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Domestic Relations

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outside the courtroom, "I want to go to tell them it's a lie, it's a lie, and I want to tell them the truth."[148] Subsequently, the defendant's motion for a new trial was denied, and, on appeal, the decision was affirmed solely on the basis of the rules stated above, and with but scant discussion. In a concurring opinion, it was stated that there was a "very strong possibility" of a different verdict upon retrial, but that it did not quite reach the stature of a "strong probability."[149]

Thus was justice palpably frustrated by the rote application of a questionable doctrine; and what should have been a substantial weapon for good was relegated to the dung-heap of word games.[150]

LAWRENCE HERMAN

DOMESTIC RELATIONS

INTERSTATE ASPECTS

Two cases reached the Ohio Supreme Court on interstate enforcement of the obligation to support a dependent. In *Harris v. Sweeney*,[1] Wisconsin asked for extradition of an Ohio resident for failure to support an illegitimate child located in Wisconsin. The supreme court held that Harris was subject to extradition.

In reaching this conclusion the court correctly applied the Wisconsin rule that a father may be criminally liable for nonsupport of an illegitimate child, even though he has not been found to be the father in a paternity action.[2]

148. 168 N.E.2d at 770.

149. *Id.* at 771. The entire concurring opinion is as follows: "While concurring with the majority opinion, I have a strong feeling that, with the sworn recantations and re-recantations of the minor children, and re-re-recantations of Ruth Hull, there is a very strong possibility that there would be a different verdict, if this case were retried in the Common Pleas Court, especially if such trial were before a jury. Perhaps even, if counsel had investigated further before this trial, and the presentation of evidence, a different result might have been reached. But I cannot quite bring myself to say that, as of now, a 'probability' of a different verdict exists. Therefore I must concur with the decision here."

150. Bear in mind that the newly discovered evidence (assuming it has the desired effect) does not automatically result in the defendant's freedom. He still must face a re-trial, and it is merely the re-trial which is at stake. Problems of punishment and community security are not involved. It is true that re-trials tax already crowded dockets. But this is no excuse for injustice. Further, it is to be doubted that a relaxation of the rules stated in the text above would result in substantial relitigation. The statute still prohibits the re-trial if the defendant with reasonable diligence could have discovered the evidence and produced it at the first trial. "Defendant," of course, really means "defense counsel," and the requirement of reasonable diligence is, in effect, a punishment imposed on the accused for his failure or inability to obtain competent counsel. The only justification for the requirement is that it prevents unscrupulous lawyers from withholding evidence and speculating on a verdict. However, if the legal profession cannot deal with its "bad apples" in other ways, ways which do not punish innocent clients, it ought to give up the label "profession."

With regard to the matter of extradition, it is necessary, under the usual concepts, to show that the defendant has committed a crime in the demanding state and has then fled beyond its jurisdiction. However, under the Uniform Reciprocal Enforcement of Support Act[3] or the Uniform Extradition Act,[4] both of which are in effect in Ohio, it is only necessary to show that the accused "committed an act" in Ohio which resulted in a crime in the demanding state. The court ruled that the commission of an act includes the failure to act, and accordingly found that a wilful failure to support a dependent in another state is a proper basis for extradition.

In the second case, *Levi v. Levi*,[5] the court held that where an order is entered under the Uniform Reciprocal Support Act, no appeal is taken, and the order is complied with over a period of years, the defendant cannot object to the constitutionality of the Act or the order in a subsequent action.

Another case dealing with the interstate aspects of domestic relations law provides an interesting example of a familiar rule applied in an unusual context. The statutes on commitment to a mental hospital require that the petitioner must be either a next of kin (including spouse) of the patient or that he must have been a resident of the county for the preceding year. In *Hamilton v. Dillon*[6] the wife obtained a Florida divorce with personal appearance by the husband. The Florida court specifically found that she was a resident of Florida at the time. Seven months later she filed an application in Ohio for the commitment of her ex-husband, Mr. Hamilton. Her application was granted, and subsequently, after he had been committed, Mr. Hamilton sought release from the Columbus State Hospital in a habeas corpus action. The ground for this action was that the original commitment was invalid since Mrs. Hamilton had been neither his wife nor a resident of Ohio for one year at the time she filed her complaint. In the author's opinion, the court of appeals should have ruled that the statutory requirement of standing to petition for commitment is not jurisdictional, or if it is, that it is a "disputable jurisdictional fact" to which res judicata must apply should the question be brought up in a subsequent proceeding. The court, however, did not mention this approach, but rather found as a fact that Mrs.

