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DOMESTIC RELATIONS

VENABLE VERMONT*

During the review period the South Carolina Supreme Court dealt with three cases involving property rights arising out of the marital relation, two cases involving divorce, one involving custody and a criminal action for non support, and the United States Supreme Court had before it one case of particular interest involving violation of the Mann Act, all of which will be hereafter discussed.

Decisions

In *Jannino v. Jannino*,¹ the first wife of a decedent sought an adjudication that she was the lawful widow of the intestate and entitled as an heir to one-half of the estate. On reference, the Master found that Jannino was lawfully divorced from his first wife, Ruth, who was estopped from claiming an interest in his estate because of certain separation and property settlement agreements entered into by her and her husband, and further that she was barred by laches from challenging the validity of the divorce decree. The circuit court reversed the Master, holding that the divorce was invalid and there was no testimony to support a finding of estoppel and laches. It followed that Ruth was the lawful widow of the intestate and entitled to one-half of the estate. The second wife, Lois, and her two children appealed. The court held, after reviewing the evidence, that it was unnecessary to pass upon the validity of the North Carolina divorce, because Ruth was barred by laches from attacking it. The court pointed out that it was not called upon to reinstate a marriage but that the action related solely to property rights. It pointed to the prior full knowledge which Ruth had of the facts which she claimed invalidated the divorce, and to the fact that her first action in the matter had been to claim not as an heir or as a widow but as a common creditor. This action was not brought until three years after the second

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1. 234 S. C. 352, 108 S. E. 2d 572 (1959).

wife, Lois, had been administering the estate, which had been considerably enhanced in value. Pointing out that Jannino's lips were closed by death, the court observed that had Ruth predeceased Jannino, he would not have been in a position to claim as an heir of her estate, and that Ruth had let the decree serve as a protection to her heirs if she should die first owning property. It was suggested that Jannino, had he known respondent intended to contest the validity of divorce, would hardly have died intestate. The court distinguished this case from *Peoples National Bank of Greenville v. Manos*,² on the grounds that in the *Manos* case the first wife, who was abandoned by her husband in Greece, had no knowledge of his divorce and subsequent remarriage until years later, and no opportunity to meet the charges upon which it was based until the action was brought. There was, therefore, no basis for the application of laches. Further, the Court held that the determination of whether or not the doctrine of laches should be applied against a void decree of divorce must be determined in the light of the circumstances of each case, based on a consideration of whether delay has worked injury, prejudice or disadvantages to one of the parties.

In *Campbell v. Christian*,³ the validity of a will was at issue, contested by Betty I. Campbell upon the grounds that it had been revoked by her marriage with the testator. The Probate Court admitted the will to probate, finding that the marriage of testator and Betty was invalid by reason of a prior common law marriage with Beulah Poole Campbell. On circuit the Probate Court's decree was affirmed, and on appeal the single issue was one of fact, to-wit: Were Campbell and Beulah lawful man and wife on the date of Campbell's purported marriage to Betty? Since the case was at law the Court's determination was limited to whether or not there was any evidence to support the circuit decree.

Campbell had a weakness, or perhaps a strength, in marital matters. He was born January 12, 1875, and was 81 at the time of his death in February of 1956. He never married the mother of his first child, although he supported the child until her marriage and left her a one-half interest in his residual estate, appointing her and another daughter his executrices. In 1921, Campbell married Mattie Gray who

2. 226 S. C. 257, 84 S. E. 2d 857, 870; 45 A. L. R. 2d, 10, 70 (1954).

3. 235 S. C. 102, 110 S. E. 2d 1 (1959).

