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or innocence. *Stevenson v. Boles*, *supra*; *State v. Goyet*, 119 Vt. 167, 132 A.2d 623 (1957).

The conclusion that such confession should not be admitted as evidence seems hard to escape when considered in light of the fact that such an accused has been denied advice of counsel and the right to be properly charged. When both of these abuses combine to produce incriminating statements, voluntary or involuntary, the subsequent use of such evidence should be prohibited. Such a conclusion was recognized even before *Escobedo v. Illinois*, *supra*, when the Chief Justice and three other members of the Court dissented to a conviction based on a voluntary confession elicited from a "suspect" who had been denied the assistance of counsel. *Crooker v. California*, 357 U.S. 433 (1958).

The fact that the United States Supreme Court has had to deal with this issue so frequently makes a new ruling in this area almost inevitable. It seems that the federal courts have been trying to allow the states to solve this problem for themselves without making a sweeping policy ruling. The ideal way for the states to do this would be to find more unlawfully obtained confessions involuntary because of the psychological pressures which are surely being exerted on a suspect when he is held for days without counsel, arraignment, or proper treatment. The tendency now is in a direction which may even go farther than the comparable *Escobedo v. Illinois*, *supra*; the ultimate effect of this may well produce the elimination of any interrogation whatsoever before counsel is provided and proper arraignment given.

Dennis Raymond Lewis

Divorce—Merger of Separation Agreement into Divorce Decree

D grossly misrepresented the value of his assets to induce *P* to accept a relatively small lump sum payment as a property settlement and for her waiver of future support payments. *P* subsequently obtained a divorce and the separation agreement was incorporated into the decree. There was no judicial inquiry as to the fairness or adequacy of the agreement. *P* later learned of the husband's fraud, brought an action of deceit and recovered judg-

ment. *Held*, affirmed. Under Kansas law, incorporation of a separation agreement into a divorce decree does not merge the contract into the decree so as to preclude a future action on the contract, unless the decree contains clear and unequivocal language requiring that conclusion. Furthermore, this was not an action on the contract itself, but was in tort to recover damages flowing from *D's* fraud. One judge dissented, reasoning that under the particular fact situation, the contract had merged into the decree, and that relief from *D's* fraud should be left to the court in which it had been practiced. *Hood v. Hood*, 335 F.2d 585 (10th Cir. 1964).

The principal case illustrates the problem which confronts the courts after entry of a final divorce decree which makes reference to or incorporates a separation agreement. The question of whether the agreement is merged in the decree so that it loses its identity as a contract is important. If a merger results, a suit can no longer be brought on the contract, and the rights and duties of the parties are regulated solely by the terms of the decree. *Simpson v. Superior Court*, 87 Ariz. 350, 351 P.2d 179 (1960). The question of whether the contract terms are a part of the decree, enforceable by contempt proceedings, is likewise important. If a merger does not occur, it is possible to resort to either the agreement or the decree, and sometimes to both. *Hettich v. Hettich*, 304 N.Y. 8, 105 N.E.2d 601 (1952); *Goldman v. Goldman*, 282 N.Y. 296, 26 N.E.2d 265 (1940). However, where a party has concurrent remedies under a property settlement and a divorce decree, payments made under one must be credited to the amount due under the other. *Roberts v. Roberts*, 83 Cal. App. 345, 256 Pac. 826 (1927).

Whether a merger occurs affects not only the remedies available in case of default, but also the legal status of the agreement in the event of a subsequent attack. If the agreement does merge into the decree, and the decree is valid, the decree is not open to collateral attack. *Wallihan v. Hughes*, 196 Va. 117, 82 S.E.2d 553 (1954). The decree is *res judicata*, and a party cannot avoid his obligations under the contract by claiming it was an illegal contract when made, or that it is voidable because procured through fraud. *Howard v. Howard*, 27 Cal. 2d 319, 163 P.2d 439 (1945). Such a decree is entitled to full faith and credit in every other state, and may be pleaded in bar in an action on the contract in any state court. *Wallihan v. Hughes, supra*.

Another effect of merger concerns the power of the court to modify the support provisions of a separation agreement at a later date, or, what is more technically correct, the court's power to modify the decree which incorporates the agreement. If a merger was affected by the incorporation, the power of the court to modify the support arrangement will be governed by the general divorce laws of that jurisdiction. If merger did not occur, the court might still modify the alimony provisions of the decree, in those states which retain continuing jurisdiction over the support arrangements in divorce actions. *Kosch v. Kosch*, 113 So. 2d 547 (Fla. 1959).

