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any relief. Viewing the evidence in the light most favorable to the plaintiff, the supreme court, in remanding for a new trial, held that such evidence would afford a substantial basis for the conclusion that defendant used more explosive than was reasonably necessary in order to operate his caliche pit, even though there was no direct evidence of the amount of explosives used.

The Texas courts have usually excluded opinions of witnesses as to carelessness as being mixed questions of law and fact—questions concerning which the jury is in as good a position as the witness to form an opinion.[27] The true theory of the opinion rule is simply that *superfluous* evidence should be excluded.[28] When as to an activity of a highly technical nature a witness has acquired special knowledge, skill or experience, and is therefore in far better position than the jury to draw conclusions from the facts, the opinion of that witness is certainly not superfluous. In such a case there can be no sound reason for excluding the opinion of the witness, even though to admit it is tantamount to allowing the expert to testify that defendant was negligent.

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FAMILY LAW AND COMMUNITY PROPERTY

Power of Court to Modify Decree for Alimony Based Upon Agreement of Parties

Arkansas. In *Bachus v. Bachus*[1] the wife had previously obtained a divorce from her husband, the decree incorporating a written contract between the parties settling their property rights and providing for the payment of alimony and child support to the wife in the amount of $200 per month. The trial court approved an application from the husband requesting that the alimony payment be reduced to $150 per month. On appeal, the supreme

[27] McCormick and Ray, *op. cit.* § 647.
[28] *Id.* § 625.
[1] 216 Ark. 802, 227 S. W. 2d 439 (1950).

court ruled that the trial court had erred in reducing the amount of the monthly payment, holding that the court had no power to modify the decree inasmuch as it incorporated a contract between the parties providing for payment of alimony.

At common law there was no power to modify a decree granting an absolute divorce,[2] but most states, including Arkansas, now have statutes giving the courts power to modify the provisions for alimony and child support whenever changed circumstances render the terms of the original decree inequitable.[3] Whether or not the decree may be modified when it incorporates an agreement of the parties is in conflict, the majority rule apparently being that, where a court has the general power to modify a decree for alimony or support, the exercise of the power is not affected by the fact that the decree is based upon an agreement entered into by the parties to the action.[4] The Arkansas court recognizes this general rule but makes a distinction between decrees based upon "agreements as to the amount the court by its decree should fix as alimony" and "agreements for the payment of alimony," allowing alteration of the former,[5] but denying modification of the latter.[6] As the agreement in the *Bachus* case came within the latter group, the court refused to allow its alteration. The validity of this distinction was questioned in the case of *McCue v. McCue*,[7] where it was characterized as "judicial hairsplitting."

The parties to a divorce action are faced with a choice of three possible courses of action in providing for payment of alimony:

(1) They may make an agreement providing for alimony payments, but choose not to have it incorporated into the decree. For enforcement of the agreement, the parties are relegated to an ordinary contract action, and do not have available the remedy of

[2] MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS (1931) 328.

[3] ARK. STAT. 1947 ANN. § 34-1213.

[4] Note, 109 A. L. R. 1068 (1937).

[5] Holmes v. Holmes, 186 Ark. 251, 53 S. W. 2d 226 (1932).

[6] Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700 (1908).

[7] 210 Ark. 826, 197 S. W. 2d 938 (1946).

contempt proceedings. The courts are without power to modify a contract of this kind.

(2) They may make no agreement, allowing the court to make whatever provision is proper under the circumstances. This provision may be enforced by contempt proceedings and may be modified by a court having general power to modify decrees.