died in 1923. Marriage, however, did not inhibit his extra-curricular activities since he entered into an illicit relation with one Beulah during the marriage with Mattie, and produced one child in 1921. At this time Campbell was 45 and Beulah was 14. In 1923, after Mattie's death, Campbell married her niece, Gertrude, and of that marriage a child was born. Meanwhile, Campbell continued his relations with Beulah who produced children in 1925 and 1928. On December 10, 1927, he divorced Gertrude in a Florida proceeding, the validity of which was not in issue. About a year after this divorce Beulah came into his home, took the name of Campbell and they lived together for more than 24 years producing 5 more children. In 1954, Campbell deserted her and moved to another house in the City of Anderson. Shortly thereafter the appellant, Betty, who had been living in Georgia, in response to a newspaper advertisement, became Campbell's cook and housekeeper under a written contract, providing among other things, "the relationship of employee and employer will be and is the only relationship which will exist between the parties thereto." On July 17, 1954, Campbell and Betty were married in Hart County, Georgia. After a careful review of the evidence, including the birth certificates of the children, the Court found that after Campbell was lawfully able to contract a valid marriage, his relationship with Beulah became that of common law husband and wife by a mutual recognition of a marriage relation terminating their previous illicit relationship and entering into a valid marriage. Since there was no subsequent divorce or annulment of Campbell's marriage to Beulah once complete, no act or disavowal of it on his part could invalidate it. Following *Jewell v. Magwood*,⁴ without questioning the authority of the lower court so to do, the parties apparently consented that an adjudication of the legitimacy of the children of Campbell and Beulah should be made. While holding that the adjudication that Campbell's marriage to Betty was invalid had foreclosed whatever remedial interest Betty might have had with respect to the legitimacy of Beulah's children, the Court nevertheless affirmed the ruling of the trial judge that the illegitimate children of Campbell and Beulah living on May 2, 1951, became legitimate upon the

4. Rich. Eq. 113, 9 S. C. Eq. 113 (1833).

approval that day of the act of the General Assembly legitimatizing issue in specified cases.⁵

In *Johnson v. Johnson*,⁶ the *administrator c. t. a.* appealed an Order of the circuit court holding that the will of the testator was revoked by his subsequent marriage to one Grace Clark.⁷

Testator died November 22, 1955, leaving a will executed April 10, 1951, which bequeathed and devised his whole estate to his son, Clyde, and to his six brothers and two sisters, share and share alike. The named executor failed to qualify and one of testator's brothers was appointed administrator with the will annexed. The Court found that none of the exceptions mentioned in Section 19-222 appeared in the will and that, therefore, any subsequent marriage by the testator would have the effect of revoking it, citing *Campbell v. Christian*.⁸ Since the case is at law, the Court concluded that its review of the circuit decree was limited to the determination of whether or not there was any evidence reasonably warranting the factual conclusions reached by the circuit judge. The administrator contended that testator and one Grace had entered into a common law relationship of husband and wife which existed on the date of the execution of the will. None of four deeds executed by the testator during 1951 and 1952 bore renunciation of dower, and the grantee of one of them was testator's brother. In 1955 testator brought an action seeking to permit the adoption of Howard Johnson, Jr. as his own child with right of inheritance, alleging that the child had been living in his home since he was born May 7, 1953, and that testator married Grace on April 1, 1955. In that proceeding, testator testified that he and Grace were married April 1, 1955. While Grace asked the Court to grant the adoption she further stated that she would like to have the Court declare the child the legal son of Howard Johnson, the testator and herself. The decree of the court in that proceeding granted the petition for adoption. Finding a sharp conflict in evidence as to whether or

5. CODE OF LAWS OF SOUTH CAROLINA § 20-5.1 (1952).

6. 235 S. C. 542, 112 S. E. 2d 647 (1960).

7. CODE OF LAWS OF SOUTH CAROLINA § 19-222 (1952): "If any person making a will shall afterwards marry and die leaving his widow or leaving issue of such marriage, unless the will shall have been made in contemplation of marriage expressed on its face, and shall contain provision for future wife and children, if any, such marriage shall be deemed and taken to be a revocation of such will to all intents and purposes."

8. See note 3 *supra*.

not the common law relation of husband and wife existed between Grace and testator when the will was executed, the Court found facts in the record sufficient to support the finding of the circuit court, and pointed out that even if the ceremonial marriage was solemnized pursuant to a defective or improperly obtained license, or without any license at all, that did not affect its validity,⁹ citing *State v. Ward*.¹⁰

