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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 thereupon 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

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choose to advertise truthfully, they may, and should, discontinue advertising." American Medicinal Products v. FTC, 136 F.2d 426,427 (9th Cir. 1943). Ultra-Violet Products, Inc. v. FTC, 143 F.2d 814 (9th Cir. 1944); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942). The courts have not questioned the Commission's power to order an advertiser to cease representing that his preparation will afford any more than temporary relief to a certain condition, a more subtle method of requiring an affirmative statement. Sebrone v. FTC, 135 F.2d 676 (7th Cir. 1943). Even where the court modified an order by striking such a requirement, the ground was that it might unduly harm the advertiser, and not that the Commission had no power to make such a requirement. D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942) In another case the court itself modified an order which modification required the advertiser to cease and desist from representing that his product had any curative value "except a possible slight value as a laxative." Lekas & Drivas, Inc. v. FTC, 145 F.2d 976 (2nd Cir. 1944).

[23] See note 7 *supra.*

[24] "It seems to me to work no hardship upon a business concern that wants to be fair in its dealings with the public to require it so to construct the wording of its advertisements as to describe accurately the virtues of its product." Minton, J., dissenting in D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942) at 683.

[25] See note 8 *supra.*

[26] "Some courts seem entirely too content with a 'commercial' standard of truth, piously hoping that the purchaser will not be so gullible as to be deceived by the depicted panaceas." Fisher, *The Proposed Food and Drugs Act: A Legal Critique,* 1 LAW & CONTEMP. PROB. 74, at 82 (1933).

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 *Parish v. Parish*,[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 proceedings[7]— including questions involving the weight of the evidence.[8] However, the Supreme Court of Ohio has never reconsidered directly the power of a

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[1] Jelm v. Jelm, 56 Ohio L. Abs. 364, 92 N.E.2d 275 (Ohio App. 1950) Certiorari was granted by the Supreme Court of Ohio on May 31, 1950. 23 Ohio Bar 221 (1950).

[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. 534 (1859).

[4] 2 CURW. STAT. 991 (1843)

[5] Bay v. Bay, 85 Ohio St. 417, 98 N.E. 109 (1912); Mulligan v. Mulligan, 82 Ohio St. 426, 92 N.E. 1120 (1910), *reversing* 11 Ohio C.C.(N.S.) 585, 31 Ohio C.C. 89 (1908); Epstein v. Epstein, 17 Ohio C.C.(N.S.) 29, 41 Ohio C.C. 695 (1909); Casto v. Casto, 10 Ohio C.C.(N.S.) 265, 30 Ohio C.C. 93 (1907); Solomon v. Solomon, 4 Ohio C.C. (N.S.) 321, 26 Ohio C.C. 307 (1904)

[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

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Ohio St. 471, 138 N.E. 71 (1922); Cox v. Cox, 104 Ohio St. 611, 136 N.E. 823 (1922); Zonars v. Zonars, 101 Ohio St. 518, 130 N.E. 943 (1920).

The statute, upon which the decision in the *Parish* case was based, precluded appeal on questions of law and fact in divorce cases. The constitutional amendment, which authorized proceedings in error as provided by law, was general in its terms. Therefore, divorce decrees were held to be no exception to the application of such relief. In Beck v. Beck, 48 Ohio App. 105, 109, 192 N.E. 791, 793 (1933), the court, referring to the amendment, stated that "The people did not see fit to except from that mandate a judgment of divorce, although they were well acquainted with the theory of public policy and the previous sanctity of divorce decrees." Thus the policy of according absolute finality to divorce decrees was held to be superseded by the constitutional amendment.

[9] Beck v. Beck, 48 Ohio App. 105, 192 N.E. 791 (1933) (vacating after term); Ready v. Ready, 25 Ohio App. 432, 158 N.E. 493 (1927) (vacating within term); Potts v. Potts, 21 Ohio L. Rep. 326 (1923) (vacating within term); Love v. Love, 17 Ohio App. 228 (1922) (vacating within term).

[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. When judgment is rendered for both divorce and alimony, the appeal will lie only to so much of the judgment as relates to the 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.[14] 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.[15] 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.[16]

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.[17] Therefore, the inherent power of the court to vacate its divorce judgments or decrees ceases at the close of the term.[18] Most courts, however, recognize that judgments which are void,[19] or were fraudulently procured,[20] 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

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[14] 1 FREEMAN, JUDGMENT § 194 (5th ed. 1925).

