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DOMESTIC RELATIONS

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The domestic relations cases decided by the Supreme Court during the review period may not have been world shattering in their legal aspects, but they do, as usual in this field, make for rather sensational reading. *Green v. Green*,[1] for example, depicts the dangers which may beset two couples who live too congenially. Mrs G sued Mr. G for divorce on the grounds of physical cruelty and desertion and, by cross action, Mr. G alleged adultery on his wife's part and asked for a divorce on that ground. Both the Master and the Spartanburg County Court found the husband's charges of adultery well laid and granted him the divorce, but the Supreme Court reversed because the allegations of adultery had been established by incompetent evidence. Mr. G's charges of adultery were sought to be established by only two witnesses. One of them was a married woman who testified that she and Mrs. G once accompanied two men to a motor court where each couple had illicit relations. The other was a Mr. K who testified that he had known the Gs for a long number of years and had had sexual relations with Mrs. G over a good portion of that period. He explained that during the period of his relationship with Mrs. G, his wife, Mrs. K, was "dating" Mr. G.

The Supreme Court found no objection to this testimony other than the fact that it was uncorroborated, but reversed because the purported corroborating evidence was clearly incompetent. That evidence was the Judgment Roll by which Mrs. K had obtained a divorce from Mr. K on the ground that he had committed adultery with Mrs. G. The Judgment Roll unquestionably contained evidence pointing in that direction, but the court, quite properly, held that since Mrs. G was not a party to that suit, neither the testimony in that case nor the finding of adultery by the County Court could be held against her. The court dismissed as unsound the contention that the error in admitting the Judgment Roll was non-prejudicial because of the other evidence in the record of adultery.

By way of rounding the situation out, the court added at the end of its opinion a statement that while the case was on appeal they had heard a motion by Mrs. G to suspend the appeal and permit her

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1. 228 S.C. 364, 90 S.E. 2d 253 (1955).

to move in the court below for a new trial because of after-discovered evidence, which consisted of a certificate by the Judge of Probate of Horry County that the respondent Mr. G and Mrs. K had been married in his County on September 6, 1954. The court found it unnecessary to pass on that motion in view of its order for a new trial.

The case of *Melton v. Melton* went to the Supreme Court twice during the review period, but neither opinion is of any general interest. In the first,[2] the court held that the action by a husband, which was for the annulment of his marriage on the ground of the wife's alleged fraudulent concealment of her physical incapacity for childbirth, the recovery of alimony payments made to her under a Florida divorce and an order restraining the wife from enforcing against him an order of the Greenville County Court directing the payment of alimony in arrears under the Florida decree, could only be brought in the County of the defendant wife's residence, which was Anderson County. In the second decision,[3] the court sustained Judge Pruitt's findings: (1) That the judgment of the Greenville County Court directing the payment of the alimony installments which were in arrears, having been rendered at a time when the defaulting plaintiff was in possession of all of the facts which he now claims to rely upon, was *res adjudicata* of the present issues; and (2) that the plaintiff would not be entitled to relief in any event because the evidence showed conclusively that the wife had no knowledge that an operation had incapacitated her from childbirth until the surgeon who performed the operation testified to that effect in the instant proceedings.

In *Frazier v. Frazier*[4] the plaintiff husband sought a divorce on account of his wife's desertion by leaving him in January 1953 while they were living in Virginia. The divorce action was instituted in March 1954. The wife did not apparently deny her desertion of the plaintiff, but claimed that they had lived together as man and wife at her mother's home in Bennettsville in the Fall of 1953, thus making the desertion of less than the statutory one year's duration. The Supreme Court upheld the finding of fact by the Marlboro County Court that there had been no cohabitation in Bennettsville and allowed the divorce to stand. Perhaps the most interesting point is the court's disposal of the appellant wife's claim that the respondent husband should pay the fee of her counsel on the appeal and the appellate

2. 227 S.C. 183, 87 S.E. 2d 485 (1955).
3. 229 S.C. 85, 91 S.E. 2d 873 (1956).
4. 228 S.C. 149, 89 S.E. 2d 225 (1955).

court costs. The court said that the fact that a wife is unsuccessful in her defense of a divorce action will not necessarily deprive her of the right to require the husband to pay the cost of prosecuting an appeal to the Supreme Court but "there are no equities or circumstances here justifying such an allowance." The court pointed out that for the duration of the appeal the defendant was drawing a Government allotment of $137.00 a month, and that the divorce decree required the husband to pay only $50.00 a month support. "The right of an appeal was never intended to be exercised solely and wholly as a device whereby a litigant could be advantaged at the expense of the opposing litigant."

