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RECENT CASES

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DIVORCE — Burden of Proof — Party Alleging Adultery Must Prove by Clear and Positive Evidence. The parties were married in August 1942 and lived together as man and wife until July 1948 when they separated. Plaintiff seeks divorce on the ground of adultery, among others. She alleges that her husband had made love to her sister-in-law in her presence, and, on one other occasion she found him in bed with her. Trial court entered decree dismissing complaint, holding that the evidence was not sufficient to support the charge. On appeal, HELD, affirmed. A charge of adultery must be corroborated by facts and circumstances aside from the testimony of the plaintiff. Here a complete lack of corroboration was fatal. *Brown v. Brown* — S.C. — 56 S. E. 2d 330 (1949).

Adultery is a ground for divorce, either *a mensa et thoro* or *a vinculo matrimonii,* in every state in the United States, the District of Columbia and the territories of the United States. *Keezer, Marriage and Divorce,* §§1180-1233 (3rd. Ed., Moreland, 1946). In one state, New York, it is the only ground for an absolute divorce. Civil Practice Act, article 68, §1147. Adultery has various meanings and definitions. Generally, however, it is agreed that adultery is the voluntary sexual intercourse of a married person with someone other than the offender's spouse. *Commonwealth v. Moon,* 151 Pa. Super. 555, 30 A. 2d 704 (1943). Five states have separate code provisions so defining adultery. They are: California, Idaho, Montana, North Dakota, and South Dakota. *American Family Law,* §65, Vernier (1932). Under both the common law and the civil law rule, adultery is committed only when the woman is married to a third person. *State v. Roberts,* 169 Wis. 570, 173 N. W. 310 (1919). In some jurisdictions both parties are guilty, though only one of them is married. *Goodwin v. State,* 70 Tex. Cr. R. 600, 158 S. W. 274 (1913). These differences seem to arise out of the fact that some of the states have adopted the common law definition and some have adopted the definition of the ecclesiastical courts, while some have combined both. In the absence of a statutory requirement of habitual carnal intercourse it is generally held that a single act of sexual intercourse between the parties is sufficient to constitute the civil offense and each such act constitutes a separate offense. *American Family Law,* §65, Vernier (1932). For the criminal offense of adultery a different definition and requirement is often laid down. The criminal defini-

tion in South Carolina is as follows: "Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, when either is lawfully married to some other person." S. C. CODE OF LAWS, (1942), §1436. Frequent occasional acts will not be sufficient to satisfy the "habitual" requirement of this section. *State v. Carroll,* 30 S. C. 85, 8 S. E. 433 (1889). It is up to the jury to determine what constitutes habitual. The State of Texas, in construing identical language, held that under such language a single or occasional act of intercourse was insufficient to constitute a "living together". *Storey v. State,* 94 Tex. CR. 246, 250 S. W. 427 (1923). The language is construed to mean an abiding together in the same habitation as a common or joint residence. Actual sexual intercourse is absolutely essential, however, only a penetration is required and not an emission. *Commonwealth v. Hussey,* 157 Mass. 415, 32 N. E. 362 (1892). Absence of consent on the part of a female so that a rape has been committed does not deprive the act of its adulterous character as to the male, if the other requirements are present; that is, marriage, penetration, and voluntariness on the part of the male. Where a woman is insane or is ravished, there is no adultery on her part because the act is not voluntary. *Johnson v. Johnson,* 78 N. J. Eq. 507, 80 Atl. 119 (1911). A mistake of fact may render the act non-adulterous. *State v. Cutchall,* 109 N. C. 764, 14 S. E. 107 (1891). But, however, a mistake of law is not sufficient to relieve the parties from the consequences of their act. *State v. Westmoreland,* 76 S. C. 145, 56 S. E. 673 (1907); *Williams v. N. C.,* 325 U. S. 226 (1945).

