South Carolina Law Review

Volume 6 | Issue 2 Article 9

Winter 12-1-1953

RECENT CASES

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

 Part of the Law Commons

Recommended Citation
Recent Cases, 6 S.C.L.R. 229. (1953).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

RECENT CASES

CRIMINAL LAW: Banishment as Alternative to Prison Confinement for Crime. The defendant appeals from a judgment putting into effect a two-year road sentence which had been suspended on the condition that he leave the State of North Carolina and not return for a period of two years. The conditional sentence resulted from a plea of guilty to a charge of criminal assault with a deadly weapon. The defendant left the state; however, it was established that he did return upon two occasions during the period of suspension. The defendant contends that the sentence is invalid since it allows departure from the state as an alternative to confinement. On appeal, HELD: Reversed and remanded for resentencing. A sentence of banishment is undoubtedly void. A sentence of two years on the roads suspended on the condition that the defendant leave the state and not return for a period of two years is in all practical effect a sentence of banishment for two years. *State v. Doughtie,* 237 N. C. 434, 74 S. E. 2d 925 (1953).

In the absence of specific statutory or constitutional authority, the practice of banishment of a citizen, either as a direct or alternative judgment, has been held to be void. *State v. Baker,* 58 S. C. 111, 36 S. E. 501 (1900); *State v. Hatley,* 110 N. C. 522, 14 S. E. 751 (1892); *People v. Baum,* 251 Mich. 187, 231 N. W. 95, 70 A. L. R. 98 (1930); *Millsaps v. Strauss,* 208 Ark. 265, 185 S. W. 2d 933 (1945); *Bernstein v. Jennings,* 231 Iowa 1280, 4 N. W. 2d 428 (1942). A sentence which required that the defendant leave a certain county within the jurisdiction of the court is void. *State v. Hoggett,* 101 Miss. 269, 57 So. 811 (1942). A municipal corporation was declared powerless to enact an ordinance which required prostitutes leave and remain away from a certain city. *Paralee v. Camden,* 49 Ark. 165, 4 Am. St. Rep. 35 (1886). The practice of banishment was unknown at common law and whenever practiced, it assumed the form of a Royal Pardon, granted by the King through statutes enacted by Parliament. HAWKINS, PLEAS OF THE CROWN 507 (8th ed.). Among the reasons cited for the voiding of either a direct or alternative sentence of banishment are: first, it is against public policy, exceeds the sovereign power of a State and is likely to invoke retaliation among the States. *People v. Baum, supra.* Second, it is an alternative judgment, and is thus voided. *State v. Hatley, supra.* It has been declared to be unusual punishment, though not "cruel and unusual" within the meaning of the Constitutional

Published by Scholar Commons, 1953

provisions embodied in State and Federal Constitutions. *People v. Baum, supra.* It was not regarded as "cruel and unusual" punishment at common law. *People v. Baum, supra.* While a sentence embracing banishment is regarded as ground for reversal and remanding to the lower court, the invalidity does not extend beyond the sentence and the defect is corrected by a new sentence. *State v. Baker, supra.* The void part of the sentence may be stricken out without affecting the remainder of the sentence. *People v. Lopez,* 81 Cal. App. 199, 253 Pac. 169 (1927). In many states, the practice of banishment is permitted in the form of a conditional pardon issued by the Governor, through power vested either by the Constitution or statute. The reasoning in such action is that a person may either accept or reject the contingent condition. *State v. Barnes,* 32 S. C. 14, 10 S. E. 611 (1890); *Ex Parte Hawkins,* 61 Ark. 321, 33 S. W. 106 (1895); *Ex Parte Marks,* 64 Cal. 29, 28 Pac. 109 (1833).

