SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 4 | Issue 3 Article 15

1953

Domestic Relations

Robert C. Bensing

tirely controlled by statute and that no statute in this state authorized it. In so deciding, the court considered Sections 12056, 12060, 12067, and 12069 of the General Code.

EDGAR I. KING

DOMESTIC RELATIONS

Divorce and Alimony

In *Cousino v. Cousino*[1] the trial court found that the parties "were living in the same home at the time the cause came on to be heard" and dismissed the divorce action. On appeal it was held that while cohabitation will be inferred from the living together of the parties, and condonation will be inferred from the living together of the parties, and condonation of aggression will be inferred from cohabitation if the contrary does not appear, where the evidence discloses that the parties had no sexual relations during the pendency of the action dismissal upon the ground that the parties were living in the same house, and that the aggression was thereby condoned, was error.

It was held in *Dexter v. Taylor*[2] that in an action for divorce and alimony brought against a non-resident defendant, or one whose residence is unknown, the trial court could subject real estate located within its territorial jurisdiction to the claim for alimony upon service by publication even though the realty was neither described nor specifically mentioned either in the petition or in the publication.

In *Justice v. Justice*[3] the court decreed that in an action for alimony only wherein a separation decree and alimony was awarded to the wife a reconciliation and resumption of cohabitation for four months, followed by another separation, did not affect the separation decree; and that such decree could be nullified only by a court upon reasonable application of both parties for a consent order or upon application of one party and a finding by the court that the reconciliation or continued cohabitation was such a change of circumstances that would warrant voiding the decree.

The decision rests upon sound reasoning for, as pointed out by the court, a contrary rule would either discourage reconciliation or encourage a scheming party to attempt a reconciliation solely to escape the decree of the court.

---

[1] 90 Ohio App. 449, 107 N.E.2d 213 (1952)

[2] 107 N.E.2d 402 (Ohio App.), *appeal dismissed*, 156 Ohio St. 182, 101 N.E.2d 502 (1951)

[3] 108 N.E.2d 874 (Erie Com. Pl. 1952).

A case of great interest is *Seitz v. Seitz.*[4] The court held that a decree in a divorce action fixing the amount the husband was to pay for the support of minor children could be consequently modified so as to lessen the amount to be paid for the minors' support even though the court had approved the parents' contract of separation and made it a part of their judgment entry since the court retained jurisdiction by stating in the judgment entry that the amount agreed upon was to be paid " until further order of this court."

An interesting case involving the custody of a minor child is *Lockard v. Lockard.*[5] After a divorce by the mother of the minor from the child's natural father, Stubbe, custody of the child was granted to the mother. She subsequently married Lockard, who adopted the child. Later, Lockard was granted a divorce from her and awarded sole custody of the child. The natural father of the child, Stubbe, filed a motion to intervene and modify the custody order. Upon hearing the adoptive father proved that he and the mother were remarried the day before the hearing. The court denied the motion, reasoning that the remarriage terminated the court's jurisdiction over both parties and the minor child.

In *Short v. Short*[6] in an action for annulment on the ground of a prior existing marriage by one of the parties, the court held that while annulment was a proper remedy the common pleas court erred in granting alimony. When a marriage is declared void *ab initio* neither party has a right to alimony since alimony attaches only to a valid marriage.

Insofar as the decision recognizes that an annulment may be granted on the ground of a prior existing marriage of one of the parties the decision has been overruled by *Eggleston v. Eggleston.*[7]

The *Eggleston* case is one of the most important domestic relations cases of the year. The supreme court held that where a marriage is entered into and either party has a spouse living at the time, divorce is the exclusive remedy and an annulment cannot be granted since the Ohio General Code authorizes the granting of a divorce in such a situation.[8] The court, following *Vanvalley v. Vanvalley*[9] and quoting the dictum in *Smith v. Smith,*[10] also held that the trial court is authorized to grant alimony to the petitioner. It is to be noted that impotency and fraudulent contract, like a prior existing marriage, although considered grounds for annulment under the common

---

[4] 156 Ohio St. 516, 103 N.E.2d 741 (1952).
[5] 102 N.E.2d 747 (Geauga Com. Pl. 1951).
[6] 105 N.E.2d 276 (Ohio App. 1950).
[7] 156 Ohio St. 422, 103 N.E.2d 395 (1952).
[8] OHIO GEN. CODE § 11979.
[9] 19 Ohio St. 588 (1869).
[10] 5 Ohio St. 32 (1855).

law, are grounds for divorce in Ohio and hence may be governed by the exclusive remedy rule of the *Eggleston* case.

Husband and Wife: Torts

The problem of whether the wife of a deceased member of a voluntary unincorporated association may maintain an action in tort against the association for a tort committed against her during her husband's lifetime was presented in *Damm v. Elyria Lodge.*[11] The supreme court, in a unanimous decision, held: "In Ohio, the Constitution and the pertinent statutes have the effect of so modifying the common-law rule as to authorize the maintenance of the action by the plaintiff against her husband and consequently against the defendants."[12] While the majority of courts have taken a contrary position, there seems, to use the words of Dean Prosser, " no justification for the majority rule except that of historical survival."[13]

Parent and Child

The question of whether an unemancipated minor may bring a personal tort action against a partnership of which his father is a member was answered affirmatively by the supreme court in *Signs v. Signs.*[14] The court, although recognizing the overwhelming authority to the contrary, stated: " if there was ever a justification for the rule announced in Mississippi in 1891,[15] the justification has now disappeared, and . an unemancipated child should have as clear a right to maintain an action in tort against his parent in the latter's business or vocational capacity[16] as such child would have to maintain an action in relation to his property rights." The opinion is well-written and the position taken seems sound.

The question of whether natural parents of an infant, making a so-called "permanent surrender" to a Family Service Society and Children's Bureau have a right to revoke the "permanent surrender" at any time prior to the actual award of adoption to persons to whom the custody of the child had been surrendered by the society was answered in the affirmative in In re *Adoption of Kane.*[17]

---

[11] 158 Ohio St. 107, 107 N.E.2d 337 (1952).
[12] *Id.* at 121, 107 N.E.2d at 344.
[13] PROSSER, TORTS 904 (1941).
[14] 156 Ohio St. 566, 103 N.E.2d 743 (1952).
[15] Hewlett v. George, 168 Miss. 703, 9 So. 885 (1891).
[16] The writer does not believe that the inclusion of the phrase "business or other vocational capacity" is a limitation on the infant's right to bring suit against his parent, but that the court completely departed from the majority rule. This impression is based upon a reading of the opinion in the *Signs* case and the court's reference to the *Signs* case in Damm v. Elyria Lodge, 158 Ohio St. 107, 117, 107 N.E.2d 337, 343 (1952).
[17] 91 Ohio App. 327, 108 N.E.2d 176 (1952).
[18] 102 N.E.2d 719 (Ohio App. 1951).