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Domestic Relations

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for is a nullity." Such practice was not a usurpation of the functions of the jury thereby infringing the right guaranteed by the Constitution. The amount of excess in this case did not imply that the jury was influenced by passion or prejudice in their finding.

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DOMESTIC RELATIONS

Interstate Divorce

In the *Estin*[1] and *Kreiger*[2] cases the United States Supreme Court held that an *ex parte* divorce decree could not terminate a prior alimony decree granted by another state. The Nevada decree denying alimony was not entitled to full faith and credit, although the part of the decree which terminated the marital status was so entitled. The argument has been made that the Nevada decree was defective only because Nevada had failed to give full faith and credit to the prior New York alimony decree, and therefore the Nevada decree denying alimony would be entitled to credit where there was no prior decree. This argument was rejected by the Ohio Supreme Court in the *Armstrong*[3] case, which held that the ex-wife could bring an alimony only action in Ohio, although the marital status had been terminated by a valid Florida divorce entered *before* the wife sued in Ohio. The *Armstrong* case was appealed to the United States Supreme Court and the same argument was made. As pointed out in last year's survey article, the Supreme Court decided the case on other grounds and ducked the constitutional issue.[4] This year the same issue was again presented to the Supreme Court, and this time the Court approved the position that the Ohio court took in the *Armstrong* case. In *Vanderbilt v. Vanderbilt*[5] the court upheld a New York alimony decree rendered after the husband divorced the wife in a Nevada *ex parte* proceeding. The scope of the decision is not clear in one respect. The majority opinion assumes that the wife was domiciled in New York at the time of the divorce. Justice Harlan dissented, pointing out that the New York court had not passed on the issue, and that any state, except New York, should be bound by the Nevada decree.

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[1] Estin v. Estin, 334 U.S. 541 (1948).

[2] Kreiger v. Kreiger, 334 U.S. 555 (1948).

[3] Armstrong v. Armstrong, 162 Ohio St. 406, 123 N.E.2d 267 (1954).

[4] Armstrong v. Armstrong, 350 U.S. 568 (1956). See 1956 Survey, 8 WEST. RES. L. REV. 308 (1957).

[5] 354 U.S. 416 (1957). See Comment, *Vanderbilt and Beyond: Choice of Law in Interstate Post-Divorce Support Actions,* 4 WAYNE L. REV. 69 (1957).

> It seems to me unfortunate that this Court should permit spouses divorced by valid decrees to comb the country, after the divorce, in search of any state where the divorcing spouse has property and which has favorable support laws, in order there to obtain alimony, I would therefore by no means hold the Nevada adjudication "void" and therefore of no effect in any state.[6]

This problem was not present in the *Armstrong* case, nor was it discussed in the New York Court of Appeals or the Supreme Court majority opinion in *Vanderbilt*. Certainly the broad language used in the majority opinion implies that the Nevada decree denying alimony was absolutely void. From this, I would assume that there is nothing in the constitution which prohibits a state from treating the right of support as a transitory cause of action, and from permitting the defendant to be sued wherever he may be found.

In *Cunningham v. Cunningham*[7] the parties were divorced in California and custody of the child was awarded to the mother. The father sued in Ohio to enforce his visitation rights under the California decree. The Supreme Court held that where the mother and child are now domiciled in Ohio, Ohio does not have to recognize the California decree, but could redetermine the issues of custody and visitation. Surprisingly, the Ohio Supreme Court did not cite the decision of the United States Supreme Court in the *Halvey* case[8] which is directly in point. The Court held that a custody decree which was subject to modification where made was not entitled to full faith and credit, and could be modified in the state where one parent and the child lived. In the instant case, it is clear that the California decree could be modified in the court where rendered, and therefore could be modified in Ohio.

Divorce

1. *Procedure*

The courts have often stated that a divorce action is more than a mere controversy between private parties, and that the state is a party to every divorce proceeding. If this is true, the court should not be limited to the evidence introduced by the parties, but should be free to collect evidence on its own — any evidence which is relevant to the marital history.[9] A recent court of appeals case represents a short step in the

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[6] Vanderbilt v. Vanderbilt, 354 U.S. 416, 434 (1957).