Banishment by the courts of the land is now, and has been, through the period covering the birth of the modern law, void. In ancient as well as present day primitive society, banishment is a virtual pronouncement of the death penalty, since under many circumstances, the individual cannot survive outside the group. In modern, present-day society, however, the penalty attached to such a sentence has virtually lost all of its severity. It does not answer a problem, it merely transfers it to another jurisdiction. The purposes behind banishing an offender are numerous, but outstanding among these is the desire of the court to avoid the severe penalties involved in imprisonment and its repercussions, and to force a change in environment upon the offender in hope time and change in environment might bring about the desired result. This is laudable where it can be established that the end result would be beneficial. The second result sought is simply to rid the state of a problem and let some other area of society shoulder the burden. This is neither sound nor safe. The good which comes from this practice is not sufficient to offset the evil, and the North Carolina court in the instant case properly refused to permit the practice.

DEXTER HAMILTON.

SPECIFIC PERFORMANCE: Discretion of the Court. Owner contracted in writing with appellant to devise premises to him if he would live with and take care of the respondent, owner's sister and appellant's aunt, on condition that appellant outlive the respondent.

Approximately four months later owner died without making the agreed testamentary provision, the failure to do so being the result of pure inadvertence. Relations between respondent and appellant were harmonious for approximately two years and the arrangement was working satisfactorily; however, friction subsequently arose. Respondent, having title to premises by will of owner and conveyance from two other heirs, brought an action in ejectment against appellant. The appellant counterclaimed for specific performance of the contract and asked to be declared owner in fee simple of said premises. Lower court held that appellant had forfeited all of his rights under the contract and should be permanently barred of any future relief. On appeal, HELD: Affirmed in part. Appellant is not permanently barred of his right to future relief, but there is no present right to specific performance. *Flowers v. Roberts,* 220 S. C. 110, 60 S. E. 2d 612 (1951).

It is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of equity, *Lesesne v. Witte,* 5 S. C. 450 (1874), guided by established principles, and exercised on consideration of all the circumstances of each particular case. *Mobley v. Quattlebaum,* 101 S. C. 221, 85 S. E. 585 (1914); *Mitchum v. Mitchum,* 183 S. C. 75, 190 S. E. 104 (1936). It was held in the case of *Marthinson v. McCutchen,* 84 S. C. 256, 66 S. E. 120 (1908), that equity would not decree specific performance of hard and unconscionable bargains, nor ones where the price was grossly inadequate. In the case of *Holley v. Anness,* 41 S. C. 349, 19 S. E. 646 (1893), the court said the contract must be certain, for valuable consideration, perfectly fair, free from misrepresentation or misapprehension, fraud or mistake, imposition or surprise, before it would decree specific performance. Also, unless the contract is fair, just, equitable, and expresses the true agreement of the parties, specific performance will not be granted. *Masonic Temple v. Ebert,* 199 S. C. 5, 18 S. E. 2d 584 (1942). This discretion of equity is not an arbitrary or capricious one, but must be governed by the rules of equity, *Clitherall v. Ogilvie,* 1 Des. Eq. 250 (S. C. 1792); *Holly Hill Lumber Co. v. McCoy,* 201 S. C. 427, 23 S. E. 2d 372 (1942); and a fair contract entered into openly and aboveboard will be enforced. *New v. Collins,* 126 S. C. 294, 119 S. E. 835 (1922). When these requirements of equity are met there is a right to a decree of specific performance. "Unless the denial of specific performance can be based upon some fixed principle of equitable jurisprudence, the denial is arbitrary and capricious,

and is violative of a plain legal right." *Sumner v. Bankhead,* 119 S. C. 78, 11 S. E. 891 (1921) (Mr. Justice Cothran dissenting), cited with approval in *Welling v. Crosland,* 129 S. C. 127, 123 S. E. 776 (1923). Some jurisdictions have held that, even though discretionary, if the proper conditions for specific performance do exist, performance will be decreed as a matter of right and not as a matter of favor, *Toomey v. Toomey,* 98 F. 2d 736 (7th Cir. 1938); *Schmidt v. Barr,* 333 Ill. 494, 165 N. E. 131 (1929), or as much a matter of right as legal relief of damages, *Oklahoma Natural Gas Corp. v. Municipal Gas Co.,* 38 F. 2d 444 (10th Cir. 1930).