(3) They may make an agreement and have it incorporated into the decree. This course is a combination of (1) and (2) and has characteristics of both. Since there is an agreement between the parties, the court should be without power to modify the agreement so as to prevent the parties from enforcing it by an ordinary contract action. So far as the award may be enforced by contempt proceedings, however, it should be subject to modification by the court which granted the award upon showing of changed circumstances. This modification would not alter the contract made between the parties, which could still be enforced by contract action.[8]

The reported decision is said to be grounded upon the principle that courts may not modify contracts voluntarily entered into between parties. However, failure to make the required payments may amount to contempt of court, resulting in possible punishment by imprisonment. The *Bachus* case disposes of this problem by observing that "if changed circumstances should subsequently render the payments inequitable the court may decline to enforce by contempt proceedings the payment of a greater sum than the circumstances warrant."[9] This answer seems insufficient in that it forces the husband to undergo the risk of contempt proceedings rather than allowing him to obtain a judicial declaration that changed circumstances have made the payment of the original amount *as alimony* inequitable. It would seem more logical to permit the wife to retain her remedy at law to recover the balance due under the contract, but to relieve the husband from undergoing the risk of contempt proceedings in order to determine whether the original amount decreed has become inequitable due to changed circumstances.

[8] For a case in which the above analysis is made and reasoned out in detail see Goldman v. Goldman, 282 N. Y. 296, 26 N. E. 2d 265 (1940).

[9] 227 S. W. 2d at 440.

CHARGEABILITY OF WIFE'S ATTORNEYS' FEES AGAINST HUSBAND

Texas. In *Carle v. Carle*[10] the wife instituted suit for divorce against her husband, and sought recovery of $6,500 attorneys' fees against the defendant. In granting the divorce, the trial court charged the $6,500 attorneys' fees against the husband's interest in the community property. The court of civil appeals reversed that part of the judgment charging the attorneys' fees against the husband's interest in the community and rendered judgment charging them against the community estate as a whole on the ground that the wife's attorneys' fees are necessities chargeable against the community estate as a matter of law. On submission of certified questions, the supreme court answered that the court of civil appeals had erred in reversing the judgment of the trial court, the attorneys' fees being but a factor to be considered by the court in making the equitable division of the estates provided for by statute.[11]

Texas courts have uniformly justified charging attorneys' fees against the husband on the theory that the fees incurred by the wife are necessaries.[12] Application of this theory of recovery apparently led the court of civil appeals to the conclusion that such recovery should be against the community estate as a whole.[13] The supreme court regarded this approach as improper when judgment is rendered in a suit granting a divorce and dividing the properties of the parties. Article 4638 of *Texas Revised Civil Statutes* (Vernon, 1948) provides that "the court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right." This statute gives the trial court discretion in dividing the estates of the parties and does not require an equal division of the community

[10] .....Tex....., 234 S. W. 2d 1002 (1950), *rev'g* 234 S. W. 2d 907 (Tex. Civ. App. 1950).

[11] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4638.

[12] 15 TEX. JUR., *Divorce and Separation*, § 155, p. 654.

[13] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4621 provides that the community estate shall be liable for necessaries. In the reported case the court mentions the rule that necessaries are primarily the obligations of the community and secondarily of the husband's estate.

between them.[14] For this reason it is immaterial whether the attorneys' fees be looked upon as necessaries inasmuch as the entire property is subject to whatever division is deemed to be just and right.

The supreme court's decision on this point should settle the conflict noted in the decisions of various courts of civil appeals when the issue is raised in a suit in which a divorce is granted and a division of property made.[15] Certainly, Article 4638 furnishes ample support for the court's approach to the question. However, the court does not deny the validity of the theory that the fees are necessaries; thus, the theory will probably continue to be applied to justify recovery against the husband in other cases in which a divorce is not granted, or in which no property settlement is made.[16]

Liability of Crops Grown on Wife's Separate Property to Debts Contracted by Husband

Texas. In *Bearden v. Knight*,[17] a divorce suit instituted by the wife, the Hereford State Bank intervened for the purpose of foreclosing a chattel mortgage lien given by the husband on crops grown on a farm adjudged to be the wife's separate property. The chattel mortgage was executed as security for a note given the bank by the husband, and the note was a community indebtedness. The trial court ruled that inasmuch as the crops were community property and the debt a community indebtedness, the mortgage gave the bank a valid lien; whereupon judgment was rendered foreclosing the lien. The judgment was affirmed by the court of civil appeals, but was reversed and rendered in favor of the wife by the supreme court.