The courts are not in agreement as to how and when a merger is accomplished. It seems universally accepted that where the agreement is not presented to the court, it survives the decree. *Hayes v. Hayes*, 15 S.E.2d 626 (Ga. 1941). However, if the court has continuing divorce jurisdiction, the parties cannot by contract bargain away their right to seek a change in alimony at a later date. *Deitch v. Deitch*, 149 N.Y.S.2d 353 (Sup. Ct. 1955). A contract also survives when it is presented to the court and is not incorporated into the decree. *Hagen v. Hagen*, 139 Ore. 369, 238 P.2d 747 (1951). In those cases where the agreement has no specific provisions against merger, the courts are split. The majority hold that the agreement survives. *Jenkins v. Jenkins*, 225 N.C. 681, 36 S.E.2d 233 (1945).

One of the problems arising when the courts incorporate a separation agreement in a divorce decree is determining whether the court's jurisdiction extends to the subject matter of the agreement. Ordinarily, in the absence of statutory authority, courts do not have the power in a divorce action to divide the property of the spouses. *State ex rel. Hammond v. Worrell*, 144 W. Va. 83, 106 S.E.2d 521 (1958). Many times, though, it is difficult to determine whether the agreement which is incorporated in the decree is a mere settlement of property rights, or a provision for the future support of the divorcing party. The problem is further complicated by the fact that some agreements which are intended solely as property settlements provide for distribution to be made by periodic cash payments over an extended period of time, thus giving them the appearance of alimony payments. In other cases, a decree represents a combination of a property settlement and a support arrangement. Since courts do not generally have jurisdic-

tion to decree property settlements, but do have authority to decree support payments, it frequently becomes important to distinguish between the two. In those states which retain continuing jurisdiction after entry of the final divorce decree for purposes of altering the alimony payments, the courts can alter only the support provisions of the decree, but have no authority to alter the property settlement provisions. *Briggs v. Briggs*, 178 Ore. 193, 165 P.2d 772 (1946).

West Virginia's position in respect to property settlements and support arrangements in divorce decrees is not clear. The Code now provides that the court may, upon decreeing a divorce, enter a decree concerning the maintenance of the divorcing party, and may from time to time thereafter revise or alter such decree. The court is also given authority to decree concerning the estate of the parties, to the extent necessary to effectuate the maintenance decree. W. VA. CODE ch. 48, art. 2, § 15 (Michie 1961). In *State ex rel. Hammond v. Worrell*, *supra*, the court stated that this section did not give a divorce court authority to partition the jointly owned lands of the parties, even with their consent, and that part of the decree which purported to do so was void, because the attempted partitioning was not for the purpose of effectuating a maintenance decree. It is questionable whether this case would be followed today, since subsequent to its decision, the West Virginia Rules of Civil Procedure were promulgated. Rule 18 (a) of the West Virginia Rules now permits the parties to join as many claims as the trial court can conveniently hear in one action. It has been held under Rule 18 (a) of the Federal Rules of Civil Procedure, the language of which is identical with that in West Virginia's Rule 18 (a), that an action for adjudication of property rights could be joined with an action for divorce. *Holcomb v. Holcomb*, 209 F.2d 794 (D.C. Cir. 1954).

State ex rel Hammond v. Worrell, *supra*, is apparently contra to an earlier case, *State ex rel. Cooper v. Garvin*, 139 W. Va. 845, 82 S.E.2d 612 (1954). In the *Cooper* case, the court said that W. VA. CODE ch. 48, art. 2, § 15 (Michie 1961), *supra*, gave the trial court authority to divide the jointly owned property of the parties. In the *Cooper* case, the husband obtained the divorce, and it is clear from the decision that the court was speaking only of a settlement of the property rights of the parties, and not a provision

for maintenance. The court seemed to overlook, in the *Cooper* case, a series of prior cases which held that the section cited did not give the trial court authority to make any decree concerning the estate of the parties, except to the extent necessary to effectuate the provisions of that section concerning maintenance. *E.g.*, *Wood v. Wood*, 126 W. Va. 189, 28 S.E.2d 423 (1943).