It is established that a decree of specific performance in South Carolina is not a matter of right, but is left in the sound or judicial discretion of equity, and that this discretion is controlled by the settled rules of equity. These rules have become so well-settled that it is somewhat misleading to use the term "discretion" with regard to granting specific performance. It may be that the term is habitually used simply to indicate that the case before the court is to be governed by well-established equitable principles, and not by legal rules; nevertheless, the term is still misleading, for when a satisfactory case for specific performance is made out it must be granted and is not dependent upon any discretionary power as that term is ordinarily used. As Mr. Justice Cothran stated in his dissent in the *Sumner* case, *supra,* ". . . unless the granting of the remedy offend one or more of these fixed principles, the plaintiff has a legal right to the remedy". If there is a legal right by the meeting of the established principles of equity, there is no discretion. If there is a legal right and no discretion, there must be an absolute right. It seems, therefore, that "discretion", as used in these cases, is somewhat inaccurate and misleading, since in effect an absolute right exists.

WILLIAM H. BALLENGER.

DOMESTIC RELATIONS: Right of Child to Attack Validity of Divorce Decree. In an action under the Virginia Workmen's Compensation Act for death of claimant's father, the first wife of deceased entered a claim on behalf of her minor son only. Said claim attacked as void a Nevada divorce decree obtained by deceased on the grounds that he was domiciled in that state, claimant's mother being constructively served in the Nevada proceedings. The Industrial Commission entered award in favor of the son as sole dependent. On appeal, HELD: Reversed. The son could not collaterally attack

the divorce decree in workmen's compensation proceedings and the award should be divided between the second wife as deceased's lawful wife and the son as his dependent child. *Evans v. Asphalt Roads Materials Company,* 72 S. E. 2d 321 (Va. 1952).

Generally a stranger to a divorce proceeding may not attack it either directly or collaterally, unless he had some pre-existing right, *Davis v. Mitchel,* 27 Tenn. App. 182, 178 S. W. 2d 889 (1944), which was prejudiced by the rendering of the decree. *Mageveny v. Karsch,* 167 Tenn. 32, 65 S. W. 2d 562, 92 A. L. R. 343 (1933); *Miller v. Miller,* 89 Kan. 151, 130 Pac. 681 (1913). A child is a stranger to a divorce proceeding, *McLeod v. McLeod,* 144 Ga. 359, 87 S. E. 286 (1928); however, a few jurisdictions allow collateral attacks by a child on the ground that the child was not a party to the divorce suit and can attack the decree regardless of its validity between the parties thereto. *Matter of Lindgren's Estate,* 293 N. Y. 18, 55 N. E. 2d 849 (1944). The departure from the general rule may be explained as a desire on the part of the courts to prevent a gross injustice to the wife, *Mintz v. Mintz,* 83 Pa. 95 (1925), or to protect the rights of a child, *Rawlins v. Rawlins,* 18 Fla. 345 (1885), or to protect a child's legitimacy. *Henley v. Foster,* 220 Ala. 420, 125 So. 662 (1930). There has been a tendency in the decisions of the United States Supreme Court to open the doors to collateral attack by a stranger to the divorce proceedings. A chronological listing is helpful to better show this tendency. *Haddock v. Haddock,* 201 U. S. 562 (1906), holds that the mere domicile within the state of the party seeking the divorce does not entitle it to full faith and credit in other states in cases in which the adverse party was a non-resident and was constructively served but did not appear. *Williams v. North Carolina,* 317 U. S. 287 (1942), overruled the *Haddock* case and held that such a decree, granted in a case where one spouse did not appear, must be accorded full faith and credit, and that although the question of domicile in the granting state must be accorded *prima facie* weight, this question can be relitigated in a sister state. In *Williams v. North Carolina,* 325 U. S. 226 (1945), a case arising from the same state of facts that gave rise to the first *Williams* case cited above, the Supreme Court affirmed the doctrine of the first *Williams* case, stating: ". . . but those not parties to a litigation ought not to be foreclosed by the interested actions of others, especially not a state which is concerned with the vindication of its own policy". This case further states that full faith and credit must be accorded if the case was litigated in a truly adverse manner on

