this is so, though the rent be payable quarterly, or monthly, or at shorter periods."³⁸

This rule was followed by the Franklin County Court of Appeals in *Grundstein v. Suburban Motor Freight, Inc.*³⁹ *Grundstein* involved a defectively executed lease for "a term of the duration of the present war and six (6) months thereafter,"⁴⁰ with an annual rental of \$3,000 payable at \$250 per month. The court found that the tenant was a tenant from year to year, notwithstanding the fact that rent was paid monthly.

However, compliance with this rule has been less than unanimous, a

³⁵ *Carey v. Richards*, 2 Ohio Dec. Reprint 630, 640 (C.P. Marion County 1860). Most jurisdictions have long adhered to this view. See, e.g., *Talamo v. Spitzmiller*, 120 N.Y. 37, 23 N.E. 980 (1890). For a recent restatement of this rule see *Flomar Corp. v. Logue*, 418 Pa. 181, 183, 210 A.2d 254, 255 (1965).

³⁶ *Walter C. Pressing Co. v. Hogan*, 99 Ohio App. 319, 133 N.E.2d 419 (6th Dist. 1954). See also *Psihozios v. Humberg*, 80 Cal. App. 2d 215, 220, 181 P.2d 699, 703 (2d Dist. 1947) (quoting *Phelan v. Anderson*, 118 Cal. 504, 506, 50 P. 685, 685 (1897)).

The acts most commonly listed as sufficient to convert a tenancy at will into a periodic tenancy are entry and payment of rent. *Walter C. Pressing Co. v. Hogan*, 99 Ohio App. 319, 322, 133 N.E.2d 419, 422 (6th Dist. 1954) (distinction as to actions at law and equity). Query whether this would allow an individual who had signed a defectively executed lease, paid a security deposit, but not entered or paid rent, the option of repudiating the lease as a tenant at will without incurring any liability. See notes 59-72 *infra* and accompanying text. See also RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 2.3 (1), Comment b (1977).

³⁷ 57 Ohio St. 161, 49 N.E. 344 (1897).

³⁸ *Id.* at 165, 49 N.E. at 345 (emphasis added). The actual syllabus reads as follows: "[A]n entry under a lease for a term of years at an annual rent, void for any cause, and payment of rent under it, creates a tenancy from year to year upon the terms of the lease, except as to its duration." *Id.* at 161, 49 N.E. at 344 (syllabus, para. no. one).

Courts of other jurisdictions have agreed that the periodic tenancy created should be determined by the manner in which rent is calculated (*i.e.*, on the basis of provision for reserved rent) and not by the interval between rent payments. See, e.g., *Darling Shops Del. Corp. v. Baltimore Center Corp.*, 191 Md. 289, 60 A.2d 669 (1948).

³⁹ 92 Ohio App. 181, 107 N.E.2d 366 (2d Dist. 1952).

⁴⁰ *Id.* at 183, 107 N.E.2d at 368.

situation for which the Ohio Supreme Court must accept a good deal of responsibility. Twenty years after the *B. & O.R.R.* rule was established, that court entertained the case of *Lithograph Bldg. Co. v. Watt*,⁴¹ in which they were called upon to determine the length of a periodic tenancy created by a defectively executed lease for one year, continuing thereafter until one party gave sixty days notice of intention to terminate the lease. The court, finding that the tenancy created was from month to month, announced that "possession taken and rents paid under a defectively executed lease creates a tenancy from year to year, or month to month, *dependent upon the terms as to payment of rentals*. . . ."⁴² The decision as to the periodic tenancy created was not inconsistent with the *B. & O.R.R.* rule because the lease contained no reservation of rent. Yet the language employed in the *Lithograph* syllabus, due to its failure to mention the absence of a reserved rent, was dangerously misleading. Consequently, some courts shifted the focus of their inquiry from the period for which a lease reserves rent⁴³ to the actual period fixed for payment of rent. An example of this misdirected analysis is *Hayden Investment Co. v. Meinert*,⁴⁴ where the court purposely disregarded the reservation of an annual rent in a defectively executed lease for five years. Instead, the court concluded that the periodic tenancy was monthly because the tenant paid rent at monthly intervals.⁴⁵

