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## Domestic Relations

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common knowledge and it is entirely possible that some juries being aware, from their own knowledge, of the non-taxable feature of verdicts may consider this aspect while others will not. Also, it may be questioned whether the non-taxable feature is so complex that the jury cannot handle it or will be diverted from the main issues of the trial. Is it any more complex, for example, than the reduction to present worth of a verdict for loss of future earnings which is often involved in personal injury suits? Or, is it any more complex than many of the accounting problems that juries are from time to time called upon to consider in arriving at their verdicts?

*Kelley v. Smith & Oby Co.*<sup>3</sup> involved generally the problem of proof of the extent of injury and therefore the amount of damages allowable in a personal injury action. The rule has been established with reasonable firmness in Ohio that in a personal injury action the plaintiff must accede to the defendant's request for reasonable physical examination but that the plaintiff's counsel and physician may be present during such examination. In the present case defendant requested that a specified doctor be allowed to conduct a psychiatric and neurologic examination. The named doctor stated to the court, by affidavit, that because of the nature of this examination it could not properly be conducted in the presence of third persons. On the basis of this, defendant asked that the usually present representatives of the plaintiff be excluded. The court granted the request as to the psychiatric aspects of the examination but denied it as to the neurologic aspects saying that the latter did not differ from a general physical examination. "The nervous and muscular reactions elicited in a neurologic examination" are not "subject to the will of the patient nor to the presence of a third party."<sup>4</sup>

EDGAR I. KING

## DOMESTIC RELATIONS

### *Interstate Divorce*

The doctrine of "divisible divorce," anomalous though it may first appear, has become a recognized concept. It is clear that if a husband procures an *ex parte* divorce the decree is effective to dissolve the marriage relation and is entitled to full faith and credit in all states.<sup>1</sup> However,

<sup>1</sup> 128 N.E.2d 166 (Ohio App. 1955).

<sup>2</sup> *Id.* at 167.

<sup>3</sup> 129 N.E.2d 106 (Ohio Com. Pl. 1954).

<sup>4</sup> *Id.* at 109.

the part of the decree which affects personal rights of the wife, though it may be recognized in other states as a matter of comity, is not entitled to full faith and credit. Prior to the decisions establishing the "divisible divorce" doctrine there were cases holding that in such a situation the decree of the state of the matrimonial domicile was entitled to interstate recognition in all respects. In *Armstrong v. Armstrong*<sup>2</sup> the matrimonial domicile was Florida. The husband obtained an *ex parte* Florida divorce decree denying the wife alimony. Later both parties moved to Ohio where the wife sued the husband for a divorce and for alimony. The Ohio Supreme Court held that Ohio could not grant a divorce but could grant alimony. The decision points out that alimony is a personal right of the wife and that the state of the matrimonial domicile is no more interested in the duty of continuing support than Ohio is. The decision appears to be correct on its facts, as the wife left Florida for at least six months prior to the Florida decree. As a broad principle of law, the case seems to be contrary to accepted rules of conflict of laws. In any event, the United States Supreme Court, which has the last word on full faith and credit is yet to be heard from.

As pointed out above, in an *ex parte* divorce, the part of the decree which affects alimony and custody need not be enforced in other states. However, as a matter of policy most states do attempt to determine these issues in such a case, apparently in the hope that other states will enforce the decree as a matter of comity, and also because it is desirable to fix the rights of the parties in advance in case the absent defendant should return. The lower courts in Ohio have generally followed this practice. The Ohio Supreme Court held this to be error, at least in the child custody situation where both the child and the mother are outside Ohio.<sup>3</sup>

### *Divorce and Support*

There was only one important case on the substantive law of divorce. The normal rule is that a valid marriage is a prerequisite to a divorce. Since bigamy is a ground for divorce in Ohio, the court of appeals held that the plaintiff in a divorce action based on other grounds does not have to allege or prove that a prior marriage was dissolved in order to obtain a di-

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<sup>2</sup> The term *ex parte* is used to refer to a divorce proceeding in which one party is served with constructive process and fails to enter a general appearance. Of course, the plaintiff seeking the divorce must be domiciled in the state granting the divorce, and the constructive service must meet the requirements of due process. Otherwise, no part of the decree is entitled to full faith and credit.

<sup>2</sup> 162 Ohio St. 406, 123 N.E.2d 267 (1954).

<sup>3</sup> *Swope v. Swope*, 163 Ohio St. 59, 125 N.E.2d 336 (1955).

vorce.<sup>4</sup> Presumably, the plaintiff still has to prove a marriage before he can get a divorce, even though he proves a void or voidable marriage.

The problem of retroactive modification of accrued alimony or support payments has continued to plague the lower courts. Last year the *Roach* case, a common pleas decision, indicated that unpaid accruals could be modified. The case was commented on and criticized in last year's survey article.<sup>5</sup> This year another common pleas court held that accruals were not as a rule open to modification.<sup>6</sup> However, in exceptional circumstances, an equity court could retroactively modify the unpaid installments. The court then proceeded to wipe out installments for the support of a child which accrued after he reached majority.

Confusion continues to exist in the lower courts on the relation between a separation agreement and a divorce decree. In two cases the court of appeals held that an agreement was binding on the parties until judicially determined on allegation and proof to be invalid by reason of fraud or mistake.<sup>7</sup> In one of the cases, the court held that the agreement which expressly released the husband from support pending a divorce action was enforceable, even though the wife incurred extraordinary medical expense due to illness which arose after the agreement was executed but prior to the divorce decree. In a third case, another court of appeals held that a support agreement could cut off the wife's right to support pending a divorce, but could not cut off the right to expense money in connection with the divorce.<sup>8</sup> In each one of these three cases, the trial court had disregarded the agreement and awarded alimony. It is to be hoped that the Supreme Court will eventually clarify this area.

### Children

In recent years there has been a substantial body of litigation in other states on the issue of whether or not the natural parent's consent to adoption is revocable prior to the adoption decree. The problem is an acute one because of the current almost universal practice of welfare agencies to take custody of an illegitimate child, to secure an advance consent, and then place the child in the home of the adoptive parents for a trial period of six months or a year before the actual adoption. After some confusion in the courts, the issue was settled in Ohio by the statute which provides

<sup>4</sup> *Treadway v. Treadway*, 125 N.E.2d 552 (Ohio App. 1955).

<sup>5</sup> 6 WEST. RES. L. REV. 249 (1955).

<sup>6</sup> *Wolff v. Wolff*, 124 N.E.2d 485 (Ohio Com. Pl. 1954).

<sup>7</sup> *Lowman v. Lowman*, 129 N.E.2d 213 (Ohio App. 1955). *Nellis v. Nellis*, 129 N.E.2d 217 (Ohio App. 1955).

<sup>8</sup> *Sinclair v. Sinclair*, 129 N.E.2d 311 (Ohio App. 1954).