1. 170 Ohio St. 151, 163 N.E.2d 762 (1959).

2. The Ohio rule is the same. See OHIO REV. CODE §§ 3111.17, 3113.01, and State v. Schwartz, 137 Ohio St. 371, 30 N.E.2d 551 (1940).

3. OHIO REV. CODE ch. 3115.

4. OHIO REV. CODE §§ 2963.01-.27.

5. 170 Ohio St. 533, 166 N.E.2d 744 (1960). See also discussion in *Conflict of Laws* section, p. 466 *supra.*

6. 110 Ohio App. 489, 167 N.E.2d 356 (1959). See also discussion in *Conflict of Laws* section, p. 465 *supra.*

Hamilton had never established a domicile in Florida and therefore did have standing as a resident of Ohio for one year to petition for commitment. The husband's writ of habeas corpus was accordingly denied. The court held that under *Williams v. North Carolina II*,[7] the State of Ohio is free to attack the validity of the Florida divorce and the finding of Florida residence. This approach results in several interesting consequences not mentioned by the court:

(1) The conclusion of the court was not that Mrs. Hamilton was still Mr. Hamilton's wife, but that she had never established a residence in Florida. However, under Florida law, domicile of the plaintiff in Florida is a jurisdictional prerequisite to a valid divorce. The facts relied upon by the State of Ohio to prove Mrs. Hamilton's continuing Ohio residence also would prove that she was still his wife. Accordingly, in a separate action against her, the state could get a decree that she was still married to the patient and liable for his maintenance in the state hospital.

(2) As far as the State of Ohio is concerned, Mr. Hamilton is still married. Mrs. Hamilton was a witness, but not a party, to the habeas corpus action. Res judicata does not apply to her, so she is single. She can never assert any marital rights (alimony or inheritance) against Mr. Hamilton, as her participation in the Florida divorce bars her from attacking its validity.[8] Thus, whatever her marital status is, it seems clear that she has marital obligations in Ohio, but no marital rights.

DIVORCE

Procedure in Divorce Cases

The Code provides that a judgment for divorce shall not be granted on the testimony of a party unsupported by other evidence.[9] The requirement is sometimes interpreted to mean that the evidence of a party must be corroborated by additional evidence, with the implication that no divorce can be granted if the party does not testify, since in such a case the other evidence would not be "additional." This was the construction placed on the statute by the trial court in a divorce case where the plaintiff wife was unable to testify.[10] This decision was reversed by the court of appeals, which held that the statute applies only where the

7. 325 U.S. 226 (1945).

8. Coe v. Coe, 334 U.S. 378 (1948). See also discussion in *Conflict of Laws* section, p. 465 *supra*.

9. OHIO REV. CODE § 3105.11.

10. The wife could not testify because her husband was under guardianship, and the "dead man statute," OHIO REV. CODE § 2317.03, provides that a party shall not testify when the adverse party is an executor or guardian.

party does testify, and has no application where the party does not testify.[11]

In another case, while a divorce action was pending, the trial court entered an interlocutory order, not subject to appeal, allowing the wife custody of certain personal property. The husband unsuccessfully objected to the trial court on the ground that the property was vital evidence in the divorce case, and then attacked the custody order by a writ of prohibition. The supreme court held that prohibition was not the appropriate remedy and the husband would have to take his chances on an appeal from the final judgment in the divorce case.[12]

Grounds and Defenses in Divorce Cases

The case of *Sevi v. Sevi*[13] is interesting as an example of the wide gap between the actions of some trial courts and the philosophy of the appellate courts. Husband and wife were both temperamental and each admitted to having a sharp tongue. They reviled each other and fought throughout their married life. After thirty-eight years of this the wife finally left her husband and sued for divorce for cruelty. The trial court must have recognized that there was mutual cruelty and mutual condonation and that it was impossible to find that after thirty-eight years of conflict "he (or she) started it all." The court granted the wife a divorce and with surprising candor stated for the record: "I should grant a divorce here because these people will never live together . . . ."[14] As might have been expected, the court of appeals reversed, pointing out that comparative rectitude does not exist in Ohio and that divorce is based on fault on one side and innocence on the other.

