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DOMESTIC RELATIONS

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The celebrated Charleston litigation of *Simonds v. Simonds*[1] has made its third appearance in the Supreme Court.[2] In addition to being fraught with human interest and involving the always fascinating subject of money in large quantities, the litigation involved, during its long life, numerous important divorce law problems and the germs of many more, but the plaintiff's case finally foundered upon the simple legal proposition that every litigant must prove his entitlement to an award before he may receive it.

In the 1956 appeal — the most important one — the Supreme Court had refused the wife her divorce on either of her claimed grounds of habitual drunkenness and constructive desertion and remanded the cause to the circuit court "to pass upon whether or not the appellant is entitled to separate maintenance and attorney's fees." The master in that trial had awarded the wife a lump sum alimony payment of $225,000.00, but the circuit judge, in reversing the master's recommendation of a divorce for the wife, had not passed upon the award of separate maintenance monies to her apart from a divorce. In this situation, the Supreme Court was powerless in the 1956 decision to consider the propriety of the award.

When the case went back to the Charleston Circuit Court, no additional testimony was taken, and the court, on the basis of the master's original report, made an award of separate maintenance to the wife in the same lump sum of $225,000.00. The husband again appealed and Mr. Justice Moss wrote his second opinion in the matter. After deciding that the circuit Judge had been correct in his procedural handling of the case, the ultimate question was reached as to "whether the respondent was entitled to any relief under the law and the facts of this case." It was held that she was not. Ever since the couple

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1. 232 S. C. 185, 101 S. E. 2d 494 (1957).
2. Its previous appearances are reported in 225 S. C. 211, 81 S. E. 2d 344 (1954) and 229 S. C. 37, 93 S. E. 2d 107 (1956).

had separated in 1952, the husband had been making regular payments, varying in amount through the years, to the wife for her support and had also been paying for the support and education of the children. The wife's complaint had alleged broadly that the support payments were insufficient for her needs and those of her children. The Court held that the burden was upon her to prove these allegations and that she had failed to do so. Striking in Judge Moss' opinion are his quotations from the wife's testimony as indicating vagueness and variableness as to her ideas of what she was entitled to.

Mr. Justice Oxner dissented. He agreed that the wife's testimony was inadequate to justify the maintenance award but he felt that since the issue of whether the support monies which the wife had received were adequate had received "scant attention" in the court below, the case should have been remanded to permit further testimony on the question.

Upon what theory is this plaintiff entitled to any separate maintenance and support from this defendant? The Court evidently felt that she would have been had she been able to prove the inadequacy of what the husband was voluntarily giving her, and this upon the theory that she was justified in leaving his home because of his alcoholic conduct for so many years. That can be conceded, but does a justification for leaving in January, 1952 necessarily establish a justification for staying away in 1957 and insisting on separate maintenance? It would seem that a rather persuasive argument could be made that separate maintenance is never due to a wife except for such periods as her husband's home is in fact intolerable because of his conduct.

If the obnoxious conduct has ceased and the stability of the reformation has been established and the husband desires the wife's return, should the wife not have to support herself if she chooses from mere dislike of the man to live separately? Judge Moss quotes from *State v. Bagwell*[3] the rule that "marriage imposes upon the husband the duty at common law of providing the wife with a reasonably adequate and suitable home and support." The *Bagwell* case goes on, however, to say this: "But that the wife owes the reciprocal duty of living with the husband, who has discharged his obligation to pro-

3. 125 S. C. 401, 118 S. E. 767 (1922).

vide her with a reasonably suitable home and support, is equally fundamental."

Only two other cases in the field of domestic relations were decided by the Supreme Court during the review period, and neither one of these was of any general interest. Both were custody cases and both simply applied recognized principles of law to their respective factual situations.

In *Powell v. Powell*[4] the Court, speaking through Chief Justice Stukes, reversed the circuit court and reinstated the finding of the master that it was to the best interest of a three-year old daughter for her custody to be awarded to the father. The divorce had been granted to the husband on account of the wife's adultery and she had not appealed from that adjudication. The Court reasoned that this fact, plus perhaps other evidence of sexual immorality not spelled out in the opinion, barred her claim of custody as against the home being offered by the husband and his parents. The Chief Justice pointed out that in some jurisdictions a divorce on the ground of adultery is a conclusive adjudication of the guilty party's unfitness to have custody of a child and that although this rule is not applied in South Carolina, our courts have never followed the general practice of awarding custody of a child of tender years to the mother in those cases where her want of moral character has been established as the ground for the divorce.

In *Dobson v. Atkinson*[5] the Court, in an opinion by Mr. Justice Taylor, found no error in the concurrent findings of a master and the Richland County Court that custody of a child should be bestowed upon the mother. Custody had been awarded to the mother in a 1956 divorce, and the present action was to enjoin the mother, who had married an Army doctor, from taking the child to the island of Kiawan, where the stepfather had been assigned for a two year tour of duty. The general fitness of the mother was also attacked, but the plaintiff failed to prevail on his factual case. On the point of the child's removal from the jurisdiction of the court, the Supreme Court was evidently satisfied with the lower court's requirement of a bond conditioned upon the mother's faithful performance of the conditions of any proper order of the court in the matter.

4. 231 S. C. 283, 98 S. E. 2d 764 (1957).
5. 232 S. C. 12, 100 S. E. 2d 531 (1957).