the merits and issues in the granting state; moreover, the limitation in the above rule applies to strangers or parties to the proceedings, but does not preclude the state's attack at any time. Three years later, following the rule in the second *Williams* case, the Supreme Court in two cases refused to allow a spouse the right to attack on jurisdictional grounds where the contesting spouse made an appearance and contested the domicile of the spouse seeking the divorce. *Sherrer v. Sherrer,* 334 U. S. 343 (1948); *Coe v. Coe,* 334 U. S. 378 (1948). A divorce decree is entitled to full faith and credit where the second spouse was constructively served but did not appear, insofar as it affects the marital status, but it is ineffective on the issue of alimony granted by a previous decree of separate maintenance in the state of matrimonial domicile. *Estin v. Estin,* 334 U. S. 541 (1948). A divorce decree cannot be attacked for lack of jurisdiction by a child who is a stranger to the proceedings where the father was a party to the proceedings and was barred from such attack by state law. *Johnson v. Muelberger,* 340 U. S. 581 (1951). Where domicile is put into issue and either contested or admitted by defendant spouse, or where defendant is personally served in the divorce state, the defendant spouse and strangers are barred from collateral attacks in a sister state, unless a less stringent rule of *res judicata* is applied to the stranger than to the parties to the divorce. *Cook v. Cook,* 342 U. S. 126 (1951). A decree rendered without personal jurisdiction over defendant is entitled to full faith and credit, but may be collaterally attacked by interested parties. *May v. Anderson,* 73 Sup. Ct. 840 (1953).

It would seem that the door is wide open for the state to collaterally attack on jurisdictional grounds a divorce rendered in a sister state, and partially open for others, including children, to so attack. This tendency was not recognized in the principal case, and the court adhered strictly to the general rule. From available cases, it would appear that South Carolina follows the general rule in not allowing collateral attacks by children whose pre-existing rights were not prejudiced. *Watson v. Watson,* 172 S. C. 362, 174 S. E. 33 (1934). The Supreme Court of South Carolina has not decided this question since the first *Williams* case started a change in the Supreme Court's requirements for full faith and credit in divorce cases. It is predicted that South Carolina will stay within the majority rule expressed in the outstanding *Watson* case, there being no necessary reasons why a child should be allowed to attack the divorce decree in South Carolina. All of the eventualities such as illegitimacy and

care of the child are provided for by statute. It is considered, however, that our courts would not hesitate to allow an attack upon grounds that the parents collusively obtained a divorce to take from the child some devise, wealth, or other valuable material asset. Generally, to allow a child to succeed in his attack upon a divorce decree would serve only to call public attention to the private affairs of the individual, and if there were children of the second union, to bastardize them. Furthermore the right to dower, peace of mind, and other kindred rights overbalance and outweigh any rights a child might have acquired subsequent to the divorce.

CLYDE H. TURNER.

TAXATION: Sale of Land with Unmatured Crops Thereon — Capital Gain or Ordinary Income? The taxpayer and her brothers were the owners of an orange grove which they sold in August 1944 for $197,100. The oranges were mature and ready to be picked in early November. Basing the value of the oranges on estimates and appraisals, the purchaser valued the unmatured crop at $120,000. The taxpayer and her husband filed a joint return and reported her one-third interest at a net gain of $48,819.82, fifty per cent of which was included in taxable income as a long-term capital gain. No portion of the taxpayer's share of the selling price of the ranch was allocated to the growing oranges on the trees at the time of the sale. The Commissioner of Internal Revenue assessed a deficiency against the taxpayer, holding that the unmatured oranges were not real property used in the taxpayer's trade or business; and further that the crop constituted property held by taxpayer primarily for sale to customers in the ordinary course of her trade or business. On appeal, HELD: Affirmed. The sale of land with unmatured crops thereon prior to taxable years beginning after December 31, 1950, is treated as ordinary income as to the portion allocable to unmatured crops. *Watson v. Commissioner,* 73 Sup. Ct. 848 (1953).