In affirming the decision of the trial court, the court of civil appeals reasoned that inasmuch as the crops were community prop-

[14] In a comment, *Settlement of Marital Property Rights Upon Divorce*, 29 Tex. L. Rev. 355 (1951), the application of Article 4638 is reviewed in some detail and its development as an effective but piecemeal substitute for an alimony statute is described.

[15] This conflict is noted and cases on both sides are cited in the opinion of the court of civil appeals, 234 S. W. 2d at 916.

[16] Roberts v. Roberts, 144 Tex. 603, 192 S. W. 2d 774 (1946).

[17] ____Tex.____, 228 S. W. 2d 837 (1950), *rev'g* 224 S. W. 2d 273 (Tex. Civ. App. 1949).

erty and were not within that group of items of community property exempted from liability for the debts of the husband by Article 4616 of *Texas Revised Civil Statutes* (Vernon 1948), they were governed by the general rule that community property is liable for a community indebtedness.

The basic statute exempting certain items of community property from liability for the debts of the husband is Article 4616:

> ". . . neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to payment of debts contracted by the husband nor of torts of the husband."

It will be noted that only *rents* from the wife's separate real estate are exempted. The supreme court indicated that the word "rents" used in a broad sense could include crops, but preferred not to rest its decision upon this ground. Thus, Article 4616, the basic exemption statute, was not relied upon to relieve crops grown upon the wife's separate realty from liability for the debts of the husband.

The court preferred to base its decision upon Article 4614 of *Texas Revised Civil Statutes* (Vernon, 1948) giving the wife control and disposition of her separate property and the application of that statute made in the case of *Hawkins v. Britton State Bank.*[18] As indicated by the court, the earlier statutory provision giving the wife control and disposition of the rents and revenues from her separate property was eliminated by the 1929 amendment to Article 4614, so that there is at present no express statutory provision to this effect. However, the decision in the *Hawkins* case implied such a power from the portion of Article 4614 which gives the wife control and disposition of her separate property, reasoning that a construction of that statute as conferring on her the bare right to control and manage the land itself, and as permitting the husband to take charge of the rents and use them to suit himself, "would saddle the wife with all the burdens incident to the management of her estate

[18] 122 Tex. 69, 52 S. W. 2d 243 (1932).

but rob her of all benefits, and render the statute an idle and a vain thing."[19] Thus, as incident to the right of control and disposition of her separate land, the wife is given the right of control and disposition of the crops grown on that land, and these crops cannot be subjected to the payment of debts contracted by the husband.

In deciding this case the court overruled *First National Bank of Lewisville v. Davis*,[20] which held that the husband had the power to mortgage cotton grown on the wife's separate land to secure a community indebtedness. The court chose instead to rely upon the reasoning of the *Hawkins* case. In doing so, the court evidenced continued approval of this controversial case and its liberal point of view toward the rights of the wife in connection with the fruits derived from her separate property. Critics of the *Hawkins* case point out that it fails to distinguish properly between these fruits and property subsequently acquired by their expenditure. While this defect in reasoning is recognized, it is nevertheless believed that the court's liberal interpretation of Article 4614 is a proper one. The division of managerial responsibility over marital property and its liability for debts along the lines indicated by these decisions is a natural one and seems to carry out the legislative intention evidenced by the Act of 1913.[21]

The court in the reported case confined its decision to the liability of revenues from the wife's separate *land* to debts contracted by the husband. It remains to be seen whether the same decision will be reached with respect to revenue from the wife's personalty other than that provided for by Article 4616, but there is reasoning in the opinion which indicates that the supreme court may "find that the present statutes exempt from the husband's debts and commit to the wife's exclusive management all varieties of revenue from her separate property, real and personal."[22]

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[19] *Id.* at 74, 52 S. W. 2d at 245.

