Recent Decisions

DOMESTIC RELATIONS — ACTION BY MINOR FOR DEPRIVATION OF FATHER'S SOCIETY

Plaintiff, a minor, sued paternal grandparents to recover for the loss of "love, affections, society, guidance and companionship of his father," who was maliciously and wilfully induced by the defendants to break up plaintiff's home and family. The trial court sustained the defendant's general demurrer. On appeal, *held,* affirmed. This action was unknown at common law and there is in Ohio no statutory authority for it. The court will not encroach upon the legislature's right to create new legal rights and remedies. *Gleitz, III v. Gleitz, Sr. et. al.,* 59 Ohio L. Abs. 186 (1951).

While this action by a minor is unknown in Ohio, the similar action for alienation of affections has long been recognized as a right belonging to the husband, *Flandermeyer v. Cooper,* 85 Ohio St. 327, 98 N.E. 102 (1912), and to the wife, *Westlake v. Westlake,* 34 Ohio St. 621 (1878). The Supreme Court of Ohio, in *Westlake v. Westlake, supra,* recognized this right in the wife although it was unknown at common law and there was no specific statutory authority for it.

An action by minor children was allowed in the leading case of *Daily v. Parker,* 152 F. 2d 174 (7th Cir. 1945). In this case the court developed what has come to be known as the "Family Unit" theory; each member of the family being entitled to the society and companionship of the others. Judge Evans continued: "Our conclusion .... is that a child today has a right enforceable in a court of law, against one who has invaded and taken from said child the support and maintenance of its father, as well as damages for the destruction of other rights which arise out of the family relationship and which have been destroyed or defeated by a wrongdoing third party. Likewise, we are persuaded that because such rights have not heretofore been recognized, is not a conclusive reason for denying them .... In the absence of a state court ruling our duty is tolerably clear. It is to decide, not avoid the question."

Other well reasoned cases have followed this approach. *Russick v. Hicks,* 85 F. Supp. 281 (W. D. Mich. 1949); *Miller v. Monsen,* 228 Minn. 400, 37 N. W. 2d 543 (1949); *Johnson et. al. v. Luhman,* 330 Ill. App. 598, 71 N.E. 2d 810 (1947).

In what is now the majority view, however, other courts have denied the action. *Nelson v. Richwagen,* 95 N.E. 2d 545 (Mass. 1950); *Taylor v. Keefe,* 134 Conn. 156, 161, 56 A. 2d 768 (1947); *Edler v. MacAlphine-Downie,* 180 F. 2d 385 (D.C. Cir. 1950); *Katz v. Katz,* 197 Misc. 412, 95 N.Y.S. 2d 863 (1950); *Hinson v. Thomas,* 231 N.C. 173, 56 S.E. 2d 432 (1949); *Rudley v. Tobias,* 84 Cal. App.

2d 454, 190 P. 2d 984 (1948) (based on California Statutes); *Garza v. Garza,* 209 S.W. 2d 1012 (Texas 1948); *McMillan v. Taylor,* 160 F. 2d 221 (D.C. Cir. 1946); *Morrow v. Yannantuono,* 152 Misc. 134, 273 N.Y.S. 912 (1934).

Various reasons have been assigned for this view. Some of the cases specifically deny that the court has the power to indulge in "judical empiricism." *Hinson v. Thomas, supra; Garza v. Garza, supra; Edler v. MacAlpine-Downie, supra.* Other cases deny the action for policy reasons. Chief among them are: fear that a multiplicity of suits would result, *Morrow v. Yannantuono, supra;* fear that to permit the action would open the door to fraud and extortion, *Katz v. Katz, supra;* and fear that the children's damages would be duplicated by being taken into consideration in an action by the parent as well as in the action by the child, *Morrow v. Yannantuono, supra.* Some note that the adoption in twelve states of "Heart-balm" acts, indicates a social trend against allowance of the action, *Taylor v. Keefe, supra;* but see *Russick v. Hicks, supra.* For a discussion of the policy arguments for allowing the action see Comment, 20 CORN. L. Q. 255 (1935). For a discussion of the policy arguments against allowing the action see Comment, 83 U. PA. L. REV. 276 (1934).