One year after the *Lithograph* decision, the Jefferson County Court of Appeals in *Rex Amusement Co. v. Nolan*,⁴⁶ addressed itself to a defective five year lease containing a reservation of rent for all five years with rent payable monthly. While it was urged by the landlord that under the authority of *B. & O.R.R.* the periodic tenancy created was yearly, the court concluded that *Lithograph* had glossed the *B. & O.R.R.* rule and applied *Lithograph*, focusing its attention on the periods fixed for payment of rent and finding that the tenancy created was from month to month.⁴⁷

It is not at all clear that *B. & O.R.R.* should have been determinative of the outcome in *Rex* because of the difference in the periods of reserved rent. However, it is obvious that the court's total disregard of the reserved rent in

⁴¹ 96 Ohio St. 74, 117 N.E. 25 (1917).

⁴² *Id.* at 75, 117 N.E. at 26 (syllabus para. no. six) (emphasis added).

⁴³ In *Lane v. Green*, 21 Ohio App. 62, 152 N.E. 790 (4th Dist. 1926), the Gallia County Court of Appeals quoted from *Rex Amusement Co. v. Nolan*, 11 Ohio App. 318 (7th Dist. 1918), in which the Jefferson County Court of Appeals had opined that the *Lithograph* decision had not "held differently from the rule as stated in *Railroad Co. v. West* . . . but the rule is amplified somewhat in holding that the term or period of the tenancy created . . . is to be determined by the periods fixed for the payment of rentals." 21 Ohio App. at 65, 152 N.E. at 791. It is difficult to see how a rule that determines periodic tenancies by the periods fixed for rental payment constitutes an amplification rather than a contradiction of an opinion that would disregard entirely the periods fixed for payment of rent. See text accompanying note 38 *supra*.

⁴⁴ 6 Ohio L. Abs. 604 (Ct. App. 8th Dist. 1928).

⁴⁵ *Id.* at 605. "In the instant case the instrument provided for the payment of rent monthly and notwithstanding a yearly rental is named we conclude that the tenancy . . . was merely one from month to month." *Id.* It should be noted, however, that the determination of the periodic tenancy was of no consequence to the outcome of the case.

⁴⁶ 11 Ohio App. 318 (7th Dist. 1918).

⁴⁷ *Id.* at 324-25.

Rex was contrary to the direction of the supreme court in *B. & O.R.R.*⁴⁸

The last in this series of oft-quoted decisions on defectively executed leases is the 1932 Ohio Supreme Court case, *Wineburgh v. Toledo Corp.*⁴⁹ *Wineburgh* involved a defectively executed five year lease with rent payable monthly and no reservation of rent. The court determined that the periodic tenancy created by a defectively executed lease for a term of years and providing for monthly rental was a tenancy from month to month.⁵⁰

Summarizing then, one finds that the supreme court has established the tenancy that ensues from a defectively executed lease in only three situations:⁵¹

- 1) when the lease is for a term of years and provides for an annually reserved rent, the tenancy is yearly regardless of the intervals at which rent is paid (*B. & O.R.R.*);
- 2) when the lease is for one year and continues automatically thereafter until terminated by one of the parties, has no reservation of rent and rent is paid monthly, the tenancy is monthly (*Lithograph*); and
- 3) when the lease is for a term of years with no reservation of rent and rent is paid monthly, the tenancy is monthly (*Wineburgh*).

The supreme court has yet to decide a case involving a defectively executed lease for years with rent reserved for the entire term of the lease and rental payments made monthly (*Rex Amusement*). If the court had such a case before it, there is no reason to believe that it would decide in accordance with the *Rex Amusement* decision and create a monthly tenancy. With rent reserved for the term of the entire lease, the court may determine that the longest of the traditional tenancies encompassed within the lease (*i.e.*, one year) most aptly characterizes the tenancy created.⁵²

From the foregoing discussion, it can be seen that the *Frank* and *Friedrich* leases both fit into the *Lithograph* category and should have been

⁴⁸ "The . . . majority viewpoint is that an invalid term of years automatically creates a year to year tenancy upon possession and payment of rent, even though the rent is calculated on a monthly basis." RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT, Reporter's Note § 2.3 at 87 (1977).

