July 2015

Local Rules of Court

J. Patrick Browne

LOCAL RULES OF COURT

J. PATRICK BROWNE*

INTRODUCTION

THE PROCEDURE to be followed in all courts of Ohio in the exercise of civil jurisdiction at law or in equity is governed and regulated by five basic sources of authority: the constitution, statutes, the Ohio Rules of Civil Procedure, the local rules of court, and judicial decisions.[1]

In the vast majority of cases, the Ohio Rules of Civil Procedure will be the primary source of authority governing the practice and procedure to be followed. But in some instances, the primary source of authority will be statutory, and the applicable sections of the Ohio Revised Code may or may not be supplemented by the Ohio Rules of Civil Procedure.[2] In

*B.S., John Carroll Univ., M.S.L.S., Case-Western Reserve Univ.; J.D., Univ. of Detroit; Member, Ohio and Michigan Bars; Professor of Law, Cleveland-Marshall College of Law, Cleveland State University.

[1] Judicial decisions not only interpret the other four sources of authority, but also create procedural requirements not explicitly found in those other four. *See, e.g.*, paragraph 1 of the syllabus of Jurko v. Jobs Europe Agency, 43 Ohio App. 2d 79, 334 N.E.2d 478, 479 (1975), where it is said:

> Plaintiff's complaint must sufficiently plead facts alleging a non-resident defendant's minimal contacts with Ohio thereby alleging the court's jurdisdiction over his person in order to withstand such defendant's motion to quash service of summons and to dismiss based on the Civil Rule 12(B)(2) defense of lack of personal jurisdiction.

Unlike Federal Civil Rule 8(a)(1), which requires "a short and plain statement of the grounds upon which the court's jurisdiction depends," Ohio Civil Rule 8(A) does not mandate the pleading of jurisdictional facts. The *Jurko* court concedes that point, but cites two pre-rule decisions—Wright v. Automatic Valve Co., 20 Ohio St. 2d 87, 253 N.E.2d 771 (1969) and Lantsberry v. Tilley Lamp Co., 27 Ohio St. 2d 303, 272 N.E.2d 127 (1971)—and offers the following argument to justify its innovation:

> The Civil Rules provide not only that a plaintiff plead a short plain statement of his claim but further that an out-of-state defendant may move to quash service on the ground he has less than minimal contacts with the forum state and to dismiss on the defense of lack of jurisdiction over his person. *See* Civil Rules 12(B)(2), 4.3(A). The short and plain statement must show that the pleader is entitled to relief and where there is an issue of long-arm jurisdiction good pleading dictates that the plaintiff recognize that fact at the outset and deal with that issue in his complaint.

Id. at 85, 334 N.E.2d at 482. In other words, "good pleading" requires the plaintiff to anticipate and forestall a possible affirmative defense by pleading facts which defeat it.

This gloss on Ohio Civil Rule 8(A) is not wholly without the approval of higher authority. *See* Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973), *but see* Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974).

[2] As it is noted in Civil Rule 1(C), the Ohio Rules of Civil Procedure do not apply to special statutory proceedings "to the extent that they would by their nature be clearly inapplicable." The converse of this, of course, is that they do apply to the extent that they would by their nature be clearly applicable. Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (1978). Further, the same subsection of Civil Rule 1 stipulates that "where any statute . . . provides for procedure by a general or specific reference to the statute governing procedure in civil actions such procedure shall be in accordance with these rules." Thus in some cases, the statutory procedure will be supplemented by the Civil Rules, and in other cases it will not. For an overview of the entire problem, see Browne, *Civil Rule 1 and the Principle of Primacy—A Guide to the Resolution of Conflicts Between Statutes and the Civil Rules*, 5 OHIO N.L. REV. 363 (1978) [hereinafter cited as *Civil Rule 1*].

either event, however, the second most important source of authority will be the local rules of court, since they supplement both the Civil Rules and the statutes, and supply the fundamental rules of practice and procedure which govern every action or proceeding in the courts of this state.[3] Accordingly, the problems posed by the local rules both deserve and demand more attention than they have received in the past, and it is the author's hope that this article will at least initiate a discussion of those problems if it does not provide an acceptable solution to them.

I. Sources Of Information

The terms "local rules of court,"[4] "local rules,"[5] and court rules"[6] refer to those rules concerning local practice which are adopted by courts inferior to the Supreme Court of Ohio.[7] Since these rules are binding upon both bench and bar,[8] and since they provide procedure not found elsewhere,[9] it is incumbent upon counsel to be familiar with them and to comply with them.[10]

But therein lies the rub, for these rules vary from court to court,[11] and there is no single source of information concerning them; no single reference book in which they can all be found. As the official repository

[3] For an illustration of the basic supplementary function of the local rules of court, *see* Browne, *Motion Practice: Some General Rules for Determining the Date for Service and Filing Documentary Opposition to Written Motions* (pts. 1-2), 51 Ohio Bar 1499, 1541 (1978) [hereinafter cited as *Motion Practice*].

[4] White v. White, 50 Ohio App. 2d 263, 362 N.E.2d 1013 (1977); Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 733 (1974).

[5] Berry v. Berry, 50 Ohio App. 2d 137, 361 N.E.2d 1095 (1977); Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts. Mun. Ct. 1972).

[6] Shore v. Chester, 40 Ohio App. 2d 412, 321 N.E.2d 614 (1974).

[7] Ohio R. Civ. P. 83 uses the term "rule of court" to describe these rules, but that term also refers to rules, including the Ohio Rules of Civil Procedure, promulgated by the Supreme Court of Ohio. Thus, to avoid confusion, a more precise descriptor is required. "Local rules," or a variant of it seems to be the preferred term since it is the term most frequently used by the courts and by others. *See, e.g.*, the Rules Advisory Committee Staff Notes to Ohio R. Civ. P. 16 and 83.

[8] Shore v. Chester, 40 Ohio App. 2d 412, 321 N.E.2d 614 (1974).

[9] *See, e.g.*, those local rules which provide the detailed procedure governing motion practice, as discussed in Browne, *Motion Practice, supra* note 3.

[10] A failure to comply with a local rule may deprive a defender of the right to defend on the merits at trial, or may lead to the dismissal of a claimant's action. *See* Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974), and Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts. Mun. Ct. 1972). But the courts must also comply with their own local rules, or risk a reversal of their decision. Repp v. Horton, *supra;* Shore v. Chester, 40 Ohio App. 2d 412, 312 N.E.2d 614 (1974); Bognar v. Cleveland Quarries Co., 7 Ohio App. 2d 187, 219 N.E.2d 827 (1966); Ramsey v. Holland, 35 Ohio App. 199, 172 N.E. 411 (1929).

[11] At one time it was held that a common pleas court could not adopt a local rule of practice unless the same rule had been adopted in every other common pleas court of the state. Cleveland Ry. Co. v. Halliday, 127 Ohio St. 278, 188 N.E. 1 (1933); Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433 (1910). But that is no longer the case. Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967). Thus, the rules may vary from court to court, and in many cases, local rules directed to the same point do vary from court to court. *See, e.g.*, those local rules discussed in Browne, *Motion Practice, supra* note 3.

for these rules,[12] the Supreme Court of Ohio could publish an official compilation of them, but it has not yet done so, and until it does, or until a publisher takes up the challenge, the practitioner will have to consult other sources. At the present time, the best printed source is *West's Ohio Rules of Court,* but it has the rules of only a few of the larger common pleas courts.[13] The next best printed source would be the various "desk books" or other reference works published by local bar associations. Many of these will contain the local rules of the courts in the geographical area covered by the bar association.[14] If these sources fail, one can consult the clerk of the court in question; many courts distribute printed copies of their local rules through the clerk's office, and those courts which have not printed their rules generally have a tattered and dog-eared copy of the rules available in the clerk's office.[15] In this latter instance, however, it is unwise to rely on telephone inquiries with respect to the local rules; only a personal examination of the clerk's copy will suffice, since it may reveal rules or applications of rules which a deputy clerk or a secretary would not deem pertinent, or it may reveal defects in the rules which render them invalid and inapplicable. Indeed, in such cases, one should not only personally examine the rules in possession of the clerk, but should also make a copy of them, since the copy may later be required

[12] OHIO R. CIV. P. 83 stipulates that the local rules are to be filed with the supreme court, and the Rules Advisory Committee Staff Note to Civil Rule 83 interprets this to mean that the supreme court is to serve as the repository for such rules: "Rule 83 restates the rule-making power of local courts and requires that the rules adopted by a local court be filed with the Supreme Court to serve as a repository for such rules."

[13] With the exception of 1974, a new edition of *West's Ohio Rules of Court* has been published annually. Its cover title has varied somewhat over the years. The four editions published between 1970 and 1973 were known as *West's Ohio Rules of Court;* the three editions published between 1975 and 1977 were known as *West's Ohio Rules of Court Desk Copy* (though the title pages retained the *West's Ohio Rules of Court* title); and the edition published in 1978 reverted to the title of *West's Ohio Rules of Court.*

The 1978 edition contains the local rules for the common pleas courts of Cuyahoga, Franklin, Hamilton and Stark Counties; the local rules for the United States District Courts for the Northern and Southern Districts of Ohio; the local rules for the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Appellate Judicial Districts of Ohio; and the local rules of the United States Court of Appeals for the Sixth Circuit. But this source, like any printed source, is only accurate as of the date of publication; one must always check for changes or amendments which become effective after a particular edition of the *Rules* was published. For the most part, the only source of information on these day-to-day changes is a published notice in an official court newspaper such as the *Daily Legal News and Cleveland Recorder.*

[14] *See, e.g.,* the *Lawyer's Desk Book,* published by The Bar Association of Greater Cleveland, which contains the local rules of the Cleveland Municipal Court, the Cuyahoga County Common Pleas Court, the Eighth District Court of Appeals, the United States District Court for the Northern District of Ohio, and the United States Court of Appeals for the Sixth Circuit. Although this publication is in loose-leaf format, and is supplemented from time to time, the rules contained therein are accurate only as of the time of publication, and the user must be on his or her guard for post-publication changes in the local rules.

[15] But again, total reliance on the accuracy of these copies may be misplaced, since they will not necessarily reflect amendments and changes made after the rules pamphlet was printed. The "single-copy-kept-in-the-clerk's-desk-drawer" variety is of even more dubious reliability, since it is highly unlikely that anyone will have made an attempt to keep such a lackadaisical venture up to date.

on appeal.[16] Finally (and it can happen), if there is a question as to whether a particular court has local rules or not because a copy of them cannot be located, inquiry should be made of the Clerk of the Ohio Supreme Court. Presumably, if there is no copy of the local rules for that court on file with the supreme court, there are no local rules applicable in that court.[17]

Given the absence of a single authoritative source of information, the wide variety of the existing sources, the questionable reliability of some of those existing sources, and the day-to-day changes and amendments that are published either haphazardly or not at all, it becomes apparent that the search for the authentic rule is as hazardous a venture as the 19th century search for the source of the Nile. Our judges have made a fetish of due process, yet they have consistently tolerated a system that flies in the face of that concept; more, they have not only tolerated such a system, they have authored and maintained it. The only saving grace is that the bench is as lax in enforcing the local rules as the bar is in observing them.

II. SOURCES OF AUTHORITY

Provisions of the Ohio Constitution,[18] the Revised Code,[19] the Ohio

---

[16] *See, e.g.*, OHIO R. APP. P. 16(E), which states, in part: "If determination of the assignments of error presented requires the consideration of provisions of . . . rules . . . , the relevant parts thereof shall be reproduced in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form."

[17] OHIO R. CIV. P. 83 requires copies of local rules to be filed with the Ohio Supreme Court. Presumably, this is a prerequisite to the validity of such rules, and they do not become effective until this filing requirement has been complied with. It follows, then, that if no rules are on file with the supreme court, there are no valid local rules for the particular court in question.

[18] OHIO CONST. art. IV, § 5(B) provides: "Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court."

[19] OHIO REV. CODE ANN. § 1901.14 (Page Supp. 1978) provides, in part: Municipal judges have further powers and duties as follows:

> . . . .
>
> (B) To adopt, publish, and revise rules for the regulation of the practice and procedure of their respective courts, and for the selection and manner of summoning persons to serve as jurors in said court;
>
> (C) To adopt, publish, and revise rules relating to the administration of the court.
>
> . . .

OHIO REV. CODE ANN. § 2301.04 (Page 1954) contains the following:

> The judges of the court of common pleas shall meet at least once in each month and at such other times as the chief justice of such court requires, and shall prescribe rules regulating the docketing and hearing of causes, motions, and demurrers and such other matters as are necessary for the advancement of justice and prevention of delay, and for the government of the officers of the court.

OHIO REV. CODE ANN. § 1911.011 (Page 1968), provides, in part:

> Civil actions and proceedings in a county court shall be commenced by filing a petition upon which summons or writ shall be issued by the clerk of the county court. A form of summons or writ shall be prescribed by rule of court. The procedure in a civil case in the county court shall be in accordance with the following provisions:
>
> (A) The return day shall be fixed by rule of court, and the summons or writ shall, unless accompanied with an order to arrest, be served at least three days before the time of appearance.

Rules of Civil Procedure,[20] and the Rules of Superintendence[21] have a bearing on the enactment of local rules. While it is sometimes said that one or more of these provisions "authorizes"[22] or "empowers"[23] the lower courts to make local rules, or that the local rules are made "pursuant"[24] to them, the better rule is that the lower courts are vested with inherent power to make rules regulating the practice and procedure in such courts, and that the above provisions are merely declaratory of this inherent rulemaking authority and, in some cases, limitations on it.[25]

A provision such as this appears to be in conflict with OHIO R. CIV. P. 1(A), which provides that the Civil Rules prescribe the procedure to be followed in all courts of Ohio in the exercise of civil jurisdiction at law or in equity. Thus, it would appear that this provision and like provisions are impliedly repealed by operation of the "conflicts" clause in OHIO CONST. art. IV, § 5(B), which states that "[a]ll laws in conflict with [the rules of practice and procedure prescribed by the supreme court] shall be of no further force or effect after such rules have taken effect." But even if that were not so, the "rule of court" adopted by the county court could not be inconsistent with the comparable provisions of the Civil Rules. *See* OHIO CONST. art. IV, § 5(B), as quoted in note 18 *supra*, and the provisions of OHIO R. CIV. P. 83, as quoted in note 20 *infra*. Accordingly, the end result will be the same as if the provision were deemed repealed, and the appropriate provisions of the Civil Rules will govern the form of summons, the return day, and the service of the summons.

[20] *See*, in particular, OHIO R. CIV. P. 83, which provides: "The expression 'rule of court' as used in these rules means a rule promulgated by the supreme court or a rule concerning local practice adopted by another court which is not inconsistent with the rules promulgated by the supreme court and which rule is filed with the supreme court."

The phrase "rules promulgated by the supreme court" appears in this rule and in that portion of OHIO CONST. art. IV, § 5(B) quoted in note 18 *supra*. In both cases, it has reference to the Ohio Rules of Civil Procedure, the Ohio Rules of Criminal Procedure, the Rules of the Court of Claims of Ohio, the Ohio Traffic Rules, the Ohio Rules of Juvenile Procedure, the Ohio Rules of Appellate Procedure, the Ohio Supreme Court's Rules of Practice, Rules of Superintendence, Rules of Superintendence for Municipal and County Courts, Rules for the Government of the Bar, and the Disciplinary Rules of the Code of Professional Responsibility. Where necessary, the phrase also has reference to the Code of Judicial Conduct. In addition, Rules of Evidence have been drafted, but have not yet been adopted.

[21] Rule 9 of the Ohio Supreme Court's Rules of Superintendence applicable to the common pleas courts, provides: "Nothing in these superintendence rules prevents any local rule of practice which seeks to promote the use of any device or procedure which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake." Rule 18 of the Ohio Supreme Court's Rules of Superintendence for Municipal Courts and County Courts is substantially the same.

[22] Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974); Sexton v. Sugar Creek Packing Co., 38 Ohio App. 2d 32, 311 N.E.2d 535 (1973).

[23] Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts. Mun. Ct. 1972).

[24] State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976).

[25] Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967); Cleveland Ry. Co. v. Halliday, 127 Ohio St. 278, 188 N.E. 1 (1933); State *ex rel.* Shube v. Beck, 40 Ohio L. Rep. 191, 17 Ohio L. Abstracts 529 (Ct. App. 1934); Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts. Mun. Ct. 1972). At is is said in Beck:

> The Common Pleas Court has the inherent right to adopt and enforce reasonable rules governing the conduct of its business so long as such rules are not in conflict with general laws. . . . We are of the opinion that courts have the inherent right to formulate rules for their government, so long as such rules are reasonable and not in conflict with general laws. The right to make such rules must be held to come within the implied powers of courts of justice. The legislature has never prescribed in minute detail all of the proceedings necessary in conducting courts of justice in an orderly manner,

While most of the above "authorities" merely make reference to the courts' inherent power to make local rules, or place some limitations on the exercise of that power, at least one "authority" appears to command the making of local rules. Thus, section 2301.04 of the Ohio Revised Code instructs the judges of the court of common pleas that they "shall prescribe rules regulating the docketing and hearing of causes, motions, and demurrers and such other matters as are necessary for the advancement of justice and prevention of delay, and for the government of the officers of the court." The statutory "shall" is normally read as mandatory in import.[26] The question then arises whether this statutory provision is binding on the common pleas courts, for if it is, there are some that are not in a state of compliance.

Demurrers, as such, have been abolished,[27] so to this extent, the statutory provision is clearly not applicable. But the function of the demurrer has been taken over by the Civil Rule 12(B) motion to dismiss,[28] and that

---

and many things must necessarily be left to the sound discretion of the court.

. . . .

We further believe that it is a well established rule that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings and facilitate the administration of justice as they may deem necessary. This power, though expressly recognized by the statutes of some states, is inherent, and exists independently of statute.

40 Ohio L. Rep. at 192, 17 Ohio L. Abstracts at 530.

This opinion was somewhat stronger than the prevailing view would accept. *Compare* Busher v. Macek, 127 Ohio St. 554, 190 N.E. 200 (1933) *and* Cleveland Ry. Co. v. Halliday, *supra.* Nevertheless, it was the genesis for two outstanding articles — Gertner, *The Inherent Power of Courts to Make Rules,* 10 U. CIN. L. REV. 32 (1936), and Case Comment, *The Rule-Making Power of Ohio Courts,* 7 OHIO BAR 630 (1935)—and in time, served as the basis for Chief Justice Taft's opinion in Cassidy v. Glossip, *supra.*

[26] As it is said in State *ex rel.* Leis v. Clark, 53 Ohio St. 2d 101, 104, 372 N.E.2d 810, 812 (1978): "This court repeatedly has declared that the term 'shall' in a statute must be construed as imposing a mandatory duty unless there appears the clear and unequivocal legislative intent that it receive a meaning other than its ordinary one." *See also* State *ex rel.* Niles v. Bernard, 53 Ohio St. 2d 31, 372 N.E.2d 339 (1978); Malloy v. City of Westlake, 52 Ohio St. 2d 103, 370 N.E.2d 457 (1977); State *ex rel.* Ewing v. Without A Stitch, 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974); Dorrian v. Scioto Conserv. Dist., 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). *But see* City of Columbus v. Teater, 53 Ohio St. 2d 253, 374 N.E.2d 154 (1978), for the exception.

[27] *See* OHIO R. CIV. P. 7(C), where it is said: "Demurrers shall not be used."

[28] It is sometimes said that the OHIO R. CIV. P. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is the rules equivalent of the former code demurrer. *See, e.g.,* Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974); State *ex rel.* Brown v. BASF Wyandotte Corp., 67 Ohio Op. 2d 239 (Cuyahoga County C.P. 1974); Bennett v. Brown, 41 Ohio Misc. 91, 322 N.E.2d 925 (Franklin County Mun. Ct. 1974); Longstreth Co. v. Charles Vangrov & Sons, Inc., 27 Ohio Misc. 15, 265 N.E.2d 843 (Dayton Mun. Ct. 1970). The Rules Advisory Committee Staff Note to OHIO R. CIV. P. 7(C), however, is not quite so precise; it states: "Rule 7(C) abolishes the demurrer, but the demurrer is subsituted for by the motion to dismiss discussed under Rule 12." From the use of the word "discussed," we may assume that this has reference to the Rules Advisory Committee Staff Note to Rule 12. In that Staff Note, only the 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is expressly referred to as a "motion to dismiss." But the tenor of the Note suggests that the appellation "motion to dismiss" is to be given to any motion which raises a Rule 12(B) defense prior to the service of the responsive pleading, and in common parlance, motions raising

the Rule 12(B) defenses are known as motions "to dismiss." Accordingly, we may conclude that "the motion to dismiss" mentioned in the Staff Note to Rule 7(C) is any motion which raises a Rule 12(B) defense prior to the service of the responsive pleading. It follows, then, that the rules equivalent of the code demurrer is any Rule 12(B) motion to dismiss, and not just the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. This conclusion is reinforced by a comparison of OHIO REV. CODE ANN. § 2309.08 (Page 1954) (repealed 1971) with OHIO R. CIV. P. 12(B). Thus:

OHIO REV. CODE ANN. § 2309.08 (Page 1954):	OHIO R. CIV. P. 12(B):
The defendant may demur to the petition only when it appears on its face that:	[T]he following defenses may at the option of the pleader be made by motion:
(A) The court has no jurisdiction of the person of the defendant;	(2) Lack of jurisdiction over the person,
(B) The Court has no jurisdiction of the subject of the action;	(1) Lack of jurisdiction over the subject matter,
(C) The plaintiff has not legal capacity to sue;	
(D) There is another action pending between the same parties for the same cause;	(1) Lack of jurisdiction over the subject matter (*see* State *ex rel.* Balson v. Harnishfeger, 55 Ohio St. 2d 38, 377 N.E.2d 750 (1978)),
(E) There is a misjoinder of parties plaintiff or defendant;	
(F) There is a defect of parties plaintiff or defendant;	(7) Failure to join a party under Rule 19 or Rule 19.1.
(G) Several causes of action are improperly joined;	
(H) Separate causes of action against several defendants are improperly joined;	
(I) The action was not brought within the time limited for the commencement of such actions;	(6) Failure to state a claim upon which relief can be granted (*see* Mills v. Whitehouse Trucking Co., *supra.*)
(J) The petition does not state facts which show a cause of action.	(6) Failure to state a claim upon which relief can be granted.