In determining gains and losses from the sale or exchange of property used in the trade or business under the provisions of Section 117 (j) of Internal Revenue Code, the term "property" means property of a character which is held for more than 6 months and which is not properly included in the inventory or held primarily for sale to customers in the ordinary course of the taxpayer's trade or business. The courts have given this section conflicting construction

as to whether profits from unmatured crops constitute a capital gain or ordinary income. Some of the courts have followed the common law of the states in which the case arose, holding that growing crops are a part of the realty, therefore subject to treatment as a capital gain. *Owen v. Commissioner,* 192 F. 2d 1006 (5th Cir. 1951); *McCoy v. Commissioner,* 192 F. 2d 486 (10th Cir. 1951). Unharvested crops are not property properly includible in an inventory of taxpayer if on hand at the end of the year, *Irrgang v. Commissioner,* 94 F. Supp. 206 (S. D. Fla. 1950); and the taxpayer does not hold unmatured crops primarily for sale in the ordinary course of his trade or business. *Irrgang v. Commissioner, supra; McCoy v. Commissioner, supra.* But in the case of *Cole v. Smyth,* 96 F. Supp. 745 (S. D. Calif. 1951), the sale of an orange grove with unmatured fruit on the trees was held to be subject to capital gain treatment on the grounds that there was no ready market for the oranges and no lending institution would consider making a loan on the crop. The amount allocable to the unmatured fruit in the sale of an apple orchard has been held subject to taxation as ordinary income. *Miller v. Commissioner,* 10 T. Ct. 210 (1951). Section 117(j) of the Code was amended by Section 323(a)(2) of the Revenue Act of 1951, specifically providing that immature crops, when sold with real estate, shall be treated as part of the real estate for the purpose of computing capital gains. Section 24 of the Code, relating to items not deductible, was amended by Section 323(b)(1) of the same Act, so as to allow no deductions for depreciation or expenses otherwise incurred in regard to unharvested crops coming under the provisions of Section 117(j)(3) of the Code. T.D. 5980 (1953) provides that the basis of such crops shall be increased by the amount of the items attributable to the production of such crops and that any other property shall be decreased by the amount of any such items which are allocable to such property, notwithstanding any provision of Section 113(b)(1), relating to basis for determining gain or loss, to the contrary.

The instant case in affirming the decision of the lower court construed the intention of Congress in enacting this amendment to Section 117(j) to be corrective, therefore holding that, under the then existing Code, unmatured crops sold with the land were subject to treatment as ordinary income. Congress did not make the amendment retroactive to taxable years beginning before January 1, 1951, and the Senate Finance Committee's report stated that there would be an es-

timated loss of $3 million annually under the amendment. It is thus evident that Congress intended not simply a clarification but a change of position in enacting Section 323 of the Revenue Act of 1951.

JAMES M. MORRIS.

PROPERTY – ADVERSE POSSESSION: Interruption of Period by Holder's Creation as Tenant-in-Common. In proceedings for partition of land the plaintiffs alleged that they were tenants-in-common with defendants, title having descended to the parties as the sole heirs of a sister who died intestate and without issue. Defendants denied the tenancy-in-common and pleaded sole seizin by virtue of an adverse holding of the land for more than twenty years. Upon trial there was a verdict for plaintiffs on the grounds that the record title to the land was in the plaintiffs and defendants as heirs, and that defendant's possession was insufficient to vest title thereto in themselves. On appeal, HELD: Affirmed. By operation of law, twenty years adverse possession after the death of the owner would be required to vest sole title in defendants as against cotenants. *Wilson v. Wilson,* 74 S. E. 2d 704 (N. C. 1953).

