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CASE NOTES

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CONSTITUTIONAL LAW — Eminent Domain — Redevelopment Plan with Sale to Private Enterprise. — Plaintiffs sought a declaratory judgment to enjoin the defendants from acquiring property under a redevelopment project and to declare unconstitutional the "Redevelopment Law", §§ 36-401 *et seq.* of the *Code of Laws of South Carolina* 1952. The Housing Authority of the City of Columbia had declared plaintiffs' property to be a blighted area which was principally occupied by slum dwellings. If necessary the property was to be taken by condemnation. Under the proposed plan the land would be cleared of its present structures and then sold, a portion going to the University of South Carolina, and the remainder to private individuals for light industrial sites. Plaintiffs contended that the taking of their property was not a taking for public use. The master and trial court upheld the law and project, with judgment being entered for the Housing Authority. On appeal, HELD: Reversed, except insofar as it affects the land which was conveyed to the University of South Carolina. According to Art. 1, Sec. 17 of the South Carolina Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor. Here the court found that there was not a public use, without which the private property could not be taken. *Edens v. City of Columbia,* 91 S.E. 2d 280 (S.C. 1956).

It is a universally established rule that private property cannot be constitutionally taken by eminent domain except for public use. *Hirsh v. Block,* 267 F. 614, 11 A.L.R. 1238 (D.C. Cir. 1920); *United States ex rel. Tennessee Valley Authority v. Welsh,* 327 U.S. 546, 90 L. Ed. 843 (1946). In most jurisdictions today the acquiring of property in slum blighted areas for the purpose of erecting low cost houses on such land for rental to people of low income is for a public use. *Zurn v. Chicago,* 389 Ill. 114, 59 N.E. 2d 18 (1945); *Belovsky v. Redevelopment Authority of Philadelphia,* 357 Pa. 329, 54 A. 2d 277 (1947); *McNulty v. Owens,* 188 S.C. 377, 199 S.E. 425 (1938). The taking of an unmarketable vacant area in which there was scattered ownership, undesirable platting, or tax delinquencies has been held to be a public use, *People ex rel. Gutknecht v. Chicago,* 414 Ill. 600, 111 N.E. 2d 626 (1953); as well as the acquisition and development of an area which includes

vacant and unimproved land and structures not in themselves substandard. *Ghold Realty Co. v. Hartford,* 141 Conn. 135, 104 A. 2d 365 (1954). The fact that every inhabitant of the community does not benefit does not prevent the use from being classified as a public use, *Bookhart v. Central Electric Power Cooperative, Inc.,* 219 S.C. 414, 65 S.E. 2d 781 (1951); nor does the fact that private individuals will receive incidental benefit keep the use from being a public use. *Hunter v. Norfolk Redevelopment and Housing Authority,* 195 Va. 326, 78 S.E. 2d 893 (1953). The fact that some element of private gain is present does not eliminate the public character of the taking. *Belovsky v. Redevelopment Authority of Philadelphia, supra.* However, a statute authorizing the exercise of eminent domain is said to be void where private and public uses are so interwoven that they cannot be separated. *Shizas v. Detroit,* 333 Mich. 44, 52 N.W. 2d 589 (1952); *Miller v. Town of Pulaski,* 109 Va. 137, 63 S.E. 880 (1909). In some courts, under a constitutional amendment granting to the legislature power to determine what is public use, a redevelopment law granting the power of eminent domain to accomplish a project from which a private corporation ultimately reaps a profit is not unconstitutional. *Hertzinger v. Mayor of Baltimore,* 203 Md. 49, 98 A. 2d 87 (1953); *Murray v. LaGuardia,* 291 N.Y. 320, 52 N.E. 2d 884 (1943). A legislative finding that a taking of property is for a public use is not conclusive, but is entitled to great respect. *New York City Housing Authority v. Muller,* 270 N.Y. 333, 1 N.E. 2d 153 (1936). Hence, the question ultimately is subject to judicial review. *Adams v. Housing Authority of Daytona Beach, Fla.,* 60 So. 2d 663 (Fla. 1952); *Cleveland v. City of Detroit,* 322 Mich. 172, 33 N.W. 2d 747 (1948).