Ground (C)—lack of capacity to sue—has been made an affirmative defense by the operation of OHIO R. CIV. P. 9(A), and as such, it must be pleaded in the responsive pleading if OHIO R. CIV. 12(B) is to be taken literally. (Rule 12(B) mandates that all defenses "shall be asserted in the responsive pleading" unless they fall within the specifically enumerated exceptions in subsections 12(B)(1) through (7). Lack of capacity does not. Therefore, it is a defense which must be asserted by way of responsive pleading "if one is required.") But under the rule of Mills v. Whitehouse Trucking Co., *supra,* the defense of lack of capacity to sue can probably be asserted by way of a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Ground (E)—misjoinder of parties—is now an objection rather than a defense. *See* OHIO R. CIV. P. 21. Likewise, grounds (G) and (H)—misjoinder of causes of action—are no longer defenses to an action. *See* OHIO R. CIV. P. 18. Therefore, to the extent that the code grounds for demurrer have survived as defenses in the rules era of pleading, each and every one of them (save, perhaps, lack of capacity to sue) may be asserted by a Rule 12(B) motion to dismiss. Accordingly, it is the Rule 12(B) motion to dismiss, and not merely the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, that is the modern rules equivalent of the old code demurrer.

But this conclusion is not without its touch of irony. Of the eight defenses listed in Rule 12(B), (subsection 12(B)(7) must be divided into two separate defenses if the rule is to be properly understood; it includes (a) the defense of failure to join a necessary party under Rule 19 or Rule 19.1, and (b) the defense of failure to join an indispensable party under Rule 19. *See* Layne v. Huffman, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975)) only the following four can result in a dismissal: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (6) failure to state a claim upon which

motion is clearly included with the term "motion" as it is used in the statute. Therefore, we cannot escape our inquiry.

Now, it would seem that the inherent power to make local rules flows from the need to regulate the manner in which judicial proceedings are conducted.[29] But the judicial proceedings which the common pleas court may entertain are limited by the subject matter jurisdiction of that court. Accordingly, the power to enact local rules is directly related to the subject matter jurisdiction of the common pleas court, and to some extent limited by it, since the need for local rules must necessarily be limited by the nature of the judicial proceedings the court is authorized to conduct. It is the General Assembly, however, that has the power and authority to specify and limit the subject matter jurisdiction of the common pleas court.[30] Further, the General Assembly has a duty to insure that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."[31]

The command of section 2301.04 might then be viewed as an apt means of implementing the General Assembly's grant of subject matter

relief can be granted, and (7)(b) failure to join an indispensable party under Rule 19. *See* OHIO R. CIV. P. 41(B)(3) and (4), *but see* Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (1971), *aff'd on other grounds*, 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972). The fifth—(3) improper venue—normally leads to a transfer of the action to the proper venue, and can lead to a dismissal only in unusual circumstances. *See* OHIO R. CIV. P. 3(D). The remaining three—(4) insufficiency of process, (5) insufficiency of service of process, and (7)(a) failure to join a necessary party under Rule 19 or 19.1—cannot lead directly to a dismissal of the action though they may set the stage for a later dismissal based on failure to prosecute, failure to comply with a court order, or lack of jurisdiction over the person. *See* OHIO R. CIV. P. 41(B)(1), (3) and (4); John P. Novatny Electric Co. v. State, 46 Ohio App. 2d 255, 349 N.E.2d 328 (1975); Howard v. Allen, *supra.* (With respect to subsection 12(B)(7)(a), Ledwell v. May Co., 54 Ohio Misc. 43, 377 N.E.2d 798 (Cuyahoga County C.P. 1977) states the correct rule as to dismissal, but incorrectly identifies the absent party as "indispensable" when it was merely "necessary.") Thus, the Rule 12(B) motion is substantially misnamed when it goes by the appellation "motion to dismiss."

[29] *See* the authorities cited in note 25, *supra.*

[30] As it is noted in OHIO CONST. art. IV, § 4:

> (A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. . . .
>
> (B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.
>
> (C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law . . . .

Thus, section 4(A) of article IV of the constitution establishes the common pleas court as an entity, and to that extent, the court is a creature of the constitution alone. But the use of the phrase "as may be provided by law" in subsections (B) and (C) of section 4 makes the General Assembly a co-creator in the sense that it may, by statute, provide for, or limit, the divisions of the court, and also in the sense that it may limit the subject matter jurisdiction of the court as a whole, or the subject matter jurisdiction of any division created by statute. *See, e.g.*, Rocca v. Wilke, 53 Ohio App. 2d 8, 371 N.E.2d 223 (1977); Shady Acres Nursing Home, Inc. v. Board, 50 Ohio App. 2d 391, 364 N.E.2d 44 (1976).

[31] OHIO CONST. art I, § 16.

jurisdiction to the common pleas court, and of satisfying the General Assembly's duty to see that "justice [is] administered without denial or delay." Therefore, it might be concluded that the General Assembly has the power to order the common pleas court to exercise its inherent authority to make local rules even though the repeal of article XIV of the Ohio Constitution,[32] and the enactment of article IV, section 5(B),[33] deprives that body of its own former power to enact rules governing practice and procedure.[34]

---

[32] OHIO CONST. art. XIV (adopted 1851, repealed 1953) read as follows:

> 1. The general assembly at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, and prescribe their tenure of office, compensation, and the mode of filling vacancies in said commission.
>
> 2. The said commissioners shall revise, reform, simplify, and abridge the practice, pleadings, forms and proceedings of the courts of record of this state; and, as far as practicable and expedient, shall provide for the abolition of the distinct forms of action at law, now in use, and for the administration of justice by a uniform mode of proceeding, without reference to any distinction between law and equity.
>
> 3. The proceedings of the commissioners shall, from time to time, be reported to the general assembly, and be subject to the action of that body.

See OHIO REV. CODE ANN. app. (Page 1979).

Chief Justice Taft was of the opinion that this was the source of the General Assembly's power to prescribe rules of practice and procedure. In Cassidy v. Glossip, 12 Ohio St. 2d at 21, 231 N.E.2d at 67, he said:

> Prior to 1953, there was substantial constitutional basis for statements . . . to the effect that statutes might prevail over reasonable rules of procedure adopted by a court under its inherent rule-making power. At that time Article XIV of the Ohio Constitution could provide substantial support for the conclusion that a legislative enactment might interfere with the inherent rule-making power of Common Pleas Court. However, in 1953, that article of the Constitution was repealed.
>
> . . . .
>
> Provision is made by Section 3, Article IV of the Ohio Constitution [now article IV, § 4] for a Common Pleas Court in each county. Although Section 4 of that article [now § 4(B)] provides that "the jurisdiction of the Courts of Common Pleas . . . shall be fixed by law," there is now nothing in the Constitution conferring upon the General Assembly authority to infringe upon the inherent power of the Common Pleas Court to establish reasonable rules regulating its proceedings.

One may agree with this position without concluding that OHIO REV. CODE ANN. § 2301.04 (Page 1954) is invalid; that section does not of itself enact any rules; it simply mandates that the common pleas court will exercise its "inherent power . . . to establish reasonable rules regulating its proceedings" in certain well-defined areas.

[33] OHIO CONST. art. IV, § 5(B) provides:

> The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

[34] *See* Judge McCormac's dissenting opinion in the unreported case of Hearing v. Delnay, No. 76AP-493 (Ohio Ct. App. Franklin County, filed Dec. 21, 1976), as quoted in note 84 *infra, but see* Judge Whiteside's concurring opinion in the same case. In essence, Judge Whiteside's position is this: In Ohio, the constitution is a limitation on the General Assembly's legislative power, and not a grant of power to the General Assembly. Therefore,

But this conclusion may be questioned on three points. First, with respect to subject matter jurisdiction. While it is true that the General Assembly may prescribe the subject matter jurisdiction of the common pleas court, it cannot deprive the court of all subject matter jurisdiction, for a constitutionally established court without any function whatsoever would be a complete absurdity. Therefore, simply by reason of its existence, the common pleas court must have some subject matter jurisdiction. But if it does have some subject matter jurisdiction apart from what the General Assembly has given it, then it must be able to conduct some judicial proceedings in accordance with that subject matter jurisdiction. But if it can conduct some judicial proceedings, there is a need to prescribe rules governing the practice and procedure applicable to those proceedings. Accordingly, in at least some limited instances, the court's inherent power to prescribe rules governing practice and procedure can be exercised without any reference to the General Assembly's grant of subject matter jurisdiction to the court. In other words, it is the court *qua* court that has the right to exercise this inherent power, and not the court as creature of the General Assembly.[35] But if that is so, then the exercise of the inherent power to

the General Assembly may enact any law, including laws governing the practice and procedure in the courts of Ohio, unless it is specifically prohibited from doing so by a constitutional provision. Article II, § 32 prohibits the General Assembly from exercising any judicial power unless it is expressly authorized to do so by some otther constitutional provision. But the power to prescribe rules governing practice and procedure has been primarily a legislative rather than a judicial power, and that traditional view must prevail unless article IV, § 5(B) can be read as changing it. Article IV, § 5(B), however, limits the General Assembly's power to legislate in the field of practice and procedure only to the extent that the supreme court prescribes a later, and inconsistent, rule of practice and procedure; there is nothing in that provision expressly stating that, after the adoption of rules thereunder by the supreme court, the General Assembly shall have no further power to enact laws in conflict with such rules. Accordingly, while article IV, § 5(B) restates the supreme court's inherent power to make rules of practice and procedure, it does not expressly prohibit the General Assembly from exercising its traditional legislative power in the same area, and the provision does not, therefore, convert the power to enact rules of practice and procedure into a purely judicial power. That being so, the General Assembly has the authority to legislate in this area, subject to having its legislation repealed by a later and inconsistent rule prescribed by the supreme court.

The author of this article takes an intermediate position. The conclusion drawn by Judge McCormac seems unwarranted by the actual language of article IV, § 5(B), and the conclusion which must follow from Judge Whiteside's argument could lead to an absurd result that is wholly out of harmony with the clear spirit and intent of article IV, § 5(B). In the author's opinion, the language, spirit and intent of article IV, § 5(B) make the enactment of rules governing practice and procedure a purely judicial function. But article I, § 16 imposes a correlative duty on the supreme court and the General Assembly to see that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Thus, to the extent that rules of practice and procedure are required to satisfy this duty, and to the extent that the supreme court, through the exercise of the power granted it by article IV, § 5(B), has not provided those rules of practice and procedure, the General Assembly has the vestigial power to fill the gap and enact the necessary rules by way of statute. In a word, the General Assembly still has the power to legislate rules of practice and procedure, but only to the extent that the Supreme Court's rules have not preempted the field. *See* Browne, *Civil Rule* 1, *supra* note 2.

[35] Strictly speaking, the common pleas court is a creature of the constitution, but to the

prescribe local rules governing practice and procedure is the exercise of a judicial power, and the General Assembly is prohibited from exercising a judicial power unless the authorization to exercise that power has been expressly conferred upon the General Assembly by the Ohio Constitution.[36] No provision of the constitution "expressly" confers upon the General Assembly the right to exercise any judicial power.[37] Therefore, the General Assembly cannot itself prescribe rules of practice and procedure.[38] But what it cannot do directly, it cannot do indirectly by commanding the court to prescribe rules of practice and procedure in given areas. Therefore, the statutory command in section 2301.04 of the Ohio Revised Code is invalid as an unconstitutional attempt to indirectly exercise a judicial power when the authority to do so has not been expressly conferred on the General Assembly by the Ohio Constitution.

Second, with respect to article I, § 16 of the Ohio Constitution.[39] For the sake of argument, it may be assumed that this provision of the constitution "expressly confers" upon the General Assembly the authority to enact statutes which prescribe the practice and procedure to be followed in the courts of Ohio.[40] Since the enactment of article IV, § 5(B), how-

---

extent that the constitution gives the General Assembly the right to prescribe the subject matter jurisdiction of the court, the General Assembly becomes, in a sense, a co-creator, and from at least one point of view, the more important of the two co-creators. In this sense, then, the common pleas court can be called a "creature" of the General Assembly. *See* note 30 *supra.*

[36] OHIO CONST. art. II, § 32 states: "The general assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred."

[37] Former article XIV of the constitution might have been read as an express grant of authority to exercise the judicial power of prescribing rules of practice and procedure, but with its repeal in 1953, the constitution was left barren of an other "express" grant of power to the General Assembly. *See* note 32 *supra.* The right of the General Assembly to prescribe rules of practice and procedure may be implied from article I, § 16 (*see* note 34 *supra*), but article II, § 32 requires the "express" conferral of such authority.

[38] *But see* Judge Whiteside's contrary opinion as summarized in note 34 *supra.*

[39] In pertinent part, the provision states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

[40] While one may accept Judge Whiteside's argument, *supra* note 34, that this authority was inherent in the General Assembly (and was thus a legislative power) prior to the enactment of OHIO CONST. art. IV, § 5(B), one is hard put to accept his argument that article IV, § 5(B) has made no change in that situation. All of the commentators have agreed that article IV, § 5(B) converts the power to make rules governing practice and procedure from a legislative power to a judicial power, and leaves the General Assembly with nothing more than a veto over the exercise of this new judicial power, or the authority to enact rules of practice and procedure when the supreme court has not fully preempted the field by exercising its judicial power to the fullest.

See Browne, *Civil Rule* 1, *supra* note 2 at 399-401:

> This long tradition of legislative supremacy in the field of practice and procedure came to an end with the enactment of the Modern Courts Amendment of the Constitution in 1968. The key provision of this amendment is article IV, § 5(B), which mandates that the supreme court shall prescribe rules governing practice and procedure in all courts of the state, thereby reducing the power of the General Assembly to the exercise of a veto over the *Rules* prescribed by the supreme court . . . .
>
> Thus, the Modern Courts Amendment effectively reversed the positions of the supreme

ever, this power is vestigial in the sense that it may only be exercised if the rules of practice and procedure promulgated by the supreme court and the inferior courts do not provide a remedy by due course of law to

---

court and the General Assembly.

. . . .

But it is consistent with the language of the "Modern Courts Amendment" to hold that the General Assembly has retained the implied power to enact procedural statutes granted by Article I, § 16 and Article II, § 1 of the Ohio Constitution. However, that implied power is now much circumscribed; it may only be exercised to the extent that an "injury" requires a "remedy by due course of law." But the *Rules of Civil Procedure* provide an adequate "remedy by due course of law" in all civil actions, and in all special proceedings to the extent that they are not clearly inapplicable by their nature. Therefore, it may be concluded that the General Assembly may exercise its implied power to enact procedural statutes only to the extent that the supreme court's rules of practice and procedure have not pre-empted the field.

Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 OHIO BAR 727, 728 (1970):

As adopted, Article IV, Section 5(b) [sic] confers full rulemaking authority upon the Supreme Court, giving the court the power to make rules for all inferior courts. The power vested in the Court is complete because the rules it promulgates are not subject to legislative action, which means that the rules supersede conflicting statutory provisions.

Harrington, *The Current Status of the Modern Courts Resolution*, 40 OHIO BAR 1293, 1294 (1967): "Under the resolution, the Supreme Court will make the rules of procedure, subject to two limitations: (1) The rules shall not abridge, enlarge, or modify any substantive right. (2) The General Assembly will have a veto."

Kent, *When Statutes and Rules Conflict*, 48 CLEV. B.J. 195, 195 (1977):

If the Franklin County Court of Appeals [decision in *Hearing v. Delnay*, No. 76AP-493 (Ohio Ct. App. Franklin County, filed Dec. 21, 1976)] has correctly interpreted the Modern Courts Amendment, the Supreme Court's rulemaking power is unsubstantial and ephemeral indeed. By the relatively simple process of enacting new laws, the General Assembly can completely abrogate the entire set of Civil Rules, Criminal Rules, and the Rules of Evidence. If the various Rules are this fragile, the Modern Courts Amendment seems less than worthwhile.

Lasher, *The Ohio Rules of Civil Procedure and Their Effect on Real Property Titles*, 4 AKRON L. REV. 47, 47-48 (1971):

Among other things, [the Modern Courts] Amendment transferred the law-making power with respect to procedural matters from the General Assembly, where it had traditionally resided, to the Supreme Court of Ohio, leaving the legislature with only a veto power over the acts of the Supreme Court and totally eliminating the Governor from this segment of the legislative process.

Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 829 (1968): "There should now be no doubt that the authority of the Supreme Court in the rulemaking area is plenary. Court action in this area supersedes contradictory legislation. The legislature retains a veto over such court-made rules, but no longer has the primary responsibility."

Note, *Substance and Procedure: The Scope of Judicial Rule Making Authority in Ohio*, 37 OHIO ST. L.J. 364, 382 (1976):

In Ohio, the role of the legislature in the issuance of court rules is similar to that of Congress in the federal system in that the General Assembly has a veto power over the rules before they become effective. . . . In Ohio, however, the legislative branch does not have the ultimate power over the practice and procedure of Ohio courts. The responsibility for judicial procedure is placed, by the Ohio Constitution, with the Ohio Supreme Court, and the power of the General Assembly is limited to that of a veto.

Modern Courts Amendment to be on May Ballot, 41 OHIO BAR 312, 313 (1968): "The essential points of the Modern Courts Amendment are: . . . Give the Supreme Court the power to make the rules of practice and procedure for Ohio courts, subject to a legislative veto."

Support the Modern Court Amendment, 41 OHIO BAR 419 (1968): "The Modern Courts Amendment will—: . . . (2) Confer on the Supreme Court of Ohio the power — subject to a veto by the legislature — to make the rules of practice and procedure for the Ohio courts."

every person who has been injured in his or her land, goods, person, or reputation.[41] But since section 2301.04 of the Ohio Revised Code predates the rules of practice and procedure enacted by the supreme court and the local rules enacted by the inferior courts,[42] it cannot have been premised on a finding that the rules promulgated by these courts do not provide a remedy by due course of law to every person who has suffered a remediable injury. Therefore, since the basis for the statute (whatever that might have been) cannot any longer be considered valid, the statute itself must be invalid in its continued operation.

Third, and again with respect to article I, § 16 of the Ohio Constitution. From the language of section 2301.04 of the Ohio Revised Code, it is apparent that that section is not the product of the General Assembly's power to enact rules of practice and procedure in the face of the supreme court's failure to provide a remedy by due course of law through its own rules, or through the rules of the inferior courts; rather, it is an attempt to supervise the rulemaking power of the courts of common pleas by mandating that rules will be made covering certain areas of practice and procedure. But article IV, § 5(A)(1) of the Ohio Constitution grants to the supreme court alone the power to supervise the courts inferior to it.[43]

---

[41] *See* Browne, *Civil Rule* 1, *supra* note 2, as quoted in note 40 *supra.*

[42] In its mandatory form, the statute was first enacted in 1923. 1923 Ohio Laws 52. Prior to that time, the language of its forebears was permissive in nature. *See* 1921 Ohio Laws 230; 1885 Ohio Laws 16; 1880 Ohio Laws 200; 1875 Ohio Laws 105.

[43] OHIO CONST. art. IV, § 5(A)(1) provides: "In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court."

State v. Singer, 50 Ohio St. 2d 103, 109, 362 N.E.2d 1216, 1220 (1977) puts it about as bluntly as it can be put: "The authority of this court to superintend all courts of this state is set out in Section 5(A)(1), Article IV of the Ohio Constitution." And *see* State v. Gettys, 49 Ohio App. 2d at 247, 360 N.E.2d at 739, where it is said:

> Under Section 5, Article IV of the Ohio Constitution, the power of general superintendence over all courts is vested in the Supreme Court and under certain conditions it shall also prescribe rules governing practice and procedure.

However, in the latter case it is also said:

> It will be noted that whereas rules of procedure adopted by the Supreme Court require submission to the legislature, rules of superintendence are not so submitted and, hence, are of a different category. They are not the equivalent of rules of procedure and have no force equivalent to a statute. They are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants. Similar considerations concern the additional citations to the Rules of Superintendence for Municipal and County Courts (Rule 5). See Constitution of Ohio, Section 5, Article IV.

Id. at 243, 360 N.E.2d at 737 (1976).

And in his concurring opinion in State v. Smith, 47 Ohio App. 2d 317, 329, 354 N.E.2d 699, 708 (1976), Judge Krenzler tells us:

> Because of the language in Sections 5(A) and 5(B), Article IV, it is my view that the Rules of Superintendence are merely directory in nature and guidelines for the conduct of the courts emanating from the Supreme Court. They do not have the same legal standing as the Rules of Practice and Procedure, which must be presented to the legislature and have the effect of law, nor do they have the same standing as legislative enactments. The Rules of Superintendence are neither the substantive nor procedural law of Ohio.

Therefore, since the General Assembly has no power of superintendence over the courts of Ohio, this attempt to exercise such power must be deemed invalid.[44]

If it be argued that article I, § 16 reserves to the General Assembly

---

Thus, the Rules of Superintendence do not have the same status as sections of the Ohio Revised Code or the Rules of Civil Procedure, and because they are neither substantive nor procedural, they cannot create rights in a party to an action or proceeding which that party would not otherwise have had. But while they may not create new rights in a party, they may deprive a party of rights heretofore deemed fixed. As it is noted in Rosenberg v. Gattarello, 49 Ohio App. 2d 87, 93, 359 N.E.2d 467, 470 (1976):

> The appellant argues that through custom and usage the administrative judge here had concurrent authority with the assigned judge to grant his motion for leave to file an untimely counterclaim. This argument is not valid. Ohio courts are governed not by custom and usage but by the Rules of Superintendence of the Ohio Supreme Court promulgated under the authority of the Ohio Constitution, Article IV, Section 5.

