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Equity

Edgar I. King

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seems a good start to say that a court should resolve the matter; i.e., determine by which name the child should be called pending the child's reaching the age of discretion. However, the court that ought to decide the matter is the court which has jurisdiction of the child, and in this case that seems to be the court that granted the original divorce decree. Rather than raise a future question of which court has jurisdiction in regard to which name shall be used, the court at most should have issued a temporary restraining order pending the decision in Cuyahoga County. The question remains: when should a court allow a divorced mother to change the name of a child of the dissolved marriage. Since an award of custody is always open to modification, the right should probably be completely denied lest there be periodic changes in name.⁹

WALTER PROBERT

EQUITY

*Taylor v. Robishaw*¹ was a suit for specific performance. The original owner of the two farms involved in the litigation had died and the suit was against her heirs. At the time of the transaction, which was the basis of the litigation, the deceased was an old and sick woman. First, she signed what purported to be a lease of the premises, with option to purchase, to plaintiff. Later, and shortly before her death, she signed a memorandum purporting to give the premises to the plaintiffs. At the time of the lease plaintiffs took sole possession of the farms but five months before her death, the deceased returned and lived with the plaintiffs for the remainder of her life. The only witnesses to the instruments and the sole witnesses at the trial as to their execution were the plaintiffs. The court held that such contracts must be looked at in a "scrupulous manner." Such contracts can be enforced only when they are clearly proved by positive testimony and the interests of the witnesses in the outcome of the case may be considered. The court in applying this test came to the conclusion that the instruments and the transaction were the result of undue influence and because deceased was unable to exercise deliberate judgment. Consequently, plaintiff's action failed.

The growing number of cases across the country in which strangers or distant relatives of elderly people have come forward after the death of the

⁹ That an attorney's fees for his work in a divorce case must be sued for as an incident of a marital suit is brought home by *Rubinstein v. Watson*, 118 N.E.2d 232, (Ohio App. 1954). The unsuccessful attorney found that her client (the wife) had achieved reconciliation. She tried to recover her fees from the husband in an independent action.

latter and sought to enforce either oral contracts, contract evidenced by only informal instruments or parol gifts against the heirs has caused the courts of Ohio and other states to view such claims with an ever increasing sharpness as is evidenced in the present decisions. Although the legislatures of the various states have shown no particular interest in the matter, the courts, show a definite tendency to return to a strict application of the Statute of Frauds in cases of this type.

In *Dependabilt Homes, Inc. v. White*,² after almost half of the purchase price of a house and lot had been paid under a land contract, an action for cancellation was brought because defendant (the purchaser) was in default as to three monthly payments. Before the case was submitted on its merits the defendant tendered into court a sum sufficient to cover the unpaid balance on the purchase price, interest and court costs. The trial court refused to allow this as a defensive maneuver and allowed the cancellation. The appellate court noted that the contract provided for delivery of a warranty deed upon full payment of the price and held that it would be inequitable to order the cancellation and take from defendants the equity which had accrued to them in the real estate when plaintiff would receive the essential performance of its promise. Plaintiff's petition was dismissed.

In *Heriott v. Marine*³ plaintiff agreed to buy and defendant to sell certain realty used as a public tavern. It was agreed that if the liquor permits could not be transferred the contract would become null and void and the cash down payment would be returned to the plaintiff. When it was discovered that the permits could not be transferred, plaintiff brought a rescission action. The court dismissed the plaintiff's petition on the ground that the remedy prescribed in the contract for the recovery of the down payment was the exclusive remedy to which plaintiff was entitled.

This result would be justified were this only a matter of failure of performance. However, the court says that plaintiff alleged in the petition that the defendants had "fraudulently" withheld the information that defendant's son in whose name the permits were held had been convicted of a felony and it was for this reason that the permits could not be transferred. In view of the fraud it would appear that plaintiff should have been able to rescind the entire transaction regardless of what remedies might have been given her in the contract for nonperformance thereof.

The appellate courts of Ohio have repeatedly avoided establishing an over-all standard as to the necessity of intent in an action to punish for

¹ 121 N.E.2d 72 (Ohio App. 1954).

² 117 N.E.2d 706 (Ohio App. 1951).

³ 96 Ohio App. 174, 121 N.E.2d 305 (1953).

contempt of violation of an order of a court. In *Taylor v. Holmes*⁴ the defendant had been ordered to cover garbage placed in a dump with earth at the close of each day's operations. Without his knowledge a load of garbage was dumped and left uncovered. The next day, as soon as he discovered this fact, he immediately covered the garbage. It would appear clear that defendant was entirely without intent to violate the court's order and was in good faith. But it would also appear clear that he did violate the court's order. On the appeal from the trial court's finding of contempt the appellate court quoted *Univis Lens Co. v. United Electrical Radio & Machine Workers of America*⁵ thus: "Whether or not intent is a necessary element, it seems, is dependent upon the nature of the act complained of." On the facts of the present case, the court went on to say, the trial court's finding must be reversed because the act was not done intentionally. A study of this opinion and the cases cited therein leave only confusion as to what action amounts to contempt without intention to violate the court's order and as to the nature of the "intentional" action necessary when it is a required element.

In *State v. Smith*⁶ certain persons who assembled together were charged with rioting. The assemblage was also in violation of an injunction. (The rioting was not proved.) The court held a conviction on an indictment will not purge a contempt, nor a conviction for a contempt be a bar to an indictment even though the act of contempt and the act for which the indictment issues be the same physical act.

In *Socotch v. Krebs*⁷ it was held not to be contempt of court for the Ohio State Board of Liquor Control to fail to obey an order of a trial court requiring the Board to renew a liquor permit when such renewal would have been a nullity in view of the fact that the permit had been issued only to allow business at a specified address.

Following a divorce, in which custody of a son was given to the wife, the wife remarried. When the son started to school he was enrolled on the school records under the surname of the wife's second husband. On petition of the boy's father the court issued a mandatory injunction requiring the school authorities to enroll him under the father's surname.⁸ The court held that although a person could, other than for fraudulent purposes, change his own name, another could not change it for him. The court was, of course, saying that a mother could not change the name of her infant son. The result seems subject to question in that it tends to point out an

⁴ 96 Ohio App. 181, 121 N.E.2d 320 (1954).

⁵ 86 Ohio App. 241, 89 N.E.2d 658 (1949).

⁶ 97 Ohio App. 86, 121 N.E.2d 199 (1954).

⁷ 97 Ohio App. 8, 119 N.E.2d 309 (1953).

⁸ *Kay v. Bell*, 95 Ohio App. 520, 121 N.E.2d 206 (1953).