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Domestic Relations

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delayed appeal. Not even a charge of unconstitutionality of a statute will help sustain the granting of the writ when the questions raised by the petitioner could have been determined on appeal. The writ may not be used as a substitute for the appeal when the court had jurisdiction of the crime and the person.[135] Another defendant unsuccessfully urged the voidness of the indictment to which he had pleaded guilty as justifying the issuance of the writ.[136] In a third petition the defendant urged errors and irregularities committed during a trial at which he received a sentence under the Habitual Criminal Act. These matters were fully reviewable upon appeal. The per curiam opinion also comments that the record discloses a proper disposition of the case under the statute, as an additional ground for denying the writ.[137]

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DOMESTIC RELATIONS

Interstate Divorce

The attorney or trial judge who has to work in the area of interstate divorce is severely handicapped by the fact that in many key areas the United States Supreme Court has failed to clarify the law and has gone to great lengths to avoid deciding important constitutional questions.[1] While it is not an Ohio case, the recent *Kovacs*[2] decision is worthy of comment, both as an example of this tendency to duck constitutional issues and as an illustration of a problem which has caused considerable difficulty in the Ohio courts.

It is clear that where a child support or custody decree is subject to modification in the state of rendition, it can later be modified by an Ohio court on a showing of change of circumstances.[3] The rationale is that Ohio does not have to give the foreign decree more "full faith and credit" than it would be given in the state where rendered. A convincing argument can be made for the proposition that where the child and one parent are domiciled in Ohio, the Ohio court can redetermine issues of custody and support without any showing of a change in circumstances since the original out-of-state decree. The argument is that the policy basis of a custody determination, "what is for the best interest of the child," outweighs the interest in certainty and finality of litigation, which is the policy behind the full faith and credit clause.

135. *In re* Harley, 167 Ohio St. 48, 146 N.E.2d 121 (1957).
136. State v. Naples, 167 Ohio St. 530, 150 N.E.2d 36 (1958).
137. *In re* Arcieri, 167 Ohio St. 37, 146 N.E.2d 123 (1957).

In the *Kovacs* case the Court refused to decide the question of whether full faith and credit applied to a child custody decree and sent the case back so the North Carolina court could expressly state whether it had refused to follow a prior New York decree because of changed circumstances, or whether the court was holding that the New York custody decree could be ignored in the absence of such a showing. Justice Frankfurter dissented, on the ground that a temporary custody decree should not be entitled to full faith and credit, and further, that by sending the case back to the state court, the Court was impliedly deciding that a change in circumstances was a constitutional requirement for non-recognition, while at the same time expressly refusing to pass on the issue.

Divorce

1. *Procedure*

Since divorce is a matter of state concern, the Code provides that a divorce judgment shall not be *granted* on the testimony or admissions of a party unsupported by other evidence.[4] Can a divorce be *denied* solely on the admissions of a party? In the *Dase* case,[5] the court answered in the negative, and held that where the plaintiff failed to reply to an answer which alleged condonation, the court could not dismiss the divorce action on a motion for judgment on the pleadings.

The same policy has impelled the Ohio Supreme Court to require that divorce cases must be heard by the trial court in person, and issues of law and fact cannot be turned over to a referee.[6] However, the lower courts are not in agreement on the power of a divorce court to refer motions to modify prior alimony or child support decrees. One court held

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1. The lack of clarification is not due to any paucity of cases. Prior to 1942, there were less than half a dozen divorce cases decided by the Supreme Court. Since the first Williams case, 317 U.S. 287 (1942), the Court has decided twenty cases involving divorce, alimony, or child support decrees. For examples of cases in which the Court went to extreme lengths to avoid passing on a constitutional question in a domestic relations case, see Armstrong v. Armstrong, 350 U.S. 568 (1956), commented on in 1956 Survey, 8 WEST. RES. L. REV. 308 (1957); and Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955).

2. Kovacs v. Brewer, 356 U.S. 604 (1958).

3. Assuming of course that Ohio has some connection with the child. Usually this means that the child and one parent are domiciled in Ohio. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947); Cunningham v. Cunningham, 166 Ohio St. 203, 141 N.E.2d 172 (1957), noted in 1957 Survey, 9 WEST. RES. L. REV. 315 (1958).