For what it is worth, it might be noted that the *Rosenberg* decision also flows from the pen of Judge Krenzler. From the tone of *Rosenberg* in its entirety, one might be led to believe that Judge Krenzler is now inclined to give more substantive weight to the Rules of Superintendence than he was when he wrote his concurring opinion in *Smith*. In any event, in *Rosenberg*, he seems to treat the rules as mandatory, and thus appears to abandon the *Smith* conclusion that they are "merely directory in nature and guidelines for the conduct of the courts."

[44] It must be emphasized that OHIO REV. CODE ANN. § 2301.04 (Page 1954) is deemed invalid because it is an unauthorized exercise of judicial power, and not because it is in conflict with rule 9 of the Rules of Superintendence, or rule 18 of the Rules of Superintendence for Municipal Courts and County Courts. (*See* note 21 *supra*.) On the face of it, there does not appear to be any conflict between the statute and those rules. But even if there were, the conflict alone would not invalidate the statute, since the "conflicts" clause of OHIO CONST. art. IV, § 5(B), *supra* note 19, applies only to the supreme court's rules of practice and procedure, and not to its rules of superintendence. As it is said in State v. Lacy, 46 Ohio App. 2d 215, 217, 348 N.E.2d 381, 383 (1975):

> The authority of the Ohio Supreme Court to superintend all courts of this state is set out in Section 5(A)(1), Article IV, of the Ohio Constitution. The authority of the Ohio Supreme Court to prescribe rules governing practice and procedure in all courts of this state is set out in Section 5(B), Article IV, of the Ohio Constitution, which provides that such rules must be submitted to the General Assembly for approval. If so approved, all laws in conflict with such rules shall have no further force or effect.
>
> There is no provision that Rules of Superintendence have to be submitted to the General Assembly for approval. We hold that paragraph (A)(1) of Section 5, Article IV, of the Ohio Constitution, is independent of paragraph (B) of such section, and that the Ohio Supreme Court Rules of Superintendence do not invalidate any existing statute.

And see paragraphs 3 and 4 of the syllabus of State v. Smith, 47 Ohio App. 2d at 317, 354 N.E.2d at 701, where it is noted:

> 3. The Rules of Superintendence of the Supreme Court of Ohio were promulgated by the Supreme Court pursuant to the authority vested in it by Section 5(A)(1), Article IV, and not Section 5(B), Article IV of the Ohio Constitution.
>
> 4. The language of Section 5(B), Article IV of the Ohio Constitution which provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect" applies only to rules of practice and procedure proposed by the Supreme Court and approved by the General Assembly, and does not apply to Rules of Superintendence promulgated by the Supreme Court under Section 5(A)(1), Article IV of the Ohio Constitution.

Or as Judge Krenzler puts it in his concurring opinion in this case: "As a matter of law, there can be no conflict between a Rule of Superintendence and a statute . . . because the statute is the law and the rule is not the law." *Id.* at 329, 354 N.E.2d at 708 (1976). (For the premises from which this conclusion is drawn, *see* the quote in note 43 *supra*.) *But see* the concluding remarks in State v. Singer, 50 Ohio St. 2d 103, 363 N.E.2d 1216 (1977).

the power to supervise the courts if the supreme court's rules of superintendence fail to provide every person with a remedy in due course of law, then section 2301.04 falls afoul of the second objection made above. Since the statute predates the supreme court's Rules of Superintendence and Rules of Superintendence for Municipal Courts and County Courts,[45] the deficiency could not have been the basis for its enactment. Therefore, it may be said once again that since the basis for its enactment cannot any longer be valid, the continued operation of the statute must likewise be invalid.

Thus, there are cogent arguments for and against the statute's validity. But in the long run, it may not make a great deal of difference. Even if there were some certain way of enforcing its provisions,[46] the supreme court would probably avoid a collision with the General Assembly by diplomatically interpreting the statutory "shall" as the permissive "may."[47]

III. TESTING THE VALIDITY OF LOCAL RULES

A. *Constitutional Limitations*

It is well-settled that the local rules may not contravene the provisions

[45] As indicated in note 42 *supra*, the statute was first passed in its mandatory version in 1923. The Ohio Supreme Court's Rules of Superintendence first became effective on September 30, 1971, 29 Ohio St. 2d at xlv (1972), and its Rules of Superintendence for Municipal Courts and County Courts first became effective on January 1, 1975, 40 Ohio St. 2d at xxxvii (1975).

[46] Only one whose personal, private legal rights have been affected by the inaction of the common pleas court can bring an action to compel compliance with the statute. State *ex rel.* Harris v. Silbert, 109 Ohio App. 71, 154 N.E.2d 455 (1958), *aff'd* 169 Ohio St. 261, 159 N.E.2d 439 (1959).

[47] *See e.g.*, City of Columbus v. Teater, 53 Ohio St. 2d 253, 374 N.E.2d 154 (1978), in which the supreme court interpreted "shall" as "may" in order to avoid the conclusion that the General Assembly had attempted the exercise of a judicial power without being expressly authorized by the constitution to do so. As the decision puts it:

> Appellee also submits that inasmuch as R.C. 1501.17 provides that the common pleas court having jurisdiction "shall," upon petition by the director, enjoin work, it constitutes an offensive invasion of the constitutional authority of the judiciary. Appellee relies upon Section 16 of Article I, and on Sections 1 and 4 of Article IV of the Constitution of Ohio. Appellee is correct in that R.C. 1501.17 cannot require a court to issue any order. However, . . . in keeping with the judicial policy of preserving legislative enactments where possible, we construe this language as being only permissive insofar as it attempts to control an exercise of the judicial function.

Id. at 261-62, 374 N.E.2d at 160 (1978).

Cleveland Ry. Co. v. Halliday, 127 Ohio St. 278, 188 N.E. 1 (1933), contains the following remark at page 283 (188 N.E. at 2-3) of the report:

> As held by both this court and by other courts of last resort throughout the country, aside from common-law or statutory grant, the power to make rules of procedure is inherent in the judicial department. [Citations omitted.] Section 1558, General Code [now section 2301.04, Revised Code], which grants to courts of common pleas in this state the power to make rules with reference to court procedure, is only declaratory of the inherent rule-making power already existing in courts.

The troublesome word here is "declaratory." Does the court mean that the statute is "declaratory" in the sense that the statutory "shall" is not mandatory, but permissive, or does it mean that the statute is "declaratory" because it is not truly a "grant" of power, but simply a restatement of the fact that power exists in the court because of its nature as a court? Given the context in which this passage is quoted in Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967), it would seem that the second meaning was the one intended. If that is so, the question of whether the statutory "shall" is to be read as mandatory, or as the permissive "may," remains open.

of the constitution.[48] Thus, such rules may be neither worded[49] nor applied[50] in such a way as to violate the express language of the constitution, or to deprive a litigant of his or her constitutional rights, or in such a way as to restrict or limit the exercise of those rights.[51] But it is equally well-settled that a local rule may reasonably[52] regulate the exercise of a constitutional right by establishing prerequisites to its exercise, or by imposing conditions on its exercise,[53] if such regulation would facilitate the earlier disposition of cases by eliminating delay, unnecessary expense, and

---

[48] As it is said in the third paragraph of the syllabus of Cassidy v. Glossip, 12 Ohio St. 2d at 18, 231 N.E.2d at 65: "A Common Pleas Court has inherent power to make reasonable rules regulating the practice and procedure in such court where such rules do not conflict with the Constitution or with any valid statute." *See also* Meyer v. Brinsky, 129 Ohio St. 371, 371, 195 N.E. 702, 702 (1935), where it is said at paragraph 2 of the syllabus: "Court rules must not contravene either the organic law or a valid statute, and they must be reasonable in their operation."

This general reference to "the Constitution" and "the organic law" includes the Constitution of the United States as well as the Constitution of the State of Ohio. Walters v. Griffith, 38 Ohio St. 2d 132, 311 N.E.2d 14 (1974).

[49] State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976).

[50] Walters v. Griffith, 38 Ohio St. 2d 132, 311 N.E.2d 14 (1974); Logue v. Wilson, 45 Ohio App. 2d 132, 341 N.E.2d 641 (1975); Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974).

[51] Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967); Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); Cleveland Ry. Co. v. Halliday, 127 Ohio St. 278, 188 N.E. 1 (1933).

[52] Almost all of the decisions insist that the local rules must be "reasonable," or "moderate and reasonable" in their operation. *See, e.g.*, Walters v. Griffith, 38 Ohio St. 2d 132, 311 N.E.2d 14 (1974); Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967); Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974). But none of them give a test of reasonableness. Presumably, a local rule is "reasonable" if it is designed to facilitate the earlier disposition of cases (Superintendence Rule 9 and Municipal Court Superintendence Rule 18) by eliminating delay, unnecessary expense, and other impediments to the expeditious administration of justice (Civil Rule 1(B)), and if it does not absolutely deprive a party of his or her constitutional or substantive rights.

[53] In addition to the cases cited in note 52 *supra, see also* Mentor v. Giordano, 9 Ohio St. 2d 140, 224 N.E.2d 343 (1967); Goldberg Co. v. Emerman, 125 Ohio St. 238, 181 N.E. 19 (1932). Hoffman v. State, 98 Ohio St. 137, 120 N.E. 234 (1918), stands for the same principle, though a rule of court was not involved in the case.

The syllabus of Walters v. Griffith, 38 Ohio St. 2d 132, 311 N.E.2d 14 (1974) illustrates the type of prerequisite or condition that may be imposed on the exercise of a constitutional right:

> Local court rules, requiring an advance deposit as security for the costs of a jury trial and providing that the failure of a party to advance such deposit constitutes a waiver of the right to a trial by jury, are moderate and reasonable regulations of the right of trial by jury, and are constitutional and valid.

Id., 311 N.E.2d at 14 (1974). Cleveland Municipal Court Rule 5C illustrates the type of prerequisite or condition that may be imposed on the exercise of a substantive right of less than constitutional rank:

> It shall be the responsibility of any party filing a counterclaim, cross claim or third party claim exceeding the monetary jurisdiction of the court, to file also a motion to certify the case to the Court of Common Pleas. The motion shall be accompanied by a check or money order in the sum of Twenty ($20.00) Dollars made payable to the Clerk of the Court of Common Pleas, as security for costs in that court. Failure to comply with this rule within thirty (30) days of the filing of such counterclaim, cross claim or third party claim shall be deemed consent to remit the excess over the court's monetary jurisdiction and authorize the court to proceed as to the residue.

other impediments to the expeditious administration of justice.[54] This aspect of local rule validity is best summed up in the words of *Meyer v. Brinsky*:[55]

> It is of course fundamental that courts are vested with inherent power to establish rules for regulating their proceedings and for facilitating the administration of justice. . . . This power exists independently of statute, and its exercise is especially to be commended at this time when the constantly increasing volume of litigation necessitates maximum efficiency in expediting court work lest justice be delayed thereby virtually denied. However, it is equally fundamental that such rules must not contravene either the organic law or a valid statute; and likewise they must be reasonable in their operation.[56]

B. *Consistency With the Civil Rules and Other Rules*

But there is a second aspect to validity that is also imposed by the constitution — the local rules must not be inconsistent with the rules promulgated by the supreme court.[57] This limitation on local rulemaking power is echoed in Civil Rule 83.[58] Thus, the local rules may not be inconsistent with the Civil Rules.[59] Consistency, however, does not require identity with the Civil Rules, for that would defeat the purpose of local rules. Local rules may be deemed consistent with the Civil Rules if they further their purpose by facilitating the earlier disposition of cases through the elimination of delay, unnecessary expense, and other impediments to the expeditious administration of justice.[60] Accordingly, the local rules

---

[54] Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974); Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts., Mun. Ct. 1972). *See also* OHIO R. CIV. P. 1(B); OHIO R. SUP. 9; and OHIO R. SUP. MUN. CT. 18.

[55] 129 Ohio St. 371, 195 N.E. 702 (1935).

[56] *Id.* at 373, 195 N.E. at 703 (1935).

[57] OHIO CONST. art. IV, § 5(B) provides "Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court."

[58] OHIO R. CIV. P. 83 provides: "The expression 'rule of court' as used in these rules means a rule promulgated by the supreme court or a rule concerning local practice adopted by another court which is not inconsistent with the rules promulgated by the supreme court and which rule is filed with the supreme court."

[59] Walters v. Griffith, 38 Ohio St. 2d 132, 311 N.E.2d 14 (1974); Ivywood Apts. v. Bennett, 51 Ohio App. 2d 209, 367 N.E.2d 1205 (1976); State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976); Logue v. Wilson, 45 Ohio App. 2d 132, 341 N.E.2d 641 (1975); Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974); Sexton v. Sugar Creek Packing Co., 38 Ohio App. 2d 32, 311 N.E.2d 535 (1973); Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts. Mun. Ct. 1972).

Of course, this requirement of consistency is not limited to the Civil Rules; it applies to all rules governing practice and procedure promulgated by the supreme court. *See, e.g.*, OHIO R. APP. P. 31; OHIO R. CRIM. P. 57(A); OHIO R. JUV. P. 2(19); and OHIO TRAF. R. 19; all of which are, to a greater or lesser extent, exact echoes of OHIO R. CIV. P. 83. For the full text of these various rules, *see* note 69 *infra*.

[60] OHIO R. SUP. 9; OHIO R. SUP. MUN. CT. 18. *See, e.g.*, OHIO R. CIV. P. 7(B)(2), which stipulates that "[t]o expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief

may supplement the Civil Rules by imposing additional procedural requirements, but they may not conflict with the Civil Rules, nor contradict them.[61]

Of course, it will not always be easy to determine whether a particular local rule supplements or conflicts with a Civil Rule when both speak to the same general subject matter and there is some inconsistency between them.[62] For example, does a local rule which requires the service *and* filing of a document within a given number of days supplement or contradict Civil Rule 5(D), which permits the filing within three days after the service? In the absence of a controlling decision by the Ohio Supreme Court, there is no absolute answer to questions such as this, but the rules which govern the supplementation of the Civil Rules by statutes[63] can be applied by analogy to good effect. Thus, assuming an inconsistency between a local rule and a Civil Rule, we can attempt to solve the supplementation vs. conflict problem with the following formulae:

1. If both the Civil Rule provisions and the local rule provisions are categorized as mandatory or exclusive with respect to the same point, they are in irreconcilable conflict, and the Civil Rule provisions must prevail.
2. If the Civil Rule provisions are mandatory or exclusive and the local rule provisions are permissive or general with respect to the same point, they are in irreconcilable conflict, and the Civil Rule provisions must prevail.
3. If both the Civil Rule provisions and the local rule provisions are permissive or general with respect to the same point, they are not necessarily in irreconcilable conflict, and in any given instance, the local rule provisions may be construed as being supplementary to the Civil Rule provisions.
4. If the Civil Rule provisions are permissive or general and the local rule provisions are mandatory or exclusive with respect to the same point, the local rule provisions may be construed as supplementary of the Civil Rule provisions and being more explicit, will prevail over the Civil Rule provisions, if they are otherwise valid.

The example given above falls within this fourth category, and the more explicit local rule provisions with respect to service *and* filing should prevail over the permissive provisions of Civil Rule 5(D) whenever the local rules are applicable.

---

written statements of reasons in support and opposition." And *see* OHIO R. CIV. P. 16, which authorizes the court to adopt rules concerning pretrial procedure which will accomplish, among other things, the settlement of actions without trial.

[61] *See* the cases cited in note 59 *supra*. *See also* OHIO TRAF. R. 19, which explicitly states: "Local rules shall be supplementary to and consistent with these [Ohio Traffic] rules."

[62] This type of supplementation may be described as supplementation through common concern. Its basic nature is discussed at some length in Browne, *Civil Rule* 1, *supra* note 2.

[63] *See id.*

C. *Statutory Limitations*

It has traditionally been held that the local rules may not contravene the provisions of a valid statute.[64] Although this rule was questioned in *Cassidy v. Glossip*[65] on the ground that the 1953 repeal of article XIV of the Ohio Constitution[66] deprived the General Assembly of its power to enact statutes governing practice and procedure, the question was not there decided, and the traditional view was repeated in the syllabus of the case.[67] Accordingly, it would appear that prior to the effective date of the Civil Rules, a local rule which conflicted with a valid statute had to yield to the statute. Whether that view still prevails is open to question.

Obviously, the local rule must yield when it conflicts with a statute that is substantive or jurisdictional in nature. By its terms, article IV, section 5(B) of the Ohio Constitution limits the local rulemaking power to matters concerning "local practice,"[68] and the supreme court's rules of practice and procedure repeat this limitation.[69] By limiting the local rules to matters of "practice,"[70] the Ohio Constitution and the various rules of practice

[64] Cassidy v. Glossip, 12 Ohio St. 2d 17, 232 N.E.2d 64 (1967); Brown v. Mossop, 139 Ohio St. 24, 37 N.E.2d 598 (1941); Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); Cleveland Ry. Co. v. Halliday, 127 Ohio St. 278, 188 N.E. 1 (1933); Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433 (1910).

[65] 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967). The pertinent portion of the decision is quoted in note 32 *supra*.

[66] The text of this article may be found in note 32 *supra*.

[67] Paragraphs 3 and 6 of the syllabus state:

> 3. A Common Pleas Court has inherent power to make reasonable rules regulating the practice and procedure in such court where such rules do not conflict with the Constitution or with any valid statute.
>
> . . . .
>
> 6. The syllabus of a decision of the Supreme Court of Ohio states the law of the case.

12 Ohio St. 2d at 18, 231 N.E.2d at 65.

[68] *See* note 57 *supra*, for the pertinent text of OHIO CONST. art. IV, § 5(B).

[69] *See, e.g.*, OHIO R. APP. P. 31: "The courts of appeals may adopt rules concerning local practice in their respective courts which are not inconsistent with these rules. Such rules shall be filed with the supreme court."
OHIO R. CIV. P. 83: "The expression 'rule of court' as used in these rules means a rule promulgated by the supreme court or a rule concerning local practice adopted by another court which is not inconsistent with the rules promulgated by the supreme court and which rule is filed with the supreme court."
OHIO R. CRIM. P. 57(A): "The expression 'rule of court' as used in these rules means: a rule promulgated by the supreme court; or a rule concerning local practice adopted by another court and filed with the supreme court, which local rule is not inconsistent with the rules promulgated by the supreme court."
OHIO R. JUV. P. 2(19): " 'Rule of court' means a rule promulgated by the supreme court or a rule concerning local practice adopted by another court which is not inconsistent with the rules promulgated by the supreme court and which rule is filed with the supreme court."
OHIO TRAF. R. 19: The expression "rule of court" as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court and filed with the Supreme Court. Local rules shall be supplementary to and consistent with these rules. Each court shall publish its local rules, distribute them within its jurisdiction and keep copies for inspection.

[70] The pertinent provisions of the Ohio Constitution and the supreme court's rules of practice and procedure speak only of local rules concerning "practice." *See* notes 57 and

and procedure seek to prohibit the adoption of local rules which would abridge, enlarge or modify substantive rights, or which would extend or limit the subject matter jurisdiction of the court adopting such a rule.[71] In other words, the local rules cannot have a broader scope than the rules governing practice and procedure promulgated by the Ohio Supreme Court.[72]

But what if the statute is purely procedural? The answer to this question depends upon whether the statute is a "valid" statute, and, as far

---

69 *supra*. "Practice" is a somewhat amorphous term, but when used in this context, it generally means all that relates to the manner in which an action or proceeding is conducted and tried, from its inception to final judgment and execution. Thus, the term clearly includes "procedure" as well. *See* paragraph 3 of the syllabus of Cassidy v. Glossip, 12 Ohio St. 2d at 18, 231 N.E.2d at 65, as quoted in note 67 *supra*. Indeed, the Ohio Constitution commands that the rules concerning local "practice" be consistent with the "rules governing practice and procedure" promulgated by the supreme court. OHIO CONST. art IV, § 5(B). Therefore, it is fair to say that "practice" and "procedure" are synonymous, and that any attempt to draw a distinction between them would be meaningless.

[71] Such powers of expansion or contraction are denied to the Ohio Supreme Court. Thus, OHIO CONST. art. IV, § 5(B) provides in pertinent part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right."
And *see, e.g.*, Linger v. Weiss, 57 Ohio St. 2d 97, 386 N.E.2d 1354 (1979); Alexander v. Buckeye Pipe Line Co., 49 Ohio St. 2d 158, 359 N.E.2d 702 (1977); State v. Waller, 47 Ohio St. 2d 52, 351 N.E.2d 195 (1976); Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976); State v. Wallace, 43 Ohio St. 2d 1, 330 N.E.2d 697 (1975); State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975); Morrison v. Steiner, 32 Ohio St. 2d 86, 290 N.E.2d 841 (1972); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); Note, *supra* note 40.

The thesis that that which is jurisdictional is also substantive is implicit in *Weiss, Waller, Wallace,* and *Hughes, supra;* it was made explicit in Malloy v. Westlake, 52 Ohio St. 2d 103, 370 N.E.2d 457 (1977), and City of Akron v. Gay, 47 Ohio St. 2d 164, 351 N.E.2d 475 (1976). Thus, in *Westlake* it is said: "The law is clear in Ohio that special statutory provisions, if jurisdictional, are substantive laws of the state and cannot be abridged, enlarged, or modified by the Ohio Rules of Civil Procedure." 52 Ohio St. 2d at 104-05, 370 N.E.2d at 458. And in *Gay* the Ohio Supreme Court noted:

> The question presented is whether the restriction upon extension of the answer date contained in R.C. 163.08 is jurisdictional (and substantive), or whether, as appellant contends, it is procedural. If the statute is jurisdictional, it is a substantive law of this state, and cannot be abridged, enlarged, or modified by the Ohio Rules of Civil Procedure.