The principal case adds little that is new to this particular field of the law. Its main importance is that it is the first decision on this question on the appellate level in Ohio.

Robert A. Strickling

PROCEDURE — ATTACHMENT IN ACTION AGAINST NON-RESIDENT — WHEN ACTION COMMENCES

In an action against a foreign corporation not licensed to do business in the state of Ohio, plaintiff filed, on January 3rd, its petition, precipe for summons, and affidavit in attachment. On the same date, the summons was returned "not found" and an order of attachment was served on the defendant garnishee. The first publication was made on January 5th. On appeal, *held,* affirmed. The order of attachment was valid although it was issued before the date of first publication. *Consumers Plumbing & Heating Co. v. Chicago Pottery Co.,* 155 Ohio St. 373, 98 N.E. 2d 823 (1951).

Section 11819 of the Ohio General Code states that attachment is proper in a civil action "at or after its commencement." Two other sections deal with the commencement of an action. Section 11230 of the Ohio General Code provides that "An action shall be deemed to be commenced *within the meaning of this chapter,* as to each defendant, at the date of the summons which is served on him. . . . When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regu-

larly made." (Emphasis supplied.) This section appears in the chapter concerning the statute of limitations.

Section 11279 of the Ohio General Code states that "A civil action must be commenced by filing . . . a petition, and causing a summons to be issued thereon." The question, here, is which of these sections defines commencement within the meaning of Section 11819 of the Ohio General Code.

Prior to 1936, the Ohio courts held that an order of attachment issued before the date of first publication was valid, provided that the action had been commenced by filing a petition and causing a summons to issue thereon, as provided in Section 11279. *Seibert v. Switzer,* 35 Ohio St. 661 (1880); *St. John v. Parsons,* 54 Ohio App. 420, 7 N. E. 2d 1013 (1936). Shortly thereafter, two removal cases arose in the federal courts, and the U. S. Supreme Court, in *Rorick v. Devon Syndicate, Ltd.,* 307 U. S. 299 (1939), held that the position of the Ohio courts was that Section 11230 merely applied to questions of the statute of limitations, and that Section 11279 provided for the commencement of the action for purposes of attachment. In so holding, the Supreme Court reversed the Circuit Court of Appeals in that case, and overruled the earlier case of *Doherty v. Fleming,* 83 F. 2d 388 (6th Cir. 1936). This put the federal courts in line with the traditional Ohio view.

Two cases arose on similar questions in the state courts upon which appellant relied in the instant case. In *Crandall v. Irwin,* 139 Ohio St. 463, 40 N.E. 2d 933 (1942), the Ohio Supreme Court held that Section 11279 prescribed the *manner* of commencing an action, while Section 11230 prescribed the *time* of commencement. In that case plaintiff was seeking to foreclose a mechanic's lien, and had filed his petition and precipe, but service was not made before the statutory six year period had run. The lien was dissolved, the court holding that this was a question of the time of commencement, so that Section 11230 applied. Judge Turner's statement in the opinion that the construction of Ohio statutes by the federal courts in the *Doherty* and *Rorick* cases, *supra,* would have no influence on the Ohio Supreme Court, is interesting as a matter of statutory construction.

In the second case, *Pilgrim Distributing Corp. v. Galsworthy, Inc.,* 148 Ohio St. 567, 76 N.E. 2d 382 (1947), plaintiff filed its affidavit in attachment along with the petition and precipe, and the order of attachment was issued immediately. The evidence showed, however, that the *summons was not issued at any time,* and that an affidavit for service by publication was not filed until some two weeks later. The court held that the attachment was void as it had been levied before the cause of action was commenced inasmuch as no summons had been issued. The dictum in the case that if

there had been publication it would not be necessary to have the summons issued has some support in Ohio. *Shaffer v. Shaffer,* 69 Ohio App. 447, 35 Ohio L. Abs. 441 (1941); *Smith v. Whittlesey,* 19 Ohio C. C. 412, 10 Ohio C. D. 377 (1899). *Contra: Central Savings Bank v. Langenbach,* 1 Ohio N.P. 124 (1894).