Alimony

The case of *Conner v. Conner*[15] is difficult to analyze. It is not clear whether the supreme court's opinion reflects a policy of vesting broad discretion in the trial court on the issue of amount of alimony, or whether the court is insisting on technical compliance with the rules of appellate procedure. The wife was awarded a divorce and alimony consisting of thirty-seven per cent of her husband's property. She appealed on two grounds, the first being that the trial court abused its discretion in ordering alimony which was inadequate, and the second being that the alimony decision was contrary to the weight of the evidence. The court

11. Wohlers v. Wohlers, 168 N.E.2d 608 (Ohio Ct. App. 1960).
12. State *ex rel.* Schumacher v. Victor, 171 Ohio St. 189, 168 N.E.2d 398 (1960).
13. 168 N.E.2d 440 (Ohio Ct. App. 1959).
14. *Id.* at 442 (concurring opinion).
15. 170 Ohio St. 85, 162 N.E.2d 852 (1959).

of appeals reversed for abuse of discretion, without specifying in what manner the trial court abused its discretion. On appeal to the supreme court, the court reversed the decision of the court of appeals and affirmed the decision of the trial court. The high court stated that while a reversal on the weight of evidence might have been justified, the court of appeals had not reversed on this ground, but rather on the more general ground of abuse of discretion, without giving any legal guides for the reconsideration of the issue by the trial court. The author is inclined to agree with the dissenting opinion of Justice Taft[16] which indicates that in this context the concepts of weight of evidence and abuse of discretion are so closely interrelated that the supreme court should remand the case to the court of appeals in order that that court could indicate in what way the trial court had erred.

In *Griste v. Griste*[17] the supreme court reaffirmed its decision of the previous year,[18] without citing it, that a domestic relations court in an alimony-only action has authority to order the husband to convey legal title to his wife of property (real or personal) which was purchased with the wife's funds but which is held in the name of the husband. Accordingly, the wife is not permitted to bring a separate equity action while the alimony case is pending.

Child Custody and Support

In *Mitchell v. Mitchell*[19] the supreme court finally decided a question which has resulted in conflicting decisions in the lower courts. The issue is whether the non-custodial parent in a divorce action, who is required to support the children, can be compelled to provide them with a college education. Most Ohio cases, after stating the rule that the obligation of support extends only to necessaries, have held that a college education, unlike a high school education, is not a "necessary." Some Ohio courts have held that the compulsory school age law fixes the age at which education ceases to become a necessary.[20] Until the present case, there was only one Ohio case squarely holding that a college education is a necessary for a child who has been accepted by an accredited college and who has demonstrated that he can profit from his college training.[21]

16. *Id.* at 90, 162 N.E.2d at 855 (dissenting opinion).

17. 171 Ohio St. 160, 167 N.E.2d 924 (1960).

18. See Goetzel v. Goetzel, 169 Ohio St. 350, 159 N.E.2d 751 (1959), noted in Ross, *Domestic Relations, Survey of Ohio Law — 1959*, 11 WEST. RES. L. REV. 372, 373 (1960).

19. 170 Ohio St. 507, 166 N.E.2d 396 (1960).

20. See, *e.g.*, Wynn v. Wynn, 6 Ohio L. Abs. 450 (Ct. App. 1928).

21. Calogeras v. Calogeras, 163 N.E.2d 713 (Ohio Juv. Ct. 1959). The comprehensive opinion of Judge Woldman contains a complete discussion of the policy factors and the case law on the issue, especially the cases from outside Ohio. The court anticipated the supreme court decision in *Mitchell* by three months.

The supreme court expressly declined to hold in *Mitchell* that a college education is necessary, but did hold that the divorce court has discretion to order a parent to provide a college education. It is unfortunate that the court failed to provide any guide lines for the exercise of this discretion.

The Revised Code provides that the juvenile court has jurisdiction to determine the custody of a child who is not the ward of another court.[22] In *Kolody v. Kolody*[23] the wife, who was separated but not divorced, asked the juvenile court for an order of custody and support. The husband objected that the court had jurisdiction to order custody (meaning placement) but had no jurisdiction to order monetary support. In a case of first impression, the order of the juvenile court for custody and support money was affirmed. The court of appeals held that the term "custody" in the statute refers to the determination and enforcement of the sum total of all legal relations between parent and child, including the child's right to support.