47 Ohio St. 2d at 165-66, 351 N.E.2d at 477. The portion of OHIO CONST. art. IV, § 5(B) quoted *supra* is clearly the authority upon which the supreme court relies for both statements.

Therefore, just as the rules promulgated by the supreme court cannot abridge, enlarge or modify substantive rights, neither can they extend or limit the subject matter jurisdiction of any court, since that which is jurisdictional is deemed to be substantive as well. And the rules do not purport to do so. *See, e.g.*, OHIO R. CIV. P. 82, which provides: "These rules shall not be construed to extend or limit the jurisdiction of the courts of this state."

But if the constitutionally *mandated* rules of the supreme court cannot extend or limit the subject matter jurisdiction of the courts, it must necessarily follow that the constitutionally *permissible* rules of the inferior courts cannot do so either. Accordingly, it must be concluded that the local rules are limited to matters of practice and procedure, and cannot abridge, enlarge or modify substantive rights, or extend or limit the subject matter jurisdiction of the court which promulgates them.

[72] This also follows from the requirement that the local rules be consistent with the rules promulgated by the Ohio Supreme Court. *See* the text of OHIO CONST. art. IV, § 5(B) as quoted in note 57 *supra*, and the texts of the various rules as quoted in note 69 *supra*.

as civil actions are concerned, the validity of the statute, in turn, may depend upon its date of enactment.

If the procedural statute was in force on the effective date of the Civil Rules, it cannot be valid unless it can survive the application of the "conflicts" clause in article IV, section 5(B) of the Ohio Constitution.[73] In other words, it will not be valid if it conflicts with the Civil Rules because, by the terms of the "conflicts" clause, all laws in conflict with the Civil Rules are of no further force or effect after the Civil Rules have taken effect.[74] Of course, a statute is not necessarily invalid in its entirety if the conflict with the Civil Rules is only partial; those portions of the statute which are not in conflict may survive if, in the absence of the conflicting balance, they would still be applicable.[75]

To the extent that a particular statute survives the application of the "conflicts" clause, it is valid, but it is probably valid only as a supplement to one or more of the Civil Rules.[76] Thus, the next question must be: what is the nature of the supplementation?

---

[73] The "conflicts" clause reads: "All laws in conflict with [rules of practice and procedure prescribed by the supreme court] shall be of no further force or effect after such rules have taken effect."

[74] City of Akron v. Gay, 47 Ohio St. 2d 164, 351 N.E.2d 475 (1976); Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976); Jacobs v. Shelly & Sands, Inc., 51 Ohio App. 2d 44, 365 N.E.2d 1259 (1976); State v. Smith, 47 Ohio App. 2d 317, 354 N.E.2d 699 (1976); Yancey v. Pyles, 44 Ohio App. 2d 410, 399 N.E.2d 835 (1975); State v. Licsak, 41 Ohio App. 2d 165, 324 N.E.2d 589 (1974); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Montgomery County C.P. 1976); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (Cuyahoga County C.P. 1976).

The "conflicts" clause, *supra* note 73, also impliedly repeals any statute in conflict with (1) the Ohio Rules of Appellate Procedure: Shilt v. Irelan, 40 Ohio App. 2d 578, 321 N.E.2d 621 (1974); (2) The Ohio Rules of Criminal Procedure: State v. Wilson, 57 Ohio App. 2d 11, 384 N.E.2d 1300 (1978); State v. Juergens, 55 Ohio App. 2d 104, 379 N.E.2d 602 (1977); Springdale v. Hubbard, 52 Ohio App. 2d 255, 369 N.E.2d 808 (1977); State v. Smith, *supra;* State v. Mitchell, 47 Ohio App. 2d 61, 352 N.E.2d 636 (1975); State v. Gaetano, 44 Ohio App. 2d 233, 337 N.E.2d 664 (1974); (3) the Ohio Rules of Juvenile Procedure: *In re* T L K, 2 Ohio Op. 3d 324 (Juv. Div. Ross County C.P. 1976); (4) the Rules of the Court of Claims of Ohio: Jacobs v. Shelly & Sands, Inc., *supra;* and (5) the Supreme Court Rules for the Government of the Bar of Ohio: Smith v. Kates, 46 Ohio St. 2d 263, 348 N.E.2d 320 (1976).

But it does not apply to the Rules of Superintendence or the Rules of Superintendence for Municipal Courts and County Courts: State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976); State v. Smith, *supra;* State v. Lacy, 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975) (*see* notes 43 and 44 *supra*). *But see* State v. Singer, 50 Ohio St. 2d 103, 362 N.E.2d 1216 (1977) and State v. Kelly, 44 Ohio App. 2d 40, 335 N.E.2d 729 (1974).

[75] City of Akron v. Gay, 47 Ohio St. 2d 164, 351 N.E.2d 475 (1976).

[76] This statement is true as far as most civil actions are concerned, but the very opposite may be true in the case of special statutory proceedings. With respect to special statutory proceedings, the statute will ordinarily be the prime authority, and the Civil Rules will be supplementary except to the extent that they would, by their nature, be clearly inapplicable. Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (1978); Harshaw v. Farrell, 55 Ohio App. 2d 246, 380 N.E.2d 749 (1977); *In re* Single County Ditch, 50 Ohio App. 2d 114, 361 N.E.2d 1353 (1976); Ryan v. Andrews, 50 Ohio App. 2d 72, 361 N.E.2d 1086 (1976); Yancey v. Pyles, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1975); Holland v. Carlson, 40 Ohio App. 2d 325, 319 N.E.2d 362 (1974); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Montgomery County C.P. 1976).

If the supplementation is by direct reference,[77] the Civil Rule, in effect, incorporates the statute as it exists, or as it may be amended,[78] into the rule itself, and it is fair to say that the Civil Rule contemplates that the provisions of the statute be followed. Therefore, should there be a conflict between a local rule and the statute, the local rule may be deemed inconsistent with the Civil Rule which makes direct reference to the statute, and the statute should prevail over the local rule.

If the special statutory proceeding is adversary in nature, there is a presumption that the Civil Rules apply. As it is said in the Rules Advisory Committee Staff Note to the 1971 amendment of OHIO R. CIV. P. 1(C):

> As a result of the amendment of Rule 1(C) the Civil Rules will be applicable to special statutory proceedings except "to the extent that they would by their nature be clearly inapplicable. . . . Certainly the Civil Rules will not be applicable to those many special statutory proceedings which are non-adversary in nature. On the other hand, the Civil Rules will be applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules.

And *see* Carter v. Johnson, *supra,* and Yancey v. Pyles, *supra,* both of which expressly adopt this view.

But there are at least two "good and sufficient" reasons for not applying the Civil Rules. First, the Civil Rules are not to be employed if their application would frustrate OHIO R. CIV. P. 1(B); that is, they are by their nature clearly inapplicable if their application would foster delay, unnecessary expense, or some other impediment to the expeditious conclusion of the special statutory proceeding. As it is said in Dvorak v. Municipal Civil Serv. Comm'n, 46 Ohio St. 2d 99, 103, 346 N.E.2d 157, 159 (1976):

> "These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling. . . ." Perhaps the key phrase in the above quote is the language "to the extent that they would by their nature be clearly inapplicable." The subdivision (C) exceptions are not to be considered in a vacuum but should be read together with subdivision (B).

And again, in State *ex rel.* Civil Rights Comm'n v. Gunn, 45 Ohio St. 2d 262, 266, 344 N.E.2d 327, 329-30 (1976):

> To render the enforcement provisions of R.C. 4112.04(B)(6) subject to the complaint and summons requirements of the Civil Rules would be contrary to the [mandates of Civil Rule 1(B) and R.C. 4112.08]; such a result would cause significant delay in the commission's investigatory process and, in so doing, would frustrate its statutory duty of eliminating unlawful discriminatory practices.

This latter decision also includes the second reason for holding the Civil Rules inapplicable to special statutory proceedings — the frustration of the basic statutory purpose. In other words, "[t]he Civil Rules should be held clearly inapplicable . . . when their use will alter the basic statutory purpose for which the specific procedure was provided in the special statutory action." Harshaw v. Farrell, 55 Ohio App. 2d at 247, 380 N.E.2d at 750.

What is said in the text with respect to the Civil Rules is equally true as to the Appellate Rules, the Criminal Rules, the Juvenile Rules, etc.; to the extent that a procedural statute remains valid, it is probably valid only as a supplement to the appropriate rule of practice and procedure.

---

[77] Supplementation by direct reference occurs when a Civil Rule or other rule of practice and procedure refers to a statute or statutes by section number or chapter number. OHIO R. CIV. P. 57 is an example of supplementation by direct reference:

> The procedure for obtaining a declaratory judgment pursuant to Sections 2721.01 to 2721.15, inclusive, of the Revised Code, shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate. The court may advance on the trial list the hearing of an action for a declaratory judgment.

[78] *See* OHIO R. CIV. P. 81, which provides: "A reference in these rules to a section of the Revised Code shall mean that section as amended from time to time including the enactment of additional sections the numbers of which are subsequent to the section referred to in the rules."

The problem becomes acute when the supplementation is through common concern.[79] In this situation we have both a statute and a local rule supplementing a Civil Rule, and an inconsistency between the statute and the local rule. Which prevails? To some extent, the answer must depend upon the nature of the inconsistency. The first type of inconsistency occurs when the statute and the local rule speak to the same general subject, but not to the same precise point. Here, the inconsistency arises out of what is left unsaid by either the statute or the local rule rather than out of what is said by either, and it is probable that both can be followed without difficulty. In other words, both the statute and the local rule prevail in their own sphere of operation. The second type of inconsistency occurs when both the statute and the local rule speak to the same general subject and to the same precise point, but say the same thing in different words. The inconsistency here is one of form rather than one of substance, and it makes no difference which is followed since the end result will be the same. But, for the reasons given below, a technical preference should be given to the language of the local rule. The third type of inconsistency occurs when the statute and the local rule both speak to the same general subject and to the same precise point, but say different things. This type of inconsistency clearly requires a choice between the statute or the local rule. Until the supreme court speaks to the point, there is no clear answer as to how the choice should be made, but there is reason to believe that the choice should favor the local rule in most instances. The argument in favor of the local rule can be stated as follows: All courts have inherent power to make local rules governing practice and procedure. Article IV, section 5(B) of the Ohio Constitution expressly recognizes this inherent power, and the validity of the local rules made pursuant to it if those rules are inconsistent with the constitution and consistent with the Civil Rules. Further, that same article and section of the Ohio Constitution limits the power of the General Assembly in matters of practice and procedure to the veto, by concurrent resolution, of the rules proposed by the supreme court. Thus, if the local rules are consistent with the constitution and the Civil Rules, their status is equivalent to the status of the Civil Rules, and superior to that of procedural statutes enacted by the General Assembly. But if the status of the local rules is equivalent to the status of the Civil Rules, it is logical to assume that the "local rules" provision of article IV, section 5(B) of the constitution extends the mantle of the "conflicts" provision of the same section to cover the local rules as well as the Civil Rules. Therefore, where there is a conflict between a statute and the local

[79] Supplementation through common concern occurs when both a Civil Rule and a statute speak to the same general subject, and the Civil Rule makes neither a direct nor an indirect reference to the statute. *Compare, e.g.,* OHIO R. CIV. P. 4.3(A)(1) through (8) *with* OHIO REV. CODE ANN. § 2307.382(A)(1) through (9) (Page Supp. 1978); OHIO R. CIV. P. 6(A) *with* OHIO REV. CODE ANN. § 1.14 (Page 1978); and OHIO R. CIV. P. 51(A) *with* OHIO REV. CODE ANN. § 2315.01(G) (Page Supp. 1978).

rules, the statute is of no further force and effect, and the local rules prevail.[80]

If the supplementation is by indirect reference,[81] or of necessity,[82] the applicable statute will generally be either substantive or jurisdictional, a combination of substantive/jurisdictional and procedural, or a special statutory proceeding. If the statute is substantive or jurisdictional, its provisions will prevail over any inconsistent provisions in the local rule. If the statute is a combination of substantive/jurisdictional and procedural, the substantive/jurisdictional portion of the statute will prevail over the local rule, and the procedural portion will be governed by the rules which apply to a statute which supplements the local rule through common concern. If the statute creates a special statutory proceeding, a conflict between the statute and the local rules will be resolved in accordance with the rules to be discussed below.

The answers are less certain if the procedural statute was enacted after the effective date of the Civil Rules. At the present time, there are three differing views[83] which may be applied by analogy to the problem of conflict between a post-rule procedural statute and a local rule. The first

[80] Admittedly, some of the arguments used in State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976); State v. Smith, 47 Ohio App. 2d 317, 354 N.E.2d 699 (1976); and State v. Lacey, 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975), appear to contradict this conclusion. In part, those decisions contend that the Ohio Supreme Court's Rules of Superintendence are not subject to the "conflicts" clause of OHIO CONST. art. IV, § 5(B), *supra* note 73, because they need not be submitted to the General Assembly for its approval. The same is true of local rules of court; they need not be submitted to the General Assembly for approval, and they are not subject to the General Assembly's veto. But the three decisions mentioned above also argue that the Rules of Superintendence are not subject to the "conflicts" clause because they are simply "housekeeping" rules rather than rules governing practice and procedure. Implicit in this point is the thesis that the "conflicts" clause does apply to rules governing practice and procedure. Local rules of court are, of course, within the practice and procedure category. Indeed, as we have seen above in notes 57 and 69, the local rules are limited to matters of "practice." Therefore, the same decisions provide some support for the proposition that the "conflicts" clause does apply when there is a conflict between a procedural statute and a local rule.

[81] Supplementation by indirect reference occurs when the Civil Rule makes a reference to the statutory law without specifying a section or chapter number. OHIO R. CIV. P. 4.4(A) illustrates the indirect reference. In material part, it provides that "when the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law." The phrase, "in actions where such service is authorized by law" is an indirect reference to OHIO REV. CODE ANN. § 2703.14 (Page 1954), and incorporates that section into the rule as a supplement to the rule. *See* Brown v. Gonzales, 50 Ohio App. 2d 254, 362 N.E.2d 685 (1975). Other examples of indirect reference may be found in OHIO R. CIV. P. 64, 66 and 69.

[82] Supplementation of necessity occurs when the Civil Rule speaks in very general terms, and one or more sections of the Ohio Revised Code supply the necessary detail. *See, e.g.*, OHIO R. CIV. P. 62(B). In pertinent part, that rule provides that "when an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond." But the rule does not define adequacy, nor does it specify the conditions of the bond. To find answers to these questions, one must, of necessity, turn to OHIO REV. CODE ANN. §§ 2505.09 and 2505.14 (Page 1954). Thus, those statutes supplement the rule even though the rule makes neither a direct nor an indirect reference to them.

[83] *See* note 34 *supra*, and note 84 *infra*.

would apply the "conflicts" clause of the constitution to post-rule statutes to the same extent that it is applied to pre-rule statutes.[84] Accordingly, if

[84] This view is best expressed by Judge McCormac in his dissenting opinion in Hearing v. Delnay, No. 76AP-493 (Ohio Ct. App. Franklin County, filed Dec. 21, 1976):

> The crucial issue then is whether the procedure set forth in R.C. 2307.42(C) which conflicts with the Civil Rules is of any force or effect.
>
> The Modern Courts Amendment of tthe Ohio Constitution was adopted in 1968 and gave the Supreme Court the power to prescribe rules governing practice and procedure in all courts of the state subject to a concurrent resolution of disapproval by the General Assembly. The critical provision is contained in Article IV, Section 5(B) as follows: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."
>
> The majority takes a very narrow view of this provision, clearly not contemplated by the constitutional provision. The provision applies to "all laws" which are in conflict with the Civil Rules, whether those laws were adopted before or after the Civil Rules took effect. The meaning of the constitutional provision is distorted out of reason by a holding that the language "of no further force or effect" limits *all laws* to only those adopted prior to the time the Civil Rules became effective. Laws containing procedure are of no further force or effect regardless of whether adopted before or after the Civil Rules became effective.
>
> To hold otherwise is to effectively emasculate the Modern Courts Amendment to the Ohio Constitution which was intended to make uniform procedure in Ohio except for special statutory proceedings where the use of the Civil Rules will alter the basic statutory purpose for which the special proceeding was enacted. To hold the General Assembly still has the power to erase, partially or completely, the Civil Rules, Criminal Rules and other procedural rules is a very long step backward certainly not contemplated by the authors of the Modern Courts Amendment or reasonably within the language of the Amendment.

See also Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Montgomery County C.P. 1976); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (Cuyahoga County C.P. 1976); Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W. RES. L. REV. 16, 28-29 nn. 44 & 47 (1978); Walinski & Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. L. REV. 344, 351-54 n.35 (1978); Note, *The Ohio Medical Malpractice Act: What Next?* 5 OHIO N. L. REV. 669, 675 n.38 (1978); Note, *supra* note 40.

Not infrequently, Jacobs v. Shelly & Sands, Inc., 51 Ohio App. 2d 44, 365 N.E.2d 1259 (1976), is cited for the proposition that the rules are superior to a conflicting post-rule statute. *See, e.g.*, Giannelli, *supra* at 29 n.47, where it is said:

> There is, however, dictum in an unreported appellate decision, Hearing v. Delnay, No. 76-493 (10th Dist. Ct. App. Dec. 21, 1976), which touches upon the issue. Not only did the majority conclude that § 5(B) does not preclude the General Assembly from acting in the absence of the court-promulgated rules, but it also concluded that court-promulgated rules supersede only legislation in force at the time the rule is adopted. Thus, according to the majority, legislation enacted after the promulgation of a court rule supersedes the rule. . . . The precedential value of the majority's dictum is further eroded because the same judges unanimously agreed the month before *Hearing* was decided that a court-promulgated rule superseded a subsequently enacted statute. *See* Jacobs v. Shelly & Sands, Inc., 51 Ohio App. 2d 44, 365 N.E.2d 1259 (10th Dist. 1976).

But *Jacobs* is not inconsistent with *Hearing* because it does not involve "a subsequently enacted statute." As State v. Licsak, 41 Ohio App. 2d at 168, 324 N.E.2d at 592, puts it in a slightly different context:

> Section 5, Article IV of the Ohio Constitution provides that the Supreme Court may promulgate and pass rules of procedure. Further, it is provided in Section 5(B), Article IV of the Ohio Constitution that: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." . . . R.C. 109.16 was in effect when the rules were promulgated and passed July 1, 1970. Hence, if the statute is inconsistent with the rules, the latter manifestly prevail.

Jacobs is simply an expression of this very orthodox view that a rule of practice and procedure promulgated by the supreme court will impliedly supersede any conflicting statute *that was in effect on the effective date of the rule.* In other words, *Jacobs* deals with a conflict created by a subsequently enacted rule, and not a conflict created by a subsequently enacted statute.

the post-rule statute was "valid" — that is, if it survived a "conflicts" clause comparison with the Civil Rules themselves — it would most probably be supplementary of the Civil Rules, and the problem of conflict between the statute and a local rule would be resolved by an application of the rules discussed above.

The second view takes the position that the General Assembly's power to enact procedural laws is superior to that of the supreme court and, since the "conflicts" clause of the constitution does not apply to post-rule statutes, the Civil Rules must give way to a conflicting post-rule statute.[85] If the Civil Rules must give way, it necessarily follows that the local rules must give way as well, and under this approach, the post-rule statute prevails over the local rules.

The third view, which might be styled the pre-emption view, has not yet been adopted by the courts, but may be considered.[86] Under this approach, the General Assembly retains the power to enact procedural statutes, but those statutes are valid only to the extent that they do not intrude on an area preempted by rules prescribed by the Ohio Supreme Court. Assuming that the local rules have the same status as the Civil Rules if they are consistent with the Ohio Constitution and the Civil Rules, they will, under this third approach, prevail over a post-rule procedural statute to the extent that there is a conflict between them and to the extent that they have pre-empted the particular area of procedure in which the conflict exists.

Ultimately, the Ohio Supreme Court must choose between these com-

---

In *Jacobs*, the conflict involved a discrepancy in the time for filing a petition for removal to the Court of Claims after a third party claim had been asserted against the state. OHIO REV. CODE ANN. § 2743.03(E)(1) (amended 1978) (Page Supp. 1978) as originally enacted stipulated that the petition for removal had to be filed within 14 days after service of the original answer, while OHIO R. CT. CL. 4(B) stipulated that the petition for removal was to be filed within 28 days after the filing of the third party complaint. Section 2743.03(E)(1) became effective Jan. 1, 1975, *see* 1975 Ohio Laws 869; Court of Claims Rule 4(B) became effective July 1, 1975, *see* OHIO R. CT. CL. 9(A). Thus, the Court of Claims Rule became effective subsequent to the effective date of the statute. That being so, under the terms of the "conflicts" clause of the Ohio Constitution, the inconsistent provision of the statute was "of no further force or effect after" July 1, 1975. It follows then, that *Jacobs* illustrates the standard situation envisioned by the "conflicts" clause — a conflict between a pre-existing statute and a recently enacted rule — and sheds no light on the problem created by the statute enacted subsequent to the effective date of the rule.

Parenthetically, it may be noted that the 1978 amendment to OHIO REV. CODE ANN. § 2743.03(E)(1) (Page Supp. 1978), conforms the language of the statute to the language of OHIO R. CT. CL. 4(B).

---

[85] *See* Judge Whiteside's concurring opinion in Hearing v. Delnay, No. 76AP-493 (Ohio Ct. App. Franklin County, filed Dec. 21, 1976), as outlined in note 34 *supra*. *See also* Denicola v. Providence Hosp., No. C-76784 (Ohio Ct. App. Hamilton County, filed May 31, 1978), as abstracted in 51 OHIO BAR 821 (1978), *aff'd on other grounds*, 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979); and Hood v. Cleveland Clinic, No. 959,498 (Ohio Ct. C.P. Cuyahoga County, filed May 20, 1977), as discussed in Note, *supra* note 84, at 675 n.38.