Public purpose and public use are not synonymous. *Bookhart v. Central Electric Power Cooperative, Inc., supra.* Nevertheless, in the majority of the courts today redevelopment projects with sale or lease of land to private agencies have been held to be for a valid *public purpose* for which the power of eminent domain may be used. *Velishka v. City of Nashua,* 99 N.H. 161, 106 A. 2d 571 (1954); *Belovsky v. Redevelopment Authority of Philadelphia, supra.* Contrarily, *Riley v. Charleston Union Station Co.,* 71 S.C. 454, 51 S.E. 485 (1904) and *Bookhart v. Central Electric Power Cooperative, Inc., supra,* hold to the effect that private property cannot be taken except for *public use;* as do *Housing Authority of Atlanta v. Johnson,* 87 Ga. App. 560, 74 S.E. 2d 891 (1953) and *Adams v. Housing Authority of Daytona Beach, Fla., supra,* which held that redevelopment projects with ultimate sale or lease of land to private

agencies were unconstitutional because the takings were not for *public use.*

In a decision representing the minority view the instant case holds in accord with two other southern states to the effect that private property cannot be taken from a private individual unless it be taken for a public use. In deciding that public use must entail some direct use by the public, the Supreme Court of South Carolina repudiated the public purpose theory which sanctioned taking of private property through eminent domain so long as the public received some benefit. By carrying the public purpose doctrine to a logical extreme it would be possible to take all private property just so long as it can be shown that the public will benefit. A zealous housing authority could condemn an area of conventional homes as a blighted area by declaring that the houses were not in conformity with the rest of an ultra-modern city. It would matter little that the conventional homeowners did not care to be modern. This case holds in accord with the theory that a man may own property and be entitled to a reasonable use thereof. And to argue that under the proposed redevelopment plan the property would ultimately return to private individuals is repugnant to those individuals who believe that property rights are sacred and should be protected.

PATRICK H. GRAYSON.

CRIMINAL LAW — Consent to Sexual Intercourse as a Defense to an Indictment for Assault with Intent to Rape. — The three defendants were indicted for rape, assault with intent to rape, and assault and battery of a high and aggravated nature. The prosecutrix alleged that they forced her into their automobile, took indecent liberties with her person against her will, drove to a secluded spot, and each in turn forcibly had intercourse with her. The defendants admitted picking up the prosecutrix and subsequently having intercourse with her, but they averred that there was absolutely no force involved and that it was all done with her acquiescence and consent. At the trial the defendants were acquitted of the first two counts, but convicted of assault and battery of a high and aggravated nature. On appeal, HELD: Affirmed. A conviction of assault and battery of a high and aggravated nature can be sustained as a matter of law even though the defendants have been acquitted of rape. An acquittal of the charge of rape when intercourse was admitted, is necessarily a finding of consent to the intercourse, but the

jury may find that there was no such consent to prior indecent acts of the defendants. DICTA: A conviction of assault with intent to rape can also be sustained as a matter of law where the defendants are acquitted of rape. *State v. Collins,* .... S.C. ...., 91 S.E. 2d 259 (1956).