In the instant case, the *Crandall* and *Pilgrim* cases, *supra,* were both distinguished. It was held that the *Crandall* case dealt with the limitation of an action, so that Section 11230, the statute of limitations section, applied. The *Pilgrim* case was distinguished on the facts, in that no summons was issued before the order of attachment.

The effect of the instant case is to lend support to the practice of filing together the petition, precipe, affidavit for constructive service, and affidavit in attachment.

Paul M. Smart

WILLS — EVIDENCE — OPINIONS OF WITNESSES AS TO MENTAL CAPACITY

In a will contest the trial court permitted witnesses to answer the question, "Tell the jury whether or not, in your opinion, Walter Yochum was able to dispose of his property by last will and testament?" The court of appeals affirmed. On appeal, *held,* reversed. Witnesses may not give their opinions as to the ability of a testator to dispose of his property by will. *Gottfried v. Yochum,* 155 Ohio St. 283, 98 N.E. 2d 821 (1951).

That opinions as to testamentary capacity are inadmissable has long been the recognized rule in Ohio. *Runyan v. Price,* 15 Ohio St. 1, 86 Am. Dec. 459 (1864); *Gillespie v. Gray,* 38 Ohio L. Abs. 145, 49 N. E. 2d 108 (1943). The great majority of other jurisdictions are in accord. *Shneider v. Manning,* 121 Ill. 376, 12 N. E. 267 (1887); *Re Ferguson,* 239 Mich. 616, 215 N.W. 51 (1927); see 155 A.L.R. 284; 57 Am. Jur. 122; 37 L.R.A. (N.S.) 595.

The instant case states that there is "a long existing and well established rule in this jurisdiction." Nevertheless the issue has been often litigated in Ohio which indicates that the "rule" is still not clear. The cause of the confusion is that the courts have used several rationales. Clearly the correct hypothesis for ruling out questions concerning testamentary capacity is that they call for opinions involving mixed issues of law and fact. Most jurisdictions have adopted this rationale. *Coblentz v. Putifer,* 87 Kan. 719, 125 Pac. 30 (1912); *Farrell v. Brennan,* 32 Mo. 328, 82 Am. Dec. 137 (1862); see notes 155 A.L.R. 285; 37 L.R.A. (N.S.) 595; 57 Am. Jur. 122. Though in proper cases witnesses should be permitted to give opinions as to facts, they should not be permitted to say that those facts meet a legal standard, for witnesses cannot know what the

proper legal standard is. In the instant case, how is the witness to know what the legal requirements for testamentary capacity are? A study of the Ohio cases dealing with the issue shows that each of them could have been settled on this ground alone.

Some of the questions Ohio courts have held incompetent are: "Do you think that she had the capacity for making a will?" *Gillespie v. Gray, supra.* "Whether testatrix was competent to make a will?" *Kahler v. Cowden,* 4 Ohio L. Abs. 501 (1926). "I will ask you if, in your judgment, from what you saw and learned of John Crowe, he had sufficient mind and memory to make a proper testamentary disposition of his property on the date you saw him?" *Burns v. Crowe,* 31 Ohio C.A. 566 (1920). "Do you think that Mr. Fink had the mental capacity to comprehend the nature of the act he was performing?" *Shuey v. Fink,* 26 Ohio C.C. (N.S.) 106 (1915). These questions are clearly incompetent since, before the witness could answer, them he would have to apply the legal standard of testamentary capacity to the factual capacity which in his opinion the testator possessed. The witness cannot know the capacity which the law requires.

The following questions have been approved by the Ohio courts: "Was Weis, during the times you observed him, rational or irrational? Was he of sound or unsound mind? Did he have sufficient mind and memory to form an intent and purpose to dispose of his property by will?" *Weis v. Weis,* 147 Ohio St. 416, 72 N.E. 2d 245 (1947). "You may state, doctor, whether or not Charles K. Jacoby . . . had sufficient mind and memory to understand the nature of business which required him to comprehend generally the nature and extent of his property; to understand the nature of the business in which he was engaged; to hold in his mind the names and identity of those who have claims upon his bounty, and to be able to appreciate his relations to the members of his family." *Brown v. Jacoby,* 55 Ohio App. 250, 9 N.E. 2d 693 (1936). "Whether, in your opinion, testator possessed sufficient understanding to transact ordinary business incident to the management of his property and household affairs?" *Baillie, Exr. et al v. Heimsath Admr. et al,* 20 Ohio App. 216, 3 Ohio L. Abs. 570 (1925). "You may also further state whether or not he had capacity to form a purpose and intention of disposing of his property by will?" *Dunlap, Exec. et al v. Dunlap et al,* 89 Ohio St. 28 (1913). These questions are competent since they ask only for opinions of factual ability or capacity and the witness needs no knowledge of legal standards to answer them.

