Divorce Decrees--Power to Vacate after Term

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nition makes no distinction between situations in which the facts not revealed are material because of representations made and in which they are material because of the consequences which may result from use of the commodity. 23

The decision seems unfortunate, for it places a limitation on the definition of false advertising which seems unwarranted, 24 frustrates the intent of the 1938 Amendment 25 and sanctions what has been referred to as a "commercial standard of truth." 26

G. Vernon Owen, Jr.

DIVORCE DECREES—POWER TO VACATE AFTER TERM

Plaintiff wife filed suit for divorce but continued living with her husband and even conceived a child after the filing of the petition. Having led her husband to believe that she was not proceeding with the divorce, plaintiff secretly obtained an uncontested divorce decree. Defendant had a valid ground of defense by virtue of plaintiff's adultery. Plaintiff had not disclosed to the court either the fact of her continued cohabitation with her husband or the fact of her pregnancy, and, following the divorce decree, she continued to live with defendant after the term in which the divorce was granted. Defendant was then informed of the divorce, and plaintiff thereafter married the person with whom she had committed adultery. After term, defendant filed a petition to vacate the divorce decree on the ground of plaintiff's fraud. On appeal, held: The trial court properly vacated
the divorce decree on the ground of fraud notwithstanding the fact that the petition to vacate was filed after term.¹

The court in the principal case was presented with the question of whether a divorce decree, which was fraudulently procured, can be vacated by a court in Ohio, after the term in which it was rendered, pursuant to a statutory provision authorizing the vacating of judgments after term for fraud.² In the early case of Parsh v. Parsh,³ a bill in equity was filed to set aside a divorce decree procured by fraud in an earlier term. The court sustained the demurrer to the bill on the ground that a decree of divorce was final and conclusive and could not be reviewed or set aside. The decision was predicated upon the then existing statute which provided that "No appeal shall be obtained from the [divorce] decree, but the same shall be final and conclusive."⁴ The court considered this statute to be a legislative recognition of the principle of public policy that divorce decrees, which enable the divorced parties to contract new matrimonial relations with other innocent persons, should never be reopened. Thus, prior to 1912, divorce decrees could not be reviewed, modified, or reversed upon appeal or error and could not be set aside in equity or vacated after term.⁵ However, in 1912, the Ohio Constitution was amended to provide that "The courts of appeals shall have jurisdiction to review, affirm, modify, or reverse the judgments of the courts of common pleas as may be provided by law.”⁶ This provision was interpreted by the courts to mean that divorce decrees could be reviewed on appeal, on questions of law—i.e., error proceedings⁷—including questions involving the weight of the evidence.⁸ However, the Supreme Court of Ohio has never reconsidered directly the power of a

² "The common pleas court or the court of appeals may vacate or modify its final order, judgment or decree after the term at which it was made 4. For fraud practiced by the successful party in obtaining a judgment or order.” OHIO GEN. CODE § 11631(4).
³ 9 Ohio St. 334 (1859).
⁴ 2 CURW. STAT. 991 (1843).
⁶ OHIO CONST. Art. IV, § 6 (as amended September, 1912).
⁷ It should be noted that in the Ohio General Code, the term "appeal on questions of law" is construed to include all proceedings previously designated as proceedings in error. The term "appeal on questions of law and fact" is construed to include all proceedings previously designated as appeal. OHIO GEN. CODE § 12223-1.
⁸ Weeden v. Weeden, 116 Ohio St. 524, 156 N.E. 908 (1927); Wells v. Wells, 105
trial court to vacate its own divorce decrees either before or after term, notwithstanding numerous courts of appeals decisions declaring this power to exist.\(^9\)

The court in the principal case decided that the above constitutional amendment superseded the public policy that divorce decrees were final and conclusive and, therefore, upheld the power to vacate such decrees.

The court did not consider the fact that even today, by statute,\(^10\) an appeal on questions of law and fact\(^11\) in divorce cases is not available. Query whether, in view of this statute, the rule of public policy is actually no longer existent in Ohio? However, the decision may be supported on grounds of statutory construction, since in construing a general statute, such as Ohio General Code Section 11631 (4),\(^12\) which authorizes the vacating of judgments by the lower court after term, it is a general rule that the court may not write in limitations or exceptions where no ambiguity exists.\(^13\) The statute being general in its terms, no exception in the case of divorce decrees should be written therein.