In *Smith v. Smith*[24] the husband was ordered to pay weekly support for his minor child up to the time the child became eighteen. Fourteen years after the child became eighteen the mother filed a motion to reduce the unpaid installments to a lump sum. The court entered the lump sum judgment, and then doubled it, by holding that interest at the legal rate was due, not from the date of the lump sum judgment, but from the date the child became eighteen. The case is of special interest to delinquent husbands or fathers in view of an earlier decision involving the same parties in which the supreme court held that neither laches nor the statute of limitations applies to a child support decree.[25]

Modification or Termination of Alimony or Support

All of the cases discussed under this heading illustrate that future litigation can be avoided by careful drafting of the initial decree. In *Hunt v. Hunt*,[26] the supreme court was faced with a separation agreement, incorporated in the decree, requiring the payment of monthly alimony for an indefinite period, and containing no provision for termination or modification. The court held that the subsequent remarriage of the wife was an election to look to her new husband for support and therefore terminated the alimony obligation. In *Dailey v. Dailey*[27] the facts were the

22. OHIO REV. CODE § 2151.23.

23. 169 N.E.2d 34 (Ohio Ct. App. 1960).

24. 167 N.E.2d 515 (Ohio Ct. App. 1960). See also discussion in *Equity* section, p. 517 *infra.*

25. Smith v. Smith, 168 Ohio St. 447, 156 N.E.2d 113 (1959).

26. 169 Ohio St. 276, 159 N.E.2d 430 (1959). See Ross, *Domestic Relations, Survey of Ohio Law — 1959*, 11 WEST. RES. L. REV. 372, 374 (1960).

27. 171 Ohio St. 133, 167 N.E.2d 906 (1960).

same, with one critical difference. In *Dailey* the alimony was a lump sum payable in monthly installments for eleven years. The court held that the alimony was a fixed obligation and would not terminate on the remarriage of the wife. The decision is consistent with an earlier decision holding that such installments continue to accrue after the death of the husband.[28]

Where an alimony decree is not based on a separation agreement, and not intended as a lump sum settlement, it is clear that the court can modify or terminate because of changed circumstances, even though the decree did not contain an express reservation of jurisdiction.[29] However, the court cannot decide issues which should have been litigated at the initial trial under the guise of modification or construction. In *Krechman v. Krechman*[30] the husband was ordered to pay as alimony the debts of the parties as they existed as of the date of the decree. The court held that the provision for payment of debts could not be modified at a subsequent term of court so as to require the husband to pay all debts due at a date prior to the initial decree.

ANTENUPTIAL AGREEMENTS

Marital obligations are determined by status rather than contract. Accordingly, the Ohio Code provides that a contract between spouses who are living together which purports to alter their legal relations is void.[31] An antenuptial agreement is valid,[32] and the supreme court recently held that an oral antenuptial agreement which is void under the statute of frauds is nevertheless valid if it has been reduced to writing after the marriage.[33] However, any misconduct by a spouse which is a ground for divorce is a breach of an implied term of the agreement, and the other spouse may elect to treat the agreement as terminated. Thus where the husband is divorced for his cruelty, he cannot rely on an antenuptial agreement releasing all future property rights in order to avoid paying alimony.[34]

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28. DeMilo v. Watson, 166 Ohio St. 433, 143 N.E.2d 707 (1957). See Ross, *Domestic Relations, Survey of Ohio Law — 1957*, 9 WEST. RES. L. REV. 314, 318 (1958).

29. Clelland v. Clelland, 166 N.E.2d 428 (Ohio Ct. App. 1959). See also Olney v. Watts, 43 Ohio St. 499, 3 N.E. 354 (1885). The same rule applies to modification of child support orders. Corbett v. Corbett, 123 Ohio St. 76, 174 N.E. 10 (1930).

30. 170 N.E.2d 91 (Ohio Ct. App. 1959).

31. OHIO REV. CODE § 3103.06.

32. Troha v. Sneller, 169 Ohio St. 397, 159 N.E.2d 899 (1959).

33. *In re* Estate of Weber, 170 Ohio St. 567, 167 N.E.2d 98 (1960). See also discussion in *Wills and Decedents' Estates* section, p. 592 *infra*.

