an objectionable juror.[14] As long as the defendant has been tried by an impartial jury he has had all he is entitled to and a re-trial would give him no more. One single man is not better to try the defendant's case than the rest of the state.[15] However, if the defendant had exhausted his preremptory challenges and the prosecution, by use of excessive peremptory challenges, had forced upon the defendant a juror who was partial to the prosecution, then such error would be cause for reversal. Even though the defendant had exhausted his peremptory challenges, such would not necessarily mean there was prejudicial error. Ohio G.C. sec. 13449-5 would seem to include in reversible errors only those which are prejudicial. Only in several of the many cases cited in the opinion of the court was the fact mentioned that the defendant had not exhausted his peremptory challenges. The principal case certainly stands with the majority rule when defendant has not exhausted his peremptory challenges. It would seem probable that its position would be unchanged even though the defendant had exhausted his peremptory challenges.

R. D. S.

DOMESTIC RELATIONS

Is Alimony Mandatory When Divorce Is at Aggression of the Husband?

Because of the aggression of her husband, Margaret Hardy was granted a divorce on her cross-petition for divorce, alimony and custody of the children. In awarding the custody of the children to their mother the trial court ordered that "said defendant shall have for their maintenance the sum of seventeen dollars per week." On appeal the Court of Appeals unanimously held that this order does not meet the mandatory provisions of Ohio G.C. sec. 11990, that the court shall allow "alimony" out of the husband's property.[1]

The origin of the doctrine of alimony is based upon the common law obligation of the husband to support his wife.[2] Founded upon considerations of equity and public policy, the natural and legal duty of the husband to support his wife does not cease when there is a legal separation or divorce because of his misconduct.[3] Where this obligation of mainte-

[14] O'Brien v. Iron-Works, 7 Mo. App. 257 (1879).

[15] Thompson v. Douglas, 13 S.E. 1015 (W.Va. 1891).

[1] Hardy v. Hardy, 64 Ohio App. 25, 17 Ohio Op. 316, 27 N.E. (2d) 497 (1940).

[2] Albert v. Albert, 7 Ohio App. 156, at 159, 28 Ohio C.A. 225, 29 Ohio C.C. 271 (1916).

[3] Fickel v. Granger, 83 Ohio St. 101, 93 N.E. 527, 32 L.R.A. (N.S.) 270, 21 Ann. Cas. 1347 (1910).

nance is continued by the courts it is ordinarily enforced by a decree for permanent alimony.[4]

A proceeding for alimony in Ohio does not invoke the general equity powers of the court but is controlled by statute.[5] The court is authorized to exercise only such powers as the statute expressly confers upon it and that are necessary to make its decrees and orders effective.[6]

The Ohio statute provides that "when the divorce is granted because of the husband's aggression the court shall, if the wife so desires, . . . allow such alimony out of her husband's property as it deems reasonable, having due regard to property which came to him by marriage and the value of his real and personal estate at the time of the divorce."[7] "Alimony in such cases may be allowed in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court deems equitable.[8]

It is important to observe, as did the court in the principal case, that there are certain mandatory clauses. The statute specifically provides that the wife shall be allowed alimony out of her husband's property.[9] When the divorce is granted to the wife because of the misconduct or fault of the husband the right of the wife to alimony is an absolute one and the language of the statute is imperative.[10] As to the making of an allowance under these circumstances,[11] there is no discretion.[12]

Although the right of the wife to alimony becomes vested by the mandatory provisions of the statute, it is incumbent upon the trial court to exercise its discretion in determining the amount of alimony to be awarded.[13] In fixing the amount of the allowance the court has a wide range of judicial discretion.[14] The trial court is required to make such allowances as it deems reasonable and to make the same payable in such manner as it deems equitable.[15] The duty to consider all the facts and

[4] Baker v. Baker, 4 Ohio App. 170, at 171, 21 Ohio C.C. (N.S.) 590, 25 Ohio C.D. 243 (1915).

[5] DeWitt v. DeWitt, 67 Ohio St. 340, at 347, 66 N.E. 136 (1902).

[6] Marleau v. Marleau, 95 Ohio St. 162, at 164, 115 N.E. 1009 (1917).

[7] OHIO G.C. sec. 11990.

[8] OHIO G.C. sec. 11991.

[9] *Supra*, note 5, at 351.

[10] Coffman v. Finney, 65 Ohio St. 61, at 67, 61 N.E. 155, 55 L.R.A. 794 (1901).

[11] *Ibid.*

[12] There are other Ohio decisions in which the courts have consistently said that the duty to allow alimony under the provisions of sections 11990 and 11991, OHIO GENERAL CODE, is mandatory: McGinnis v. McGinnis, 9 Ohio App. 81, at 83, 29 Ohio C.A. 588 (1918); Lape v. Lape, 99 Ohio St. 143, at 147, 124 N.E. 51, 6 A.L.R. 187 (1918); Stuart v. Stuart, 15 Ohio L. Abs. 535 (1933).

[13] *Supra*, note 10.

[14] *Supra*, note 10.

[15] McGinnis v. McGinnis, 9 Ohio App. 81, at 83, 29 Ohio C.A. 588 (1918); Stuart v. Stuart, 15 Ohio L.Abs. 535 (1933).

circumstances by the record is imposed upon the court by the statute.[16] The trial court may and should consider the pecuniary circumstances of both parties in fixing the amount of alimony to be allowed.[17] A decree for alimony calls for sound discretion by the court in fitting the judgment, as to the amount, time and manner of payment, to the facts in hand.[18]

Under similar statutes in other states, the courts have held that the amount of alimony to be awarded is largely within the discretion of the courts.