[7] 166 Ohio St. 203, 141 N.E.2d 172 (1957). Accord as to full faith and credit and child custody decrees, Bain v. Rose, 103 Ohio App. 297, 145 N.E.2d 319 (1957).

[8] New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

[9] As to divorce actions involving children under 14, this policy is reflected in the mandatory divorce investigation act, OHIO REV. CODE § 3105.08.

right direction. In the *Weikert*[10] case the wife entered a general denial to the husband's petition charging gross neglect. The trial court strictly limited the evidence and scope of cross-examination to the narrow issue of whether there was gross neglect during the period just prior to separation, and denied the wife permission to testify or cross-examine relative to the underlying causes of the marital breakup. The court of appeals held that this narrow approach, while justifiable in some civil cases, was prejudicial error. The court said "The issue before the court is simply stated. What was the cause of the separation of these parties after a marital relationship of nearly twenty years?"[11]

In *Ward v. Ward*[12] it was held that the statute permitting the court of appeals to award temporary alimony on the appeal of a divorce case, also permitted the award on the appeal of a decree modifying a pre-existing alimony order. The court did not discuss the constitutionality of the statute, which was the issue in *Beach v. Beach,* discussed in last year's survey article.[13]

2. *Grounds for Divorce and Defenses*

There was only one unusual case on cruelty as a ground for divorce.[14] In the opinion, the court agreed to "reluctantly elaborate" on the plaintiff's claim that her husband was a sexual pervert who forced or persuaded her to collaborate with him. Recognizing that there were no Ohio cases on the subject, the plaintiff argued that to deny her relief would have the effect of judicially approving sodomy and other similar conduct. The court denied the divorce, concluding that the acts were not against the will of the plaintiff. Perhaps the underlying rationale of the decision is found in one of the concluding remarks of the court: "It is not unfair to observe that the parties lack gentility."[15]

There are two interesting court of appeals decisions on defenses to a divorce action. Generally, both condonation and recrimination are defenses which will bar any divorce, at least where pleaded. In Ohio, three of the grounds for divorce are "annulment" grounds, i.e., they relate to defects in the formation of the marriage, rather than to events which happen later. The three grounds are fraud, impotency and bigamy. In a case of first impression, the court in the *Kontner*[16] case held that

[10] Weikert v. Weikert, 143 N.E.2d 863 (Ohio Ct. App. 1956).

[11] *Id.* at 865.

[12] 140 N.E.2d 906 (Ohio Ct. App. 1956).

[13] 134 N.E.2d 162 (Ohio Ct. App. 1955). See 1956 Survey, 8 WEST. RES. L. REV. 310 (1957).

[14] Johnston v. Johnston, 143 N.E.2d 498 (Ohio C.P. 1957).

[15] *Id.* at 500.

[16] Kontner v. Kontner, 139 N.E.2d 366 (Ohio Ct. App. 1956).

the defenses would not be applied where the ground for divorce was bigamy. Both husband and wife pleaded and proved that at the time of the marriage the other spouse was already married to someone else, and it was pleaded and proved that the parties had lived together after the filing of the petition. The divorce was granted to the husband, although where both parties are guilty of bigamy, the logical thing would be to grant each party a divorce from the other.

The doctrine of recrimination is harsh enough in the situation where one spouse wants a divorce and the other does not. It is even harder to defend a rule which would require the denial of a divorce where both parties are guilty of some misconduct, and both spouses desire a divorce. For this reason it is generally held in Ohio and elsewhere that recrimination is an affirmative defense and must be pleaded. In *Lewis v. Lewis*[17] the court applied the recrimination rule to deny a divorce in an uncontested case. The wife sued for divorce on the ground that her husband was serving a ten year term in prison. After she rested her case, and in response to a question from the court, she admitted that she had become the mother of an illegitimate child after her husband went to prison. The public policy of Ohio is to promote family unity and harmony, and the denial of the divorce in this case does affect this policy. The happy family is left intact; the husband in prison, the mother on the outside, presumably still living with her boy friend, and the child judicially labeled "bastard" in an uncontested case.