While the verdict might seem to be inconsistent, a jury is not required to be consistent and mere inconsistency will not invalidate the verdict. *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104 (1939); *State v. Duck,* 201 S.C. 94, 41 S.E. 2d 628 (1947). When an indictment includes an offense of an inferior degree, the jury may discharge the accused of the higher crime and convict him of the lesser. *Watson v. State of Georgia,* 116 Ga. 607, 43 S.E. 32 (1902); *People v. Santoro,* 229 N.Y. 277, 128 N.E. 237 (1920). This is true even though the same evidence is presented in proving the various crimes. *State v. Rector,* 166 S.C. 335, 164 S.E. 865 (1931); *State v. Williams,* 202 S.C. 408, 25 S.E. 2d 288 (1943). In a rape prosecution, where the penetration has been admitted or established, it is possible that the facts will justify a conviction of rape and nothing else. *People v. Swist,* 136 Cal. 520, 69 Pac. 223 (1902); *Parrett v. State,* 20 Ind. 7, 159 N.E. 755 (1928). In such instances, it is not error for the trial judge to refrain from charging the jury on the offenses of assault with intent to rape and assault and battery. *Andrews v. State,* 196 Ga. 84, 26 S.E. 263 (1943); *State v. Gatlin,* 208 S.C. 414, 38 S.E. 2d 238 (1946). However, under an indictment charging rape, the accused may be convicted of assault and battery and found not guilty of rape. *Sills v. State,* 36 Ga. 103, 135 S.E. 758 (1926); *State v. Allison,* 126 N.J.L. 76, 18 A. 2d 713 (1941). The jury can also convict the defendant of assault with intent to rape under a rape indictment if they find that the prosecutrix resisted for a time but ultimately yielded. *State v. Hartigan,* 32 Vt. 607, 78 Am. Dec. 609 (1860); *Paxton v. State,* 108 Ark. 316, 157 S.W. 396 (1913). Her resistance might not have been so continued and persistent as to render the defendant guilty of rape when he succeeds in having carnal knowledge. *State v. Cross,* 12 Iowa 66, 79 Am. Dec. 519 (1861); *Taylor v. State,* 180 Wis. 577, 193 N.W. 353 (1923). The subsequent yielding and consent does not mitigate the crime, *Parkinson v. State,* 205 Ark. 975, 172 S.W. 2d 18 (1943); *Paxton v. State, supra,* nor does it have a retroactive effect so as to justify the assault with intent to rape. *State v. Hartigan, supra.* However, only in cases where the evidence requires or permits, can a conviction for assault with intent to rape be sustained under an indictment charging rape. *People v. Lewis,*

252 Ill. 281, 96 N.E. 1005 (1911). The facts may show that the prosecutrix actually consented to the entire transaction, and therefore there was no offense at all. *People v. Keith,* 141 Cal. 686, 75 Pac. 304 (1904); *Parrett v. State, supra.*

In the instant case, the South Carolina Supreme Court did not pass directly on the question of whether an acquittal on a rape charge would bar an indictment for assault with intent to rape. Since the jury found the defendants not guilty on this charge, it was not an issue on appeal. Nevertheless, the principal discussion in the opinion was concerned with this problem. The court did hold that the defendant could be convicted of assault and battery of a high and aggravated nature even though acquitted of rape. This offense is just one rung further down the ladder of lesser included offenses. More important, the court in reaching its conclusion relied on cases from other jurisdictions which held that consent to intercourse is not a bar to an indictment for assault with intent to rape. The South Carolina Court did not cite a single case dealing with assault and battery, but relied wholly on cases concerned with the point under discussion. This seems to indicate that if the question were to come before the court, they would follow the majority of American jurisdictions in holding that an acquittal of rape is not necessarily a defense to an indictment for assault with intent to rape.

HARVEY M. SPAR.

CRIMINAL LAW — Power of the Appellate Court to Modify a Sentence. — The defendants were convicted on the charge of highway robbery and sentenced to serve 10 years imprisonment. An accomplice, having waived presentment of a true bill by the grand jury, pleaded guilty and was sentenced to serve 18 months. On appeal, the defendants raised the question of whether their sentence was not out of reason in view of the confessor getting only an 18 months sentence where he had a record that warranted a maximum sentence. HELD: Affirmed. The Supreme Court has no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law in the discretion of the trial judge and is not the result of partiality, prejudice, oppression or a corrupt motive. *State v. Fleming,* 228 S.C. 129, 89 S.E. 2d 104 (1955).

