6278, four have arisen out of strikes. By the decision in the principal case this avenue of redress has been materially narrowed. If the intent of the legislature was to strike at all mob violence, then this intent has been defeated. Gone also is the salutary effect of the law in inducing the inhabitants of counties to refrain from mob violence on penalty of increased taxes to pay verdicts secured against the county wherein the mob acted. It would seem that as the law now stands the only persons entitled to recover under the statute are those persons taken from the hands of the authorities and cases where the mob "beats" the law-enforcing agencies to the scene and vents its wrath on a real or supposed wrongdoer who is thought to have violated the law. Many of these victims would doubtless be guilty of the offense and deserve legal punishment. On the other side of the picture are those persons who are assaulted and lynched by mobs and who are entirely within their legal rights and guilty of no violation of law, and this fact is at that time perfectly recognized by the mob who attacks them. But this group is wholly unprotected. It seems that no distinction should be made to the prejudice of wholly innocent and law abiding citizens. It is to be hoped that the court will see its way clear to modify the construction of the statute so as to include within it those victims of mob violence who are neither real nor supposed wrongdoers in the sense of having violated the law.

VERNON LEE

DIVORCE

MODIFICATION OF THE DECREE — ACTION OF DIVORCE AND ALIMONY

The Court of Common Pleas of Mahoning County in a decree of divorce awarded custody of one child to the plaintiff and alimony of $60.00 per month for the support of herself and the child, which the court, at a subsequent term, modified to $45.00 per month. On motion of the defendant to vacate a judgment for payments in default and to modify the decree, the court reduced the alimony payments to $20.00 per month for the support of the child until 21 years of age and also ordered the defendant to pay $25.00 a month on the judgment for accrued alimony until satisfied. The court of appeals held that the jurisdiction of the court in cases of alimony was continuing and affirmed the judgment.[1]

This note deals with the power of the court to modify decrees of

[1] *Heckert* v. *Heckert*, 57 Ohio App. 421, 14 N.E. (2d) 428 (1936).

absolute divorce. One must distinguish between actions for separate maintenance and actions for permanent divorce and alimony. In Ohio this problem is confused by the terms of the statute. An action for separate maintenance is called one for alimony alone while that for absolute divorce is for divorce and alimony.[2] Most jurisdictions recognize that the court has continuing jurisdiction to modify the decree in an action for alimony only.[3]

After the term in which permanent divorce is granted there is generally no power in the court to alter a decree except where authority to do so is reserved in the decree or unless the power is given by statute.[4] However, past due installments may not be modified.[5] A few states including Ohio have held that the power to modify is impliedly reserved in the decree when alimony is payable in installments for the support of the wife,[6] and, as most jurisdictions would agree, where the decree provides for the custody and support of minor children.[7] Where the decree is for periodic payments over an indefinite length of time it is necessarily a decree for continuing control by the courts.[8] Continuing jurisdiction is necessary for the welfare of minor children under the unfortunate circumstances wherein the parents are separated by permanent divorce.[9] Where the court has had jurisdiction over the person or property of the defendant, if a divorce is granted and alimony is not awarded, a subsequent action for alimony will not be sustained[10] since the court may presume that the rights of the parties were adjudicated in the divorce action.[11] But in *Harlan* v. *Harlan*[12] the court held that it had jurisdiction to grant a support order for the maintenance of the children

[2] Ohio G.C., sec. 11997.

[3] *Gloth* v. *Gloth*, 154 Va. 511, 153 S.E. 879, 71 A.L.R. 700 (1932); *Smedley* v. *State*, 95 Ohio St. 141, 115 N.E. 1022 (1916); *Gilbert* v. *Gilbert*, 83 Ohio St. 265, 94 N.E. 421, 35 L.R.A. (N.S.) 521 (1911).

[4] KEEZER, MARRIAGE AND DIVORCE, 2d Ed., sec. 765 (1923); *Ruge* v. *Ruge*, 97 Wash. 51, 165 Pac. 1063 (1917); *Sampson* v. *Sampson*, 16 R.I. 456, 16 Atl. 711, 3 L.R.A. 349 (1889); In *Noonaw* v. *Noonaw*, 127 Kan. 287, 273 Pac. 409 (1929), the court refused to modify the decree because absolute divorce and alimony are statutory rights and should be strictly construed; *Boehmer* v. *Boehmer*, 259 Ky. 69, 82 S.W. (2d) 199 (1935), noted 20 Minn. L. Rev. 314 (1936).

[5] *Epps*. v. *Epps*. 218 Ala. 667, 120 So. 150 (1929); *contra, Plankers* v. *Plankers*, 178 Minn. 31, 225 N.W. 913 (1929) (statutory).

Epps v. *Epps*, 218 Ala. 667, 120 So. 150 (1929); *contra, Plankers* v. *Plankers*

[6] *Epps*. v. *Epps*, 218 Ala. 667, 120 So. 150 (1929); *Olney* v. *Watts*, 43 Ohio St. 499, 3 N.E. 354 (1885).