Adverse possession has been defined as the open and notorious possession and occupation of real property under an evident claim of right. *Atlantic Coast Line Ry. Co. v. Searson,* 137 S. C. 468, 135 S. E. 567 (1943). It is universally established that the adverse possession must be continued during the time necessary to create a bar under the statute of limitations. *Fordson Coal Co. v. Collins,* 268 Ky. 331, 104 S. W. 2d 985 (1937); *Bland v. Beasley,* 145 N. C. 168, 58 S. E. 993 (1907). Indeed, continuity is the very essence of this mode of acquiring title and any substantial interruption of this continuity will be fatal to the claim. *Turnipseed v. Busby,* 1 McCord 279 (S. C. 1821); *McCullough v. Wall,* 4 Rich. 68 (S. C. 1850). The failure of any one of the requirements, *viz.,* actual, visible, exclusive and hostile, will interrupt the continuity of the holding. *Frick v. Harper,* 155 Ala. 231, 46 So. 453 (1908); *Bean v. Bean,* 163 Mich. 379, 128 N. W. 413 (1910). In the instant case the creation of the defendants as tenants-in-common with the other heirs was held to constitute an interruption of the continuity of possession. This holding must presumably have been based on the absence of at least one of the mentioned elements. To analyze this decision, therefore, it is necessary to examine the characteristics of tenancy-in-common.

Tenancy-in-common is the holding of an estate in land by several

persons by separate and distinct titles, there being unity of possession only. *Altobelli v. Montesi,* 300 Mass. 396, 15 N. E. 2d 463 (1938); *Appeal of Delashmutt,* 234 Iowa 1255, 15 N. W. 2d 619 (1944). Each tenant owns an undivided, hence unknown, portion of the land and therefore is entitled before severance to an interest in every portion. *Martin v. Bowie,* 37 S. C. 102, 119, 15 S. E. 736 (1892); *Taylor v. Millard,* 118 N. Y. 244, 23 N. E. 376 (1890). Each tenant has the right to occupy the land, and the possession of one tenant is presumed to be the possession of all, until the contrary appears. *Clary v. Hatton,* 152 N. C. 107, 67 S. E. 258 (1910); *Knotts v. Joiner,* 217 S. C. 99, 59 S. E. 2d 850 (1950). A cotenant, however, may acquire title by adverse possession as against the others by unequivocal acts repudiating their rights so as to amount to an ouster of them during the statutory period. *Crews v. Crews,* 192 N. C. 679, 686, 135 S. E. 784 (1926); *Wells v. Coursey,* 197 S. C. 483, 15 S. E. 2d 752 (1941). Therefore, it is clear that in the case under analysis the defendants could have been holding adversely as to their cotenants after the time of the sister's death. Then why could not the periods be tacked? The case does not explain this question. With the exception of *Winstead v. Woolard,* 223 N. C. 814, 28 S. E. 2d 507 (1944), the cases cited as precedents merely apply the ruling seemingly without analysis. And though the *Winstead* case differs from the instant case in that the court found, by way of fiction, that the defendant had not been in possession prior to the ancestor's death, a feasible explanation for the holding in the instant case may be constructed from its premises. This explanation would be that, by operation of law at the sister's death intestate, the defendants were put in possession of the land as cotenants with the plaintiffs and could not repudiate their right to the inheritance so as to be in possession other than by their real title. *Winstead v. Woolard, supra; Nixon v. Williams,* 95 N. C. 103 (1886). Therefore, under the well-settled principle that the possession of one cotenant is in law the possession of all, the period of holding thereafter would inure to the benefit of the cotenants for any holding less than the statutory period. *Bullin v. Hancock,* 138 N. C. 198, 50 S. E. 621 (1905).

On these grounds the decision in the instant case would be in accord with the unanimously recognized and fundamental principles of adverse possession and tenancy-in-common. However, the vast majority of the cases have not directly analyzed the holding and have thought it sufficient to merely rule that the creation of the claimant

as a tenant-in-common does interrupt the running of the statute. Perhaps it has been considered too fundamental, but in any event this scarcity of analysis may leave room for variation should a like case arise in this jurisdiction.

LEROY M. SMITH.