[86] The argument for the pre-emption approach is summarized in note 34 *supra*, and stated in greater detail in Browne, *Civil Rule 1*, *supra* note 2.

peting views, or select some alternative approach of its own. To date, the problem of the post-rule procedural statute has been epitomized by Ohio's so-called Medical Malpractice Act.[87] That Act has twice been before the Ohio Supreme Court, but the only hint we have as to the court's thinking on this problem is the following enigmatic note:

> In holding that R.C. 2743.43 does not violate either the Equal Protection Clause or R.C. 1.48, this court in no way passes upon whether the enactment of procedural statutes, affecting areas traditionally within the province of the courts, is constitutional within the purview of Section 5(B), Article IV of the Ohio Constitution, or whether the passage of such procedural statutes violates the Separation of Powers doctrine by unreasonably infringing upon the inherent power of the judicial branch of state government.[88]

Since one may read into this what one likes, speculation will cease only when there is a supreme court decision squarely on point. Until then, one can only say that the courts are divided on a solution to the problem, but as far as the Medical Malpractice Act is concerned, the weight of appellate authority appears to favor the constitutionality of post-rule statutes which prescribe conflicting standards of practice and procedure.

Matters are no more easily resolved if the statute creates a special statutory proceeding. Here, the question is not one of "validity" in the "conflicts" clause sense, because it is conceded that the General Assembly has the power and authority to establish special statutory proceedings which are not in complete harmony with the Civil Rules. Indeed, many special statutory proceedings are intentionally designed to avoid the procedural complexity inherent in the rules applicable to civil actions, and to require perfect harmony between them and the Civil Rules would be to defeat their purpose.[89] But it does not follow that the Civil Rules, and by analogy the local rules, have no application to special statutory proceedings. They do; and the real question is: to what extent do they have such application?

If it is again accepted that the local rules which are consistent with the constitution and the Civil Rules have the same status as the Civil Rules, then Civil Rule 1(C) suggests an appropriate answer: local rules apply to special statutory proceedings to the extent that they would, by their nature, be clearly applicable.[90] Accordingly, the applicability of the local rules to

---

[87] The "Medical Malpractice Act" is spread over several titles and sections of the Ohio Revised Code. For the complete text of the Act, *see* 1975 Ohio Laws 2809 or 1975 Baldwin Legis. Serv. 4-160, 4-258. OHIO REV. CODE ANN. §§ 2307.42 and 2307.43 (Page Supp. 1978) are the portions of the Act which have most galled the courts from a procedural point of view. *See* the cases cited in notes 84 and 85 *supra*.

[88] Denicola v. Providence Hosp., 57 Ohio St. 2d at 115 n.4, 387 N.E.2d at 231 n.4.

[89] *See, e.g.*, Dvorak v. Municipal Civil Serv. Comm'n, 46 Ohio St. 2d 99, 346 N.E.2d 157 (1976); State *ex rel.* Civil Rights Comm'n v. Gunn, 45 Ohio St. 2d 262, 344 N.E.2d 327 (1976); Harshaw v. Farrell, 55 Ohio App. 2d 246, 380 N.E.2d 749 (1977).

[90] *See* note 76 *supra*.

special statutory proceedings is to be determined by the same rules which determine the applicability of the Civil Rules to such proceedings.[91] Those rules may be summarized as follows:

In every special statutory proceeding, local rules of court governing practice and procedure will prevail over conflicting statutory procedure unless:

1. the proceeding is non-adversary in nature;[92]
2. the application of the local rules procedure would abridge, enlarge, or modify any substantive right;[93]
3. the application of the local rules procedure would extend or limit the jurisdiction of the court;[94]
4. the application of the local rules procedure would serve no useful purpose or would be a meaningless duplication of the statutory procedures;[95]
5. the application of the local rules procedure would frustrate the purpose of the proceeding, or would cause delay, unnecessary expense, or other impediments to the expeditious administration of the proceeding.[96]

From what has been said above, it would appear that the traditional view is no longer completely valid. It is no longer true to say that the local rules may not contravene the provisions of a valid statute; rather, a local rule may not contravene the provisions of a valid statute only if the statute is substantive or jurisdictional in nature, or only if the statute is procedural, and supplements a Civil Rule by direct reference. This conclusion is premised on the assumption that the inherent rulemaking power of the lower courts is equal to that of the Ohio Supreme Court, and that

[91] These rules are discussed at some length in Browne, *Civil Rule* 1, *supra* note 2.

[92] Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (1978); State *ex rel.* Civil Rights Comm'n v. Gunn, 47 Ohio App. 2d 149, 352 N.E.2d 654 (1975), *aff'd on other grounds,* 45 Ohio St. 2d 262, 344 N.E.2d 327 (1976); Yancey v. Pyles, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1975); Ohio Rules Advisory Committee Staff Note to OHIO R. CIV. P. 1(C), as amended July 1, 1971. In this latter authority it is said: "Certainly the Civil Rules will not be applicable to those many special statutory proceedings which are non-adversary in nature."

[93] In addition to the authorities cited in note 71 *supra, see* State v. Wilson, 57 Ohio App. 2d 11, 384 N.E.2d 1300 (1978); State v. Juergens, 55 Ohio App. 2d 104, 379 N.E.2d 602 (1977); City of Springdale v. Hubbard, 52 Ohio App. 2d 255, 369 N.E.2d 808 (1977); Jacobs v. Shelly & Sands, Inc., 51 Ohio App. 2d 44, 365 N.E.2d 1259 (1976); State v. Lacy, 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975); Yancey v. Pyles, 44 Ohio App. 2d 410, 339 N.E.2d 835 (1975); Moore v. Van Wert Propane, Inc., 34 Ohio App. 2d 187, 297 N.E.2d 548 (1973); Note, *supra* note 40.

[94] In addition to the authorities cited in note 71 *supra, see* Townsend v. Board of Bldg. Appeals, 49 Ohio App. 2d 402, 361 N.E.2d 271 (1976); Holland v. Carlson, 40 Ohio App. 2d 325, 319 N.E.2d 362 (1974); Moore v. Van Wert Propane, Inc., 34 Ohio App. 2d 187, 297 N.E.2d 548 (1973); Masheter v. Hughes, 25 Ohio Misc. 121, 263 N.E.2d 794 (Paulding County C.P. 1970); Boggess v. Tarrent, 73 Ohio Op. 2d 345 (Ct. Cl. 1975); OHIO R. JUV. P. 44.

[95] Richley v. Liechty, 44 Ohio App. 2d 359, 338 N.E.2d 789 (1975).

[96] *See* authorities cited in note 76 *supra.*

as a consequence, the local rules have the same constitutional status as rules prescribed by the supreme court. But it will be objected that the supreme court's rulemaking power is limited by the requirement that its proposed rules be submitted to the General Assembly for that body's consideration and possible veto, but no such limitation applies to local rules, and for that reason they cannot be deemed to have the same status as the supreme court's rules.[97] Rather, in the absence of such a limitation their status must necessarily be greater than that of the rules prescribed by the supreme court. But the conclusion that the status of the local rules is greater than the status of the supreme court's rules is inconsistent with the spirit, if not the letter, of the Modern Courts Amendment. Therefore, the objection concludes, the assumption upon which this argument is based must fail.

But that is not necessarily so. While it is true that the local rules need not be submitted to the General Assembly, the equivalent of that limitation on the local rulemaking power is supplied by the requirement that the local rules must be consistent with the constitution and with the rules of practice and procedure prescribed by the supreme court, and that they must be limited to matters of local practice. Thus, to the extent that the local rules meet these requirements, they are valid products of the lower courts' inherent rulemaking power, and the assumption stands.

D. *Filing With the Supreme Court*

There is yet another prerequisite to the validity of the local rules. By the terms of Civil Rule 83, they are not valid until they are filed with the Ohio Supreme Court.[98] While Civil Rule 83 does not expressly state that filing is a prerequisite to validity, that conclusion follows by necessary implication.[99] It is well-settled that the local rules are not binding unless litigants and attorneys have notice of them.[100] Actual notice, of course, is not required; constructive notice will suffice. But notice there must be, and constructive notice, at least, will follow upon publication.[101] And there must be some single, uniform method of publication so that all will have constructive notice equally. Through its powers of superintendence over all courts in the State of Ohio,[102] the supreme court has elected filing with it as

---

[97] *See* note 80 *supra.*

[98] In addition to OHIO R. CIV. P. 83, *see* OHIO R. APP. P. 31; OHIO R. CRIM. P. 57(A); OHIO R. JUV. P. 2(19); and OHIO TRAF. R. 19; all of which are quoted in note 69 *supra.*

[99] *See, e.g.,* Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Shaker Hts. Mun. Ct. 1972).

[100] Repp v. Horton, 44 Ohio App. 2d 63, 355 N.E.2d 722 (1974).

[101] *See, e.g.,* OHIO TRAF. R. 19, where it is said in pertinent part: "Each court shall publish its local rules, distribute them within its jurisdiction, and keep copies for inspection."

[102] The power of superintendence flows from OHIO CONST. art. IV, § 5(A)(1), quoted in note 43 *supra.*

While such power is customarily exercised through the various Rules of Superintendence, its exercise is not limited to those rules, and may be exercised through other rules as well. Civil Rule 83 is, at least in part, one such other rule, as are its parallels in the Appellate Rules, Criminal Rules, etc. *See* notes 69 and 98 *supra.*

the one, uniform method of publication that must be followed in every case so that the supreme court, as a repository of the local rules,[103] will be the single, accurate source of information to which all may turn to discover which local rules are in effect and binding. Therefore, filing with the supreme court is an essential prerequisite to the validity of the local rules.[104]

E. *Journalization*

Whether or not the Ohio Supreme Court has the inherent power to prescribe rules of practice and procedure for the inferior courts[105] is now quite beside the point since that power is expressly conferred upon the supreme court by article IV, section 5(B) of the Ohio Constitution.[106] But that section not only authorizes the enactment of such rules, it also specifies how they are to be promulgated:

> Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval.

Unless the General Assembly "vetoes" such rules by a "concurrent resolution of disapproval,"[107] they automatically become effective on the first day of July following their filing with the General Assembly. But it is the timely[108] filing of the proposed rules, or the amendments to existing

---

[103] *See* note 12 *supra.*

[104] Thus, the preamble to the Uniform Rules of Municipal Courts in Greater Cleveland notes: "The following rules shall be effective upon adoption, by each individual court, and, the filing of the same thereafter with the Supreme Court of the State of Ohio as required under the Ohio Rules of Civil Procedure, Rule No. 83."

[105] *See,* by analogy, Chief Justice Taft's argument in Cassidy v. Glossip, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967), the principal portion of which is quoted in note 32 *supra.*

[106] For the full text of OHIO CONST. art. IV, § 5(B), *see* note 33 *supra.*

[107] This exercise of the legislative veto is illustrated by H. Con. Res. 43, 112th Ohio Gen. Ass., 2d Sess. (1978) (1978 Baldwin Legis. Serv. 3-30), and Am. H. Con. Res. 14, 112th Ohio Gen. Ass., 1st Sess. (1977) (1977 Baldwin Legis. Serv. 3-27), both of which reject the supreme court's proposed Rules of Evidence, and S. Con. Res. 20, 112th Ohio Gen. Ass., 1st Sess. (1977) (1977 Baldwin Legis. Serv. 3-28), which rejects certain proposed amendments to the Civil, Appellate and Juvenile Rules of Procedure.

[108] *See* S. Con. Res. 20, 112th Ohio Gen. Ass., 1st. Sess. (1977) (1977 Baldwin Legis. Serv. 3-28), in which the General Assembly rejected proposed amendments to OHIO R. CIV. P. 4.1 and 6 on the ostensible ground that they had not been timely filed with the General Assembly, and that as a consequence that body did not have sufficient time to give them the due deliberation which they deserved. The key paragraph in the Resolution reads as follows:

> WHEREAS, These proposed rules—Civil Rules 4.1, 6, and 86; Appellate Rule 33; and Juvenile Rule 47—have failed to meet the procedural requirements of Section 5(B) of Article IV of the Ohio Constitution, in that they were submitted to the Ohio General Assembly after the January fifteenth deadline and are not amendments of any proposed rules submitted prior to the January fifteenth deadline; . . . .

This assertion is so patent a misinterpretation of the plain language of article IV, § 5(B) that one is compelled to take the General Assembly's stated reason for the rejection of the amendments with a considerable quantity of salt.

rules, that accomplishes promulgation of the new or amended rules. In other words, rules of practice and procedure prescribed by the Ohio Supreme Court are officially enacted when they are filed with the General Assembly even though — in the absence of a veto — they do not become effective until the first day of July following their filing.[109] But no such procedure applies to the local rules promulgated by the courts inferior to the supreme court, since such local rules need not be submitted to the General Assembly for its approval or disapproval. Therefore, we must inquire into the method for officially enacting local rules of court.

As noted above,[110] it is the court as court that has the inherent power to enact local rules of court. Further, local rules of court obtain their binding authority from their status as standing orders of court.[111] Therefore, the enactment of a local rule of court is the making of a court order, and the making of a court order is a purely judicial act. But a court acts judicially as a court only through the entries in its journal.[112] Thus, if the promulga-

[109]But this simple enactment procedure has its drawbacks. Suppose the supreme court changes its mind after it has filed a proposed amendment with the General Assembly. There is no provision for withdrawing the submitted amendment, and once filed it automatically becomes effective on the first day of July following its submission unless the General Assembly vetoes it by concurrent resolution of disapproval. Thus, in the absence of legislative veto, the supreme court will be saddled with an amendment which it no longer wants. The supreme court's answer to this problem is simplicity itself. In order to withdraw an amendment, it files a second amendment with the General Assembly. This second amendment deletes the amending language contained in the first amendment, and restores the original language of the rule. Thereafter, if the General Assembly does not veto the second amendment, it is the second amendment that becomes effective on July first, and the rule is restored to its original form. For an illustration of how this process works, *compare* the amendments to OHIO R. CIV. P. 4.1(1) and 4.3(B)(1), which the supreme court filed with the General Assembly on January 12, 1978 (1978 Baldwin Legis. Serv. 3-1), with the amendments to the same rules which the supreme court filed on April 28, 1978 (1978 Baldwin Legis. Serv. 3-17). The first submission amended both rules by adding: "The return receipt may be signed either by the addressee or by a person qualified to receive the certified mail in accordance with the regulations of the postal service. The return receipt shall constitute prima facie evidence that the certified mail was received by the addressee or a person qualified to receive his certified mail." The second submission withdrew the amendment by deleting these words and restating both rules in their original form. The whole process produced something of a mystery and a disappointment. *See* Harper, *Service of Process in Ohio by Certified Mail: A Critique of the Southgate Shopping Center Case*, 5 OHIO N. L. REV. 613 (1978).

Of course, the supreme court may find itself covered with embarrassment if the General Assembly becomes petulant or pixieish, and vetoes the second amendment.

[110] *See* note 25 *supra.*

[111] This point is explicit in White v. White, 50 Ohio App. 2d 263, 362 N.E.2d 1013 (1977), and implicit in the conclusion reached in Berry v. Berry, 50 Ohio App. 2d 137, 361 N.E.2d 1095 (1977).

[112] As it is said in paragraph 2 of the syllabus of Carter v. Johnson, 55 Ohio App. 2d at 157, 380 N.E.2d at 759: "A judge speaks as the court only through the journal of the court." And *see* former OHIO REV. CODE ANN. § 2323.22 (Page 1954) (repealed 1971), where it is said: "All judgments and orders must be entered on the journal of the court . . . ." Although this section of the Ohio Revised Code has been repealed because it is in partial conflict with OHIO R. CIV. P. 58, that portion quoted above remains a sound statement of the accepted law.

For the distinction between a court's exercise of its judicial powers and the exercise of appointive powers conferred upon it by statute, *see* State *ex rel.* Crance v. Kennedy, 53

tion of a local rule of court is to be a valid exercise of the judicial power, the text of the local rule must be entered in the court's journal.

But when is a court order journalized? Civil Rule 58 tells us that journalization takes place when the written entry is filed with the clerk of the court for journalization.[113] But Civil Rule 58 applies only to judgments,[114] and a local rule of court is not a judgment.[115] Rather, it is a "direction of a court," as described in former section 2323.01, Ohio Revised Code.[116] In the absence of former section 2323.22, Ohio Revised Code,[117] there is neither statute nor rule which tells us the precise point in time when an order other than a judgment is deemed journalized or entered. Therefore, to solve this problem we must either apply Civil Rule 58 by analogy, or revive Section 2323.22 of the Revised Code by means of the "Savings Clause" in House Bill 1201.[118] Although the exercise of either option would

---

Ohio St. 2d 166, 373 N.E.2d 383 (1978). A court exercises its judicial powers only through the entries in its journal, but the exercise of its appointive powers need not be evidenced by a journal entry unless the statute conferring the appointive power requires that formality. Presumably, what is said here of the non-judicial power of appointment conferred by statute would be equally applicable to other non-judicial powers conferred by statute.

[113] In pertinent part, OHIO R. CIV. P. 58 states: "A judgment is effective only when filed with the clerk for journalization."

[114] *Id.*

[115] OHIO R. CIV. P. 54(A) tells us that the word "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." A local rule of court has the status of a court order but it is not an order from which an appeal lies. *See* OHIO REV. CODE ANN. §§ 2505.02 (Page 1954) and 2503.03 (Page 1954 & Supp. 1978). Therefore, it cannot be a judgment.

[116] OHIO REV. CODE ANN. § 2323.01 (Page 1954) (repealed 1971), read as follows: "A judgment is the final determination of the rights of the parties in an action. A direction of a court or judge, made or entered in writing and not included in a judgment is an order." This section has been repealed because it is ostensibly in conflict with OHIO R. CIV. P. 54(A).

[117] OHIO REV. CODE ANN. § 2323.22 (Page 1954) (repealed 1971), read as follows:

> All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action. The entry must be written into the journal as soon as the entry is filed with the clerk or directed by the court and shall be journalized as of the date of the filing of said entry or of the written direction by the court.

As indicated by note 112 *supra*, this has been repealed as being in conflict with OHIO R. CIV. P. 58.

[118] Am. H.B. 1201, 108th Ohio Gen. Ass., 2d Sess. (1970), 1970 Ohio Laws 3017 repealed a substantial number of Revised Code sections on the ground of conflict with the newly enacted Civil Rules. However, section 3 of the Act—the "Savings Clause"—made provision as follows:

> That the taking effect of the Rules of Civil Procedure on July 1, 1970, is prima-facie evidence that the sections of the Revised Code to be repealed by Section 1 [of the Act] are in conflict with such rules and shall have no further force or effect, . . . unless a court shall determine that one of such sections, or some part thereof, has clearly not been superseded by such rules and that in the absence of such section or part thereof being effective, there would be no applicable standard of procedure prescribed by either statutory law or rule of court.

yield the same result,[119] there is some slight danger in reviving the statute.[120] Accordingly, the analogous application of Civil Rule 58 is the preferred solution, and that yields a journalization date as of the time the written rules are filed with the clerk of the court for journalization.

But if Civil Rule 58 is to apply by analogy, we must take up the question of the signature. Under the terms of that rule, a judgment entry is invalid unless it is signed personally by the judge whose judgment it is.[121] Accordingly, we may reasonably suppose that the original copy of the local rules of court — as court orders — must also be signed personally before being filed with the clerk for journalization. But signed by whom? Unlike a judgment or order in an action, the local rules of court are not the order of a single judge; they are the order of all the judges acting as a body. This does not mean, however, that the original copy must be signed by all the judges personally. Just as the judgment or order in an action is the act of the *court,* even though signed by a single judge thereof, so too can the local rules be the order of the court though signed by a single judge. The problem, then, is to determine which judge that is to be.

Since the judges of the court enact the local rules as a body rather than as individuals, it would seem logical to suppose that the judge who presides over that body is the judge who must sign the original copy of

---

[119] Compare:

OHIO REV. CODE ANN. § 2323.22 (Page 1954):	OHIO R. CIV. P. 58:
The entry . . . shall be journalized as of the date	A judgment is effective only when filed with the clerk for journalization.
1. of the filing of said entry, or	
2. of the written direction by the court.	

[120] As demonstrated in note 119 *supra,* the statute provides two potential "journalization" dates: the date the entry is filed for journalization, or the date of the written direction by the court. Since this latter date is inconsistent with the thrust of OHIO R. CIV. P. 58, it would probably not be revived under the "Savings Clause," but its mere existence would raise unnecessary speculation along those lines.

[121] In pertinent part OHIO R. CIV. P. 58 provides: "[T]he court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it."

As for the personal signature of the judge, *see* Judge Whiteside's concurring opinion in Peters v. Arbaugh, 50 Ohio App. 2d 30, 361 N.E.2d 531 (1976), where he says:

> It is my view . . . that there can be no judgment unless and until it is signed by the court, that is by the judge personally. The affixing of the judge's name by some unknown person who then initials the "signature" cannot meet the requirement by Civ. R. 58 that the court sign the judgment.
>
> . . . .
>
> In any event, I concur in the majority finding that a writing cannot constitute a judgment meeting the requirements of Civ. R. 58 unless it is personally signed by the judge entering it.
>
> Regardless of its label, language, or phraseology, a writing not signed by the judge purportedly entering it cannot constitute a judgment. An initialed "signature" does not constitute signing by the court.

Id. at 35-36, 361 N.E.2d at 534-35.