The power to vacate judgments in general, during term, having its origin


\(^10\) OHIO GEN. CODE § 12002: "No appeal shall be allowed from a judgment or order of the common pleas court under this [divorce] chapter, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony."

\(^11\) See notes 7 and 8 supra.

\(^12\) A similar statute, authorizing the vacating of judgment or decrees by the court which rendered them, existed at the time of the Parish case. 51 Ohio Laws 150 (1853). However, the court in that case, being an equity court with power to set aside judgments at law, had no occasion to look to such a statute. Although the statute would have afforded an excellent illustration of the adequacy of the remedy at law, the court did not consider it. Actually the issue of whether a law court may vacate its own decree of divorce was not before this court.

\(^13\) Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914).
in the common law, is inherent in all courts of record. The great majority of courts outside of Ohio have made no distinction between divorce judgments or decrees and other judgments so far as the power to vacate is concerned. The power, therefore, to vacate divorce decrees during the term in which they are rendered is inherent in the courts, to be exercised in their judicial discretion.

However, a distinction must be drawn between the power to vacate within the term and the power to vacate after the term in which the decree is rendered. It is a general rule that all judgments become final at the close of the term since the interests of society demand that there be a termination to every controversy. Therefore, the inherent power of the court to vacate its divorce judgments or decrees ceases at the close of the term. Most courts, however, recognize that judgments which are void, or were fraudulently procured, constitute exceptions to that rule, and can be vacated by the court, after the term in which they were rendered, through the exercise of the court's inherent power. In addition, some courts recognize that the court retains inherent power to vacate the judgment, after

14 1 Freeman, Judgment § 194 (5th ed. 1925).
16 Ibid.
17 1 Freeman, Judgments § 197 (5th ed. 1925)
18 Ibid.
19 Regardless of statutory authority, a divorce decree which is void for want of jurisdiction over the person or subject matter can be vacated even in the absence of fraud. Partlow v. Partlow, 246 Ala. 259, 20 So.2d-517 (1945); Lockwood v. Lockwood, 19 Ariz. 215, 168 Pac. 501 (1917); Tatum v. Tatum, 203 Ga. 406, 46 S.E.2d 915 (1948); Swift v. Swift, 239 Iowa 62, 29 N.W.2d 535 (1947).
20 In any action to vacate a divorce decree for fraud, within or without term, the fraud must be shown to have been "extrinsic or collateral" to the matter determined in the divorce proceedings. Graham v. Graham, 251 Ala. 124, 36 So.2d 316 (1948). For a discussion of "extrinsic" as distinguished from "intrinsic" fraud, see 2 Western Reserve L. Rev. 87 (1950)

With or without statutory authority, divorce decrees have been vacated for fraud in the following cases: (1) Where the decree was rendered on service by publication, and the prevailing party, to obtain such service, knowingly made a false affidavit stating the defendant's residence to be unknown or unascertainable, and the defendant received no notice. Pringle v. Pringle, 55 Wash. 93, 104 Pac. 135 (1909). (2) Where the decree was rendered on personal service, and, due to fraud perpetrated in the service, defendant was prevented from having due knowledge of the suit. Peterson v. Peterson, 221 Iowa 897, 267 N.W 719 (1936). (3) Where the prevailing plaintiff intentionally kept the defendant in ignorance of the suit.
term, upon the petition of both parties, even though such judgment is not void or fraudulently procured. To vacate judgments or decrees after term, for reasons other than those enumerated above, the courts require a statutory grant of authority.

General statutes which authorize relief from judgments either before or after term are by most courts construed to include divorce judgments or decrees. This construction has been applied to statutes giving a right of action to set aside judgments procured by fraud, statutes permitting the opening of default judgments, those permitting the opening of judgments where there was a lack of jurisdiction over the person or subject matter, and those authorizing relief from judgments rendered through mistake, inadvertence, surprise, or excusable neglect.