See also *Kallins v. Rex, Inc.*, 103 Ohio App. 108, 125 N.E.2d 371 (8th Dist. 1955) wherein the parties agreed to a five year lease with rent reserved for the entire term, subject to zoning board approval of the tenant's proposed use of the premises. When the tenant could obtain only a one year temporary permit, the court, after finding the lease invalid, held that the tenancy created was by implication of law one from year to year, despite the fact that the rent was paid monthly.

⁴⁹ 125 Ohio St. 219, 181 N.E. 20 (1932).

⁵⁰ Apparently, the court relied heavily upon the *Lithograph* case for this result. *Id.* at 222, 181 N.E. at 21. *Accord*, *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St. 2d 282, 209 N.E.2d 194 (1965).

⁵¹ It has been suggested that a large portion of the blame for the welter of confusion existing as to the various problems arising with defective leases under the statute of conveyances may be placed directly upon the supreme court. The court's policy of announcing the law of a given case in the syllabus rather than the opinion has been criticized as not representative of the true holdings of the opinions. *Frauds of Conveyances*, *supra* note 1, at 147. The validity of this allegation becomes apparent when comparing, for example, *Baltimore & O.R.R.* with *Lithograph*.

The process by which the supreme court selects cases for review in order to facilitate proper development of the law also came under attack in *Berick, Muddle in the Ohio Law of Defectively Executed Leases*, 8 CLEV. B.A.J. 69 (1937).

⁵² The Second Restatement of Property has developed a unique method for classifying periodic tenancies in order to determine the notice protection to which each party is entitled. The presumption is that the tenancy is defined by the intervals between rental payments provided for in the lease. "Where successive periodic payments of rent aggregate the length of

characterized as month-to-month tenancies. The *Frank* lease was not so characterized as the result of a mistake of fact. Contrary to the opinion of the court, the *Frank* lease did not contain a reserved annual rent. The only agreement as to rent was a covenant to pay \$110 per month for twelve months.⁵³ Thus, the *Frank* and *Friedrich* leases were identical with respect to rental agreements, and indeed, were nearly identical in all respects.⁵⁴ On the basis of the above review of pertinent Ohio law, and due to a mistaken factual finding, the *Frank* case was wrongly decided as regards the length of tenancy resulting under an invalid lease.⁵⁵

In many jurisdictions, courts never encounter this problem of defining the periodic tenancy created by a lease not in compliance with a statute similar to the statute of conveyances⁵⁶ (e.g., a statute of frauds or any statute prescribing procedural requirements for conveyancing). In these jurisdictions the parties, having once received benefits under the lease, are estopped to deny the validity of the lease for its want of adherence to requirements relating to execution.

Similar solutions to this vexing problem have been proposed by various landlord-tenant reform groups. One such solution, a model code drafted by the American Bar Foundation,⁵⁷ contains, *inter alia*, the following provisions relevant to unsigned rental agreements under the Ohio statute of conveyances:

- 1) if the landlord doesn't sign the lease but the tenant does, and the landlord accepts the tenant's rent without reservations, the lease should be given the same effect as though it were signed; and
- 2) if an unsigned lease is for a term longer than one year, it shall be given effect for only one year.⁵⁸

The merits of these alternative approaches might be debated at length. However, Ohio law has not adopted them, but continues to rely on one aged avenue of relief for parties engaged in litigation over a defectively executed lease — equity.

III. NONCOMPLIANCE — AVAILABILITY OF EQUITABLE RELIEF

There are essentially two forms of equitable relief available to a party

one of the longer traditional periods (month to month, quarter to quarter, year to year), the tenancy acquires the notice protections of the longer period . . ." limited to the maximum period specified in the lease or, if none is specified, one year. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 2.3, Comment d at 84 (1977).

⁵³ Agreed Statement at exhibit "C," *Friedrich v. Matrka*, No. 37178 (8th Dist. Ct. App. Mar. 23, 1978).

⁵⁴ *Id.* at exhibit "A."

⁵⁵ It should be recognized that periodic tenancies, while judicially defined as to length, are subject to all other terms and covenants contained in the original, defectively executed lease. See, e.g., *Baltimore & O.R.R. Co. v. West*, 57 Ohio St. 161, 49 N.E. 344 (1897); *Grundstein v. Suburban Motor Freight, Inc.*, 92 Ohio App. 181, 107 N.E.2d 366 (2d Dist. 1952). For the application of this rule in another jurisdiction, see *Hyatt v. Romero*, 190 Md. 500, 58 A.2d 899 (1948).