As to the sufficiency of the evidence of the crime of adultery, by the rule of the canon law, the uncorroborated confession of the defendant was insufficient and the same rule has been declared by a number of the courts of the United States. *Buchanan v. Buchanan,* 229 App. Div. 631, 243 N. Y. S. 436 (1930). The evidence of a paramour is of the weakest kind and usually should be corroborated. *Evans v. Evans,* 93 Ky. 510, 20 S. W. 605 (1892). It has been held that such uncorroborated testimony is sufficient. *Reynolds v. Reynolds,* 297 Mo. 447, 249 S. W. 407 (1923). The testimony of a prostitute is looked upon with more suspicion, if anything, than that of any other *particeps criminis,* and corroboration is necessary. *Turney v. Turney,* 4 Edw. Ch. (N. Y.) 566. A prostitute or a person filling the role of a "pimp" is not thereby entirely disqualified, but the testimony of such a person is considered unreliable and not entitled to the weight and consideration that is required by the courts unless there are facts or testimony furnishing such corroboration as the court deems suffi-

cient. *McCarthy v. McCarthy,* 143 N. Y. 235, 38 N. E. 288 (1894). Although the great weight of authority is *contra,* some courts have held that the uncorroborated testimony of the plaintiff is sufficient. *Murphy v. Murphy,* 150 Mich. 97, 113 N. W. 583 (1907). A few states by statute make the plaintiff's testimony inadmissible so as to prevent collusion. There is no definite rule as to the degree of corroboration required, but each case must be decided according to its own facts and circumstances. The general rule seems to be that where a particular fact or circumstance is vital to the complainant's case, some evidence of the same in addition to complainant's testimony will be required. The corroborating evidence must go to all of the material allegations of the complaint necessary to sustain a decree of divorce. In re *Sweeney,* 51 Ariz. 9, 73 P. 2d 1349 (1937). A more liberal view is that the complainant's testimony is not required to be corroborated in every particular, but it is enough if corroborated by the testimony of third persons as to some of the causes alleged. *Van Ness v. Van Ness,* 32 Cal. App. 2d 66, 89 P. 2d 166 (1939). In the absence of collusion, slight corroborating evidence may suffice. *Broderich v. Broderich,* 40 Cal. App. 550, 181 P. 402 (1919). The evidence of adultery is nearly always circumstantial. Lord Stowell said years ago: "It is not necessary to prove the direct fact of adultery, for being committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt". *Loveden v. Loveden,* 2 Hagg. Const. 2, 161 Eng. R. 648 (1810). This is an accurate discription of the law as it is today. *Wakefield v. Wakefield,* 217 Ala. 517, 116 So. 685 (1928). It is often said that the proof must be "clear and positive". *Lang v. Lang,* 155 Md. 464, 142 Atl. 485 (1928).

It seems clear that in the principal case the correct decision was reached. The divorce act does not define adultery and therefore some confusion is certain to arise as to what will constitute adultery in South Carolina under the act. If based upon the criminal definition of adultery, there must be a "living together and carnal intercourse or habitual carnal intercourse without living together". This was hardly the intention of the legislature in so far as the civil offense is concerned. One act of adultery should be all that is required. In such a matter and upon such an accusation the courts are extremely prone to move cautiously upon the evidence, but a divorce is a civil action, and it is not necessary that the proof should be convincing "beyond a reasonable doubt", but only that there be a clear preponderance of the evidence. If the conduct of the parties is open to an in-

terpretation of either innocence or guilt, the presumption of innocence should prevail. It would seem that in South Carolina, due to the long Constitutional prohibition against divorce that the amendment granting to the courts the power to decree divorces will be very strictly construed. The courts should not, however, defeat the legislative intent by requiring too high a degree of proof. From the dictum of the case it is gratifying to note that the court clearly initmates that in a proper case the burden of proof may be met by a clear preponderance of the evidence.

BASIL S. NORRIS.

LABOR — Discriminatory Contracts by Union. Negro employees of southern railroads brought suit against a labor union, their exclusive bargaining representative under the Railway Labor Act 48 Stat. 1185, 45 U. S. C. §151 *et seq.,* to enjoin compliance with a collective labor agreement, negotiated by the union, which discriminated against colored firemen by classifying them as "not promotable" under the agreement. This suit was brought in the District of Columbia, under a statute permitting an action to be maintained if a defendant was found within the district. The district court granted a preliminary injunction. The U. S. Court of Appeals held that the venue was improperly laid, since it could not be supported under the Federal venue statute and this statute was the sole authority for bringing suit in the District of Columbia. On writ of certiorari HELD, the venue had been properly laid and the plaintiff's rights to nondiscriminatory representation could be enforced by injunction. *Graham v. Brotherhood of Locomotive Firemen and Enginemen,* 94 L. Ed. 1 (1949).

