

157, 149 N.W. 985, L.R.A. 1915C 362 (1914); *McCarthy v. Henderson*, 138 Mass. 310 (1885).

A growing view is that adopted by the Federal Court and several State Courts to the effect that the seller may retain an amount which will compensate him for the depreciation in value of the article due to the infant's use or abuse, which amount cannot exceed the sum paid in advance by the infant. *Mestetzko v. Elf Motor Co.*, 119 Ohio St. 575, 165 N.E. 93 (1929); *Myers v. Hurley Motor Co.*, 273 U.S. 18, 71 L.Ed. 515, 50 A.L.R. 1181, 47 S. Ct. 277 (1927); *Rich v. Butler*, 160 N.Y. 578, 47 L.R.A. 303, 73 Am. St. Rep. 303, 55 N.E. 275 (1899); *Garther v. Wallingford*, 101 Or. 389, 200 P. 910 (1921).

It appears that the courts, in deciding cases relating to the counterclaim of the seller, do not give him damages unless there is something positive that has occurred such as deterioration caused by the use of the article by the infant. Consequently, the lessor in the principal case was rightly denied damages arising out of his inability to lease promptly to another when the infant lessees took advantage of their privilege to rescind.

NOAH J. KERN.

DOMESTIC RELATIONS

GROUND'S FOR DIVORCE—DESERTION AS GROSS NEGLIGENCE OF DUTY—EPILEPTIC SPOUSE.

The plaintiff filed her petition for divorce charging extreme cruelty. The defendant cross-petitioned alleging gross neglect of duty. The defendant was an epileptic and plaintiff had become quite proficient in caring for him. Two months after she left him she began this action. The Supreme Court of Ohio affirmed the decree granting the defendant the divorce holding that the desertion under the circumstances constitute gross neglect of duty. *Porter, Ex'r. v. Lerch*, 129 Ohio St. 47, 193 N.E. 766 (1934).

Failure or neglect to perform marital duties is an element in gross neglect. There is some authority that this alone is sufficient to constitute the cause of action. *Lee v. Lee*, 132 Pac. 1070 (Okl., 1913). The court there held that a substantial failure of a husband to provide suitably for his wife's support when he is able to do so is gross neglect of duty. It is to be noted that the husband's ability to provide was a circumstance. The query as to whether it is a substantial factor is answered in *Nail v. Nail*, 2 Ohio Dec. (Rep.) 501 (1861), where the court

expressly provided that the husband's ability should accompany his failure or neglect to provide. "Ability" in statutes authorizing a divorce when the husband refuses or neglects to provide for his wife has been construed by some courts to mean the possession of property which can be applied to that purpose. Thus the divorce was denied where the husband was imprisoned, *Hammond v. Hammond*, 15 R.I. 40, 23 Atl. 143 (1885); where husband had only daily earnings to support himself and wife, *Stewart v. Stewart*, 155 Mich. 421, 119 N.W. 444 (1909), where husband did not have requisite amount of money or property even though he was shiftless and lazy, *Farnsworth v. Farnsworth*, 58 Vt. 555, 5 Atl. 401 (1886); *Berry v. Berry*, 18 O.N.P. (N.S.) 521 (1915).

It is generally held that the word "gross" is not redundant, that it means something more than mere neglect. "Gross" means some circumstances of aggravation, or wilfulness, 14 O. Jur. p. 394, indignity or aggravation or insult. *In re Gross Neglect*, 8 Ohio Dec. 701 (1897). Examples of such circumstances are: insulting language, *Holland v. Holland*, 8 Ohio Dec. (Reprint) 460 (1892), or excessive drinking, *Zeigler v. Zeigler*, 7 Ohio Dec. (Reprint) 139 (1876) or gambling away the family income, *Holland v. Holland, supra*, or refusal of wife to cohabit for an unreasonable length of time and failure to perform household duties, *Leach v. Leach*, 46 Kan. 724 (1891), or, after getting his property, driving her husband from the house and preferring against him a false charge of insanity, *Osterhout v. Osterhout*, 30 Kan. 746 (1883). But in *Dunbar v. Dunbar*, 4 Ohio Dec. (Reprint) 237 (1878) a gross neglect of duty was not established where the wife ordered her husband to leave the house and finally abandoned him after getting his property.

As the court in the principal case observed, gross neglect of duty is elusive of definition. There is little doubt, however, that the sound discretion of the court, which is the ultimate test, is based on social policies and the special facts of each case.

R. HAROLD THOMAS.

MODIFICATION OF DIVORCE DECREE BASED ON AGREEMENT —PROVISION FOR ALIMONY AND SUPPORT OF CHILD.

A decree for divorce embodied an agreement between husband and wife for the provision of alimony and the support of the child. Subsequently, due to a change of conditions, the husband applied to the court to decrease the amount of the weekly payments. *Held*, because of the