3. *Grant of Alimony*

Ohio Revised Code § 3105.18 provides that in fixing alimony, the court may consider among other factors "the value of real and personal estate of either, at the time of the decree." In *Ziegler v. Ziegler*[18] the Supreme Court held that the "estate" which was to be considered was not limited to a legal estate, but included equitable interests. At the time of the divorce trial, the husband's mother had died naming him as sole legatee. The will had been probated but no distribution had been made and legal title was still in the executor. The trial court refused to admit evidence of the estimated value of the mother's estate, and this was held to be prejudical error.

The Supreme Court has held that a divorce decree which orders alimony of "$100 per month until the wife remarries" automatically terminates on the death of the husband.[19] In the same case, the court, as dicta, said that alimony cannot continue beyond the death of the husband

[17] 144 N.E.2d 887 (Ohio Ct. App. 1956).

[18] 166 Ohio St. 406, 143 N.E.2d 589 (1957).

[19] Snouffer v. Snouffer, 132 Ohio St. 617, 9 N.E.2d 621 (1937).

unless a separation agreement, which is incorporated in the decree, so provides. In the recent *DeMilo*[20] case the Supreme Court repudiated this statement, and permitted the alimony to run beyond the death of the husband, where this was expressly provided for in the decree, even though the decree was not based on a separation agreement.

The third Supreme Court case in this area involved the extent to which a divorce court is bound by a separation agreement. Early Supreme Court decisions indicated that post-nuptial separation agreements were valid where the contract was fair, reasonable and just, considering all the circumstances. Following this lead, the lower courts in Ohio have felt free to disregard separation agreements where the court found that the agreement was unfair at the time the divorce was granted. In 1950, the Supreme Court upset this line of decisions in the *Meyer*[21] case and held that the provisions of the agreement respecting alimony are binding on the divorce court until the court affirmatively finds that the agreement must be rescinded for fraud or mistake, and that the burden is on the person who attempts to avoid the contract. In spite of this decision, a number of lower courts have continued to set aside support agreements for unfairness and grant alimony in a manner inconsistent with the terms of the contract. In the recent case of *Lowman v. Lowman*[22] the Supreme Court indicated that it really meant what it said in the *Meyer* case, and that the agreement could not be disregarded by the divorce court, no matter how harsh or unfair it was. In this case both spouses were employed and agreed to separate. Each party expressly waived any right to future support or alimony. While the divorce action was pending, the husband beat the wife so badly that she almost died, became unemployable, and incurred large medical bills. The trial court ordered the husband to pay temporary alimony and to pay the medical bills. The court held that the agreement would be disregarded because it was so unfair. The court reasoned that the wife's expenses and inability to work were caused by her husband, and the separation agreement contemplated by the statute[23] must provide for some support, rather than total non-support. The court of appeals affirmed, and was then reversed by a unanimous Supreme Court.

Two courts of appeals came to different conclusions as to the power of a court to order a division of property in an action for alimony alone.

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

[21] Meyer v. Meyer, 153 Ohio St. 408, 91 N.E.2d 892 (1950).

[22] 166 Ohio St. 1, 139 N.E.2d 1 (1956). On the somewhat related issue of the effect of a separation agreement on a life insurance policy in which the wife is the named beneficiary, see Western and Southern Life Ins. Co. v. Hague, 140 N.E. 2d 89 (Ohio C.P. 1956), commented on in the Insurance Survey article *infra.*

[23] OHIO REV. CODE § 3103.06.

The *Durham*[24] case in 1922 held that the court had no jurisdiction to make such an award, since divorce courts had no equitable powers. The 1951 amendment to the divorce statutes specified that divorce courts do have equity powers and the *Morrison*[25] case holds that a final property settlement is now authorized by statute in an alimony action. The *Hetrick*[26] case reached the opposite conclusion, on the ground that the marital obligation still exists and any alimony only decree must therefore remain subject to modification.