⁵⁶ *Gill v. Livingston*, 158 Fla. 577, 29 So. 2d 631 (1947); *Lipkin v. Bonita Garden Apts., Inc.*, 122 So. 2d 623 (Fla. Dist. Ct. App. 1960). See also *Chicago Title & Trust Co. v. Kemler Lumber Co.*, 151 Ill. App. 579 (1909); *Indianapolis Natural Gas Co. v. Kibbey*, 135 Ind. 357, 35 N.E. 392 (1893).

⁵⁷ AM. BAR FOUNDATION MODEL RESIDENTIAL LANDLORD-TENANT CODE § 1-301 (Tent. Draft), reprinted in *JEROME G. ROSE, LANDLORDS & TENANTS*, 233, 237 (1973).

⁵⁸ *Id.*

litigating a defectively executed lease — specific performance and part performance. In the *Friedrich* case, the landlord first sought equitable relief at an oral hearing on a motion for a new trial.⁵⁹ The relief requested was that the court treat the lease as a contract to make a lease and grant specific performance of the contract. The court of appeals refused to consider this question on appeal, stating that there was “nothing in the record to show that this was ever an issue before the lower court.”⁶⁰

Nonetheless, specific performance of defective leases has had as illustrious and desultory a history as other aspects of defective lease litigation. The supreme court has long recognized and approved this method of relief. In its 1917 *Lithograph* opinion, the court remarked in dicta that the rationale for characterizing a defective lease as an enforceable contract is that it is just to require one to abide by his contracts.⁶¹ This same reasoning was applied by the Sandusky County Court of Appeals in *Pero v. Miller*.⁶² In *Pero*, the court treated a defectively executed renewal lease, under which the parties had maintained a landlord-tenant relationship for nine months, as a contract to make a lease and decreed specific performance. The court found that all the requirements of a valid contract existed, even though the lease itself did not meet certain procedural requirements.⁶³

While courts today may be less reluctant to decree specific performance,⁶⁴ earlier courts had strong reservations about granting this relief. For example, the First District Court of Appeals felt that granting specific performance of an otherwise invalid document was doing indirectly what the legislature prohibited directly.⁶⁵ Nonetheless, in litigation arising over the great number of residential leases which have been defectively executed and which contain no annual reservation of rent, specific performance is the most likely method by which Ohio courts may validate leases. Suppose a situation wherein numbers of both tenants and landlords, upon discovering that their leases are

⁵⁹ Agreed Statement of Facts at 5, *Friedrich v. Matrka*, No. 37178 (8th Dist. Ct. App. Mar. 23, 1978).

⁶⁰ *Id.*, slip op. at 6 (8th Dist. Ct. App. Mar. 23, 1978).

⁶¹ *Lithograph Bldg. Co. v. Watt*, 96 Ohio St. 74, 117 N.E. 25 (1917). “A defectively executed . . . lease . . . when made by the owner, may be enforced against him as a contract to make a lease . . . for the reason that it is his contract.” *Id.* at 84, 117 N.E. at 28.

⁶² 32 Ohio App. 174, 166 N.E. 242 (6th Dist. 1928).

⁶³ “There is no magic about the word ‘lease.’ . . . The instrument had a valid consideration and specific provisions, and was executed by parties competent to contract.” *Id.* at 176, 166 N.E. at 243. See *Frauds of Conveyances*, *supra* note 1, at 150-51, for a discussion of *Pero* and similar cases as regards the doctrine of equitable estoppel. In *Schloss v. Brown*, 13 Ohio App. 294 (1st Dist. 1920) a tenant under a defectively executed lease was given relief identical to that granted in *Pero*. However, the court spoke in terms of equitable estoppel, not specific performance. “An imperfectly executed lease may operate to create an equitable estate in the lessee, if it be plainly shown that the instrument was intended as a lease and was accepted and treated as such by the lessee.” *Id.* at 296. Note the similarity of this treatment to that discussed in the text accompanying note 56 *supra*.