What is said here of judgments is equally true of orders, since the only essential difference between a judgment and an order is that a judgment is final and appealable, while an order is interlocutory and not immediately appealable.

the rules. Therefore, after consulting article IV, section 4(A) of the Ohio Constitution;[122] sections 1901.15 and 2301.04, Ohio Revised Code;[123] Rules 2 and 3(B) of the Rules of Superintendence [for courts of common pleas];[124] and Rule 2 of the Rules of Superintendence for Municipal Courts and County Courts,[125] one may conclude that the original copy of the local

---

[122] OHIO CONST. art. IV, § 4(A) reads, in pertinent part:

> In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. . . . the presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

[123] In pertinent part, OHIO REV. CODE ANN. § 1901.15 (Page Supp. 1978) tells us: "[T]he presiding municipal judge has the general supervision of the business of the court and may classify and distribute among the judges the business pending in the court."
And OHIO REV. CODE ANN. § 2301.04 (Page 1954) states:

> The chief justice of the court of common pleas shall have the general superintendence of the business of the court, and shall classify and distribute it among the judges.
>
> . . . .
>
> The judges of the court of common pleas shall meet at least once in each month and at such other times as the chief justice of such court requires, and shall prescribe rules regulating the docketing and hearing of causes, motions and demurrers and such other matters as are necessary for the advancement of justice and prevention of delay, and for the government of the officers of the court.

For "chief justice," read "presiding judge." *See* OHIO CONST. art. IV, § 4(A), as quoted in note 122 *supra.*

[124] In material part, OHIO R. SUP. 2 provides:

> The judges of all multi-judge courts of common pleas shall meet at the call of the presiding judge, and at least once each term of court, for the purpose of discussing and resolving administrative problems common to all divisions of the court. The presiding judge shall chair all such meetings . . . .

Again, in material part, OHIO R. SUP. 3 reads:

> (A) The judges of each multi-judge division of the court of common pleas shall . . . select one of their number to act as administrative judge.
>
> . . . .
>
> (B) The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. [He has] overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay.

In connection with the last sentence of Rule 3(B), *see* Rule 9 which provides: "Nothing in these superintendence rules prevents any local rule of practice which seeks to promote the use of any device of procedure which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake."

[125] OHIO R. SUP. MUN. CT. 2 provides:

> (A) In every multi-judge court, the judges of the court shall, by majority vote, elect one of their number as administrative judge.
>
> . . . .
>
> (B) The administrative judge shall have full control over the administration, docket and calendar of the court. He shall exercise the powers conferred upon him by these rules and the powers vested by statute in the presiding judge.
>
> . . . .
>
> (C) The administrative judge shall be responsible to the Chief Justice of the Supreme Court in the discharge of his duties and shall: . . . (9) Perform such other duties as are required by these rules or the Chief Justice of the Supreme Court.

For the statutory duties of the presiding judge, *see* OHIO REV. CODE ANN. § 1901.15 (Page Supp. 1978) as quoted in note 123 *supra.* For one of the duties to which Rule 2(C)(9) refers, *see* Rule 18, which specifies: Nothing in these rules prevents any local rule of practice which seeks to promote the use of any device or procedure which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake."

rules filed with the clerk for journalization must be signed by the judge in single-judge courts; by the presiding judge in multi-judge common pleas courts (or in some instances, by the administrative judge of a multi-judge division of a multi-judge common pleas court);[126] or by the administrative judge of a multi-judge municipal or county court.

In sum, then (and all other things being equal), local rules of court are validly enacted when they are signed by the appropriate judge and filed with the clerk of the court for journalization.

F. *Uniformity of Operation*

In *Walters v. Griffith*,[127] the Ohio Supreme Court said: "The Municipal Court is a local court, with local rules of general and uniform operation within its special jurisdiction."[128] It is unclear whether the court intends this as a touchstone of validity, or whether it is simply a pale reflection of the old rule that a court could not adopt a local rule of practice unless the same rule had been adopted by every other court within the same territorial "jurisdiction."[129] Perhaps it simply means that a rule of court should apply uniformly to all attorneys appearing in the court promulgating the rule irrespective of their place of residence in the state.[130] Until the supreme court further develops this theme, we cannot know precisely what is intended by this remark (if anything); it is sufficient for the moment to note it and to suggest that it be given consideration in the formulation of local rules.

G. *Summary*

To be valid, then, local rules of court (1) must be limited to matters of practice and procedure; (2) must supplement the statutory or rules procedure in the sense that they add requirements not found in that procedure, or supply a procedure when the statutes or rules are silent on a particular point; (3) must be moderate and reasonable in their operation, and of general and uniform operation within the court's jurisdiction; (4) must be consistent with the provisions of the Ohio and federal constitutions; the rules of practice and procedure and the Superintendence Rules prescribed by the Ohio Supreme Court; substantive or jurisdictional statutes; and procedural statutes which supplement the rules by direct reference; (5) must be signed by the appropriate presiding judge and filed with the clerk of the court for journalization; and (6) they must be filed with the Supreme Court of Ohio.

---

[126] If the local rules in question pertain only to a single division of the court, it would seem that the administrative judge, as the presiding judge of that division (*see* OHIO R. SUP. 3(B), as quoted in note 124 *supra*), is the appropriate judge for signature purposes.

[127] 38 Ohio St. 2d 132, 311 N.E.2d 14 (1974).

[128] *Id.* at 133, 311 N.E.2d at 15.

[129] *See* note 11 *supra*.

[130] *See* Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); State *ex rel.* Wilke v. Newton, 125 Ohio St. 640, 186 N.E. 94 (1932).

IV. ENFORCING COMPLIANCE WITH THE RULES

A. *Compliance by the Court*

The Court of Appeals for Franklin County puts the basic principle about as well as it can be put:

> Court rules are made to be followed, both by the court and by counsel, not ignored. If a court feels its rules do not reflect the proper course of action, it should amend them, not ignore them. Counsel should be able to rely upon duly adopted court rules.[131]

Much the same was said more than fifty years ago.[132] Nevertheless, the courts are so thoroughly committed to the pragmatic disposition of cases that they frequently ignore their own rules when that course seems more expedient than a course which would observe those rules.[133] Thus, the question: How can the courts be made to follow their own rules?

Unfortunately, it must be said that except in those rare instances when mandamus, prohibition or (more rarely) procedendo will lie, there is very little that can be done until the noncompliance with the rule results in an order or judgment. And even after the entry of an order or a judgment, very little can be done by way of vindication unless it can be demonstrated that the violation of the local rule resulted in substantial harm or serious injury to the party complaining.[134] But if the noncompliance with the rule results in more than mere "harmless error," the violation will warrant the vacation of the order or judgment, or the reversal of the judgment on appeal. Thus it is said:

> Where a court has adopted valid rules for the conducting of its business, litigants may rely upon the court conducting its proceedings in conformity with such rules, and a judgment rendered in violation of a valid rule is properly set aside upon motion by the party injuriously affected thereby.[135]

---

[131] Shore v. Chester, 40 Ohio App. 2d at 414, 321 N.E.2d at 617.

[132] *See* Ramsey v. Holland, 35 Ohio App. 199, 172 N.E. 411 (1929), and *see* the text at note 135 *infra*.

[133] *See, e.g.*, Myers v. Duibley, 94 Ohio App. 228, 114 N.E.2d 832 (1952).

[134] *See* OHIO R. CIV. P. 61, which states:

> No error . . . in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

And *see* Hanes v. Block, 78 Ohio App. 394, 65 N.E.2d 86 (1945); Ramsey v. Holland, 35 Ohio App. 199, 172 N.E. 411 (1929); Sargent v. Corbley, 18 Ohio Cir. Dec. 125 (Hamilton County Cir. Ct. 1905).

[135] Ramsey v. Holland, 35 Ohio App. at 202, 172 N.E. at 412. In paragraph 3 of the syllabus, the court stated: "Where court in rendering judgment disregards court rules, depriving party of trial, judgment is erroneous." *Id.* at 199, 172 N.E. at 411. Thus, the court recognizes the availability of relief both by motion and by appeal.

But see Myers v. Duibley, 94 Ohio App. at 232-33, 114 N.E.2d at 835, where it is said: "Ordinarily, litigants may rely on the observance by the court of its rules in the conduct

If the noncompliance with the local rule results in an interlocutory order, a suitable vehicle for obtaining the vacation of the order is a motion for reconsideration or rehearing.[136] But if the noncompliance results in a

of its proceedings, and the failure to do so may constitute an abuse of discretion. *Ramsey v. Holland,* 35 Ohio App. 199, 172 N.E. 411. However, a rule of court is not a principle of law, but is of the court's own making, and is not a bar to an act which a sound exercise of the court's discretion dictates, and a waiver of or departure from such rule is not an abuse of discretion. *Sargent v. Corbley,* 7 C.C. (N.S.), 226, 18 C.D., 125. This court has held that the enforcement of rules of court is within the sound discretion of the court. *Hanes v. Block,* 78 Ohio App. 394, 65 N.E.(2d), 86. . . . [I]n tax foreclosure actions, the court systematically ignored the published rules, and this fact was well known [to the appellant] and its counsel. . . . Therefore, the rule was rendered nugatory by the established practice, and such rule will be given no legal effect. A litigant may not urge the failure to comply with the provisions of a rule which, over a long period of time, is not enforced by the court, and which fact is well known to the litigant.

And again, in Sargent v. Corbley, 18 Ohio Cir. Dec. at 127, we find:

The rule of the probate court is not a principle of law, but a rule of the court's own making for the expedient transaction and dispatch of business in said court, and if said court, for reasons satisfactory to itself, sees fit to break or waive such rule, it is not to be charged to it as an abuse of discretion.

Finally, Hanes v. Block, 78 Ohio App. at 397, 65 N.E.2d at 87 tells us:

That does not reach our immediate question, namely, were defendants prejudiced by the action of the court in waiving the strict provisions of the rule [respecting demands for trial by jury]. The enforcement of rules of court, whether made by reason of the courts' inherent power or under statutory authorization is uniformly held to be within the sound discretion of the courts.

It would be difficult to hold that the defendants were prejudiced by the action of the court in permitting the plaintiffs to have their cause submitted to a jury. *Sargent v. Corbley,* 7 C.C. (N.S.), 226, 18 C.D., 125.

We are satisfied that there was no abuse of discretion on the part of the trial judge in overruling the motion of defendants [to strike the tardily filed jury demand from the files], and that they were not prejudiced by such action.

If these three decisions were to be read in haste, they might lead one to conclude that the enforcement of local rules is simply a matter of judicial whimsey. But that is not the case at all. With the exception of *Duibley*'s remarks directed to rules that are systematically ignored, the three decisions make the following points: (1) local rules are to be obeyed, not ignored. (2) In its discretion, a court may waive compliance with one of its local rules, but only if the interests of justice would be better served by noncompliance rather than compliance, and if no other party to the action will be unduly prejudiced by such noncompliance. (3) It is an abuse of discretion to waive compliance with a local rule if noncompliance will result in substantial prejudice to another party to the action. Indeed, *Duibley* may even be read to demand compliance with long-ignored rules if a party to the action did not know of the established practice of ignoring such rules.

Thus, while this trio of cases differ from *Ramsey* in their result, they do not essentially differ from it in philosophy. And if they are read as presenting a more liberal philosophy with respect to compliance by the court with its own rules, suffice it to say that they are not in harmony with the more recent strict compliance rules espoused by Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214 (1977); Repp. v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974); Shore v. Chester, 40 Ohio App. 2d 412, 321 N.E.2d 614 (1974); Bognar v. Cleveland Quarries Co., 7 Ohio App. 2d 187, 219 N.E.2d 827 (1966).

[136] The motion for reconsideration, or rehearing (the two terms are frequently used interchangeably, as if they did not have a distinct meaning), is known neither to Civil Rule nor to statute; rather, "It is an invention of counsel," Kent, *Odds and Ends,* 49 CLEV. B.J. 280 (1978), and its use is "an informal local practice," Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974).

That is not to say, however, that the motion for reconsideration or the motion for rehearing cannot be employed in civil litigation; the problem is not one of employment, but one of *proper* employment.

It is now well-settled that neither the "reconsideration" nor "rehearing" aspect of

judgment or final order, the injured party may seek relief by way of appeal, or by way of a motion for judgment notwithstanding the verdict, a motion for a new trial, or a motion for relief from judgment, as the situation warrants.[137] Of these three, the motion for judgment notwithstanding the verdict[138]

this informal motion may be directed to a judgment or final order. *See, e.g.*, William W. Bond, Jr. and Assocs. v. Airway Dev. Corp., 54 Ohio St. 2d 363, 377 N.E.2d 988 (1978); State *ex rel.* Pajestka v. Faulhaber, 50 Ohio St. 2d 41, 362 N.E.2d 263 (1977); Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974); Hutchison v. Hutchison, No. 38713 (Cuyahoga County Ct. App., filed April 12, 1979), as abstracted in 52 OHIO BAR 1469 (1979); Fortune v. Callihan, No. CA-923 (Athens County Ct. App., filed Aug. 29, 1978), as abstracted in 51 OHIO BAR 1249 (1978); Dittmar v. Zwelling, No. CA-78-8 (Muskingum County Ct. App., filed June 1, 1978), as abstracted in 51 OHIO BAR 1014 (1978); North Royalton Educ. Ass'n v. Bd. of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974) (and note especially Judge Krenzler's separate concurring opinion, 41 Ohio App. 2d at 251, 325 N.E.2d at 908); Cammack v. V.N. Holderman & Sons, 37 Ohio App. 2d 79, 307 N.E.2d 38 (1973); Taray v. Sadoff, 331 N.E.2d 448 (Ohio Ct. App. 1974); Browne, *The Fatal Pause — Summary Judgment and the Motion for Reconsideration*, 44 CLEV. B.J. 7 (1972). *But see* State *ex rel.* Shearer v. Wertz, 50 Ohio St. 2d 348, 364 N.E.2d 36 (1977). This apparently contradictory holding can be explaind by noting that it involves criminal procedure and not civil procedure.

The reason for this rule is fairly simple. If a motion for reconsideration or rehearing is directed at a judgment or final order (hereinafter, "judgment"), it would be for the purpose of seeking some form of relief from that judgment. But OHIO R. CIV. P. 60(B) provides: "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules." "These rules," of course, must necessarily mean the Ohio Rules of Civil Procedure. But the only Civil Rules motions which prescribe a procedure for relief from judgment are the motion for judgment notwithstanding the verdict or for judgment notwithstanding the jury's failure to agree (OHIO R. CIV. P. 50(B)); the motion for a new trial (OHIO R. CIV. P. 59); and the motion for relief from judgment (OHIO R. CIV. P. 60 (B)); the Civil Rules make absolutely no mention of a motion for reconsideration or a motion for rehearing. As Kent tells us: "There simply is no provision in the Civil Rules for a motion to reconsider; it is an invention of counsel." Kent, *Odds and Ends, supra.* Therefore, since the motion for reconsideration or rehearing is not a Civil Rules motion which prescribes a procedure for obtaining relief from a judgment, it may not be used for that purpose. Or to put it in a nutshell: After the entry of a judgment or final order, a motion for reconsideration or rehearing does not lie.

Nevertheless, the Civil Rules do suggest occasions for seeking relief from interlocutory orders. *See, e.g.*, OHIO R. CIV. P. 54(B), which provides that an order falling within its embrace "is subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties." Further, it is logical to assume that a motion is the most appropriate vehicle for seeking such a revision, or other relief from an interlocutory order. The Civil Rules, however, do not tell us what such a motion should be called. But in LaBarbera v. Batsch, 117 Ohio App. 273, 182 N.E.2d 632 (1962), we are told:

> There is no provision in the procedural statutes of Ohio (dealing with trial courts), providing for a "rehearing" or "reconsideration" of an order, judgment or decree of a trial order. . . . A practice has grown up whereby these terms have been applied to requests for reconsideration of interlocutory orders which may be entertained at the discretion of the court, but such motions are not provided for by statute or otherwise, except in some instances, perhaps, by rule of court, where such a motion is filed, which, because of the entry to which it is directed, is not a judgment, decree or appealable order.

Id. at 275-76, 182 N.E.2d at 634.

Therefore, the motion employed in seeking relief from an interlocutory order may properly be designated a motion for reconsideration or a motion for rehearing, and either motion is a suitable vehicle for obtaining such relief.

[137] *See* the discussion in note 136 *supra.*

[138] It must be noted that OHIO R. CIV. P. 50(B) contains two motions, the motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the jury's failure to agree. Both serve an essentially similar purpose, and for the sake of brevity,

is the least likely to be useful, since the noncompliance with a local rule will seldom result in a situation that would warrant withholding the case from the jury and directing a verdict for the movant. But there are few absolutes in this business and one can conceive of a situation in which the motion for judgment might lie. Suppose a local rule stipulates that an expert witness will not be permitted to testify at the trial unless the party who intends to call that witness furnishes a copy of that witness's report to the opposing party a given number of days before trial or pretrial.[139] Suppose further that the plaintiff has such a report, but fails to furnish a copy to the defendant. If the local rule was properly worded, it is a standing order of court, and the plaintiff's failure to comply therewith automatically invokes the sanction mentioned.[140] Plaintiff calls the expert as a witness at the trial, and defendant objects, basing the objection on the noncompliance with the local rule. The court overrules the objection, and permits the expert to testify. In the absence of that testimony, the plaintiff would not have made a case, and a verdict would have been directed for the defendant,[141] but because the testimony was admitted, the jury found for the plaintiff. Here, then, is a situation where the court's noncompliance with its own rule resulted in a case being sent to the jury when it would not have been so submitted had the rule been followed. Accordingly, it would

any reference herein to the motion for judgment notwithstanding the verdict should be read as including the motion for judgment notwithstanding the jury's failure to agree unless the latter is expressly excluded from the comment.

[139] *See, e.g.,* Rule 21, pt. I(C), Rules of the Court of Common Pleas, Cuyahoga County, which states:

> Expert witnesses whose reports have not been furnished to opposing counsel prior to a pretrial held within sixty (60) days before trial, will not be permitted to testify at the trial, except where a party has not received a written report from such expert witness but has fully complied with Item 2-(A) hereof.

See also George Whalley Co. v. National City Bank, 55 Ohio App. 2d 205, 380 N.E.2d 742 (1977), which provides a model for the supposition in the text.

[140] *See, e.g.,* Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214 (1977), which presents a similar situation but with a slightly different version of the local rule quoted in note 139 *supra.* In substance, the *Bilsky* rule stipulated that expert witness reports would be exchanged if the trial judge "required" their exchange. The Court of Appeals read this to mean that the local rule was not itself a standing order of court requiring an exchange of reports, but simply an expression of the trial court's authority to expressly "require" the exchange. Accordingly, in the absence of an order stating that "requirement," there was no obligation to comply with the rule. As the court put it:

> Furthermore, the requirement that counsel file Pretrial Statements is not self-executing under Local Rule 21, Part I(A). Rather, the requirement is contingent upon the judge issuing it at least one week prior to the scheduled pretrial hearing. Although the rule is mandatory that the judge "shall" issue such a requirement, unless and until the judge does so, there is no requirement on counsel to file Pretrial Statements. If the judge does require that Pretrial Statements be filed, and also requires that counsel exchange reports of expert witnesses expected to be called by each party, but a party's Pretrial Statement does not indicate full compliance with the requirement that a report of its expert witness be furnished, only then may the court impose the sanction written into Local Rule 21, Part I(A), that the expert witness "will not be permitted to testify at trial."

Id. at 225-26, 367 N.E.2d at 1218.

[141] *See,* by analogy, Denicola v. Providence Hosp., 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979).

seem that the violation of the local rule might serve as a basis for a motion for judgment notwithstanding the verdict.[142]

If the judgment follows a trial of the issues raised by the pleadings, a motion for a new trial may be used to good effect. The essential problem here is the choice of grounds upon which to premise such a motion. To some extent, the answer to the problem depends upon the court's motivation in ignoring its own rule. If the noncompliance with the rule was inadvertent and unintentional — that is, the consequence of haste, carelessness, ignorance, inattention, or the like — the better ground (all other things being equal) is irregularity in the proceedings of the court.[143] On the other hand, if the court's noncompliance with its own rule was deliberate and intended, the motion for new trial may be grounded on abuse of discretion.[144]

---

[142] The defendant might also have attempted to block the admission of the expert's testimony by means of a motion in limine made prior to the commencement of the trial itself. However, George Whalley Co. v. National City Bank, 55 Ohio App. 2d 205, 380 N.E.2d 742 (1977), casts some doubt upon the availability of the motion in limine for this purpose. In *Whalley* the plaintiff contended that a particular affirmative defense had been waived because it had not been specifically pleaded in accordance with the provisions of OHIO R. CIV. P. 8(C), and sought to prevent the admission of testimony pertaining to that defense by the use of a motion in limine. The trial court failed to rule on the motion, and this failure was asserted as error on appeal. The Court of Appeals for Cuyahoga County held that under the circumstances, any error the trial court may have committed was harmless. But it also noted: "Appellee contends that a motion in limine is not a proper way in which to bring the matter before the trial court. However, it is not necessary for us to decide that issue." *Id.* at 214 n.12, 380 N.E.2d at 748 n.12. By noting the question, the court suggests some impropriety in the plaintiff's procedure; by leaving the question unresolved, the court invites caution in using the same procedure in a similar situation.

[143] OHIO R. CIV. P. 59(A)(1). In addition, *see* Sherwin-Williams Co. v. Globe Rutgers Fire Ins. Co., 31 Ohio Cir. Dec. 248 (Cuyahoga County Cir. Ct. 1912), where it is said:

> The term "irregularity" is a very comprehensive one, and was intended by the Legislature no doubt to embrace all such acts of a party to the action, an officer of the court, or of the court itself, as constitute a departure from the due, orderly and established mode of proceeding therein, where a party, with no fault on his part, has been deprived of some right or benefit otherwise available to him. Such irregularity may consist of acts of commission or omission, constituting a want of adherence to some prescribed rule or method of procedure.

Id. at 250.

[144] Again, *see* OHIO R. CIV. P. 59(A)(1). Abuse of discretion connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court. *See, e.g.,* Klever v. Reid Bros. Express, Inc., 154 Ohio St. 491, 96 N.E.2d 781 (1951); Steiner v. Custer, 137 Ohio St. 448, 31 N.E.2d 855 (1940); Schreiner v. Karson, 52 Ohio App. 2d 219, 369 N.E.2d 800 (1977); State v. Fellows, 47 Ohio App. 154, 352 N.E.2d 631 (1975). *But see* Judge Day's dissenting opinion in State v. Bound, 43 Ohio App. 2d 44, 52 n.13, 332 N.E.2d 366, 371 n.13 (1975).