4. *Child Support and Custody*

In *Hall v. Hall*[27] the petition for divorce stated that the parties had a minor child but did not ask for an order of custody or support. The court granted the divorce but the decree was silent as to any provisions relative to the custody or support of the child. After the expiration of three terms of court, the wife filed a motion in the original divorce case asking for custody. The court of appeals held that the court had never had jurisdiction over the child, and applied the familiar rule that a court loses control of its judgments at the end of each term, and cannot vacate, modify or re-open a case in a subsequent term. Doubtless this is good law as applied to normal civil cases, but the decision is highly questionable in the child custody area. The court could have held that jurisdiction over the child attaches as soon as the parents file for divorce, even though the parents do not ask for a custody order. This argument is strengthened by the mandatory provision of the Code which states that in every case where a divorce is granted, the court must make provision for the custody of the child.[28]

The courts of appeals are not in agreement on the power of a trial court to award custody and support where the court has denied the divorce or alimony. Two courts have held that the court has no jurisdiction, and two courts have held that it does, and that it is an abuse of discretion to fail to make such an order. A fifth court has now lined up with the former group.[29]

Although there is not much authority in Ohio, other states have generally held that a divorce court which has both parents before it can decide questions of custody and child support, even though the child is a permanent resident of another state. This majority rule was followed

[24] Durham v. Durham, 104 Ohio St. 7, 135 N.E. 280 (1922).
[25] Morrison v. Morrison, 102 Ohio App. 376, 143 N.E.2d 591 (1956).
[26] Hetrick v. Hetrick, 101 Ohio App. 334, 139 N.E.2d 674 (1954).
[27] 101 Ohio App. 237, 139 N.E.2d 60 (1956).
[28] OHIO REV. CODE § 3105.21.
[29] Lewis v. Lewis, 144 N.E.2d 887 (Ohio Ct. App. 1956).

by the court of appeals in *Bowman v. Bowman*,[30] where the child had never lived in Ohio. In a somewhat similar case, a common pleas court held that it had jurisdiction to modify a child custody award where both the mother and child were outside Ohio. The mother was served in West Virginia, but had been before the court in the original divorce action.[31]

5. *Modification of Alimony, Support or Custody*[32]

The *Ward*[33] case is an interesting illustration of the factors which a court will consider in modifying an alimony award. Here the original decree recited that the husband was to pay a monthly sum, unless the financial status of the wife is changed. The court held that the improvement in the husband's financial status would not justify an increase, but where the wife could show that her financial status had changed for the worse, the court could increase the alimony and could then consider both the improved status of the husband and the general devaluation of the dollar which had occurred since the original decree.

In *Stafford v. Stafford*[34] the husband asked the court to reduce the monthly payments for child support that he was required to pay under the original divorce decree. The court held:

(1) The court could modify the decree, even though the original decree contained no express reservation of power to modify.

(2) The burden of proof is on the party who seeks to modify the decree.

(3) The husband is not prevented from seeking a reduction simply because he was in arrears on past installments and had been found in contempt of prior court orders. He was given a chance to explain his inability to comply with the prior decrees. On this last point, another court of appeals pointed out that the trial court had discretion to dismiss a motion for change of custody, where the petitioner was in arrears on support payments and was unable to justify his failure to observe the court order.[35]

6. *Enforcement of Alimony and Support Decrees*

In the *Tritto*[36] case, the wife got an alimony judgment for monthly

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[30] 101 Ohio App. 400, 139 N.E.2d 679 (1956).

[31] Kirkpatrick v. Kirkpatrick, 139 N.E.2d 119 (Ohio C.P. 1956).

[32] The jurisdiction of an Ohio court to modify a child custody support or alimony decree rendered in another state is discussed in the first section of this Survey article. See text at note 7 *supra*.

[33] Ward v. Ward, 140 N.E.2d 906 (Ohio Ct. App. 1956).

[34] 139 N.E.2d 347 (Ohio App. 1956).

[35] Hahn v. Hahn, 144 N.E.2d 499 (Ohio Ct. App. 1956).

installments in New York. Later, the New York court reduced the unpaid installments to a lump sum judgment, although the husband was not served and had no notice of the action. His attorney in the first case was served in the second. The wife then sued in Ohio on the second New York judgment and the court of appeals affirmed a judgment for the plaintiff, pointing out that even if no lump sum judgment had been entered in New York, the wife could sue in Ohio for the unpaid installments.