The Alabama statute formerly provided that "upon granting a divorce the judge must decree the wife an allowance . . ."[19] In *Jones* v. *Jones*,[20] the court said that when a divorce is granted in favor of a wife who has no separate estate, or if it is insufficient for her maintenance, she is entitled to an allowance out of the estate of her husband.[21] In such a case "the allowance must be as liberal as the estate of the husband will permit, regard being had to the condition of his family, and to all the circumstances of the case."[22]

A Missouri court held that upon rendition of a decree of divorce in favor of the wife it is the mandatory duty of the court under the statute[23] to make an order touching the alimony and maintenance of the wife.[24]

Other states having similar statutes are:[25] Arkansas,[26] Florida,[27] Indiana,[28] Kansas,[29] Oklahoma[30] and Virginia.[31] Decisions in these

[16] McGinnis v. McGinnis, *supra;* Coleman v. Coleman, 37 Ohio App. 475, 175 N.E. 38 (1930). The latter case was not an action for divorce and alimony but for alimony only.

[17] *Ibid.*

[18] *Supra,* note 4. In Kundert v. Kundert, 24 Ohio App. 342, 345, 156 N.E. 237, 238 (1927) the court held that an allowance is not required in every case where the wife is granted a divorce because of the husband's misconduct, because the trial judge is vested with a large discretion subject to review by the court because it is judicial and not arbitrary in nature.

[19] 95 Ala. 443, 11 So. 11, at 13 (1892).

[20] ALA. CODE ANN. (Michie, 1928) 7418. An amendment in 1933 changed the wording from "the judge . . . must decree" to "the judge . . . at his discretion may . . ."

[21] In Gibson v. Gibson, 203 Ala. 466, 83 So. 478 (1919), the court said that the wife is entitled to permanent alimony upon the granting of a divorce, whether in her favor or in favor of the husband as a matter of right, unless she had a separate estate in view of the two following sections of the code.

[22] ALA. CODE ANN. (Michie, 1928) 7419. This section was also amended in 1933 allowing the court to exercise its discretion in conformity with change made in previous section.

[23] MISSOURI REV. STAT. (1929) §1355.

[24] Allen v. Allen, 226 Mo. App. 822, 47 S.W. (2d) 254 (1932).

[25] 2 VERNIER, AMERICAN FAMILY LAWS, sec. 105.

[26] ARK. CODE (1937) § 4390.

[27] FLA. COMP. GEN LAWS ANN. (1927) §4987.

[28] BURNS ANN. IND. STAT. (1933) §3-1217.

[29] KANS. STAT. ANN. (1935) §60-1511.

[30] OKLA. STAT. ANN. (1937). Title 12, §1278.

[31] VIRGINIA CODE (Michie, 1936) §5111.

states hold that the trial court must use its discretion in allowing permanent alimony, taking into consideration the husband's ability to pay, wife's condition and means and the conduct of the parties.[32]

One authority[33] in the field found that nine of the forty-seven statutes allowing the trial court to award alimony in absolute divorce cases provide that the court "must" or "shall" allow alimony in proper cases. In the other states the courts "may" do so or "have the power to decree" alimony. He concluded that since the statutes place the whole matter in the discretion of the court, these differences are probably not significant.

From the standpoint of policy and in the light of the decisions, both in Ohio and other states having similar mandatory statutes, the rule of construction allowing the courts to exercise a wide latitude of judicial discretion in the determination of the amount of alimony commends itself as an application of good sense and inherent justice. Measuring the statute under consideration by the yardstick of what is consonant with reason and good discretion, one cannot conclude that the General Assembly intended to preclude the courts from giving consideration to the facts and circumstances of each case.

Sed quaere whether, under the statute, the court *must* grant a decree for *some* amount, even though nominal, where it appears that the husband is virtually indigent and the wife has sufficient wealth of her own to support herself? L.S.F.

Legitimizing Illegitimates — Effect of Statutes and of Presumptions

In *Garner* v. *Goodrich*,[1] a child conceived before, but born posthumously after a bigamous marriage, asserted a claim for a death award under the Workmen's Compensation Act[2], because of the accidental death of his father. In order to recover, the child's legitimacy had to be proved[3]. The Ohio Supreme Court, under the following statute, held that he was legitimate and entitled to recover: "When by a woman

[32] Shirey v. Shirey, 87 Ark. 175, at 184, 111 S.W. 369 (1908); Johnson v. Johnson, 165 Ark. 195, at 203, 263 S.W. 379 (1924); Baker v. Baker, 94 Fla. 1001, 114 So. 661 (1927); Dissette v. Dissette, 208 Ind. 567, 661, 196 N.E. 684 (1935); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927); Mann v. Mann, 136 Kan. 331, 15 Pac. (2d) 478 (1932); Lassen v. Lassen, 134 Kan. 436, 7 Pac. (2d) 120 (1932); Sango v. Sango, 105 Okla. 166, 232 Pac. 49 (1924); Derritt v. Derritt, 66 Okla. 124, 168 Pac. 455 (1917); Myers v. Myers, 83 Va. 806, at 815, 6 S.E. 630 (1887).

[33] 2 Vernier, American Family Laws, sec. 105, p. 266.

[1] 136 Ohio St. 397, 26 N.E. (2d) 203, 16 Ohio Op. 568 (1940).

[2] Ohio G. C. sec. 1465-82.

[3] Staker v. Industrial Commission, 127 Ohio St. 13, 186 N.E. 616 (1933).