[7] *Hart* v. *Hart*, 174 Wash. 316, 24 Pac. (2d) 620 (1933); *Corbett* v. *Corbett*, 123 Ohio St. 76, 174 N.E. 10 (1930), *aff'd*. 36 Ohio App. 321, 173 N.E. 316 (1930).

[8] *Francis* v. *Francis*, 192 Mo. App. 710, 179 S.W. 975 (1915).

[9] *Heckert* v. *Heckert*, 57 Ohio App. 421, 14 N.E. (2d) 428 (1936).

[10] *Marshall* v. *Marshall*, 162 Md. 116, 159 Atl. 260 (1931); *O'Brien* v. *O'Brien*, 130 Cal. 409, 62 Pac. 598 (1900).

[11] *Spain* v. *Spain*, 177 Iowa 249, 158 N.W. 529 (1916); *Kamp* v. *Kamp*, 59 N.Y. 212 (1874).

[12] 154 Cal. 341, 98 Pac. 32 (1908).

although provision for their care was omitted from the decree. Where the court does not have jurisdiction to grant alimony due to the fact that the defendant could not be personally served, some courts do not allow a subsequent suit for alimony.[13] But several states either by statute or otherwise have allowed such an action.[14] Thus, one might say, in view of the Ohio decisions, the general rule in Ohio is that the jurisdiction of the court to modify a divorce decree awarding alimony is continuing subject to certain exceptions. The most troublesome of these exceptions is found in those cases where the decree is based upon the agreement of the parties.

Many decrees in divorce actions are based upon an agreement of the parties providing for property settlements, support of the wife, custody and support of the minor children. Clearly the incorporation of an agreement does not prevent the modification of alimony for support when jurisdiction is expressly reserved in the decree.[15] The majority of the cases hold that the power to modify given by statutes in most of these jurisdictions is not affected by the fact that the decree is based on the consent or contract of the parties.[16] The arguments in support of this rule are that the contract is merged into the decree and thereby loses its contractual nature thus permitting modification;[17] or that since the court is not compelled to use the agreement, when it does employ the decree as evidence of a satisfactory adjustment, this will not prevent the court from altering the decree.[18] In some cases a contrary result is reached on the theory that the court ratifies the contract and on the principles of contract it cannot modify the decree unless the parties consent.[19] But in jurisdictions following this rule usually the incorporation of an agreement does not preclude the court from modifying the

[13] *Doeksen* v. *Doeksen*, 202 Iowa 489, 210 N.W. 545 (1926); *Darby* v. *Darby*, 152 Tenn. 287, 277 S.W. 894 (1925); *Weidman* v. *Weidman*, 57 Ohio St. 101, 48 N.E. 506 (1897).

[14] *Thurston* v. *Thurston*, 58 Minn. 279, 59 N.W. 1017 (1894); *Woods* v. *Waddle*, 44 Ohio St. 449, 8 N.E. 297 (1886) (divorce in foreign jurisdiction); *Stephenson* v. *Stephenson*, 54 Ohio App. 239, 6 N.E. (2d) 1005 (1936) (domestic decree).

[15] *Beal* v. *Beal*, 218 Cal. 755, 24 Pac. (2d) 768 (1933); *Morgan* v. *Morgan*, 211 Ala. 7, 99 So. 185 (1924). The phrase "until further order of court" is a part of the decree and must be considered as a part of the agreement. *Folz* v. *Folz*, 42 Ohio App. 135, 181 N.E. 658 (1932) (action for alimony only).

[16] *Eddy* v. *Eddy*, 264 Mich. 328, 249 N.W. 868 (1933), note 32 Mich. L. Rev. 701 (1934); *Worthington* v. *Worthington*, 224 Ala. 237, 139 So. 334 (1932); *Maginnis* v. *Maginnis*, 323 Ill. 113, 153 N.E. 654 (1930), note 58 A.L.R. 639. The same is true even of an agreement included in a decree settling property rights. *Skinner* v. *Skinner*, 205 Mich. 243, 171 N.W. 383 (1919).

[17] *Herrick* v. *Herrick*, 319 Ill. 146, 149 N.E. 820 (1925).

[18] *Warren* v. *Warren*, 116 Minn. 458, 133 N.W. 1009 (1912).

[19] *Dickey* v. *Dickey*, 154 Md. 675, 141 Atl. 387, 58 A.L.R. 634 (1928); *Law* v. *Law*, 64 Ohio St. 369, 60 N.E. 560 (1901); *Henderson* v. *Henderson*, 37 Ore. 141, 60 Pac. 597, 48 L.R.A. 766, 82 Am. St. Rep. 741 (1900).