The language of the Act, §152, fourth provides: "Employees shall organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act . . ." Under §152, Sixth and Seventh, when the representative bargains for a change of working conditions, the latter section specifies that these conditions are working conditions of employees as a class. §151, Sixth of the Act defines "representative" as meaning "Any person or . . . labor union . . . designated either by a carrier or group of carriers or by its or their employees, to act for it or them". These sections read in the light of the purpose of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employ-

ees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. *J. I. Case Co. v. National Labor Relations Board,* 321 U. S. 332 (1944). The duty of a statutory collective bargaining representative under the Railway Act to fairly represent the individual employees does not preclude it from making a collective bargaining agreement which may have unfavorable affects on some of the members of the craft represented, so long as the provisions of the agreement are based on differences relevant to the authorized purposes of the contract in the conditions to which they are to be applied, such as differences in seniority, the type of work performed, and the competence and skill with which it is performed. *Carmichael v. Southern Coal and Coke Co.,* 301 U. S. 495, (1937). This does not, however, include the authority to make, among the members of the craft, discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. *Steele v. Louisville and Nashville Ry.,* 323 U. S. 192 (1944). The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210 (1944). Since there is no adequate administrative remedy available to the petitioner, the cause is reviewable in the Supreme Court. *Steele v. Louisville and Nashville Ry., supra.*

It is submitted that on the facts involved in this case, no other decision could have been reached. Certainly discrimination within the membership of the craft solely upon racial lines is unwarranted. The arguments propounded in this type of case that the majority of the members have voted for just such discriminatory contracts are very easily rebutted by pointing out, as does the court, that the majority in most of these cases happen to be of the white race.

C. KAREGEANNES.

LIBEL AND SLANDER — Publication — Dictation to Private Secretary. Defendant, a business executive, was brought into court on two causes of action, one for libel and the other for slander. Both grew out of an alleged libelous letter which defendant dictated to his private secretary, who afterwards transcribed the letter from her shorthand notes by typewriter and sent it to the plaintiff. The trial court sustained defendant's motion for a directed verdict, whereupon plain-

tiff appealed to this court. HELD, affirmed. Dictation to a private secretary and subsequent transcription by her does not constitute a publication in the sense of the law of libel. *Watson v. Wannamaker* — S.C. — (February 3, 1950).

A libel is published when, and only when, it is communicated to some third person who understands it. *McKeel v. Latham,* 202 N. C. 318, 162 S. E. 747 (1932); *Hedgpeth v. Coleman,* 183 N. C. 309, 111 S. E. 517 (1922). This is so because the gravamen of the complaint is the alleged pecuniary injury or damage to the character or credit of the party defamed, and it is obvious that no such injury or damage can arise without publication. *Freeman v. Dayton Scale Company,* 159 Tenn. 413, 19 S. W. 2nd 255 (1929). There is a distinct split of authority in this country and the courts are in general disagreement as to what constitutes a publication under the law of libel. *Rodgers v. Wise,* 193 S .C. 5, 7 S. E. 2nd 517 (1940). On the affirmative side of the question, the New York court has said that a defamatory writing is published as soon as read by some third party and the legal consequence is not altered by the fact that where the symbols reproduced or interpreted are the notes of a stenographer, and that there is still publication as a result of the dictation, at least where the notes have been examined or transcribed. *Ostrowe v. Lee,* 256 N. Y. 36, 175 N. E. 505 (1931). In following this line of reasoning, a stenographer is an *individual* just as any other employee and there is no basis for the belief that a communication made to one occupying such a position would be less injurious to the plaintiff than if it were made to any other of defendant's employees. *Nelson v. Whitten,* 272 F. 135 (E. D. N. Y. 1921). Over and above all, the most important fact in a situation of this kind is that the defamation refers to business unconnected with defendant's ordinary business, in that the writing of the defamatory statements is not a daily occurrence, but certainly the exception. *Gambrill v. Schooley,* 92 Md. 48, 48 Atl. 730 (1901). The evil effect presented by this situation is in the loss of esteem of the one defamed by the stenographer in person, and not in any relation to the chief agent nor the common employer. *Berry v. City of New York Insurance Co.,* 210 Ala. 369, 98 So. 290 (1923); *Ferdon v. Dickens,* 161 Ala. 181, 49 So. 888 (1909). The more liberal rule, which has the support of the weight of modern authority, is that where the communication is made to a servant or business associate in the ordinary and natural course of business, there is no actionable libel. *Beck v. Oden,* 64 Ga. App. 407, 13 S. E. 2nd 468 (1941). The reasoning behind this rule is that a corporation or firm can act only through agents, and the acts of both the officer dictating