4. OHIO REV. CODE § 3105.11.

5. Dase v. Dase, 152 N.E.2d 20 (Ohio C.P. 1958).

6. State *ex rel.* Kleinman v. Cleveland, 118 Ohio St. 536, 161 N.E. 918 (1928).

that this type of auxiliary proceeding could be referred,[7] and another court held it could not.[8] If such a motion can be referred, it is clear that the referee is required to make written findings and recommendations.[9]

There were three cases on appellate procedure. Generally, the Ohio Appellate Procedure Act requires an appeal bond for appeals on questions of law and fact and does not require a bond for appeals on questions of law alone. However, the divorce chapter of the Code provides in rather general terms that "an appeal to a higher court may be had upon the appellant's giving bond. . . ."[10] The statute does not specify whether the bond is required for both types of appeals, or only for those appeals which are appeals on law and fact. In *Volz v. Volz*[11] the court held, in a 4 to 3 decision, that a bond was required in all appeals from a divorce court, including an appeal from a decision refusing to modify a child custody order. The two lower court decisions on appellate procedure both held that a provisional order in a divorce proceeding is not appealable.[12]

2. *Alimony*

It is quite common for a creditor of the husband and wife to file a petition in the divorce court, or be interpleaded by the wife, so that the joint debt can be paid by the husband as alimony. A recent case indicates the importance to the wife of a decree which not only orders the husband to pay the debt, but also orders him to save the wife harmless. In the *Fredericks* case,[13] the husband went into bankruptcy shortly after the divorce. The court indicated that the part of the decree which required the husband to pay was a "debt" and dischargable, but the "save harmless" clause was "alimony" and not dischargable in bankruptcy.

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7. Hebdon v. Hebdon, 153 N.E.2d 150 (Ohio Ct. App. 1957); McGhee v. McGhee, 152 N.E.2d 810 (Ohio Ct. App. 1957); Lindsay v. Lindsay, 146 N.E.2d 151 (Ohio Ct. App. 1957).

8. Rider v. Rider, 152 N.E.2d 361 (Ohio Ct. App. 1957).

9. Lindsay v. Lindsay, 146 N.E.2d 151 (Ohio Ct. App. 1957). See also CONSTITUTIONAL LAW section, *supra.*

10. OHIO REV. CODE § 3109.07.

11. 167 Ohio St. 141, 146 N.E.2d 734 (1957).

12. Hedben v. Hedben, 152 N.E.2d 448 (Ohio Ct. App. 1958) (order suspending husband's obligation to make child support payments was not appealable where order specified that payments would be made up if wife's appeal from a separate order granting visitation rights to husband were sustained); Walcutt v. Walcutt, 146 N.E.2d 631 (Ohio Ct. App. 1957) (order requiring husband to vacate residence of parties pending divorce action was an award of use of residence to wife as temporary alimony and not appealable).

13. Fredericks v. Fredericks, 146 N.E.2d 153 (Ohio Ct. App. 1956).

3. *Child Support and Custody*

There were two important cases of first impression in this area. In *Hackett v. Hackett*,[14] the parties executed an antenuptial agreement that all children born of the marriage would be raised as Roman Catholics and attend a parochial school. The parents later separated and provided by a separation agreement that the mother (the non-Catholic) was to have custody of the child and the child would attend a designated Catholic school. The agreement, incorporated in a divorce decree, was violated by the mother who enrolled the child in a public school. The father's motion to cite for contempt was dismissed. The court held that an agreement that a child be educated in a particular faith is not enforceable against the parent who has custody, even though the agreement is incorporated in a custody decree. Enforcement of such a decree would violate the freedom of religion clause of the Ohio Constitution by interfering with the religious freedom of the custodial parent. The result is in accord with other recent decisions on the constitutional issue of state control over religious training.[15] The court also emphasized that apart from the constitutional arguments there are serious policy objections to the enforcement of such a decree; that the part of the decree relating to general religious training is difficult to enforce,[16] and that it conflicts with the basic rule that the welfare of the child, rather than the rights of the non-custodial parent, should be controlling. To create a religious conflict between the child and the custodian would be detrimental to the mental and spiritual welfare of both.

The second major case was *Robrock v. Robrock*[17] involving the jurisdiction of the divorce court in child custody cases. It is a familiar rule that "parties cannot by agreement clothe the court with jurisdiction it does not possess."[18] In the domestic relations area the axiom has suffered considerable erosion. The first setback occurred in the *DeMilo* case,[19] decided in 1957. The Supreme Court held that a divorce court could order installment alimony payments to run beyond the death of the husband. The express holding was that a lump sum property settlement

14. 150 N.E.2d 431 (Ohio Ct. App. 1958), noted 72 HARV. L. REV. 372 (1958); *affirming* 146 N.E.2d 477 (Ohio C.P. 1957); *appeal as of right denied*, 168 Ohio St. 373 (1958). See discussion in CONSTITUTIONAL LAW section, *supra*.

15. Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953). See Pfeffer, *Religion in the Upbringing of Children*, 35 B.U.L. REV. 333 (1955).

16. Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956).

17. 167 Ohio St. 479, 150 N.E.2d 421 (1958), *affirming* 151 N.E.2d 234 (Ohio Ct. App. 1956).