⁶⁴ Assuming, of course, that the issue has been properly raised. See, e.g., *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St. 2d 282, 289, 209 N.E.2d 194, 199 (1965); *Grundstein v. Suburban Motor Freight, Inc.*, 92 Ohio App. 181, 186, 107 N.E.2d 366, 369 (2d Dist. 1952).

⁶⁵ *Adams v. Connelly*, 10 Ohio L. Abs. 121, 122 (Ct. App. 1st Dist. 1930). Apparently, however, this particular view has never been followed by a majority of courts. See generally Berick, *Muddle in the Ohio Law of Defectively Executed Leases*, 8 CLEV. B.A.J. 69 (1937), for a review of several conflicting decisions regarding the availability of legal and equitable relief under a defectively executed lease.

defective and that the tenancies established thereunder may be only month to month, seek judicial intervention. Disgruntled landlords under such leases may give thirty day notices on problem tenants and then evict them, raise their rents, or negotiate new rental agreements. In such a situation the doctrine of specific performance, if timely raised and directed to the existence of the requirements for a valid contract,⁶⁶ should validate the lease as a contract to make a lease. The relative positions of the parties would not have changed even though the lease had been improperly executed. If, however, in the exercise of its equitable jurisdiction, the court proceeded to balance equities, a different result may be reached in some cases. A "model" tenant renting from a landlord who refuses to provide adequate services (*e.g.* fails to provide adequate heat, plumbing, etc.) might use the landlord's behavior to prevent him from obtaining specific performance. The "model" landlord may also find that inequitable actions by his tenant (*e.g.* late payment of rent, excessive noise, etc.) will prevent the tenant from specifically enforcing the lease as a contract.

The second form of equitable relief which may be obtained is termed part performance. This doctrine, which removes the agreement from the operation of the statute of conveyances,⁶⁷ has had a somewhat checkered career in Ohio courts.⁶⁸ Originally the requirements for relief under part performance were slight and such relief was easily obtainable; a mere taking of possession of the demised premises was sufficient to remove the lease from procedural requirements.⁶⁹ More recently Ohio courts have compounded the burden of one seeking a decree of part performance. In 1965, the supreme court announced the test of part performance: "[p]art performance . . . must consist of unequivocal acts by the party relying upon the agreement, which are exclusively referable to the agreement and which have changed his position to his detriment and make it impossible or impractical to place the parties in *statu quo*."⁷⁰ The acts required to prove part performance

⁶⁶ See note 63 *supra*.

⁶⁷ *Compare Sites v. Keller*, 6 Ohio 484 (1834) with *Stark v. Turner*, 23 Ohio N.P.(n.s.) 313 (C.P. Hamilton County 1921).

⁶⁸ Part performance is sometimes confused with equitable reformation of a defective instrument. Neither the court's equity powers nor Ohio's "curative" statute, OHIO REV. CODE ANN. § 2719.01 (Page 1954), operate to validate or reform a lease defective in execution, rather than defective as to a substantive requirement. *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St. 2d 282, 209 N.E.2d 194 (1965). Reformation need not, of course, be sought in order to seek other equitable relief under a defectively executed lease. *Walter C. Pressing Co. v. Hogan*, 99 Ohio App. 319, 133 N.E. 2d 419 (6th Dist. 1954).

⁶⁹ *Wilber v. Paine*, 1 Ohio 251 (1824). In 1952, the Franklin County Court of Appeals, in dicta, affirmed the *Wilber* definition of part performance. "Possession taken under the lease constitutes part performance." *Grundstein v. Suburban Motor Freight, Inc.*, 92 Ohio App. 181, 191, 107 N.E.2d 366, 372 (2d Dist. 1952).

⁷⁰ *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St. 2d 282, 283, 209 N.E.2d 194, 195 (1965) (syllabus, para. no. four). The Second Restatement of Property takes the view that "substantial performances which are clearly referable to the terms of the lease. . ." are necessary in order to give the lease full effect. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 2.3(3) at 82 (1977).