and the stenographer to whom the letter is dictated are the acts of the corporation or firm. *Cartwright-Caps Co. v. Kaufman,* 113 Miss. 359, 74 So. 278 (1917). Likewise, the manager of a corporation and his stenographer can be regarded, not as master and servant, but as co-servants, and the dictation, copying, and mailing considered as a single act of the firm. *Owen v. Ogilvie Publishing Co.,* 32 App. Div. 465, 53 N. Y. Supp. 1033 (1898).

The question involved is comparatively new in South Carolina, but the present case removes all doubt as to the position of the court on this point. The more liberal rule was applied to the case at bar and definitely has the weight of authority behind it and is seemingly gaining in support as time progresses. It would certainly be a burden on the business man of today, and very impractical, to say that dictation to a confidential secretary might constitute publication as the secretary is the invaluable instrument through which the executive transacts his business and the ever-existent threat of a libel suit resulting from the dictation would create an insurmountable barrier to the successful operation of any enterprise.

WILLIAM H. SEALS.

PARTIAL ASSIGNMENT OF A CHOSE IN ACTION — Right of Partial Assignee to Join with Assignor in Bringing an Action at Law. — The machinery and plant of a box manufacturing company were damaged by fire allegedly due to the negligence of the defendant in supplying a highly volatile fuel oil without notifying the owner of its nature. The owner then conveyed the land and building and assigned the fire claim for damages to the present plaintiff-assignor, who in turn assigned to plaintiff-assignee 1/100th interest in the land, building, and fire claim. Both the assignor and partial assignee join in bringing an action on the fire claim. Defendant was unsuccessful in an attempt to remove to the Federal Court.[1] In the lower court the defendant's motion to strike the assignee as not being a proper party was refused. On appeal, HELD, affirmed as to this issue. The partial assignee of a legally assignable chose in action may join with his assignor in an action at law on the claim. *Ridgeland Box Manufacturing Co. v. Sinclair Refining Co.,* 216 S. C. 20, 56 S. E. 2d 585 (1949).

An assignee of part of a legally assignable chose in action may sue

1. As to the effect of the citizenship of a partial assignee as co-plaintiff on removal of cause see Ridgeland Box Manufacturing Co. v. Sinclair Refining Co., 82 F. Supp. 274 (E. D. S. C. 1949), noted in 2 South Carolina Law Quarterly 89 (Sept. 1949).

at law in his own name on the claim if the debtor assents to the assignment; *Hughes v. Kiddell,* 2 Bay 324 (S. C. 1801); or if the debtor doesn't assent, the assignee may join with the assignor, *Schilling v. Mullen,* 55 Minn. 122, 56 N. W. 586 (1893), intervene in an action brought by the assignor, §409, S. C. CODE OF LAWS (1942); 2 WILLISTON, CONTRACTS, §443 (rev. ed. 1938), or if the assignor refuses to join as plaintiff, the assignee may make him a party defendant, §404, S. C. CODE OF LAWS (1942). The early common law did not recognize the assignment of a chose in action since to do so would encourage maintenance and, also, violate the privity which existed between the original parties. *Noland v. Law,* 170 S. C. 345, 170 S. E. 439 (1933); *Sullivan v. Curling,* 149 Ga. 96, 99 S. E. 533 (1919). These objections no longer prevail in most jurisdictions which now generally permit the assignment of a chose in action arising out of contract or out of tort for injuries to both real and personal property. *Miller v. Newell,* 20 S. C. 123 (1883). However, no cause of action for a strictly personal tort, *e. g.,* assault and battery, slander, false imprisonment, etc., is assignable. Ex parte *Hiers,* 67 S. C. 108, 45 S. E. 146 (1903); *Evans v. Walker,* 112 S. C. 419, 100 S. E. 153 (1919). The modern test of assignability is survivability. *Bultman v. Atlantic Coast Line Ry.,* 103 S. C. 512, 88 S. E. 279 (1916). If the cause of action is one that would survive to or against one's personal representatives, then it is assignable. §§419 and 8362, S. C. CODE OF LAWS (1942).