Elkind v. Harding[37] raises a novel question which has not previously been decided in Ohio, and which has been the subject of conflicting decisions in other states. The wife obtained custody of the child in a divorce action and an order for the husband to pay her $20 per week for the support of the child. The decree also provided that the child was not to be removed from Ohio without prior permission from the court. The mother took the child to California in violation of the court order, and later sued in Ohio to reduce unpaid installments to judgment. The trial court construed the decree as meaning the husband must pay support only while the child is in Ohio, and disallowed the claim for installments which accrued after the move to California. The court of appeals reversed, giving several reasons for its decision. The principal reason relied on by the court was that unpaid accruals are vested rights which cannot be modified. This argument seems unconvincing. It is true that due and owing installments are judgments which are entitled to full faith and credit, but the divorce court now has equity powers and should be able to apply the "clean hands" rule to bar a party who is in contempt of court from enforcing his rights, even if the rights rest on a judgment. A much better reason, and one mentioned only in passing by the court, is that the guilding policy is the interest of the child. Someone has to support the child and the legislative policy is clear that the primary duty of support rests on the father. While the fact of the mother's violation of the court order might be considered in a motion to change custody to the father, or might be considered in this case in a contempt proceeding initiated by the court when the mother seeks to enforce payment, it should not prevent the child from collecting the support to which he is entitled.

The two cases which reached conflicting results on the power of a wife to collect alimony from a spendthrift trust are commented on in the TRUSTS survey article in this issue.[38]

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[36] Tritto v. Tritto, 138 N.E.2d 453 (Ohio Ct. App. 1955).

[37] 143 N.E.2d 752 (Ohio Ct. App. 1957).

[38] See text of Trusts Survey article, *infra*, at footnotes 5 and 6.

Husband and Wife[39]

The Code provides that workmen's compensation death benefits may be paid only to a "member of the family of the deceased employee."[40] In the *Evans*[41] case the claimant married the employee after the employee's first wife had written saying that she had divorced him. The fact was that there had been no divorce and the marriage was technically bigamous, although entered into in good faith. The Supreme Court reversed the lower courts and held that the claimant could not qualify as a member of the family. Of course the first wife is also barred because she was not living with her husband at the time of death, as required by the same statute.

Legally a common law marriage is just as good as any other marriage. The difficulty lies in proving it. *Lynch v. Romas*[42] points out that this difficulty may be almost impossible to overcome in some situations. The court of appeals held that where an alleged common law wife attempts to qualify as a widow of the deceased, the "dead man" statute prevents her from testifying as to the marriage. Although the parties lived together for several years and were known in the community as husband and wife, the court held that the wife could not testify as to any agreement of marriage. Without her own testimony, the wife failed to meet the burden of proving a marriage by clear and convincing evidence.

A court of appeals case on the authority of a wife, as agent, to bind her husband to a contract is discussed in the AGENCY survey article *supra.*

Adoption

Two recent cases involve the procedure for adoption. *In re Masters,*[43] discussed in detail in last year's Survey,[44] held that the requirement of the consent of the mother to the adoption of her child could not be dispensed with in the absence of clear evidence of willful neglect. In a similar case, decided this year, the Supreme Court repeated the rule of the *Masters* case and set aside the finding of neglect for lack of sufficient evidence.[45] Another case held that habeas corpus is a proper remedy where the natural parent tries to upset an adoption on the ground that the consent was forged.[46]

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[39] On pleading a cause of action for alienation of affections see Rittenhouse v. Rittenhouse, 140 N.E.2d 84 (Ohio C.P. 1957).

[40] OHIO REV. CODE § 4123.59.

[41] Evans v. Ind. Com., 166 Ohio St. 413, 143 N.E.2d 705 (1957).

[42] 139 N.E.2d 352 (Ohio Ct. App. 1956).

[43] 165 Ohio St. 503, 137 N.E.2d 752 (1956).

[44] 1956 Survey, 8 WEST. RES. L. REV. 317 (1957).

[45] *In re* Kronjaeger, 166 Ohio St. 172, 140 N.E.2d 773 (1957).

[46] *In re* Martin, 140 N.E.2d 623 (Ohio Ct. App. 1957).