Generally, in the absence of statutory authority, the appellate court has no discretionary jurisdiction to modify a judgment within

the limits allowed by the applicable statutes. *U. S. v. Kapsalis,* 214 F. 2d 685 (7th Cir. 1954); *U. S. v. Rosenberg,* 195 F. 2d 583 (2d Cir. 1952); *State v. Horton,* 132 Conn. 276, 43 A. 2d 744 (1945); *Lowery v. State,* 202 Md. 314, 96 A. 2d 20 (1953). "The Legislature is the judge of the adequacy of the penalties necessary to prevent crime and unless it clearly and manifestly appears that the punishment fixed by that body is cruel and unconstitutional the court will not interfere." *Golden v. Commonwealth,* 275 Ky. 208, 121 S.W. 2d 21 (1938). The imposition of a sentence in a criminal case is a matter peculiarly within the province of the trial judge, *Reid v. State,* 200 Md. 89, 88 A. 2d 478 (1952); *State v. Johnson,* 119 S.C. 55, 110 S.E. 460 (1919) or, in other jurisdictions, within the province of the jury. *Scott v. State,* 247 Ala. 62, 22 So. 2d 529 (1945); *Golden v. Commonwealth, supra.* The appellate court has no means by which to ascertain all the elements that enter into the fixing of the length of a sentence, whereas the trial judge is in a much better position to award the proper punishment. *State v. Mele,* 125 Conn. 210, 4 A. 2d 336 (1939); *State v. Sheppard,* 54 S.C. 178, 32 S. E. 146 (1899). A sentence within the limits fixed by a statute will not be regarded as cruel or unusual if the statute fixing the punishment is not unconstitutional. *Reid v. State, supra; State v. Scates,* 212 S.C. 150, 46 S.E. 2d 693 (1948). Therefore, a sentence will not be modified on appeal if it is within the statutory limits and from the facts it is not manifestly shown that the trial court has abused its discretion. *State v. Horton, supra; Golden v. Commonwealth, supra; State v. Sheppard, supra.* This restriction of the power of an appellate court has been removed in a number of jurisdictions with the grant of statutory authority. *People v. Cossey,* 97 Cal. App. 2d 101, 217 P. 2d 133 (1950); *State v. Robinson,* 161 Ohio St. 213, 118 N.E. 2d 517 (1954); *Commonwealth v. Oxman,* 173 Pa. Super. 482, 98 A. 2d 424 (1953). Thus, when it is necessary in the furtherance of justice, it is the duty of the appellate court to review the evidence and to reduce or modify the degree of the offense or the punishment imposed when the evidence does not warrant the sentence rendered in the lower court, *Sundahl v. State,* 154 Neb. 550, 48 N.W. 2d 689 (1951); *Easterling v. State,* .... Okla. Cr. App. ...., 248 P. 2d 741 (1955), although the question as to excessive sentence was not raised on appeal by the defendant, *State v. Constanzo,* 76 Idaho 19, 276 P. 2d 959 (1954). Correction may be made by the appellate court and the modified sentence imposed by that court, *People v. Blumenthal,* 128 N.Y.S. 2d 735 (1954); *Forsha v. State,* 183 Tenn. 604, 194 S.W. 2d 463 (1946),