decree where the decree of support money is for the benefit of minor children.[20] The law upon this point is not clear in Ohio. In *Law* v. *Law*[21] the court held that a decree based upon an agreement was not subject to modification although the support of minor children was provided for in the decree. This case involved an agreement in which the father agreed to pay the wife $3,000 a year in monthly installments for her support and for the support and education of their minor child, and after the death of the wife to pay $1500 a year in installments to the daughter until she married. Upon the basis of this decision it would seem clear that a decree based upon the agreement of the parties which awards alimony to the spouse may not be modified.[22] A more recent case decided that the jurisdiction of the court to alter the decree continues where it provides for the custody, care, and support of minor children thus permitting an increase in the amount for support awarded in a decree based on the agreement of the parties.[23] The court did not discuss the effect of the agreement upon the decree, and as a result two court of appeals cases have held that, while an increase may be permissible, a decree based on a contract may not be decreased.[24] In *Campbell* v. *Campbell*,[25] the court felt that to allow a decrease would be an impairment of the obligation of a contract, and thus was unconstitutional; but an increase might be allowed, so the court said, because the parent is under a legal obligation to support minor children and therefore an increase would be in accord with public policy. This argument seems to overlook the fact that an increase is quite as much an impairment of the contract and that a parent's duty is to furnish his children with necessaries according to his financial ability. The dissent pointed out that public policy might be invoked either way. The state, as a third party, is interested in the husband's duty to support his wife and children, which duty survives divorce and is found in alimony and support money as substitutes.[26] If this approach is sound then the agreement of the parties should be ineffective to defeat the court's power to modify a decree based upon the parties' agreement providing for support of the wife and

[20] *Troyer* v. *Troyer*, 177 Wash. 88, 30 Pac. (2d) 963 (1934); *Connett* v. *Connett*, 81 Neb. 777, 116 N.W. 658 (1908).

[21] 64 Ohio St. 369, 60 N.E. 560 (1901).

[22] *Cf. Petersine* v. *Thomas*, 28 Ohio St. 596 (1876).

[23] *Corbett* v. *Corbett*, 123 Ohio St. 76, 174 N.E. 10 (1930). This case was held as authority to permit the reduction of a decree based upon agreement in another case decided without opinion. *Newkirk* v. *Newkirk*, 129 Ohio St. 543, 196 N.E. 146 (1935).

[24] *Ferger* v. *Ferger*, 46 Ohio App. 558, 189 N.E. 665 (1934), noted in 2 O.S.L.J. 49 (1935); *Campbell* v. *Campbell*, 46 Ohio App. 197, 188 N.E. 300 (1933), noted in 20 Va. L. Rev. 584 (1934).

[25] 46 Ohio App. 197, 188 N.E. 300 (1933) noted in 20 Va. L. Rev. 584 (1934).

[26] SCHOULER, MARRIAGE, DIVORCE, SEPARATION & DOMESTIC RELATIONS, 6th. ed., secs. 1796-1797 (1921).

the minor children. In any event an agreement should not be considered as a final settlement of the rights of minor children not parties to the arrangement and to which they are incapable of assenting.[27]

ITHAMAR D. WEED

INSURANCE

AUTOMOBILE INDEMNITY — GUEST STATUTE

The plaintiff while riding as a guest of one Hickok in Michigan was injured in an automobile accident. She brought action against Hickok in Ohio. The jury found that the accident was the result of the wilful and wanton misconduct of the insured, thus taking the case out of the operation of the Michigan guest statute (Sec. 4648 Compiled Laws of Michigan (1929) — relieving the owner or operator of liability except in cases of gross negligence or wilful and wanton misconduct), and gave her judgment. Hickok carried liability insurance with the Yorkshire Indemnity Company of New York and the plaintiff then filed against it to recover on the previous judgment. A general demurrer was entered by the company on the ground that the policy covered only accidental injuries. From a judgment sustaining the demurrer, the plaintiff appealed. In reversing the judgment, the court held that the injuries resulting from the wilful and wanton misconduct of the insured were accidental within the meaning of the policy. *Herrell* v. *Hickok,* 57 Ohio App. 213, 13 N. E. (2nd) 358 (1937). The Supreme Court affirmed the Appellate Court finding that if the Michigan law was as alleged in the petition, then, under the law of that state, the injuries were accidentally sustained. The court said it was unnecessary to decide whether injuries caused by wilful or wanton misconduct would be covered by the policy in a case arising in Ohio. *Herrell* v. *Hickok,* 133 Ohio St. 66, 11 N.E. (2nd) 869 (1937).

In the absence of statute the general rule is that an owner or operator

[27] The Committee on Judicial Administration and Legal Reform of the Ohio State Bar Association has accepted the draft of the Marriage and Divorce Commission appointed by Gov. White, which will probably be submitted to the General Assembly in the near future. This statute will eliminate the problems discussed in this note. The proposed divorce law provides that in an action for divorce, alimony, or annulment the court shall have the power to raise, lower, or otherwise modify an award of alimony for future support of the spouse if payable in installments, or an award for support money to minor children either in installments or in a lump sum, whether or not the award was based upon a contract between the parties. An award to the spouse of a lump sum to be paid in installments is not subject to modification when such sum is a final property settlement. The court will also have the power to equitably adjust arrears of such alimony or payment to minor children which may have accumulated by reason of the inability of the party to meet such payments. Proposed Divorce Law, sec. 8b, 11 Ohio Bar 275 (July 18, 1938).