34. Dearbaugh v. Dearbaugh, 170 N.E.2d 262 (Ohio Ct. App. 1959).

Marriage

Two of the cases on the creation of the marital status were criminal cases. In *State v. Schreckengost*[35] the court held that a bigamous marriage contracted outside of Ohio was not a violation of the Ohio bigamy statute,[36] which is clearly phrased in terms of the act of marriage rather than cohabitation.

In *State v. Weitzel*[37] the defendant was charged with burglary and larceny. The defense was that the victim was the defendant's common-law wife. The trial court determined as a matter of law that no marriage existed. This was held to be error by the court of appeals, which stated that the existence of the marriage was properly a question for the jury. In giving this ruling, the court said, without citing authority, that the existence of a marriage was an absolute defense to the crime of larceny or burglary. This is the common-law rule which was adopted by Ohio in an early case.[38] In contrast to this rule there are several recent cases from other jurisdictions which have held that with the passage of the Married Women's Property Acts the husband can be convicted of larceny or embezzlement where he intentionally steals his wife's separate property, although clear proof is required that he had no authority to deal with her property.[39]

Etter v. Von Aschen[40] is a recent example of a judicial trend to view with skepticism the claims of a party who professes to have been the common-law spouse of the deceased. In most cases the claim is made by a woman; in the present case the claim was made by a man who claimed that he was the deceased's widower. The court held that the claim of the alleged widower was an action adverse to the administrator of the deceased, and therefore that the "dead man statute"[41] prevented him from testifying as to the alleged common-law marriage. The court then ruled that he had failed to establish his claim by clear and convincing evidence.

PARENT AND CHILD

At common law a child was not required to support his adult parent. Any statute which attempts to change this rule is apt to bump into the principle that statutes in derogation of the common law will be strictly construed. This was the case in *State v. Pizon.*[42] The statute provides that

35. 170 N.E.2d 307 (Ohio Munic. Ct. 1960).
36. OHIO REV. CODE § 2905.43.
37. 168 N.E.2d 550 (Ohio Ct. App. 1960).
38. State v. Phillips, 85 Ohio St. 317, 97 N.E. 976 (1912).
39. The recent cases are cited in PERKINS, CRIMINAL LAW 217 (1957).
40. 163 N.E.2d 197 (Ohio P. Ct. 1959).
41. OHIO REV. CODE § 2317.03.
42. 168 N.E.2d 631 (Ohio C.P. 1959).

the parents, spouse and children of a patient in a state mental hospital are liable for his support.[43] The court held that the statute did not expressly provide for either a joint or several liability. Since the primary liability for support is placed on the spouse by other statutes, the court ruled that the children of the patient could not be held liable where there was a spouse living, even though that spouse was insolvent.

ADOPTION

During the period covered by this survey, there were two interesting juvenile court opinions which are indicative of the factors considered in adoption cases. In the first case,[44] an unwed Roman Catholic mother gave her child to a Jewish and Presbyterian couple, expressly indicating that she did not care if the child was raised as a non-Catholic. On the couple's petition for adoption, the court held that the Catholic Church could intervene as amicus curiae, but that the Church had no legal right to have the child raised as a Catholic. The controlling principle is the welfare of the child, and religion is only one factor to be considered.

Incidentally, the court is to be commended for publishing the opinion under a fictitious name ("Jane Doe") in order to protect the mother and child. This practice is common in England and some of the eastern states where a good many divorce and annulment cases involving sexual difficulties are docketed and published as "Doe v. Doe" or "Anonymous v Anonymous." There have been several Ohio cases which have indicated that this cannot be done in the absence of a statute. It seems to the author that the court in this case was correct in holding that a court has inherent power to protect innocent parties who may be affected by the decision, and that the public interest in protecting the child outweighs the freedom of the press.

The second case, *In re Douglas,*[45] is a good illustration of the controlling factors in a decision to terminate the parental rights of the natural parents for a continuous course of misconduct, thereby paving the way for an adoption proceeding in which their consent can be dispensed with.

HUGH A. ROSS

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43. OHIO REV. CODE § 5121.06.
44. In the Matter of Jane Doe, 167 N.E.2d 396 (Ohio Juv. Ct. 1956).
45. 164 N.E.2d 475 (Ohio Juv. Ct. 1959).