[20] 5 S. W. 2d 753 (Tex. 1928).

[21] Tex. Acts 1913, c. 32, p. 61. In Huie, *The Community Property Law of Texas*, VERNON'S TEX. CIV. STAT. ANN., v. 13 1951), p. VII, this legislative scheme is outlined and some of the mishaps besetting the scheme are discussed.

[22] Huie, *supra* note 21, at XXXIX.

VALIDITY OF WIFE'S AFFIDAVIT SWORN TO BEFORE HER ATTORNEY

Texas. Ex parte Nix[23] involved habeas corpus proceedings to determine the validity of an order adjudging the relator in contempt of court for failure to comply with a judgment ordering him to contribute $25 per month to his divorced wife for child support. The complaint forming the basis of the contempt hearing was sworn to by the divorced wife before her attorney. Relator contended that the order of contempt based upon such a complaint was void. Invoking Texas Rule of Civil Procedure 308-a, effective March 1, 1950, the supreme court held that inasmuch as such complaints no longer need even be verified, the complaint was not void because verified before the affiant's attorney.

Prior to the adoption of Rule 308-a, Texas courts followed the rule that a contempt order based upon a complaint verified before the affiant's attorney was void and subject to collateral attack by writ of habeas corpus, regardless of whether such contempt order grew out of civil or criminal proceedings. This rule was first announced by the supreme court in *Ex parte Scott*,[24] in which it reasoned that contempt proceedings are criminal in nature because they involve the essential idea of wilful disobedience of judicial orders or decrees. Reasoning from the rule in criminal cases that the attorney for the accused is incompetent to take affidavits filed therein, the court held that the attorney for the accuser, the divorced wife, was also incompetent to take an affidavit to be used in the case. It was argued that the affidavit should be taken under circumstances that would subject the affiant to the pains and penalties of perjury and that it would be difficult to see how this could be done where the affidavit is taken by the affiant's own attorney. The rule has been uniformly applied to invalidate contempt orders in which the wife complaining of her ex-husband's failure to make child support payments verified the complaint before her attorney.[25]

Rule 308-a is a new rule promulgated October 12, 1949, to take

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[23] ..... Tex. ....., 231 S. W. 2d 411 (1950).

[24] 133 Tex. 1, 123 S. W. 2d 306 (1939).

[25] Ex parte Freeman, 144 Tex. 392, 191 S. W. 2d 6 (1945); Ex parte King, 135 Tex. 296, 143 S. W. 2d 580 (1940).

effect March 1, 1950. The portion of the rule applied in this case provides as follows:

> "In cases where the court has ordered periodical payments for the support of a child or children . . ., and it is claimed that such order has been disobeyed, the person claiming that such disobedience has occurred may file with the clerk of the court a written statement describing such claimed disobedience, *which statement need not be verified.*" (Emphasis supplied.)

The adoption of this rule has made the rule of *Ex parte Scott* ineffective in cases in which the divorced wife is complaining of the failure of her former spouse to make child support payments as directed. Inasmuch as no affidavit is required, it is immaterial that the affidavit was verified before the affiant's attorney.

Among the changes in rules tentatively adopted by the supreme court this spring is an amendment to Rule 308-a which may restore the rule of *Ex parte Scott* if finally adopted.[26] This proposed amendment deletes that portion of the rule which provides that the complaint need not be verified. In its place is a provision that upon application of the divorced wife, the court may appoint an attorney to advise with and represent her. If the attorney in good faith believes that the order of the court is being contemptously disobeyed, it shall be his duty to file a written statement, verified by the wife's affidavit, describing the disobedience. The court may then issue an order to the husband to show cause why he should not be held in contempt of court. The reason for this proposed amendment to the rule is the considerable volume of unverified complaints which are filed under the rule as it now stands, imposing upon the courts the difficult task of determining which of the complaints have merit. The proposed amendment would have the effect of placing upon the Bar the duty of screening these complaints in an effort to aid the court in the decision of such cases. It may be doubted whether this is a function that the Bar properly should be called upon to perform, since the attorney is called upon to state his own opinion as to the merits of his client's claim, a function which ordinarily