Githens v. Githens, 78 Colo. 102, 239 Pac. 1023 (1925)

1 FREEMAN, JUDGMENTS § 197 (5th ed. 1925).

Nichells v. Nichells, 5 N.D. 125, 64 N.W. 73 (1895). Although purely equitable relief from a legal judgment is clearly distinguishable from the action of a law court in vacating its own judgments, the two remedies vary in form, not substance, and are governed by the same equitable principles. See 2 FREEMAN, JUDGMENTS § 1186 (5th ed. 1925).

Brockman v. Brockman, 133 Minn. 148, 157 N.W. 1086 (1916); Meeker v. Meeker, 117 Wash. 410, 201 Pac. 786 (1921).


Lockwood v. Lockwood, 19 Ariz. 215, 168 Pac. 501 (1917); Miller v. Miller, 37 Neb. 257, 142 Pac. 218 (1914).

Blair v. Blair, 48 Ariz. 501, 62 P.2d 1321 (1936); Simpkins v. Simpkins, 14 Mont. 386, 36 Pac. 759 (1894); Carmichael v. Carmichael, 101 Ore. 172, 199 Pac. 385 (1921). With or without statutory authority, the court, in its discretion, can vacate a divorce decree when the defendant was prevented from making a de-
Although there is a natural reluctance on the part of courts to disturb a status upon which the rights of innocent third parties may have been founded, the majority of courts have held that remarriage of the party who obtained the decree is not in itself sufficient to end the power of a court to vacate the decree. The major reason for such a holding is the policy that the innocent husband or wife is entitled, at least, to as much protection as the third party. Another reason is that a contrary rule would make the power of the court dependent upon the acts of the party who fraudulently procured a divorce. Finally, it is thought that the exercise of such power would have the desirable effect of restraining divorced parties from remarrying hastily while the divorce is still subject to attack and reversal.

The weight of authority supports the rule that the court may still vacate the decree, following the death of the prevailing party, if the purpose of the vacation is to establish property rights.

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fense due to an accident, misfortune, or mistake which is unavoidable and occurs without negligence. Smith v. Smith, 64 Cal. App.2d 415, 148 P.2d 868 (1944) (advancement of a hearing without notification to one party); Wilson v. Wilson, 55 Cal. App.2d 421, 130 P.2d 782 (1942) (sickness); Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531 (1890) (transfer of the suit to another forum without notice to one party); Walrad v. Walrad, 55 Ill. App. 668 (1894) (miscarriage of mails); Bostwick v. Bostwick, 73 Tex. 182, 11 S.W 178 (1889) (calling of trial outside of regular order).

1 FREEMAN, JUDGMENTS § 213 (5th ed. 1925). In Carmichael v. Carmichael, 101 Ore. 172, 199 Pac. 385 (1921), the court explained that in vacating divorce decrees the court will exercise greater caution and care for the intervening rights of strangers.

E.g., Johnson v. Johnson, 81 Cal. App.2d 686, 185 P.2d 49 (1947); Croyle v. Croyle, 184 Md. 126, 40 A.2d 374 (1944); Curtis v. Curtis, 250 Mich. 105, 229 N.W 622 (1930); Cherry v. Cherry, 225 Mo. App. 998, 35 S.W.2d 659 (1931); Wisdom v. Wisdom, 24 Neb. 551, 39 N.W 594 (1888); Bussey v. Bussey, 94 N.H. 328, 52 A.2d 856 (1947); Woodruff v. Woodruff, 215 N.C. 685, 3 S.E.2d 5 (1939); Walker v. Walker, 151 Wash. 480, 276 Pac. 300 (1929) Contra: Bushong v. Bushong, 283 Ky. 36, 140 S.W.2d 610 (1940). Even the fact of children in the second marriage does not impair the power of the court to vacate the decree. Medina v. Medina, 22 Colo. 146, 43 Pac. 1001 (1896). Of course, if the party against whom the divorce was granted remarries, that party is estopped to attack the decree. Arthur v. Israel, 15 Colo. 147, 25 Pac. 81 (1890)

1 See Nichells v. Nichells, 5 N.D. 125, 64 N.W. 73 (1895).

2 In Fleming v. Fleming, 83 Pa. Super. Ct. 554 (1924), the court indicated that if a libellant were permitted to transform a fraudulent decree of divorce into a valid one by the simple act of marrying again, a premium would be put on fraud and perjury in the divorce courts.

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