In *Holliday v. Holliday*¹¹ an action for divorce, the defendant wife was allowed to answer after default and the plaintiff-husband appeals. The last residence of the parties had been Richland County, S. C., until September 20, 1958, when the wife left and went to Darlington County, S. C., with her two daughters, 14 and 11 years old. The wife brought an action in the Civil and Criminal Court of Darlington for separate maintenance and support of herself and children, which was dismissed on special appearance for lack of jurisdiction. Thereafter on the date the instant action was begun in the Court of Common Pleas of Richland County, the wife brought an action against the husband in the Richland County Court for separate maintenance and support of herself and children. In the action before the Court of Common Pleas for divorce, the husband alleged desertion and demanded exclusive custody of the children. The wife failed to timely answer the complaint, reference was held and the master recommended a divorce on grounds of desertion, finding that the husband was properly supporting his children and no order thereabouts was necessary, nor should custody of the children be now adjudicated. On the date of the Master's report the wife moved before the presiding judge for leave to answer, and the husband filed a written return thereto. The circuit judge allowed the wife leave to answer and referred the case back to the master, citing the pending action between the parties in the county court involving the same issues, and in which a temporary order had been issued, holding that the rights of minor children were involved and concluding that the ends of justice would be best served by litigation of the matter in the court of common pleas. In affirming the order of the court of common pleas, the court held that the granting of such answer after default was

9. CODE OF LAWS OF SOUTH CAROLINA, § 20-31 (1952).

10. 204 S. C. 210, 28 S. E. 2d 785, Annot. 61 A. L. R. 2d 847 (1944).

11. 235 S. C. 246, 111 S. E. 2d 205 (1959).

within the discretion of the trial court¹² and finding no error of law or inadequate evidentiary support of the factual considerations to support a claimed abuse of discretion.

Surprisingly enough the Court inferred excusable neglect to timely answer of the complaint from the fact that there was a pending action in the County Court, an appearance by counsel therein and the issuance of an order *pendente lite* in it, protracted negotiations between counsel for support settlement and haste with which the action was pressed, although the latter met the minimum requirements of the statute.¹³ Further the Court agreed that there was a meritorious defense inasmuch as the allegations were that the desertion had occurred on September 20, 1958, and the complaint was dated and served November 6, 1958. Since the statute requires for that ground of divorce desertion for a period of one year,¹⁴ the Court rejected the contention of the appellant that the constitutional authorization of divorce on the grounds of desertion does not prescribe its duration and the statute is void as in violation of the constitutional provision.¹⁵ The Court did not consider this on the grounds that the question was not adjudicated in the lower court and appears not to have been raised there, and, therefore, could not be considered on appeal.¹⁶

Finding no factual errors in the order below, the Court concluded that defaults in divorce actions are more readily opened than in other cases by reason of the public interest in the rights of the individuals involved, and in the preservation of the marital status.

In *Moore v. Moore*,¹⁷ the Court considered that an action involving custody of a child of a service man and his wife whose peripatetic marriage had terminated in Georgetown and Conway in this State in 1956, when the wife left the home and took the child with her to the home of her parents in Oklahoma where she instituted an action against her husband for separate maintenance, and custody of the child, serving the husband by publication. During the pendency of the action the husband went to Oklahoma and surreptitiously spirited the child away, returning to Conway, S. C.,

12. CODE OF LAWS OF SOUTH CAROLINA §§ 10-609, 10-1213 (1952).

13. CODE OF LAWS OF SOUTH CAROLINA § 20-108 (1952).

14. CODE OF LAWS OF SOUTH CAROLINA § 20-101 (1952).

15. S. C. CONST. Art. XVII, § 3 (1949).

16. 3 S. C. L. Q. 265 "Desertion as Ground of Divorce."

17. 235 S. C. 386, 111 S. E. 2d 695 (1959).

and defaulting in the Oklahoma action wherein judgment was rendered against him for separate support of his wife and child and for attorney's fees and costs.

When the wife came to this State presumably to recover possession of the child she was promptly served with summons and complaint in this action by the husband seeking custody of the child on the grounds that it was in the best interest that he remain with the father, alleging lack of care and the usual grounds.

The wife answered the complaint denying the allegations of it and alleging abusive treatment and various other shortcomings of the husband praying an award of custody to her, and further alleged the judgment of the Oklahoma court was binding upon the courts of this State in seeking the enforcement thereof. In reply thereto the husband denied the allegations and particularly the jurisdiction of the court of Oklahoma.