Assuming there has been a valid assignment of a legally assignable chose in action, what are the rights of the assignee? The common law refused him relief until it adopted the practice which had long existed in equity of allowing the assignee to sue in his own name. *Hopkins v. Hopkins,* 4 Strob. Eq. 207 (S. C. 1850); *Noland v. Law, supra.* Modern statutes have removed any doubt on this subject by providing that an action *must* be prosecuted in the name of the real party in interest. §397, S. C. CODE OF LAWS (1942). However, the above statute applies only to total assignments, thereby leaving partial assignments governed by the common law. *Childs v. Alexander,* 22 S. C. 169 (1884). The common law courts refused relief to a partial assignee on the ground that a debtor has the right to pay his obligations in one sum and not be subjected to several actions arising out of one obligation. *Carwile v. Metropolitan Life Insurance Co.,* 136 S. C. 179, 134 S. E. 285 (1925); *New York Trust Co v. Island Oil Corp.,* 34 F. 2d 649 (C.C.A. 2d 1929). Equity recognized the partial assignee's equitable title and would enforce it where all interested parties were before the court. *Graham v. Southern Ry.,*

173 Ga. 573, 161 S. E. 125 (1931). In this manner the rights of all persons could be judicially determined in one action. *Exchange Bank v. McLoon,* 73 Me. 498, 40 Am. Rep. 388 (1882). The reason for the rule at law was avoided as the debtor could pay the obligation into court in its entirety leaving the court to make the distribution. *Orr Cotton Mills v. St. Mary's Hospital,* 203 S. C. 114, 26 S. E. 2d 408 (1943). But the reason at law for not allowing a partial assignee to sue in his own name still remains. *Graham v. Southern Ry., supra.* Most jurisdictions have abolished the distinction that formerly existed between law and equity, making the equity procedure applicable to actions at law insofar as practicable. S. C. CONST. ART. VI, §3; *Childs v. Alexander, supra.* A partial assignee may now enforce his claim in an action at law in the same manner as formerly existed only in equity. *Lapping v. Duffy,* 47 Ind. 51 (1874). He may do so by joining with his assignor in bringing an action at law, *Grain v. Aldrich,* 38 Cal. 514, 99 Am. Dec. 423 (1869), or if the assignor refuses to join as party plaintiff, the partial assignee may make him a party defendant, *Schilling v. Mullen, supra,* or he may intervene in an action brought by the assignor. §409, S. C. CODE OF LAWS (1942). The main objective in suits involving partial assignments in either law or equity is to bring before the court in one action all interested parties in order to avoid a multiplicity of suits. *Miller v. Gulf & Atlantic Insurance Co.,* 132 S. C. 78, 129 S. E. 131 (1925). If the debtor assents to the partial assignment, the assignee may sue alone in his own name for his interest. *Bank of Harlem v. Bayonne,* 48 N. J. Eq. 246, 21 Atl. 478 (1891). If the debtor does not consent, then he must demur to the complaint brought by the partial assignee or he will be deemed to have waived his right to pay his obligation in one sum. *Delaware County v. Diebold Safe & Lock Co.,* 133 U. S. 473 (1889).

In order to equally protect the rights of both a debtor and a partial assignee, the courts are gradually beginning to formulate what seems to be a just and equitable rule. However, in their zeal to protect the partial assignee, they should not lose sight of the fundamental right of a debtor to pay his obligation in one sum and not have it split into several causes of actions. The rule as announced in the instant case accords with the great weight of authority and does not prejudice the rights of the debtor. Since there is only one cause of action, the debtor has no right to complain if more than one has an interest in the chose and all parties in interest join in the suit.

JOHN E. CUMBEE.