18. Baltimore and Ohio R.R. v. Hollenberger, 76 Ohio St. 177 (1907).

19. DeMilo v. Watson, 166 Ohio St. 433, 143 N.E.2d 707 (1957).

could be made payable in installments extending beyond the death of the obligor, which is clearly in accord with the weight of authority, but the language of the court implied that an order for continuing alimony, not based on a lump sum, could also extend beyond death. Limited to its facts, the case also holds that such a decree is not subject to collateral attack after the time for appeal has passed (*i.e.,* that the court had *jurisdiction*), but the opinion clearly indicates that such a decree would not be upset on a direct appeal.

The *Robrock* case[20] is the next step in expanding the jurisdiction of the trial court in divorce matters. Like *DeMilo,* it was a collateral attack on a decree which was brought by one of the parties to the divorce after the appeal time had run. The Supreme Court held that a divorce court has jurisdiction to incorporate in its decree a separation agreement which requires the husband to support the children of the marriage beyond the age of 21. The dissent pointed to numerous cases holding that a divorce court has no power to order a husband to support his children beyond minority, and argued that this power could not be conferred on the court by agreement of the parties. The majority opinion clearly indicates that the whole problem is not one of jurisdiction at all, and that any provision in a contract can be incorporated into a divorce decree, even though the contract creates obligations which the court would be powerless to create by itself.

An incidental point worth noting is a statement in the court of appeals' opinion to the effect that the law does not require a parent to furnish a college education to his child as part of his duty of support.[21] The statement was dictum and was not discussed in the Supreme Court opinion. There are opposing lines of authority on this issue and the question is still open in Ohio.

4. *Modification and Enforcement — Alimony, Custody and Support Decrees*

Three of the four cases in this area are cases where the litigation could have been avoided by careful drafting of the separation agreement. In the *Riggle* case[22] the contract appeared to be collusive on its face, as the husband agreed to make no defense against the divorce petition of his wife. The agreement was incorporated in the decree and the court of

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20. Robrock v. Robrock, 167 Ohio St. 479, 150 N.E.2d 421 (1958). The decree ordered the husband to maintain insurance policies on his life with the children named as beneficiaries, and this arrangement was to continue beyond the minority of the children. The decree also ordered the husband to pay the expense of a college education for the children.

21. Robrock v. Robrock, 151 N.E.2d 234, 241 (Ohio Ct. App. 1956).

22. Riggle v. Riggle, 148 N.E.2d 72 (Ohio Ct. App. 1957).

appeals held that a collusive divorce is voidable rather than void, and the husband could not plead the collusion as a defense to the wife's attempt to enforce a support order.

The second case illustrates the importance of including an "anti-merger" clause in a separation agreement, where it is contemplated that the agreement will be incorporated in a divorce decree. In the absence of such a clause, the general rule is that the contract is merged in the decree, so that the wife can no longer follow the defaulting husband from state to state suing on the contract, but must sue on the decree, which sometimes means that she has to go back to the state of rendition in order to have accrued installments reduced to a lump sum judgment. In *Klassen v. Newell*[23] the separation agreement was executed in New York, incorporated in a Nevada divorce decree, and sued on in Ohio. The court applied the Ohio rule on merger, instead of the Nevada rule (the choice of law problem was not raised by the parties) and denied enforcement of the contract.

The third case which could have been solved by an appropriate clause in the agreement was *Miller v. Miller*.[24] The court held that where there is no provision in a divorce decree for modification of child support payments, the payments could be reduced on a showing of change in circumstances, but could not be reduced if the decree was based on a separation agreement which contained no such reservation. The court concluded that *Tullis v. Tullis*[25] was still the law in Ohio, in spite of later Supreme Court cases which express some doubt as to the validity of the *Tullis* rule.[26]

In the *Smith* case[27] the court held that divorce is a special action to which statutes of limitations do not apply, and the child support order could be enforced, although the wife waited until fourteen years after the last installment was due before bringing the action.

Marriage

The only Supreme Court case in this area was *State v. Gans*, a criminal case.[28] The parents took their 11-year-old daughter from Ohio to West

23. 153 N.E.2d 704 (Ohio Ct. App. 1957).

24. 153 N.E.2d 355 (Ohio C.P. 1958).

25. 138 Ohio St. 187, 34 N.E.2d 212 (1941).

26. Lowman v. Lowman, 166 Ohio St. 1, 6, 139 N.E.2d 1, 6 (1956); Seitz v. Seitz, 156 Ohio St. 516, 518, 103 N.E.2d 741, 743 (1952) (concurring opinion of Taft, J.).

27. Smith v. Smith, 146 N.E.2d 454 (Ohio Ct. App. 1957), *aff'd*, 168 Ohio St. 447 (1959).

28. 168 Ohio St. 174, 151 N.E.2d 709 (1958). The case is also discussed in the CRIMINAL LAW section, *supra*.