The trial court after voluminous testimony found for the mother, holding that the Oklahoma decree was binding on the parties but proceeding independently of it to decide the case on the merits. The Court, affirming the decision below that the parents had equal rights in the legal custody of the children, and that the welfare of the children is a first consideration of the court, held it was unnecessary to decide whether or not the Oklahoma decision was binding upon the husband, intimating no opinion thereabout, perhaps because the full record was before the court which proceeded to pass upon the merits of the case rather than limiting its decision to the narrow question of the applicability of the full faith and credit clause.

Reviewing the factual findings of the court below, in the light of established principles in custody cases, the Court affirmed the awarding of the child's custody to its mother, pointing out that a custody award of a child is never final, and that changed circumstances in the future may authorize change of custody. The Court did, however, remand the case to the trial court with leave to the husband to apply for visitation privileges and requiring the wife to file a bond to secure her compliance with any future order relating to the custody of the child if he be so advised, pointing out that it was discretionary with the lower court to require a bond or not, after inquiry into the facts.

In *Inabinet v. Inabinet*¹⁸ the husband sought a divorce on the grounds of desertion wherein the wife counterclaimed for separate maintenance of herself and minor child on the grounds that the husband failed and refused to provide a home for them. The court below dismissed the complaint and ordered the husband to pay the wife a certain sum each month. The husband appealed. The Court, reviewing the evidence, held that the acts and words of the husband's parents were such as to make the wife's life in their home intolerable, and to justify her in leaving the abode. The Court distinguished the facts necessary to support a charge of constructive desertion as sufficient grounds for divorce and that sufficient to support an action for separate maintenance,¹⁹ pointing out that an action for divorce is limited by the terms of the constitution, but that in view of the lack of a statute fixing the grounds for separate maintenance and support, the broad discretion of the court of equity should apply. Suggesting that a wife marries the husband, not his family, the Court said that her obligation to be tolerant within reason of his shortcomings was one thing, but her right to freedom from ill treatment, nagging and unwarranted interference on the part of his parents was another, and finally concluded that each case must be decided on its own circumstances considered as a whole.

The sole criminal case involving domestic relations decided by the South Carolina Supreme Court during the review period was *State v. Collins*,²⁰ the prosecution of the husband for non support of his wife and minor child. As in the *Inabinet*²¹ case, the Court considered constructive desertion raised by reason of the fact that the wife had left the temporary home of the parties in Georgia and returned to the home of her mother in Kershaw County, S. C. The appellant claimed that the desertion, if any, took place in Georgia, and objected to the jurisdiction of the court, pointing out that the offense of non support is a continuing one.²² Reviewing the record the court found sufficient evidence of ill treatment and abuse of the wife, justifying her leaving under such circumstances and making the husband guilty of constructive desertion.

18. 236 S. C. 52, 113 S. E. 2d 66 (1960).

19. *Mincey v. Mincey*, 224 S. C. 520, 80 S. E. 2d 123 (1954).

20. 235 S. C. 65, 110 S. E. 2d 270 (1959).

21. See note 18 *supra*.

22. CODE OF LAWS OF SOUTH CAROLINA § 20-303 (1952).

The Court further held that the husband forfeited the right to select situs of the residence provided for the wife if she is subjected to physical abuse and ill treatment, and affirmed the conviction.

It should be noted that the charge of the trial judge seems unusually fair and could well be used as a model in similar cases. This reviewer thinks it might be well to include it in the practitioner's notebook for future reference.

A Federal Decision

The United States Supreme Court had before it one case during the review period, *Wyatt v. United States*,²³ which obliquely involved domestic relations. In that case, the defendant was convicted of a violation of the Mann Act.²⁴ On trial it appeared that the victim of the offense had, since its occurrence, married the defendant. Over the objection of the wife and husband, the wife was required by the trial court to testify on behalf of the prosecution. The Court of Appeals for the 5th Circuit affirmed the conviction,²⁵ and subsequently the United States Supreme Court affirmed the judgment below, holding that a Mann Act prosecution involving an offense against the defendant's wife is an exception to the common law rule permitting a party to exclude the adverse testimony of his spouse, and that in such a prosecution the testimony of the wife-victim, can be compelled over the objection of the witness.