As we have noted elsewhere, the trial court has the discretion to waive compliance with its local rules. *See* Myers v. Duibley, 94 Ohio App. 228, 114 N.E.2d 832 (1952); Hanes v. Block, 78 Ohio App. 394, 65 N.E.2d 86 (1945); Sargent v. Corbley, 18 Ohio Cir. Dec. 125 (Hamilton County Cir. Ct. 1905), as quoted in note 135 *supra.* But where the court ignores its own rules to the substantial injury of a party who has relied upon those rules, it is an abuse of discretion. Ramsey v. Holland, 35 Ohio App. 199, 172 N.E. 411 (1929).

The difficulty with *Ramsey,* however, is that it defines abuse of discretion in terms of irregularity:

> Abuse of discretion has been defined as some act done or step taken by the court in person, or upon request or by an officer of the court, which is not according to the

Choice of grounds is also the problem basic to the use of the Civil Rule 60(B) motion for relief from judgment. There is some authority for the proposition that noncompliance with a local rule may be raised under the rubric of "mistake," as that term is used in subsection (1) of Rule 60(B).[145] However, the few Ohio cases that have considered analogous situations tend to favor subsection (5) — any other reason justifying relief from the judgment.[146]

Whether the ground for relief be "mistake" or "any other just reason," it is more important to remember that a motion for relief from judgment may not be used as a substitute for an appeal.[147] This means that if the noncompliance with a local rule is to be the basis for a motion for relief from judgment, that motion must be made prior to the expiration of the time for filing a notice of appeal.[148] It also means that if the motion is not

---

regular course of proceeding, by which a party is deprived of the benefit of defense without fault on his part.

Id. at 201-02, 172 N.E. at 412. No doubt, an abuse of discretion is an irregularity in the proceedings of the court. But if a distinction is to be drawn between these two grounds for a new trial, it seems advisable to limit "irregularity" to the unintended failure to follow prescribed procedure, and allocate "abuse of discretion" to the intentional failure to follow prescribed procedure.

[145] *See*, by analogy, Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964). But note that where judicial error is asserted as the "mistake" which warrants relief from judgment, the motion for relief from judgment must be made within the time limited for filing the notice of appeal.

[146] Thus, in State *ex rel.* Gyurcsik v. Angelotta, 50 Ohio St. 2d 345, 347, 364 N.E.2d 284, 285 (1977), we find: "It is generally held that court errors and omissions are reasons justifying relief under the 'other reasons' clause." And again, in Buckman v. Goldblatt, 39 Ohio App. 2d 1, 5, 314 N.E.2d 188, 190 (1974), it is said: "An application of the applicable law to the facts in this case leads to the conclusion that the levy and foreclosure were contrary to law. This impropriety results in a condition for the appellants that the catch-all provisions of Civ. Rule 60(B)(5) was patterned to correct." Borovskaya v. State, 54 Ohio App. 2d 79, 375 N.E.2d 57 (1977), might also be listed here, though the basis for the decision is less clear-cut. After noting that the judgment of escheat was not valid because it did not expressly state that there were no heirs, the Court of Appeals for Wood County said: "Pursuant to Civ. R. 60(B), on a motion made within a reasonable time, a party may be relieved from a final judgment for any reason justifying relief." *Id.* at 84, 375 N.E.2d at 60. This implies that judicial error is ground for relief under OHIO R. CIV. P. 60(B)(5).

But there is at least one case which appears to prefer "mistake" under OHIO R. CIV. P. 60(B)(1). *See* Heading Co. v. Morog, No. 2753 (Lorain County Ct. App., filed Dec. 6, 1978), as abstracted in 52 OHIO BAR 278 (1979): "In a contract action, appeal is from denial of motion to vacate default judgment against Plaintiffs. Held: reversed. Plaintiffs' personal assets could not be attached for a corporate debt, and such mistake constituted grounds to vacate under Civ. R. 60(B) when timely filed."

[147] Lewis v. Lewis, No. 78 CA 117 (Mahoning County Ct. App., filed Dec. 13, 1978), as abstracted in 52 OHIO BAR 266-67 (1979); Daniels v. Sears, Roebuck & Co., No. 37787 (Cuyahoga County Ct. App., filed Nov. 9, 1978), as abstracted in 52 OHIO BAR 58 (1979); Town & Country Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975); Bosco v. City of Euclid, 38 Ohio App. 2d 40, 31 N.E.2d 870 (1974); Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 248 N.E.2d 194 (1972).

[148] As it is said in Town & Country Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975):

> It has been set forth in many texts, as well as case law related to Civ. R. 60(B), that such rule cannot be used to circumvent or extend the time requirements by virtue of vacating a judgment and reinstating it in order to start the time for filing such notice

so made, and if the noncompliance with the local rules *could have been* assigned as error on appeal (whether an appeal was taken or not), the motion for relief from judgment cannot be made after the time for filing the notice of appeal has expired.[149] But even if the motion is timely served

---

of appeal to run anew. As stated in 7 Moore, Federal Practice, Section 60.29:
"It, therefore, follows that a motion for relief on one or more of the 6 grounds stated in 60(b) for relief from a final judgment does not affect the finality of the judgment; and hence does not toll the time for appeal from the final judgment."]
Additionally, in Moore, supra at Section 60.30 we find:
"While in appropriate situations we believe that, *within the time allowed for appeal,* a district court may grant relief from judicial error under Rule 60(b), the Rule cannot be used as a substitute for appeal. And an appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought."] [Emphasis added.]

. . . .

We believe that such textual statement in fact sets forth the acceptable application of Civ. R. 60(B). Such rule basically is for the purpose of vacating voidable judgments and those judgments which have inherent defects, and the filing of a motion under such rule may not serve the purpose of allowing additional time for the filing of an otherwise barred notice of appeal, nor extend time within which an appellant could have filed one of the tolling motions as referred to in App. R. 4(A).

Id. at 266-67, 348 N.E.2d at 744. *See also* Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964).

[149] Thus, in Cuyahoga Dunham Supply Co. v. Kus-Tom Builders, Inc., No. 38608 (Cuyahoga County Ct. App., filed April 12, 1979) (also abstracted in 52 OHIO BAR 1469 (1979)), we find the following:

This case concerns the issue of whether a Civ. R. 60(B) motion for relief from judgment is an appropriate method to attack the trial court's refusing to continue the present case which was set for trial.
It is now well established that a Civ. R. 60(B) motion may not be used as a substitute for a timely appeal where a party did not file a notice of appeal with the clerk of the trial court within thirty days of the date of the entry of judgment or order appealed from. *Bosco v. Euclid* (1974), 38 Ohio App. 2d 40.

. . . .

The Court of Appeals in *Bosco v. Euclid, supra,* stated that the failure to file a timely notice of appeal is jurisdictional under App. R. 3 and 4(A), and that the purpose of the rules is salutary in that they require litigants to be alert to insure an orderly and prompt processing of appeals. The court held that an appellant cannot do by indirection that which he could not do directly. Once the time to appeal the judgment has passed, a party is precluded from appealing the same issues that could have been raised in a direct appeal by use of Civ. R. 60(B). The court then held that if Civ. R. 60(B)(1) through (5) could be used under those circumstances it would be a substitute for an appeal and used to circumvent the policy of App. R. 4(A) establishing an appeal period of 30 days.

. . . .

[T]he appropriate method of attacking the trial court's refusal to grant the continuance was by a direct timely appeal under App. R. 4(A). This the appellant did not do. Because appellant did not file a timely notice of appeal challenging the trial court's refusal to grant a continuance, it is precluded from using Civ. R. 60(B)(1) through (5) to raise the same issue.

Also, *see* Davis v. Davis, No. 38008 (Cuyahoga County Ct. App., filed Jan. 4, 1979), as abstracted in 52 OHIO BAR 526 (1979): "In a divorce and award of custody action, appeal is from denial of motion to grant relief from judgment. Held: affirmed. Plaintiff could not use his motion in place of a direct appeal for which the appeal period had run"; and Antonucci v. Antonucci, No. 37867 (Cuyahoga County Ct. App., filed Nov. 24, 1978), as abstracted in 52 OHIO BAR 61 (1979): "Appeal is from denial of motion to vacate by Appellant after Appellant was granted a divorce. Held: affirmed. 'Issues which could have been raised on appeal but which were not cannot subsequently be raised' under a Civ. R. 60(B) motion to vacate."

The same rule of preclusion applies if an appeal is taken, but the issue of non-

within the 30 days following the entry of the judgment,[150] the movant is far from being home free. If the court does not pass on the motion within that 30-day period, the movant will have to file his or her notice of appeal, or lose the appeal.[151] If he or she timely files a notice of appeal, however, the trial court loses jurisdiction over the motion for relief from judgment, and will not be able to rule on it unless the court of appeals remands the case for such a ruling.[152] Thus, the use of the motion for relief from judgment limits the injured party's room for maneuver, and is not a very satisfactory instrument for obtaining compliance with a local rule of court. About the only time the motion for relief from judgment can be used with any advantage is when the injured party was prevented from raising the question of noncompliance by motion for new trial, or appeal, through no fault of his or her own.[153] In the final analysis, then, the only two practical post-

compliance with the local rule was not assigned as error in that appeal though it could have been. *See* Carlson v. Farmiloe, No. 37933 (Cuyahoga County Ct. App., filed Nov. 30, 1978), as abstracted in 52 OHIO BAR 52 (1979):

> Appeal is from judgment granting relief from a previous judgment in a landlord tenant action. Held: reversed. Trial court abused its discretion by allowing the motion to grant relief under Civ. R. 60(B) when all of the issues could have been raised in an earlier direct appeal. "Where no operative facts have been provided that demonstrate the timeliness of the motion and reason upon which the motion can properly be granted, the movant is not entitled to relief nor a hearing on the motions." On the facts of the case, the trial court abused its discretion in holding a hearing.

[150] In the Ohio system, service, and not filing, is the key jurisdictional act which determines the timeliness of a motion. Browne, *The Metaphysics of Motion Practice: When is a Motion "Made" for the Purposes of the Rules of Civil Procedure,* 50 OHIO BAR 925 (1977); Corrigan, *supra* note 40.

The notice of appeal must normally be filed with the court from which the appeal is being taken within 30 days after the entry of the judgment being appealed. OHIO R. APP. P. 4(A). Therefore, to be timely, the motion for relief from judgment would have to be served within the same 30-day period.

[151] Even a timely served motion for relief from judgment does not stay the running of the time for filing a notice of appeal. Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974); OHIO R. CIV. P. 60(B).

[152] Garrett v. Garrett, 54 Ohio App. 2d 25, 374 N.E.2d 654 (1977); Majnaric v. Majnaric, 46 Ohio App. 2d 157, 347 N.E.2d 552 (1975); Vavrina v. Greczanik, 40 Ohio App. 2d 129, 318 N.E.2d 408 (1974).

For the more general rule with respect to the transfer of jurisdiction to the court of appeals, *see* State *ex rel.* Special Prosecutors v. Judges, 55 Ohio St. 2d 94, 378 N.E.2d 162 (1978); State v. Watson, 48 Ohio App. 2d 110, 355 N.E.2d 883 (1975); Cuyahoga County Bd. of Mental Retardation v. Association, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975).

[153] The failure of the court to give notice of the entry of judgment ordinarily does not excuse the failure to take a timely appeal. Graphic Laminating, Inc. v. Creative Enterprises, Inc., No. 38030 (Cuyahoga County Ct. App., filed Dec. 7, 1978), as abstracted in 52 OHIO BAR 272 (1979); Town & Country Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975). *But see* First Nat'l Bank of Akron v. Branan, No. 8696 (Summit County Ct. App., filed Nov. 15, 1978). The abstract in 52 OHIO BAR 119 (1979), tells us: "Motion for vacation of journal entry. Held: vacated. Court failed to give notice of the decision to all counsel of record." *Compare* that case *with* Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433 (1910), where it is said at paragraph 3 of the syllabus:

> A judgment by default, rendered by the superior court of Cincinnati, upon default, in every way regular on its face, cannot be suspended nor execution thereon stayed by that court on a motion filed at a subsequent term for an alleged irregularity in obtaining such judgment where such irregularity consists solely in the failure of the clerk

judgment methods of obtaining judicial compliance with local rules of court are the appeal and the motion for a new trial; and the latter is available only after there has been a trial of the issues raised by the pleadings; in the absence of such an "old trial," the motion for a new trial will not lie,[154] and the only practical method remaining is the appeal.

B. *Compliance by the Parties*

The court has available to it a wide variety of sanctions which it may use to ensure compliance by the parties. If local rule pertains to form or to filing, for example, the court can compel the parties to comply with that local rule by striking an offending document from the court's files. Since minor sanctions such as this almost never lead to the final disposition of the action, they seldom present any problems. Rather, problems arise when the court attempts to impose the more severe sanctions of dismissal or default judgment. Accordingly, the balance of this discussion will be limited to those sanctions.

If the local rule pertains to discovery identical to, or similar to, the discovery which may be had under Civil Rules 26 through 36,[155] and if the local rule is phrased in such a way that it is a self-executing standing order of the court,[156] the court can punish noncompliance by imposing one or more of the sanctions listed in Rule 37(B), including the sanction of

---

to note such judgment on his appearance docket, and of the plaintiff to give notice thereof in the Court Index, a newspaper, for three successive days, notwithstanding both such acts purport to be required by a rule of that court.

Id., 92 N.E. at 433.

[154] Browne, *The Finality of an Order Granting a Rule* 60(B) *Motion for Relief from Judgment: Some Footnotes to GTE Automatic Electric, Inc. v. ARC Industries, Inc.* 26 CLEV. ST. L. REV. 13 (1977); Note, *The Meaning of the Term "Trial" Within the Ohio Rules of Civil Procedure*, 25 CLEV. ST. L. REV. 515 (1976).

[155] *See, e.g.*, Rule 15(B) of the Rules of the Court of Common Pleas, Hamilton County, which states in pertinent part:

> In furtherance of Civil Rule 16(10), the judge to whom the cause is assigned may, on his own motion, or at the request of any trial attorney appearing in the cause shall require any trial attorney before, at or after such formal pretrial conference, to provide all other trial attorneys appearing in the cause, a list of the names, identities and whereabouts of each witness expected to be called at the trial, together with a brief statement of what the trial attorney proposes to establish by the testimony of each such witness. Only such material points which the trial attorney proposes to establish by the testimony of such witnesses need be disclosed, but the refusal or willful failure of any trial attorney to disclose a material point may render evidence on that point inadmissible at the trial.

Rules such as this provide for discovery similar to that which may be obtained by way of interrogatory under OHIO R. CIV. P. 26(B)(1) and 33, and provide a sanction for disobedience similar to the sanction for resisting discovery found in OHIO R. CIV. P. 37(B)(2)(b): "[The court may make] an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence . . . ."

[156] The local rule used as an illustration in note 155 *supra*, is not self-executing. Before is comes into operation, the judge must "require" the exchange of information pertaining to witnesses to be used at the trial. For a somewhat similar rule and a discussion of its application, *see*, Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214 (1977), as discussed in note 140 *supra*.

dismissal or default judgment.[157] Accordingly, if a local rule were to say that parties attending a pretrial conference "shall" exchange the reports of expert witnesses, the rule is self-executing, and a party who fails to make the exchange may be sanctioned under the provisions of Civil Rule 37(B).[158] On the other hand, if the local rule is not phrased as a self-executing standing order of court, a party cannot be sanctioned for noncompliance with the rule unless the court has "activated" the rule by a specific court order commanding obedience with its precepts.[159] Thus, if a local rule states that the court "may require" the parties to exchange the reports of expert witnesses at a pretrial conference, a party cannot be sanctioned for not doing so unless the court does "require" the exchange by a journalized court order implementing this aspect of the local rule.[160] Once activated by specific order, however, the local rule must be obeyed, or the noncomplying party will be subject to Rule 37(B) sanctions.[161] But whatever the nature of the rule, the severe sanction of dismissal with prejudice, or default judgment, cannot be imposed unless the court is satisfied that the party's noncompliance was due to willfulness, bad faith, or other fault, and not due to inability.[162] Whether or not this determination requires a separate hearing[163] will largely depend upon circumstances. If the non-

[157] *See* OHIO R. CIV. P. 16(8), which states: "A court may adopt rules concerning pretrial procedure to accomplish the following objectives: . . . (8) The imposition of sanctions as authorized by Rule 37 . . . ." And *see* Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214 (1977). *But see* Sexton v. Sugar Creek Packing Co., 38 Ohio App. 2d 32, 311 N.E.2d 535 (1973). To the extent that *Sexton* appears to require a second, specific court order to implement a self-executing local rule, it is wrong; the self-executing rule is itself the "discovery order," and noncompliance with it puts the noncomplying party in jeopardy of sanctions under the provisions of OHIO R. CIV. P. 37(B).

[158] *Id. But see* Sexton v. Sugar Creek Packing Co., 38 Ohio App. 2d 32, 311 N.E.2d 535 (1973), which does not appear to recognize the distinction between a self-executing local rule, and one that requires "activation" by a specific court order.

[159] *See* the authorities cited and discussed in notes 140 and 157 *supra.*

[160] *Id.*

[161] Inner City Wrecking Co. v. Bilsky, 51 Ohio App. 2d 220, 367 N.E.2d 1214 (1977); Sexton v. Sugar Creek Packing Co., 38 Ohio App. 2d 32, 311 N.E.2d 535 (1973).

[162] Ward v. Hester, 36 Ohio St. 2d 38, 303 N.E.2d 861 (1973).

[163] The term "hearing," as it is used in the Ohio Rules of Civil Procedure and elsewhere, continues to be a perplexing one. Does it necessarily import an oral hearing? At least one recent decision suggests that this question can be answered by the context in which the word appears:

> A careful review of the Ohio Rules of Civil Procedure demonstrates that whenever these rules intend that a hearing shall be held such intention is clearly expressed. For example, it is stated in clear language in Civ. R. 12 that a hearing and determination are required before trial on application of any party when the defenses enumerated in Civ. R. 12(B)(1) through (7) are raised.
>
> . . . .
>
> On the other hand, when it is discretionary as to whether an oral hearing will be given, language similar to that contained in Civ. R. 56(C) is used. For example, Civ. R. 6(D) states that a notice of hearing shall be served not later than 7 days before the time fixed for the hearing on a motion for relief from judgment. The language in Civ. R. 56(C) provides that a notice of a hearing shall be served not later than 14 days before the time fixed for tthe hearing. Neither Civ. R. 6(D) nor Civ. R. 56(C) require that there be a hearing on every motion.

Gates Mills Inv. Co. v. Village of Pepper Pike, 59 Ohio App. 2d 155, 162-63, 392 N.E.2d

compliance is part of a pattern, or if it takes place in the presence of the court, then it may be that the court can properly assess the noncomplying party's motivation without further inquiry,[164] but if the noncompliance is a singular incident such as nonappearance at a scheduled pretrial, the noncomplying party ought to have some opportunity to explain his default, and by tradition, such an opportunity is a hearing prior to the imposition of the sanction.[165]

If there is no element of discovery in the local rules, or if the discovery element of the local rules is not invoked by the court,[166] it is more difficult to find any express authority for the imposition of sanctions for noncompliance with the local rules. A very liberal reading of *Schreiner v. Karson*[167] yields the suggestion that the trial court might impose any one or more of the sanctions listed in Civil Rule 37, not on the ground that a discovery order has been disobeyed, but on the theory that Rule 37 is a restatement of those sanctions that are within the court's inherent power to impose. As the court puts it:

1316 (1978). But this argument is not convincing.

> Whatever may be the full meaning of the word, it cannot mean less than this: the opportunity to submit evidence and/or arguments to the court, and the right to have that material carefully considered by the court prior to a ruling. If this minimum standard can be satisfied by briefs or other written memoranda, then an oral hearing would not be required; otherwise, it would seem that the concept of due process would not be satisfied by anything less than an oral hearing.

---

[164] Ward v. Hester, 36 Ohio St. 2d 38, 303 N.E.2d 861 (1973). *See also* Curtis v. Chiaramonte, 53 Ohio St. 2d 15, 371 N.E.2d 839 (1978); Cherry v. Baltimore & O.R.R., 29 Ohio St. 2d 158, 280 N.E.2d 380 (1972); Sergio v. Haytcher, No. 78 AP-65 (Franklin County Ct. App., filed July 11, 1978), as abstracted in 51 OHIO BAR 1203 (1978); Schreiner v. Karson, 52 Ohio App. 2d 219, 369 N.E.2d 800 (1977).

[165] *Cf.* Ries Flooring Co. v. Dileno Constr. Co., 53 Ohio App. 2d 255, 373 N.E.2d 1266 (1977). Here, the defendant failed to appear at a status call, and a default judgment was entered against it as a sanction. In affirming the trial court's subsequent vacation of that judgment, the Court of Appeals for Cuyahoga County said:

> If the party who has failed to appear also fails to appear at the default hearing or if he does appear at the default hearing but fails to adequately explain his original nonappearance, the court could properly enter a default judgment against him at that time.
>
> Further, by holding a hearing on the motion and creating a record, the issue is immediately appealable. The trial court and the parties are saved the additional time and expense of holding a separate hearing pursuant to Civil Rule 60(B) for the nonappearing party to present his reasons for his failure to appear and moving to vacate the default judgment.

Id. at 262-63, 373 N.E.2d at 1270-71. In other words, where the noncompliance with the local rule is singular and unexplained, the noncomplying party ought to be given an opportunity to explain his or her noncompliance at a hearing held prior to the imposition of the sanction. Of course, if the hearing reveals an adequate explanation for noncompliance, no sanction should be imposed.