Goolsby v. Goolsby[5] involved a motion by a former wife to vacate a judgment of divorce obtained against her on the ground of her alleged mental incompetence when the action was commenced and when the judgment was rendered. The Supreme Court agreed with Judge Henderson that mental incompetence was not proved and that certain affidavits of doctors as to their treatment of the appellant introduced in evidence before the Master could not be considered on the point since the doctors were not put on the stand and made subject to cross examination.

The last case to be commented upon, *Taylor v. Taylor*,[6] is the only case involving a real legal problem. Although the court's opinion makes the problem seem simple, it is, in actuality, a most difficult one and it may well be that the court will be troubled in other cases in the future by the simple way in which the point is disposed of in the *Taylor* case. The plaintiff's action was one in the Spartanburg County Court to declare her marriage with the defendant invalid on the ground that a divorce he had obtained from a former wife in Nevada was lacking in jurisdictional foundation. The County Court granted the relief, but the Supreme Court reversed, holding three things: (1) That the plaintiff had failed to carry her burden of proving that the Nevada Court was wanting in jurisdiction, the record showing that the plaintiff in that action had gone to Nevada with the intention of making that state his home for an indefinite period and had been employed there; (2) That the first wife could not challenge the Nevada jurisdiction because she had made a general appearance in the court there and had an opportunity to challenge directly the plaintiff's domicile; and (3) That the plaintiff, like any other stranger to the Nevada decree, has no right to attack collaterally the divorce proceedings.

5. 229 S.C. 101, 92 S.E. 2d 57 (1956).
6. 229 S.C. 92, 91 S.E. 2d 876 (1956).

The first two points were unquestionably decided correctly. Not all Nevada divorces are bad and the defendant had apparently made a very good record on the *bona fides* of his Nevada domicile. The second point, that the wife who participated in the Nevada divorce is barred from attacking it collaterally, is the doctrine of the *Shearer*[7] and *Coe*[8] cases in the United States Supreme Court which our court followed in *Kahn v. Kahn.*[9] The third point, however, that the second wife, being a stranger to the Nevada decree, is also barred from attacking it, is a very questionable one as a study of the annotations in 120 A.L.R. 815 and 12 A.L.R. 2d 717 will show. Mr. Justice Moss, who wrote the opinion, seems to rest his decision of the point on two grounds. The first is that *because* the first wife could not collaterally attack the Nevada decree, no other person can; and the second is that no judicial decree may ever be attacked by a person whose rights in the matter were not in existence at the time of the decree. The annotations cited show that there is some support for both positions in authorities from other states, but these authorities occupy a minority position. It is difficult to see why the participation of one wife in a fraudulent divorce should bar a second wife from complaining of that fraud. It is also difficult to see why the rule that only persons who had existing rights when a judgment is entered may collaterally attack the judgment, although applicable in other situations, should have application in divorce cases where a person has assumed rights and liabilities in erroneous reliance upon the validity of a divorce decree.

Furthermore, the ruling seems contrary to the court's decision in *Nimmer's Estate v. Nimmer.*[10] The question there was whether a woman claiming to be the widow of an intestate or the intestate's father should be appointed administrator of his estate. The father claimed that a Georgia divorce which the woman had obtained in order to marry the intestate was invalid and her marriage therefore void. The court agreed with that position and met the argument that the father and the other heirs were strangers to the Georgia divorce proceedings and therefore incapable of attacking them by saying: "While some support is found for this contention among the authorities, we think the better rule is that where the attack is upon the ground that the court lacked jurisdiction, it may be made at the instance of any interested party." It should be noted that both the

7. 334 U.S. 343, 68 Sup. Ct. 1087, 92 L. Ed. 1429 (1948).
8. 334 U.S. 378, 68 Sup. Ct. 1094, 92 L. Ed. 1451 (1948).
9. 213 S.C. 369, 49 S.E. 2d 570 (1948).
10. 212 S.C. 311, 47 S.E. 2d 716 (1948).

so-called widow, who wrongfully claimed Georgia domicile, and the intestate, who aided and abetted the Georgia proceedings, were estopped from attacking the divorce judgment, but this fact did not bar other persons from attacking it.

It is submitted that the fallacy of the court's third ruling in the *Taylor* case (and it must be remembered that that point was unnecessary to the decision) lies in Judge Moss' statement that "the decree in Nevada took away no rights of the respondent in this case." It is true that the decree, if valid, took away none of her rights, but, had the decree been invalid, its invalidity would have deprived her of the quite fundamental right to a valid marriage to an unmarried man.