The court's conclusion that in such a prosecution the defendant's prostituted witness-wife may not voluntarily decide to protect her husband by declining to testify against him was based on a finding that women in such situations often have no independent will of their own and must be protected against themselves. The court distinguished *Hawkins v. United States*,²⁶ also a prosecution under the Mann Act, in which it was held that where the offense charged is not against the person of the wife, it was error to allow the Government to use the defendant's wife as a witness against him. That case had reversed the Court of Appeals for the 10th Circuit and the District Court.²⁷ In the *Hawkins* case,

23. _____ U. S. _____, 4 L. ed. 2d 931 (1960).

24. 18 U. S. C. A. § 2421 (1952).

25. 263 F. 2d 304 (1959).

26. 358 U. S. 743, 3 L. ed. 2d 125 (1958).

27. 249 F. 2d 735 (1957).

while the wife had been placed under bond to appear in the District Court, she offered no objection to testifying against her husband, and only the defendant husband objected to her testimony. In the *Wyatt* case both the wife and the defendant-husband objected to her testimony. The Chief Justice, joined by Mr. Justice Black and Mr. Justice Douglas, dissented vigorously in the *Wyatt* case, on the ground that while a proper construction of law would give the injured party the option to testify without compelling the testimony, the decision concludes that it should be assumed that the wife is under the duress of the husband so that she may not be entrusted with a proper choice and should be protected by the court or the prosecutor against herself by forcing her to testify. The dissent points out that the defect in this conclusion lies in an evaluation by the court of the mental state of the wife which found no support in the instant record, and could not be properly justified by legislative enactment. The dissent distinguishes between the woman's consent to the culprit's criminal responsibility which is made immaterial by the Mann Act,²⁸ and the testimonial privilege traditionally thought to preserve the conjugal relationship. The Chief Justice pointed out that while Federal Courts have the authority to interpret the common law rules of the evidence, "in the light of reason and experience",²⁹ that authority must be exercised with the discriminating awareness of the distinction between matters coming within the special competence of the judiciary and those primarily within the concern of the legislature. It is interesting to note that Mr. Justice Stewart concurring in the *Hawkins* decision, pointed out in a footnote that before assuming that a change in the present rule would work such a wholesale disruption of domestic felicity as the court's opinion implies, it would be helpful to know the experience in those jurisdictions where the rule has been abandoned or modified, as well as the views of the District Judges and members of the practicing bar, and that the Judicial Conferences of the several circuits would provide appropriate forums for imparting that kind of experience, and concurs in the recommendations of two of the Circuit Judicial Conferences for the establishment of a continuing body to study and recommend uniform rules of evidence for the Federal Courts.

28. 18 U. S. C. A. § 2422 (1952).

29. FED. R. CRIM. P. 26.

Legislation

In the field of legislation, the General Assembly of South Carolina in its 1960 session passed several acts concerning domestic relations. Act No. 617 of the General Assembly extends the scope of CODE OF LAWS OF SOUTH CAROLINA, Section 20-45 (1952), regarding service on non-residents in marriage annulment actions. It allows the plaintiff service by publication as provided under Sections 10-450 and 10-454 in any action for the annulment of a marriage contracted or solemnized outside of this State when the plaintiff was a resident of this state at the time of the marriage or has been a resident of the State for at least one year prior to the commencement of the action.

Act. No. 618 transferred all jurisdictional powers, duties and authority presently vested by law and statute in respect to delinquent, neglected, destitute or physically handicapped children from the Probate Court of Charleston County to the Domestic Relations Court of Charleston County, and the Children's Court division thereof.

Act No. 597 confirms the marriages of white persons with Catawba Indians prior to its effective date, and legalizes marriages between white persons and Catawba Indians hereafter.

Act No. 683 establishes a civil and criminal court for a certain portion of Darlington County giving it concurrent jurisdiction with the Court of Common Pleas in actions relating to divorce from the bonds of matrimony, annulments and all matters affecting the custody and maintenance of children, with jurisdiction in cases involving the adoption of minors and allowing the judge of the court to act as a special referee in matters referred to him by the circuit court.

Act No. 661 amends Section 15-1112 so as to make the courts established thereunder courts of record having an official seal.

Act No. 824 amends Section 20-24.1 of the CODE OF LAWS OF SOUTH CAROLINA (1952), as amended in 1957, to allow applicants for a marriage license to use in lieu of furnishing a birth certificate for the purpose of establishing their ages, military service identification cards, selective service identification cards, passports and visas.

Act No. 875 established a Criminal and Juvenile Domestic Relations Court for Richland County.