or remanded to the lower court for resentencing. *Bornstein v. State,* 54 So. 2d 519 (Fla. 1951); *Jenkins v. State,* 207 Miss. 281, 42 So. 2d 198 (1949). However, this power is not used indiscriminately, and where the evidence is sufficient to support the sentence, usually no modification of the trial court's sentence is made. *Kawakita v. U. S.,* 343 U.S. 717, 96 L. Ed. 1249 (1952); *Jordan v. State,* 96 Okla. Cr. App. 343, 255 P. 2d 295 (1953). In South Carolina there appears to be one exception to the otherwise firmly entrenched rule. The cases which fall into the exception are those cases wherein the defendant was convicted under a statute that fixes no maximum penalty for the offense but leaves it to the discretion of the trial judge to determine the punishment since it is necessarily influenced by numerous factors. As was stated in *Singletary v. Wilson, Superintendent,* 191 S.C. 153, 3 S.E. 2d 802 (1939), "It necessarily follows that the discretion of the trial court in its determination of the amount of the penalty . . . must be subject to be reviewed on appeal to this Court, if clearly abused, under Article I, Section 19 of the Constitution, which not only forbids the infliction of cruel and unusual punishment, but forbids the imposition of excessive fines." However, the sentence must be manifestly excessive from the facts ". . . to evoke the rare jurisdiction of this court to interfere with the exercise of the discretion of the trial Judge in the imposition of sentence upon a defendant . . . ," *State v. Goodall,* 221 S.C. 175, 69 S.E. 2d 915 (1952), since the trial judge is in a much better position than the appellate court to fix the penalty to be imposed. *State v. Kimbrough,* 212 S.C. 348, 46 S.E. 2d 273 (1948). In the instances in which the South Carolina Supreme Court has determined that a sentence is excessive for the crime charged, the usual procedure is to affirm the conviction, set aside the sentence and remand the case to the lower court for resentencing. *State v. Kimbrough, supra; State v. Gregory,* 198 S.C. 98, 16 S.E. 2d 532 (1941).

Throughout the entire process from arrest to conviction, great efforts are expended to insure that justice is rendered to the accused. The appellate court has the power to review any and every step of the process to assure that the rights of the accused have been kept inviolate. Ought not the sentence imposed be subject to this same scrutinizing review? As was said in *Lowery v. State, supra,* "It is well to remember that judges, though trained and disciplined, are not impervious to influences which affect other men." Experience has shown that trial judges do err in actions in both

law cases of a civil nature and equity cases. Through what fantasy is it to be presumed that he who is capable of error in other phases of his discretion is now omniscient for this one act?

ARTHUR M. FLOWERS, JR.

DOMESTIC RELATIONS — FEES AND ALLOWANCES — Allowance of Counsel Fees Upon Reconciliation of Parties During Suit. — Plaintiff wife retained an attorney to bring an action for separate maintenance against defendant spouse, whereupon defendant filed a counterclaim for divorce. At the preliminary hearing, plaintiff's counsel was awarded a fee *pendente lite* in the sum of $500 plus taxed costs. The action continued on the docket during which time the parties became reconciled and plaintiff's attorney moved to dismiss the action and counterclaim and applied for a counsel fee. Chancery Division of the Superior Court allowed a fee of $2,000. Defendant counsel's petition for a rehearing on the grounds that the decree was issued after the judge's statutory retirement because of age was granted. ON REHEARING: No award of a fee could be made because the cause of action had abated with the reconciliation and only an order of dismissal could be issued in the case. *Cole v. Cole,* 30 N.J. Super. 433, 104 A. 2d 866 (1954).

Alimony and counsel fees may be awarded, not as a matter of course, but rather in the sound discretion of the court after consideration of the pleadings and customary affidavits. *Shaffer v. Shaffer,* 129 N.J. Eq. 42, 17 A. 2d 780 (1941); *Mugin v. Mugin,* 166 S.C. 43, 164 S.E. 238 (1932). Most states, including South Carolina, have statutes to this effect. *Code of Laws of South Carolina* 1952 §§ 20-113 and 20-113.1. It is the duty of the court though to bring about a reconciliation of the parties where possible. *Code of Laws of South Carolina* 1952 §§ 20-110 and 20-110.1. A majority of jurisdictions hold that once the parties to the suit have become reconciled, or a dismissal of the action has been requested or obtained due to the reconciliation, the court has no power to entertain any further proceedings in the suit. *Keefer v. Keefer,* 140 Ga. 18, 78 S.E. 462, 46 L.R.A. (N.S.) 527 (1913); *Anderson v. Stegar,* 173 Ill. 112, 50 N.E. 665 (1898). These courts base their holdings principally on two points. Primarily, the necessary reopening of the suit is a violation of public policy as it may tend to break up the reconciliation and cause a resumption of the litigation. *Bell v. Bell,* 214 Ala. 537, 108 So. 375, 45 A.L.R. 935 (1926); *Hardy v.*