[166] Local rules pertaining to pretrial conferences generally have an element of discovery in them to the extent that they govern the exchange of the reports of expert witnesses, the names of ordinary witnesses to be called at trial, and the like, but not every pretrial conference will invoke these elements of the rule. For example, a pretrial conference called solely for the purpose of discussing settlement possibilities has no discovery overtone, and does not invoke the discovery elements of the local rule governing pretrials.

[167] 52 Ohio App. 2d 219, 369 N.E.2d 800 (1977).

> Less harsh sanctions [than dismissal with prejudice] could easily be imposed. The trial court could have dismissed without prejudice or ordered a trial on such conditions as were just and reasonable. The court could have limited plaintiff's case to those witnesses named in the discovery proceedings. Court costs and certain of defendant's attorney's fees could be imposed. All of these disciplinary weapons could have been utilized.[168]

Although no mention of Civil Rule 37 is made in this passage, it is reasonably clear that the court's recitation of the sanctions available parallels the list of sanctions in Rule 37, and from this we might conclude that the court views Rule 37 as a restatement of that which is within the court's inherent power. Over against this theory, however, is the fact that the case did not involve the noncompliance with a local rule, but did, in part, involve a failure to respond to a request for discovery.[169] Thus, the basis for our argument is not as pure as it might be.

Whatever may be the case with respect to the lesser sanctions, there is reasonably good authority for the proposition that a dismissal of the action may be used to sanction a claimant who has failed to comply with a local rule. Civil Rule 41(B)(1) provides in material part: "Where the plaintiff fails . . . to comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." Now, the term "these rules" obviously applies to the Ohio Rules of Civil Procedure, and local rules are not part of the Ohio Rules of Civil Procedure. Therefore that portion of Rule 41(B)(1) which refers to noncompliance with "these rules" cannot be used to authorize a dismissal. But as we have seen above, local rules which impose affirmative duties on claimants are generally of two types — either self-executing standing orders of court, or rules which are "activated" by a specific court order.[170] In either event, the noncompliance with such rule is the noncompliance with a "court order," and as such, it falls squarely within the embrace of Rule 41(B)(1).

Again, however, the severe sanction of dismissal with prejudice ought not be imposed unless the noncompliance was due to willfulness, bad faith, or other fault.[171] Accordingly, the offending party must be given an op-

---

[168] *Id.* at 223-24, 369 N.E.2d at 803.

[169] "Over the course of the litigation, defendant sent three sets of interrogatories to Robert Schreiner, who was generally dilatory in answering. Despite an order compelling him to do so, Robert Schreiner did not answer the third set of interrogatories. He was also dilatory in providing defendant with the report of his expert witness." *Id.* at 220, 360 N.E.2d at 801.

[170] *See* text accompanying notes 155-59 *supra*.

[171] As it is put in paragraph 2 of the syllabus of Schreiner v. Karson, 52 Ohio App. 2d at 219, 369 N.E.2d at 801: "Lesser sanctions than dismissal with prejudice before trial should be applied unless a plaintiff's conduct is so negligent, irresponsible, contumacious, or dilatory as to provide substantial grounds for such a dismissal." How does this compare with the "willfulness, bad faith, or other fault" of Ward v. Hester, 36 Ohio St. 2d 38, 303 N.E.2d 861 (1973)? Contumacy and dilatory conduct fall comfortably within the concepts of willfulness

portunity to explain his or her noncompliance with the rule, and to this end, Civil Rule 41(B)(1) provides for notice to the party's counsel. But if *Schreiner* and *Repp v. Horton*[172] are true guides on this question of notice, special notice of the impending dismissal need not be given prior to the dismissal itself. Rather, we may extrapolate the following rule from what is said in those two cases: If the local rule clearly specifies dismissal as the sanction for noncompliance, then the local rule itself is sufficient notice to the parties, and noncompliance with the rule gives rise to the presumption of willfulness. This presumption may be rebutted by a post-dismissal motion proceeding in which the offending party demonstrates that his or her noncompliance was due to inability rather than willfulness.[173] If the dismissal does not qualify as a judgment under the provisions of Civil Rule 54, and more particularly, subsection (B) thereof, the appropriate post-dismissal vehicle for rebutting the presumption is a motion for rehearing;[174] but if the dismissal qualifies as a judgment, the appropriate post-dismissal vehicle is the Civil Rule 60(B) motion for relief from judgment.[175]

---

and bad faith, but it would seem that negligence and irresponsibility are specifications under the general charge of "other fault."

Point Rental Co. v. Posani, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (1976), and Ledwell v. May Co., 54 Ohio Misc. 43, 377 N.E.2d 798 (Cuyahoga County C.P. 1977), may also be cited for the proposition that a willful and deliberate failure to obey a court order merits a dismissal with prejudice, although in *Ledwell* the court opted for a dismissal without prejudice.

[172] 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974).

[173] Paragraph 3 of the *Schreiner* syllabus puts the rule in a nutshell:

> A trial judge's failure to give notice of the dismissal of a plaintiff's case, pursuant to Civ. R. 41(B)(1), does not prejudicially deny plaintiff due process of law where notice can reasonably be implied or where plaintiff has challenged the propriety of the order through motions subsequent to the dismissal.

Schreiner v. Karson, 52 Ohio App. 2d at 219-20, 369 N.E.2d at 801. *Schreiner*, of course, does not involve a local rule of court. But the following remark from *Repp* warrants the conclusion that the local rule itself may be adequate notice if it is explicit as to the consequence for noncompliance:

> The evidence clearly demonstrates that counsel for the defendant and the representative of the insurance company were well aware of Rule 21. It cannot be said that they had no notice of the consequences of their failing to appear as provided by Rule 21 (H)(2). [The explicit sanction for a violation of Rule 21(H)(2) was given in Rule 21(G)(2) in the following terms. "To order the plaintiff to proceed with the case and to decide and determine all matters ex parte upon failure of the defendant to appear in person or by counsel at any pretrial conference or trial as required in (H)(2) of this Rule."] As noted above, Rule 21(H)(2) is a reasonable exercise of the power of the court to make local rules. Therefore, we find that a defendant, having notice of the court rules, yet failing to appear as provided, has waived his rights to a trial by jury and to participate in the hearing, and the court may proceed to determine the matter ex parte.

Repp v. Horton, 44 Ohio St. 2d at 68, 335 N.E.2d at 726.

[174] *See* note 136 *supra.*

[175] In most cases, the ground for relief will be either mistake, inadvertence, surprise, or excusable neglect. *See* OHIO R. CIV. P. 60(B)(1).

The use of a 60(B) motion in these circumstances does not violate the injunction against using that motion as a substitute for an appeal. (*See* note 149 *supra.*) Assuming that noncompliance with the rule was due to inability rather than willfulness, no error in entering the dismissal will appear on the face of the record until after the court denies the motion for relief from judgment. But if no error appears on the face of the record, no appeal is possible until after the denial of the motion. Therefore, the motion cannot be a substitute for an appeal; if anything, it is a prerequisite to the taking of an appeal.

Penalty defaults are not as easily dealt with as penalty dismissals because they differ from the latter in three important respects: (1) In the absence of Civil Rule 37 (which we assume does not apply when there is no element of discovery involved), there is no express authority in the Civil Rules for the entry of a penalty default judgment for failure to comply with a court order, that is, there is no default counterpart to Civil Rule 41(B)(1)'s penalty dismissal. (2) There are no gradations of severity; a penalty dismissal may be terminal (on the merits) or a slap on the wrist (otherwise than on the merits),[176] but all penalty defaults are terminal; that is, they are on the merits. (3) There is a question of the quantity and quality of the relief to be granted to the claimant; a question that does not arise when the claimant is denied all relief because his or her claim is dismissed.

The Court of Appeals for Cuyahoga County has attempted to avoid the difficulties which flow from these differences by bringing penalty defaults under the aegis of Civil Rule 55.[177] But Rule 55 does not provide for penalty defaults; it provides only for defaults on the issues raised in the statement of claim. (For want of a better term, we might say that Rule 55 provides for defaults "on the merits.") By the express terms of Rule 55(A), a party is in default only if he or she fails "to plead or otherwise defend as provided by these rules"; that is, a party is in default only if he or she fails to serve a responsive pleading to the opposing party's statement of claim when a responsive pleading is required by the Civil Rule (failure to plead), or if he or she fails to assert a challenge to the jurisdiction, the venue, the joinder of parties, or the adequacy of the statement of claim, in lieu of serving a responsive pleading to the statement of claim (failure to otherwise defend).[178]

This matter can be better understood if it is approached from the perspective of Civil Rules 8 and 12. These rules contemplate either (1) a response to the merits of the claimant's claim for relief, or (2) a challenge to jurisdiction, venue, joinder of parties, or the adequacy of the claimant's statement of the claim for relief, or (3) both a response and a challenge, after the claimant's statement has been served on the defender. The defender may include both the response to the merits and the challenge in the responsive

[176] *See* Schreiner v. Karson, 52 Ohio App. 2d 219, 369 N.E.2d 800 (1977); Point Rental Co. v. Posani, 52 Ohio App. 2d 183, 368 N.E.2d 1267 (1976); Ledwell v. May Co., 65 Ohio Misc. 43, 377 N.E.2d 798 (Cuyahoga County C.P. 1977); and OHIO R. CIV. P. 41 (B)(1) and (3).

[177] *See,* in the order in which they were decided: Meinhard Coml. Corp. v. Spoke & Wheel, Inc., 52 Ohio App. 2d 198, 368 N.E.2d 1275 (1977); Ries Flooring Co. v. Dileno Constr. Co., 53 Ohio App. 2d 255, 373 N.E.2d 1266 (1977); Carter v. Johnson, 55 Ohio App. 2d 157, 380 N.E.2d 758 (1978); and Schultz v. Cleveland Psychiatric Inst., No. 37537 (Cuyahoga County Ct. App., filed July 27, 1978), as abstracted in 51 OHIO BAR 1174-75 (1978).

[178] *See* Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949), where it is said: "The words 'otherwise defend' refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits."

pleading, or he or she may assert the challenge by motion made prior to the responsive pleading. If the defender elects to do the latter, no response to the merits is required unless and until the challenge is overruled, but if the challenge is overruled, a response on the merits then becomes necessary. If the defender fails to respond to the merits in lieu of a challenge, fails to respond to the merits with the challenge, or fails to respond to the merits after the challenge has been overruled, he or she admits the averments in the statement of claim other than an averment as to the amount of damages suffered by the claimant.[179] In other words, by failing "to plead [i.e., respond to the merits] or otherwise defend" (i.e., challenge), the defender admits the truth of the claimant's claim, but not the amount of damages suffered by the claimant. It is this admission, coupled, when necessary, with evidence as to the amount of damages to be awarded, that warrants the entry of a default judgment under the terms of Rule 55(A). But the noncompliance with a local rule of court cannot be either authorized or justified by the averments in the claimant's statement of claim,[180] and in the absence of such an admission, no default judgment can be entered under the provisions of Rule 55. Therefore, a penalty default solely for noncompliance with a local rule of court cannot be either authorized or justified by the provisions of Civil Rule 55, and that rule has no application to penalty defaults. Rather, if penalty defaults are to be justified at all, they must be justified under the court's inherent power to punish disobedience of its orders.[181] And it is that conclusion that brings us to the basic question: Under what circumstances may the court exercise that inherent power, and what is the scope of the default judgment which it may enter in the exercise of that power?

---

[179] *See* OHIO R. CIV. P. 8(D), which states in pertinent part: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

[180] It may, of course, do so indirectly. For example, if a responsive pleading is stricken from the files because it does not comply with a local rule, and the court does not permit the service and filing of an amended responsive pleading, the defender will have failed to plead or otherwise defend, and a default judgment could be entered.

[181] Judge Corrigan appears to recognize the court's inherent power to punish by means of a penalty default, but he also appears loath to divorce the exercise of this power from the provisions of OHIO R. CIV. P. 55. Thus, in his dissenting opinion in Ries Flooring Co. v. Dileno Constr. Co. he says:

> Further, an exception is taken to the holding of the majority that the court's entry of judgment was improper because the court did not notify the appellee seven days prior to the entry of judgment. Such a strict construction of the language of the rule would prevent every court from exercising its inherent power to enter a judgment against any party who either intentionally or unintentionally absents himself from the trial of a case.
>
> The clear purpose of the seven day notice provision is to afford notice to the party who has entered an appearance in the case and against whom a default judgment is sought. The rule was not intended to prevent a trial court from proceeding to enter a judgment in a case that is at issue and is set for trial after notice is given and a party absents himself from the trial.

53 Ohio App. 2d at 265, 373 N.E.2d at 1272. His concurring opinion in Schultz v. Cleveland Psychiatric Inst., No. 37537 (Cuyahoga County Ct. App., filed July 27, 1978), is practically an echo of the above.

We may reasonably suppose that what has already been said with respect to Rule 37 penalty defaults and Rule 41(B)(1) penalty dismissals is equally true with respect to penalty defaults entered pursuant to the exercise of inherent power—they may not be entered unless the offending party's disobedience of the court's order was due to willfulness, bad faith, or other fault. Thus, we must again face the problem of motivation, and the concomitant problem of notice to the non-complying party and the opportunity for him or her to be heard; a problem which cannot be solved by the easy reference to the "notice" provisions of Civil Rule 55. We could, of course, solve the problem by indulging in the presumption which we discussed above in connection with the penalty dismissal[182] (and such a solution would probably be valid enough), but the second question raised by the concept of a penalty default suggests an answer more in harmony with the solution adopted by the majority in *Ries Flooring Co.*[183]

The second question goes to the scope of the penalty default. Does it extend to questions of liability only, or does it also concede the relief (including the *amount* of damages) sought by the claimant? Unlike a Rule 55(A) default on the merits, a penalty default is not the child of Rules 8 and 12. Therefore, there is nothing in the Civil Rules that limits a penalty default to liability only.[184] On the other hand, it is a truism to say that the average claimant's demand for relief — especially where money damages are being sought — is so grossly exaggerated that it bears absolutely no relationship to reality whatsoever. Accordingly, to hold that a penalty default also concedes the amount of damages being sought by the claimant would be to sanction a travesty. And what is said here with respect to money damages is equally applicable to other forms of relief.

The better rule, then, is that a penalty default is a default as to liability only, and does not concede the relief being sought by the claimant. That being so, the court must hold a hearing to determine the quality and quantity of relief to be granted the claimant. And that hearing brings us to the rule of *Ries Flooring Co.*[185] Since the offending defender has the right to participate in the hearing, and to contest the claimant's demands for relief, he or she must be given adequate notice of the time and place of the hearing. But that notice can also inform the defender that the penalty default will not be imposed if he or she can adequately explain the non-

---

[182] *See* text following note 172 *supra.*

[183] *See* that portion of Ries Flooring Co. v. Dileno Constr. Co., 53 Ohio App. 2d 255, 373 N.E.2d 1266 (1977), that is quoted in note 165 *supra.*

[184] In actions seeking money damages, a default on the merits concedes liability only; the claimant must still prove the amount of damages. *See* OHIO R. CIV. P. 8(D), as quoted in note 179 *supra.*

[185] *See* that portion of Ries Flooring Co. v. Dileno Constr. Co., 53 Ohio App. 2d 255, 373 N.E.2d 1266 (1977), that is quoted in note 165 *supra.*

compliance with the local rule that triggered the punitive proceeding. Then, as Judge Jackson puts it:

> If the party who has failed to [comply with the local rule of court] also fails to appear at the default hearing or if he does appear at the default hearing but fails to adequately explain his original [noncompliance], the court could properly enter a default judgment against him at that time.[186]

Thus, the hearing serves either of two purposes: it exonerates the defender or, having found the defender culpable of willfulness, bad faith, or other fault in his or her noncompliance, it determines the amount and type of relief to be granted the claimant.

> Further, by holding a hearing on the [defender's motivation with the hearing on the relief to be granted if default is entered, and thereby] creating a record, the issue is immediately appealable. The trial court and the parties are saved the additional time and expense of holding a separate hearing pursuant to Civil Rule 60(B) for the [noncomplying] party to present his reasons for his failure to [comply] and moving to vacate the default judgment.[187]

Now there is no great difference between this procedure and that prescribed by Civil Rule 55. But it is important to keep in mind that this procedure is wholly outside the bounds of Rule 55, and is not controlled by that rule. Therefore, the strict *seven day* notice requirement of that rule need not be observed, and Judge Corrigan's objections are satisfied.[188]

Finally, note must be taken of a second sanction which may be employed against a noncomplying defender — the ex parte proceeding. Although the courts have demonstrated an alarming tendency to confuse the ex parte proceeding with a penalty default,[189] there are significant differences between them. As we have seen above, a penalty default concedes the question of liability, and the claimant need only prove the amount of his or her damages. But an ex parte proceeding concedes nothing; the claimant must prove both liability and the amount of damages. The defender, however, may not participate in the presentation of evidence, and may neither challenge nor contest the claimant's proofs.[190] It is this denial of an op-

---

[186] Ries Flooring Co. v. Dileno Constr. Co., 53 Ohio App. 2d at 262, 373 N.E.2d at 1270.

[187] *Id.* at 262-63, 373 N.E.2d at 1270-71.

[188] For Judge Corrigan's objections, *see* note 181 *supra.*

[189] *See, e.g.,* Martin v. Alvin Homes, No. 37740 (Cuyahoga County Ct. App., filed Nov. 2, 1978), as abstracted in 52 OHIO BAR 57-58 (1979) (emphasis added):

> In a home improvement contract case, appeal from *default judgment* against Defendant. Held: affirmed. "Cuyahoga County Court of Common Pleas Rule 21, Part II(G)(2) specifically provides that the court may *proceed ex parte* with the case upon defendant's failure to appear if required to appear by subsection (H)(2) of the rule." (Emphasis added)

[190] As it is said in Repp v. Horton, 44 Ohio App. 2d at 68, 335 N.E.2d at 726: "[A] defendant, having notice of the court rules, yet failing to [comply with them] as provided, has waived his rights to a trial by jury and to participate in the hearing, and the court

portunity to participate in the hearing that is the sanction imposed on the defender for noncompliance with the local rule.

Theoretically, an ex parte proceeding should be a less severe sanction than a penalty default, since the court's judgment must be based on the evidence presented by the claimant. But the court is not likely to examine that evidence too closely when it is unchallenged, and this is especially so if the court has demonstrated its inability to distinguish between a true ex parte proceeding and a penalty default.[191] Therefore, as a practical matter, the ex parte proceeding is about on a par with a penalty default.

Because there is very little practical difference between the effect of either, the ex parte proceeding should be allowed only under the same circumstances as would warrant the entry of a penalty default — that is, when the defender's noncompliance with the local rule is due to willfulness, bad faith, or other fault. Thus, we are again faced with the problem of motivation, notice and hearing.

To the extent that the courts have spoken to the point, they have solved the problem by indulging in a presumption of willfulness, bad faith, or other fault if the offending party can be held to have had notice of the local rule, and if the local rule clearly spells out the sanction that will be imposed if it is not obeyed.[192] Indeed, the courts have said (albeit, by way of *dictum*) that when noncompliance with such a rule consists of nonappearance at a scheduled proceeding, the court may proceed ex parte without giving the offending party any advance notice of its intention to do so, or any advance opportunity to explain his or her noncompliance.[193] In any event, after the entry of a decision following the ex parte proceeding, the noncomplying defender may attempt to exonerate himself or herself by means of the same post-decision motions that are available after the entry of a penalty dismissal — a motion for rehearing, if the entry is interlocutory in nature, or a motion for relief from judgment, if the entry is a final order.

In sum, then, the courts may enforce party compliance with local rules of court through a wide range of sanctions, including, but by no means limited to, penalty dismissals, penalty defaults, and ex parte proceedings.

---

may proceed to determine the matter ex parte." *See also* Martin v. Alvin Homes, No. 37740 (Cuyahoga County Ct. App., filed Nov. 2, 1978), as abstracted in 52 OHIO BAR 57-58 (1979).

[191] *See* note 189 *supra.*

[192] *See* Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974), as quoted in notes 173 and 190 *supra.*

[193] Thus, in Ries Flooring Co. v. Dileno Constr. Co. we find:

> There is additional authority in other jurisdictions holding that a court could immediately proceed with hearing evidence from the appearing party in the action and enter a judgment "on the merits." Such a procedure would not be pursuant to Rule 55 and no notice would be required, *Coulas v. Smith* (1964), 96 Ariz. 325, 395 P.2d 527; Staff Notes Civil Rule 55(A).

53 Ohio App. 2d at 263 n.8, 373 N.E.2d at 1271 n.8.

These latter three, however, should not be used unless the noncompliance was due to willfulness, bad faith, or other fault. But if the local rule in question clearly lists any one of these three sanctions as the punishment for noncompliance, then the court may presume that noncompliance is culpable in the degree required. Such presumption, however, is rebuttable, and the noncomplying party must ordinarily be given an opportunity to rebut it either before the imposition of the sanction, or by means of a post-decision motion proceeding after the imposition of the sanction.

CONCLUSION

This article began with a justification for local rules of court, and an admonition that they be studied and obeyed. It is appropriate, then, that it close with a like justification and admonition. It is the author's good fortune to find both in the language of the Ohio Supreme Court:

> There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court. They are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto. Not to be minimized is the necessity of compliance as an accommodation to the correct dispatch of the court's business. But our overarching concern is that the legitimate interests of litigants be protected to the utmost. To this end, our profession is committed, and adherence to our rules should be dedicated.[194]
>
> The failure of a member of the bar to comply with the [rules of this court] not only places in jeopardy his client's interests, which deserve the utmost protection, but necessarily wrongs those members of the bar who labor to adhere to the rules.[195]

These two remarks say all that really needs to be said on the subject, and although they are addressed to the supreme court's own Rules of Practice, they could be made with equal fervor by any of the inferior courts that have enacted local rules.

---

[194] Drake v. Bucher, 5 Ohio St. 2d 37, 39-40, 213 N.E.2d 182, 184 (1966).

[195] *Id.* at 37, 213 N.E.2d at 183 (Syllabus, ¶ 2).