In *Runyan v. Price,* 15 Ohio St. 1 (1864), regarded as the Ohio authority on the issue, the court did adopt the correct rationale, saying, "Such inquiry involves a matter of law; also assumes that the witness knows the degree of capacity required to perform the

act in issue." But the court did not stop there. It went on to say, "This branch of the inquiry involved a question of law and fact, and, to the extent that capacity was involved in the issue, *the very question to be determined by the jury.*" (Emphasis supplied). It is this last phrase which has caused confusion. Considered in context it means that the jury, not the witness, should apply the legal standard to the facts, and of course even the jury must be told by the court what the correct legal standard is. Unfortunately, in subsequent litigation, courts and attorneys have used the phrase without discriminating between questions purely of fact and those also involving legal standards. The phrase has come to mean that any opinion determinative of the case is inadmissable, whether the opinion be purely of fact or involves both facts and the law. Taken in that sense the phrase is fallacious. To illustrate, in a simple negligence case no defense attorney would object to a witness testifying that he saw the defendant go through a red light, and if there should be an objection no court would sustain it. Yet if the jury should believe the witness's testimony and apply to it the correct legal standard making this negligence per se, one of the ultimate issues in the case is decided. The same logic applies to other branches of the law including will contests. In *Bahl v. Byal et al,* 90 Ohio St. 129 (1914) a witness was correctly permitted to testify that in his opinion the testator could not comprehend the "division and distribution of an estate valued at about $70,000.00." Should the jury believe that testimony and apply to it the proper legal standard for testamentary capacity, they must necessarily conclude that the testator did not have the legal capacity to make a will, and one of the ultimate issues has in effect been answered by the witness.

The difficulty is not exclusive with Ohio, other jurisdictions too have encountered it, and the modern trend is to abolish altogether the use of "the ultimate question for the jury" as a rationale in any branch of the law. *U. S. Smelting Co. v. Parry,* 166 Fed. 407 (8th Cir. 1909); *Grismore v. Consolidated Products Co.,* 232 Iowa 328, 5 N.W. 2d 646 (1942); see notes 78 A.L.R. 755; 20 Am. Jur. 654; 57 Am. Jur. 122. Text writers have been especially bitter in their condemnation of this rationale. 7 WIGMORE, EVIDENCE §§ 1920, 1921 (3d ed. 1940); 1 GREENLEAF, EVIDENCE § 441b (16th ed. 1899); MODEL CODE OF EVIDENCE, Rule 401 (1942); 20 Am. Jur. 654.

The instant decision is couched in the following terms, "Opinions of such witnesses are not admissable where such opinions *in fact answer the ultimate question at issue* and which is to be submitted to the jury upon competent evidence for its decision." (Emphasis supplied). The result of the case is correct, but does the court mean that all opinions, even those purely of fact, which answer the ultimate question at issue are incompetent, or does it really mean that

only opinions involving *law* and fact are inadmissable? Considered in the light of the results of past cases without regard to their language, the instant decision condemns only mixed questions of law and fact. Assuming this interpretation to be correct, the court's rationale as well as their result is clearly proper, but it would seem that a more precise statement of that rationale by the court would have aided greatly in clarifying the law and perhaps reducing future litigation on the issue.

Leonard Goldberg

INSURANCE — DEATH WHILE IN VIOLATION OF LAW

Action by a beneficiary to recover on two policies of life insurance providing in substance for payment on the death of the insured. The insured, while engaged in the crime of armed robbery, was shot and killed by his victim. The Superior Court found for the defendant. On appeal, *held,* affirmed. Public policy forbids even an innocent beneficiary of a life insurance policy from recovering on the policy where the death is the result of the insured's own criminal conduct. *Malloy v. John Hancock Mutual Ins. Co.,* 97 N.E. 2d 422 (Mass. 1951).