In the *Cooper* case, *supra*, the court cited W. VA. CODE ch. 48, art. 2, § 15 (Michie 1961), and overlooked section nineteen of the same article, which would seem to give the appropriate authorization for an adjudication of pure property rights. W. VA. CODE ch. 48, art. 2, § 19 (Michie 1961) gives the court authority to award to either of the parties whatever of his property is in the name of, or under the control of, the other party. The court is given power to compel a transfer or other conveyance thereof as in other equity cases. In *State ex rel. Hammond, supra*, the court cited section nineteen, but then proceeded to explain why section fifteen did not give authority to partition lands in a divorce action. It is true that in *Wood v. Wood, supra*, the court stated that W. VA. CODE ch. 48, art. 2, § 19 (Michie 1961), contemplated a restoration in kind to the party entitled thereto, and not a money recovery for its value. Such an interpretation would seem to unduly restrict the statute's operation, and would frustrate what could otherwise be a legitimate and desirable purpose, *i.e.*, to provide for the convenient and final adjudication of all property rights of the parties at the time of the final divorce decree. To restrict its operation to restoration of property in kind would forbid its use in those frequent cases where both spouses have contributed to the purchase of property, and the property is not susceptible of physical division or partition. Since the statute gives the divorce court authority to compel a transfer or conveyance as in other cases of chancery, it is arguable that this should include partitioning, either physically, by sale, or by allotment and monetary compensation. It should be noted, however, that the statute was not intended to give to either party the property which rightfully belongs to the other. Any decree issued under color of W. VA. CODE ch. 48, art. 2, § 19 (Michie 1961), which would attempt to approve by incorporation an agreement in which one of the parties was giving the other party more than his rightful share, would be void to that extent. *Selvy v. Selvy*, 115 W. Va. 338, 177 S.E. 437 (1934).

In the absence of a statutory provision to the contrary, it is well settled that a divorce decree, rendered on personal service or its equivalent, which is silent as to alimony, is *res judicata* as to that issue, and neither party can subsequently petition for alimony. This is generally held to be true even in those states with statutes similar to West Virginia's, which gives the courts authority to alter or revise a previous alimony decree. The theory is that if there is no alimony decree, there is nothing to alter or revise, and the statute cannot operate. *Perry v. Perry*, 202 Va. 849, 120 S.E.2d 385 (1961). Even if there is at the time of the decree an agreement between the parties providing for the maintenance of the divorcing party, such an agreement will not be sufficient to give the court with statutes similar to West Virginia's. This is true even if the court was fully aware of the agreement, and the agreement was itself the reason the court made no mention of alimony in the decree. *Johnson v. Johnson*, 65 How. Pr. 517, 12 Daly 232 (N.Y. 1883).

Suppose a West Virginia court incorporates into a divorce decree a separation agreement which provides for a lump sum payment as a provision for the divorcing spouse's future maintenance, and expressly provides that the spouse waives any future rights to more money. Is that part of the decree valid? The West Virginia cases are not entirely clear on whether a lump sum payment can be made as a provision for future support. Ordinarily, alimony should be in periodical payments of reasonable sums, out of the husband's income. *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S.E. 381 (1910). If the court lacks authority to award alimony in gross, then it necessarily follows that any decree incorporating an agreement between the parties, providing for a lump sum alimony payment, is void to that extent, and the only remedy available in the event of default would be a legal action on the contract itself. In the *Reynolds* case, the trial court had awarded the husband's realty to the wife for her future maintenance. The statute then in effect was much broader than the present statute, and gave the court authority upon decreeing a divorce, to make such further order as it deemed expedient concerning the estate of the parties. Even so, the supreme court of appeals reversed, stating that generally, in the absence of special circumstances, it is error to award permanent alimony out of the estate of the husband. The court did not enumerate the special circumstances in which a lump sum could

be awarded. In *Tuning v. Tuning*, 90 W. Va. 457, 111 S.E. 139 (1922), the court recognized one of those "special circumstances." In that case, the wife had worked hard for years, and her efforts had helped pay for the farm and had helped support the family. The court stated that under those circumstances the trial court was justified in awarding a gross sum in lieu of alimony, payable in installments, and secured by a lien upon the husband's real estate. The court relied heavily upon the factual situation to find a "special circumstance," but failed to lay down any specific criteria for determining when a "special circumstance" exists. It would therefore seem difficult to ever be completely certain that a West Virginia divorce decree, providing for a lump sum maintenance payment, would be valid insofar as the maintenance payment was concerned.

It is obvious that the inter-relationship between post-nuptial separation agreements and divorce decrees is often rather complicated, and can lead the unwary into unexpected results. It is thus incumbent upon the attorney and the court to proceed with extreme caution when approaching these situations, in order to insure that the decree and agreement are both given the effect desired to the full extent permitted by law.

Charles Edward Barnett

**Federal Courts—Diversity Jurisdiction of Proceeding
Brought by a Nonresident Guardian for a
Nonresident Incompetent Minor**

This action against Tennessee residents by a nonresident for a nonresident ward was brought in a federal court sitting in Tennessee. *P*, adult citizen of Florida, brought suit as guardian of her mentally incompetent child against *Ds* contending that under a consent order, entered following a will contest, *Ds* were responsible for the support of their sister, the ward. The action was dismissed in the United States district court for lack of diversity jurisdiction. *Held*, reversed. The district court must look to the law of the state in which the federal court was sitting to determine the competence of the guardian to bring suit in federal court, but the Tennessee statute requiring appointment of a resident guardian as co-plaintiff is inapplicable to a nonresident guardian suing for a