[26] *Proposed Civil Rule Amendments*, 14 Tex. B. J. 307 (1951).

attorneys are not permitted to perform.[27] In any event, the rule as finally amended should be so worded as to make it clear that the contempt proceedings will not be void even if the affidavit filed by the wife is verified before her attorney.

WAIVER OF RIGHT OF APPEAL BY ACCEPTANCE OF BENEFITS

Texas. In *Carle v. Carle*[28] the property settlement provided for by the divorce decree adjudged three items of realty and the furnishings thereon to be the wife's separate property, two of which were subject to offsets in favor of the husband in the amount of one-half of the community funds used to pay off obligations against these properties. The offsets were charged against the wife's interest in the community estate, and a commissioner was appointed to sell the community estate and distribute the proceeds. The husband filed formal notice of appeal, objecting to the court's finding that the properties were the wife's separate estate. Before the appeal was decided, the commissioner sold the community property and distributed a portion to the husband at his request in order that he might use the funds in his business. The court of civil appeals held that as to the two properties against which there were offsets, the husband had waived his right to complain of the judgment, but that as to the other he had not. The portion of the judgment that had not been waived was reversed and remanded for a new trial. In answer to certified questions, the supreme court held that the husband had waived his right to complain of the judgment as to all of the properties.

The supreme court recognized the general rule that a litigant who accepts benefits under a judgment cannot thereafter appeal.[29] It further recognized the exception to this rule which provides that the appeal may be allowed where reversal of the judgment cannot possibly affect the appellant's right to the benefits already ac-

[27] "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause." American Bar Association, *Canons of Professional Ethics* (1948), Canon 15.

[28] .....Tex....., 234 S. W. 2d 1002 (1950), *rev'g* 234 S .W. 2d 907 (Tex. Civ. App. 1950).

[29] Matlow v. Cox, 25 Tex. 578 (1860).

cepted.[30] The question for decision in this case was whether or not the exception was applicable. The court held that it was not.

In refusing to allow the appeal, the court reasoned that should a reversal of the judgment result in a new trial, the court would be under a duty to divide the estates of the parties. Such division could result in an award to the wife of a portion of the properties already sold. The proceeds of these sales having already been distributed to the husband, such an award would require that the husband return all or part of the proceeds paid to him. Since this forced return would "affect the appellant's right to the benefits already accepted," the case did not fall within the exception noted by the court and was controlled by the general rule denying the right of appeal after acceptance of benefits.

The development of the general rule applied in this case and a review of the situations in which some courts have attempted to modify its rigor are presented in a recent annotation.[31] It seems well settled that a litigant cannot appeal from a judgment if the appeal could result in putting in issue his right to the benefits accepted. This rule is generally applied even if financial hardship will result from the fact that the litigant must await the outcome of the appeal before accepting the benefits which have already been awarded him.[32] The decision of the court in this case is well supported by authority, since it is apparent that a new trial would again put in issue the defendant's right to the money already paid him, because of the discretion allowed the court in dividing the marital property when a divorce is decreed.[33] It appears that some relaxation of the rule is desirable when financial need makes it necessary that the litigant accept the benefits of the judgment in order to keep himself in business—a situation which might often occur in divorce cases such as this. If the husband had been awarded the filling station which he had been operating as his business, and had desired to appeal from some other portion of the judgment, apparently he would have been faced with the choice

[30] Citing 2 AM. JUR., *Appeal and Error*, § 215, p. 977.

[31] 169 A. L. R. 985 (1947).

[32] *Id.* at 1066.

[33] TEX. REV. CIV. STAT. (Vernon, 1948) art. 4638.