[15] *E.g.*, Wright v. Wright, 230 Ala. 35, 159 So. 220 (1935); Wood v. Wood, 136 Iowa 128, 113 N.W 492 (1907); Edson v. Edson, 108 Mass. 590 (1867); Smithson v. Smithson, 37 Neb. 535, 56 N.W 300 (1893); Wisdom v. Wisdom, 24 Neb. 551, 39 N.W 594 (1888); Adams v. Adams, 51 N.H. 388 (1872); Nichells v. Nichells, 5 N.D. 125, 64 N.W 73 (1895); Yorke v. Yorke, 3 N.D. 343, 55 N.W 1095 (1893); State v. Watson, 20 R.I. 354, 39 Atl. 193 (1898), *aff'd*, 179 U.S. 679, 21 Sup. Ct. 915 (1900); Graham v. Graham, 54 Wash. 70, 102 Pac. 891 (1909).

[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,[21] 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.[22]

General statutes which authorize relief from judgments either before or after term are by most courts construed to include divorce judgments or decrees.[23] This construction has been applied to statutes giving a right of action to set aside judgments procured by fraud,[24] statutes permitting the opening of default judgments,[25] those permitting the opening of judgments where there was a lack of jurisdiction over the person or subject matter,[26] and those authorizing relief from judgments rendered through mistake, inadvertence, surprise, or excusable neglect.[27]

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through affirmative acts. Tollefson v. Tollefson, 137 Iowa 151, 114 N.W 631 (1908); Olmstead v. Olmstead, 41 Minn. 297, 43 N.W 67 (1889) (suit fraudulently instituted in name of other spouse without the latter's knowledge). (4) Where the plaintiff fraudulently induced the defendant not to defend the action. McDonald v. McDonald, 175 Mo. App. 513, 161 S.W 850 (1913). (5) Where the plaintiff, after commencing suit, assured the defendant that the action would not be prosecuted, and the defendant, relying thereon, failed to defend. Womack v. Womack, 73 Ark. 281, 83 S.W 937 (1904). (6) Where there was condonation, of which cohabitation during the pendency of the suit is a sufficient showing. Sampson v. Sampson, 223 Mass. 451, 112 N.E. 84 (1916) (7) Where there was collusion, according to some cases. *See* Jennings v. Jennings, 337 Ill. App. 647, 86 N.E.2d 287 (1949). *Contra:* Godfrey v. Godfrey, 30 Cal. App.2d 370, 86 P.2d 357 (1939). For a discussion of the effect of collusion in an action to set aside a decree for fraud, see 2 ALA. L. REV. 117 (1949).

Duress, generally bracketed with fraud, is a sufficient ground for vacating a divorce decree even in the absence of fraud. Berg v. Berg, 227 Minn. 173, 34 N.W.2d 722 (1948); Lake v. Lake, 124 App. Div. 89, 108 N.Y. Supp. 964 (1908) (threat of abandonment); Butler v. Butler, 34 Okla. 392, 125 Pac. 1127 (1912) (threat of violence); Graham v. Graham, 54 Wash. 70, 102 Pac. 891 (1909) (threat of suicide).

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

[22] 1 FREEMAN, JUDGMENTS § 197 (5th ed. 1925).

[23] 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).

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

[25] Schafer v. Schafer, 71 Neb. 708, 99 N.W 482 (1904); Guardia v. Guardia, 48 Nev. 230, 229 Pac. 386 (1924); Nichells v. Nichells, 5 N.D. 125, 64 N.W 73 (1895).

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

[27] 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,[28] 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.[29] 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.[30] 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.[31] 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.[32]

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.[33]

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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).

[28] 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.

[29] *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)

[30] McConkey v. McConkey, 187 S.W 1100 (Tex. Civ. App. 1916).

[31] In Fleming v. Fleming, 83 Pa. Super. Ct. 554 (1924), the court indicated that if a libelant 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.

[32] See Nichells v. Nichells, 5 N.D. 125, 64 N.W 73 (1895).

[33] Fox v. Fox, 235 Ala. 338, 179 So. 237 (1938); Britton v. Bryson, 216 Cal. 362, 14 P.2d 502 (1932); Beavers v. Bess, 58 Ind. App. 287, 108 N.E. 266 (1915); Blair v. Blair, 96 Kan. 757, 153 Pac. 544 (1915); Croyle v. Croyle, 184 Md. 126, 40 A.2d 374 (1944).