The general view is that there can be recovery where the insured is killed while violating the law unless there is an express provision in the policy providing otherwise or the policy was obtained with the commission of the illegal act in contemplation. 6 COUCH, INSURANCE § 1236 (1930); APPLEMAN, INSURANCE LAW AND PRACTICE § 511 (1941); VANCE, INSURANCE § 190 (3d ed. 1951).

In contrast to the general rule several jurisdictions deny recovery in certain circumstances even though there is no express provision in the policy prohibiting recovery. The rule in the federal courts, *Burt v. Union Central Ins. Co.,* 187 U.S. 362 (1902), and England, *Amicable Society v. Bolland,* 4 Bligh. N.S. 194 (1830), is that the insurer does not have to pay if the deceased was executed for a crime even though such risk is not expressly excepted in the policy. The thought here is that the threat of cancellation of an insurance policy would deter a person from committing a crime which carried a death penalty. This rule has been criticized in that, in fact, it does not deter crime. *Fields v. Met. Life Ins. Co.,* 147 Tenn. 464, 249 S.W. 2d 798 (1923); *Weeks v. N. Y. Life Ins. Co.,* 128 S.C. 223, 122 S.E. 591 (1924); *Collins v. Met. Life Ins. Co.,* 232 Ill. 37, 83 N. E. 542 (1907).

Some courts follow the decision in *Mutual Life Ins. Co. of N.Y. v. Guller,* 68 Ind. App. 544, 119 N.E. 173 (1918), in saying that life insurance policies can be divided into two types; (1) those payable to the estate and (2) those payable to designated third parties as beneficiaries. These courts hold that the third parties acquire a

vested interest in the policy at the time of its issuance and thereafter their rights cannot be affected by the wrong of the insured, for whose acts they are in no way responsible. According to this view public policy does not excuse the insurer from liability when the insured dies as a result of a violation of law and the beneficiary is a third party but the insurer is excused when the beneficiary is the estate because the estate is considered to be the same as the insured and public policy prevents the insured from profiting by his own wrong. *Payne v. Louisiana Industrial Life Ins. Co.*, 33 So. 2d 444 (La. 1948). This distinction in life insurance policies was rejected by the United States Supreme Court in *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234 (1911). The court held that the policy was "the measure of the rights of everyone thereunder."

Massachusetts, along with some other states, holds that the express provision prohibiting recovery when the death was due to a violation of law is superfluous since it is just a statement of the controlling public policy. *Lubianez v. Met. Life Ins. Co.*, 323 Mass. 16, 79 N.E. 2d 876 (1948). The principal case is consistent with this precedent.

The value of the principal case is in clearly showing Massachusetts' position that public policy forbids recovery by an innocent beneficiary when the insured is killed as a result of a violation of law. Previous Massachusetts cases on this point were not as clear as the principal case since they all contained something in the fact situation that could bring them under one of the minority rules previously mentioned. *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550 (1876) was payable to the estate; *DeMello v. John Hancock Mutual Life Ins. Co.*, 281 Mass. 190 183 N.E. 255 (1937), and *Lubianez v. Met. Life Ins. Co., supra,* were both suits on a double indemnity clause in the contract; and *Millen v. John Hancock Mutual Life Ins. Co., supra,* was a case in which the death penalty was inflicted.

The public policy argument that refusing payment to the beneficiary when the insured is killed while violating the law will decrease crime seems weak to the writer. A person bent on doing some illegal act would not be deterred by the fear that his insurance policy would not be paid if he were to be killed. Payment is no fraud on the insurance company since the rates are based on mortality tables which are computed on the basis of actual deaths including those caused by a violation of the law. VANCE, INSURANCE 229 (2d ed. 1930). The better rule seems to be that the beneficiaries' rights should be fixed by the terms of the policy and in the event that there is no clause excepting death by violation of law the insurer should be liable.

William H. Schneider