Virginia, where she lied about her age to get a license, was married and returned to Ohio to live, all with the knowledge and consent of her parents. Bride, groom, and parents were at all times domiciled in Ohio. The parents were convicted of "acting in a way tending to cause delinquency in such child" and the conviction was affirmed. Without commenting on the merits of the criminal aspect of the case, it seems clear that the decision does indirectly change the accepted law on non-age marriages. The general rule is that a non-age marriage is valid in Ohio if valid where made, and the court of appeals has held that where the non-age marriage was valid where made, the husband could not be convicted of contributing to the juvenile delinquency of his 15-year-old wife.[29] In the *Gans* case the Supreme Court expressly declined to pass on the validity of the marriage, although the dissenting opinion pointed out that under West Virginia law it was valid. The interesting thing about the opinion is that every argument the court uses to convict the parents of tending to cause delinquency applies with equal force to the husband. If this analysis is correct, we have the anomalous situation where the husband entering a marriage which is valid in Ohio, can be jailed for so doing.

There are only two cases in Ohio on the validity of a contract in restraint of marriage, and one of these was decided last year. In *Saslow v. Saslow*[30] the parties executed a separation agreement, later incorporated in a divorce decree, which gave the house to the wife and provided that if she remarried within three years of divorce she would convey the house to the children of the first marriage. The wife sold the house, invested the proceeds in a residence of equal value and remarried within three years. On her refusal to convey the second house to the children she was convicted of contempt of the divorce decree. The court held that such a contract is valid where the purpose of the restraint on marriage is to protect the children of a prior marriage. The court also held that an equity court might follow the proceeds of the sale and impose a constructive trust for the benefit of the children, but this could not be done by a divorce court in a contempt action, and the conviction was set aside.

Last year's Survey article pointed out that there is a marked attitude of hostility towards common law marriages among the lower courts in Ohio.[31] A recent case exhibits the same tendency and held that the facts failed to establish the marriage by clear and convincing evidence.[32]

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29. Peefer v. State, 42 Ohio App. 276, 182 N.E. 117 (1931).

30. 147 N.E.2d 262 (Ohio Ct. App. 1957). The other Ohio case is King v. King, 63 Ohio St. 363, 59 N.E. 111 (1900).

31. See Lynch v. Romas, 139 N.E.2d 352 (Ohio Ct. App. 1956), noted in 1957 Survey, 9 WEST. RES. L. REV. 322 (1958), a case which applied a high standard of proof and also barred the surviving spouse from testifying as to the marriage.

32. Brastein v. Sedivy, 153 N.E.2d 541 (Ohio Prob. 1957).

Adoption

In the *Biddle* case,[33] the Supreme Court resolved a problem which has caused considerable difficulty in the lower courts. The court held that the probate court has exclusive jurisdiction over adoption and can enter a valid adoption order, even though the child is the ward of a common pleas court which had divorced the child's parents and had reserved continuing jurisdiction over custody of the child.

Illegitimacy

There were a number of interesting lower court cases on illegitimacy. The statute provides that an unmarried mother can file a paternity action.[34] The phrase "unmarried mother" has not been construed by the Supreme Court, but a 1949 court of appeals decision held that the plaintiff must be unmarried at the time of the filing of the action.[35] A recent juvenile court opinion disagreed and held that where the mother was single when the child was born, her marriage prior to filing the complaint would not bar the action.[36]

In a unique case of first impression, an ingenious attorney was able to get around the marriage bar. Apparently the mother was already married, both at the time of the birth and thereafter, so under any possible construction of the paternity statute her claim would be barred. She picked another and ultimately successful route to her objective. First she sued as next friend of the child, asking for a declaratory judgment adjudging that the child was in fact the illegitimate child of the defendant.[37] The mother then filed an action as a creditor, alleging that she had furnished necessary support for the child of the defendant, and asking for reimbursement. The court held that the findings of paternity in the first case were *res judicata* in the second case, and ordered reimbursement.[38]

In Ohio as elsewhere, an illegitimate child can not inherit from his father. However, a recent case holds that the child can inherit from a father by affinity. The probate court held that where the mother married a man who was not the father of the illegitimate child, and then predeceased him, the child could inherit from him as a "step-child."[39]

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33. *In re* Biddles Adoption, 168 Ohio St. 209, 152 N.E.2d 105 (1958).
34. OHIO REV. CODE § 3111.01.
35. Fischer v. McKinney, 85 N.E.2d 562 (Ohio Ct. App. 1949).
36. Kirkbride v. Eschbaugh, 147 N.E.2d 676 (Ohio Juv. Ct. 1957).
37. Maiden v. Maiden, 153 N.E.2d 460 (Ohio C.P. 1955).
38. Everett v. Maiden, 153 N.E.2d 462 (Ohio C.P. 1957).
39. Kest v. State, 146 N.E.2d 755 (Ohio Prob. 1957).