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## Domestic Relations

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ment and product of plaintiff were of precision type and the cleaning-up process involved the disassembling of intricate machinery, cleaning it, immersing it in oil, and then reassembling it. The cleaning of the product involved metallurgical knowledge and processes—scarcely work for common labor.”<sup>2</sup>

What facts are necessary to sustain a jury’s award of punitive damages? The court in deciding *Waters v. Novak*<sup>3</sup> was concerned with that problem. The plaintiff had purchased a suburban house and lot from the defendant. The plaintiff was in part induced to make the purchase by the defendant’s false representation that the well for the home provided sufficient water. The evidence established that defendant knew that the water supply was inadequate and indicated that such was defendant’s reason for selling the house. At the trial the jury awarded punitive damages and from this an appeal was taken. Beginning with *Drew v. Christopher Construction Co.*,<sup>4</sup> the court of appeals reviewed the earlier cases concerned with the award of punitive damages. The court concluded that while punitive damages cannot be allowed because of “legal” malice that they will be allowed where “actual” malice is present. It quotes with approval, from *Green v. Kethley*,<sup>5</sup> that as to “the nature of the malice in actions of the kind involved in the instant case the better rule is that such malice must be not simply the doing of an unlawful or injurious act but as going further and meaning evil motive, actual malice in the sense of a spirit of mischief or criminal indifference to civil obligations.”<sup>6</sup> On this basis the evidence was held to support the jury’s award.

EDGAR I. KING

## DOMESTIC RELATIONS

### *Annulment, Divorce and Alimony*

In January, 1952, the Ohio Supreme Court in *Eggleston v. Eggleston*<sup>1</sup> laid down the broad rule that Section 3105.01 of the Ohio Revised Code (Ohio General Code Section 11979), authorizing the granting of a divorce where “either party had a husband or wife living at the time of the marriage from which the divorce is sought,” provides an exclusive remedy in cases involving that situation, and that an annulment cannot be granted.

<sup>1</sup> 113 N.E.2d 401 (Ohio App. 1953)

<sup>2</sup> *Id.* at 406.

<sup>3</sup> 115 N.E.2d 420 (Ohio App. 1953)

<sup>4</sup> 140 Ohio St. 1, 41 N.E.2d 1018 (1942).

<sup>5</sup> 86 F.2d 238 (8th Cir. 1936).

<sup>6</sup> *Waters v. Novak*, 115 N.E.2d 420, 425 (Ohio App. 1953).

In April, 1952, the same general problem was presented to the Cuyahoga County Court of Appeals in *Nyhuus v. Pierce*.<sup>2</sup> The plaintiff sought an annulment on the grounds that at the time of the marriage between the plaintiff and the defendant, the defendant was validly married to another. The defendant's answer joined in seeking the relief prayed for by the plaintiff. Held: an annulment may be granted. The court, in distinguishing the present case from the *Eggleston* case, reasoned that the plaintiff in the *Eggleston* case was asking for relief under the divorce statutes and was clearly entitled thereto. But that under the facts of the instant case, neither of the parties asked for, nor were they entitled to, any relief that was exclusively within the purview of the divorce statutes. The court stated that where the facts do not require the use of the divorce statutes to protect the rights of property or support, they should not be construed as being involved.

Although the result in *Nyhuus v. Pierce* is sensible, and while it is true that the facts in the two cases are not identical, nevertheless it might well be argued that the rule as stated in the *Eggleston* case is broad enough to cover the *Nyhuus* situation.

*Basickas v. Basickas*<sup>3</sup> was an action for divorce by the wife upon the ground that the marriage was fraudulently contracted. The plaintiff wife is the niece of the defendant husband. Both parties knew of the relationship at the time they signed the application for the marriage license and therein stated that they were not nearer of kin than second cousins and that there was no legal impediment to their marriage. The trial court dissolved the marriage and the husband appealed, maintaining that the trial court erred as a matter of law in awarding a judgment of divorce to the wife on the ground of fraudulent contract. Held: where one has entered into a marriage within the degree of consanguinity prohibited by the law of Ohio, either party to such marriage may obtain a divorce on the statutory ground of fraudulent contract. Such marriage is void *ab initio*. The relief afforded by the statute is extended to a fraud perpetrated on the law. The judgment was affirmed. The court cited the *Eggleston*<sup>4</sup> case and recognized its doctrine of the supremacy of the divorce statutes.

An attempt at suicide, or at least going through the motions, by one who is not mentally ill or otherwise incompetent, accompanied by prior and subsequent statements of a desire to commit suicide, or to be dead, whether such acts and statements were made or done with bona fide intent or to aggravate the other party to the marriage, constitutes extreme cruelty, which is ground for divorce.<sup>5</sup>

<sup>1</sup> 156 Ohio St. 422, 103 N.E.2d 395 (1952).

<sup>2</sup> 65 Ohio L. Abs. 73, 114 N.E.2d 75 (App. 1952).

<sup>3</sup> 93 Ohio App. 531, 114 N.E.2d 270 (1953).