The requirements in *Delfino* have been criticized as improperly burdensome and historically inaccurate. *Frauds of Conveyances*, *supra* note 1, at 147-48. The author concludes that Ohio courts have mistakenly merged the doctrines of equitable estoppel and part performance, with the result that "it is far more difficult to take a case out of the operation of the Statute of Frauds in Ohio today, than it was in 17th and 18th century England, when the strict application of the Statute was justifiable." *Id.* at 151.

have traditionally been the execution of substantial improvements called for by the lease.⁷¹ "However, other acts not relating to improvements may also [suffice] . . . "if sufficiently uncommon or complicated to show that the parties must have had the lease clearly in mind."⁷² Substantial improvements or other acts sufficient to constitute part performance are not likely to occur under a modern residential form lease, so this form of equitable relief will rarely be decreed in a case such as *Friedrich*. Specific performance, not part performance, appears to be the only viable recourse available to keep many defectively executed leases from being converted into month to month tenancies.

IV. CONCLUSION

The considerations brought to light in the *Friedrich* case raise questions beyond the numbers of ineffectual leases that exist today and the tenancies that are created as a result. It has been said that the rationale behind the statutes of frauds and conveyances is grounded in evidentiary considerations; the original English statute of frauds was a response to the dilemma encountered when delivery of seisin was being abandoned as a requirement of conveyancing. Due to primitive rules of evidence then in existence, fraudulent conveyances were easily validated by unwary juries. The statute of frauds was enacted to standardize conveyancing and render proof thereof certain.⁷³ With refinement of modern rules of evidence and the continued utilization of equitable doctrines to mitigate the effect of the statute, it has been argued that the statute be abolished.⁷⁴ One must seriously question the necessity of enforcing the statute in cases such as *Friedrich*, involving residential leases. What legislative policy is being furthered by requiring such leases to conform to the statute? Are evidentiary considerations as to fraud valid in this context? If there is a valid legislative policy being pursued, have courts not overstepped their bounds in circumventing the statute by granting equitable relief? What effect does this circumvention have on the statute's validity?

Whatever the eventual fate of the statute, its continued application to situations such as *Friedrich* cannot logically be justified. The tenancies created in the wake of a defective lease, yearly and monthly, will by operation of law automatically renew themselves if neither party gives timely notice.⁷⁵ Should the parties be able to resolve their differences and continue their relationship under the judicially imposed tenancy (subject still to the terms of

⁷¹ See, e.g., *Wilber v. Paine*, 1 Ohio 251 (1824).

⁷² RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT, § 2.3, Comment e at 85-86 (1977).

⁷³ *Frauds of Conveyances*, *supra* note 1, at 319-41.

⁷⁴ *Id.* at 152-54. The author argues persuasively for the repeal of OHIO REV. CODE ANN. § 5301.01 (Page 1970). In his words, the statute of conveyances:

violates many of what ought to be cardinal principles of rational legislation. It sets forth a highly artificial rule about a very simple matter. . . . It is inefficient and expensive in that it breeds litigation. It functions not in telling decent men how they may be bound, but by arming the unscrupulous with a device for escaping bargains they have improvidently made.

⁷⁵ See, e.g., *Curry v. Engle*, 56 Ohio L. Abs. 17, 91 N.E.2d 41 (Ct. App. 7th Dist. 1949).

the defective lease) their "lease" would then become a perpetuity. Ironically, the very solution arrived at by Ohio courts is in violation of the statute of conveyances.⁷⁶ Assuming that there presently exists a valid rationale behind the statute, current judicial practice fails to enforce it. Unless the courts are able to fashion a remedy that supports the statute, its continued application cannot be defended.

CRAIG S. BONNELL

⁷⁶ While it may not be often that the parties continue a landlord-tenant relationship after having resorted to litigation, an even more ironic situation exists. By interpreting OHIO REV. CODE ANN. § 5301.01 (Page 1970), to cover leases with perpetual renewals, the courts have helped place the legislature in the anomalous position of sanctioning and protecting oral tenancies that are, by definition, in contravention of OHIO REV. CODE ANN. § 5301.01 (Page 1970). See OHIO REV. CODE ANN. § 5321.01 (D) (Page Supp. 1977), which includes oral month to month tenancies as "rental agreements" to which chapter 5321 applies.

Oral month to month tenancies automatically renew themselves unless either party gives the other timely notice of intention to terminate. As such, they are perpetuities; they are conveyances of an interest in real property for a period greater than three years, and therefore are defective in that they fail to, and indeed cannot, meet the requirements of the statute of conveyances.