<sup>4</sup> 156 Ohio St. 422, 103 N.E.2d 395 (1952)

Although it is provided by statute that "on the filing of petition for divorce or for alimony, the court may and in cases in which there are children under fourteen years of age involved shall, cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action,"<sup>6</sup> no statute provides for payment of the expenses of the investigation. In *Smith v. Smith*<sup>7</sup> it was held that such expenses could not be included in the costs and assessed against one of the parties since costs are allowable only by authority of statute. Payment of these expenses may be made, however, upon the warrant of the county auditor upon the proper certificate of the common pleas court judge allowing the claim.

### Temporary Alimony

A sound position was taken by the court of appeals in *Englund v. Englund*,<sup>8</sup> where it was held that the fact that a husband and wife continue to live together under the same roof after a petition for divorce has been filed, while constituting an element to be given careful consideration, should not necessarily and ipso facto require a denial of temporary alimony to the wife, and where the financial or other circumstances of the parties furnish practical reasons for such action, temporary alimony may be warranted.

### Effect of Divorce Upon Dower

A question of great interest to title attorneys was answered to their satisfaction by the Ohio Supreme Court in *Goodman v. Gerstle*,<sup>9</sup> a declaratory judgment action brought to determine the dower rights of the plaintiff. Prior to 1932, the Ohio Code provided that if the successful party survived his or her divorced spouse, such party was entitled to dower in the realty of which the deceased was seized during coverture. Since January 1, 1932, the statutes have provided that upon the granting of a divorce each party shall be barred of all right of dower in the realty of the other.<sup>10</sup> In the principal case the plaintiff was granted an absolute divorce from her husband in 1918. In the decree, the court expressly provided that "she was not by this decree of divorce and alimony barred of her right and interest of dower in any of the real estate of the defendant at the date of this decree." The deceased died in 1947. This action was then brought by the plaintiff. Affirming a judgment for the defendants, the court held the legislation of

<sup>6</sup> *Liedorff v. Liedorff*, 113 N.E.2d 127 (Erie Com. Pl. 1953).

<sup>7</sup> OHIO REV. CODE § 3105.08 (OHIO GEN. CODE § 8003-9)

<sup>8</sup> 93 Ohio App. 294, 114 N.E.2d 480 (1952)

<sup>9</sup> 92 Ohio App. 527, 110 N.E.2d 35 (1952).

<sup>10</sup> 158 Ohio St. 353, 109 N.E.2d 489 (1952).

<sup>11</sup> OHIO REV. CODE § 3105.10 (OHIO GEN. CODE § 8003-11)

1932 barring dower to be a valid exercise of legislative power and applicable to all inchoate dower rights existing at the time the legislation became effective. The decision also pointed out that the divorce court in 1918, in making the order to the effect that the plaintiff was not by the decree of divorce and alimony barred of her dower rights in the realty owned by her husband at that time, " was without jurisdiction to pass upon or render any decree awarding the plaintiff any right of dower which was in conflict with legislative enactment creating dower or alimony rights."<sup>11</sup> In other words, inchoate dower is the creature of statute, and does or does not exist solely by the force of statute.

The theory of the decision would appear to eliminate any claim to dower in the analogous situation where, prior to 1932 a husband conveys realty without his wife's joining in the conveyance to release her dower rights; the wife subsequently, but before 1932, obtains an absolute divorce; and the husband sometime after January 1, 1932, dies leaving his ex-wife surviving. While the dower statute presently in force<sup>12</sup> gives the "surviving spouse" dower in any realty conveyed by a deceased consort during marriage, it does so only if the surviving spouse has not (1) relinquished, or (2) been barred from dower in such realty. It would appear that the ex-spouse would fall within the second provision of the statute and hence would have no claim to dower in such a situation. It also is difficult to see how the ex-wife could be regarded as a "surviving spouse," as the term is used in the dower statute.

### *Minor Spouse Bound by Separation Agreement*

It was held in *Burlovic v. Farmer*<sup>13</sup> that although the wife was a minor at the time she entered into a separation agreement with her husband, now deceased, wherein it was provided that they both released each other from all claims of any nature arising out of the marital relationship and that the wife was not to receive any alimony or support and would not demand any rights accruing to her by reason of the marital relationship, such separation agreement was valid and binding on the wife and she was not entitled to any portion of her deceased husband's estate, including the part exempt from administration and the year's allowance.

The court reasoned, quite correctly it seems, that the wife could not avoid the agreement on the ground of minority since the statute<sup>14</sup> authorizing separation agreements does not distinguish between married persons who have attained majority and those who have not. Still another reason

<sup>11</sup> *Goodman v. Gerstle*, 158 Ohio St. 353, 360, 109 N.E.2d 489, 493 (1952).

<sup>12</sup> OHIO REV. CODE § 2103.02 (OHIO GEN. CODE § 10502-1).

<sup>13</sup> 115 N.E.2d 411 (Ohio App. 1953).

<sup>14</sup> OHIO REV. CODE § 3103.06 (OHIO GEN. CODE § 8002-6).