Hardy, 67 Ill. App. 533, 92 N.E. 2d 221 (1950); *State ex rel. Cash v. Rose, Judge,* 63 Ohio App. 244, 26 N.E. 2d 225 (1939). Secondly, the courts assert that they are without jurisdiction to hear any such motion because the cause of action is abated. Neither party can take any action adverse to the other and the motion would necessarily have to be maintained in the wife's name. *Reynolds v. Reynolds,* 67 Cal. 176, 7 Pac. 480 (1885); *Mayer v. Mayer,* 30 Ill. App. 683, 51 N.E. 2d 805 (1943); *Kuntz v. Kuntz,* 80 N.J. Eq. 429, 83 Atl. 787 (1912). It has been held, however, that where the attorney already has a valid order or judgment for payment of part of his fees, the amount fixed is presumed to be earned and is unaffected by a subsequent reconciliation of the parties and a dismissal of the action. *Shinn v. Morris, Dist. Judge of the 7th Judicial Dist.,* 205 Okla. 289, 237 P. 2d 455 (1951); *Sherry v. Rowe,* 181 Okla. 119, 73 P. 2d 134 (1937). In *Beaulieu v. Beaulieu,* 114 Minn. 511, 131 N.W. 481 (1911) it was held a mere reconciliation and nothing more did not deprive counsel of action for his fees as this was not the legal equivalent of a dismissal and the action was still pending. Georgia, on the other hand, has held that a resumption of marital relationships during the pendency of the suit amounts to a termination of the divorce proceedings and will render void a judgment for temporary alimony and attorney's fees. *Hamby v. Pye,* 195 Ga. 366, 24 S.E. 2d 201 (1943); *Thomas v. Smith,* 185 Ga. 243, 194 S.E. 502 (1937). This position perhaps is due to a statute which reads: "The subsequent voluntary cohabitation of the husband and wife shall annul and set aside all provisions made, either by deed or decree, for permanent alimony." *Code of Laws of Georgia* 1933 § 30-217. The minority view is that upon the clearest principles of common honesty as well as law, an attorney should be compensated for services rendered and the wife allowed suit money for the purpose. *Taylor v. Taylor,* 33 Idaho 445, 196 Pac. 211 (1921); *Fullhart v. Fullhart,* 109 Mo. App. 705, 83 S.W. 541 (1904); *Kiddle v. Kiddle,* 90 Neb. 248, 133 N.W. 181, 36 L.R.A. (N.S.) 1001, Ann. Cas. 1913A 796 (1911). In actions for separate maintenance, some courts have allowed the attorney to maintain in his own name an action against the husband on the theory that the wife's counsel fees are necessaries. *Maddy v. Prevulsky,* 178 Iowa 1091, 160 N.W. 762, L.R.A. 1917C 335 (1917); *Gosserand v. Monteleone,* 159 La. 316, 105 So. 356, 42 A.L.R. 310 (1925). In any case the attorney may proceed to sue the wife for the services he rendered to her. *Collins v. Welsh,* 2 Cal. App. 2d 103, 37 P. 2d 505 (1934); *Murphy v. Murphy,* 56 S.D. 355, 228

N.W. 464 (1930); *Humpries v. Cooper,* 55 Wash. 376, 104 Pac. 606 (1909).

In matrimonial cases, the wife is regarded as the favored suitor and the husband is called upon to pay her counsel's fees; otherwise, in many cases an indigent wife would be powerless to assert her legal rights. Wives, therefore, are enabled to obtain reputable counsel who have the implied assurance that their fees will be paid. Counsel in such cases are strongly urged both by the court and by public policy to affect reconciliations where possible. Yet are attorneys to be penalized by a denial of their fees when they have carried out this duty laid upon them? A mere platitude seems to exist. Public policy condones the giving of reasonable counsel fees; yet puts upon counsel the duty of bringing about a reconciliation and then denies them their compensation. It is true the cause of action no longer exists between the husband and wife and the only order the court can make is to dismiss the action, but it would seem that the wife's solicitor has acquired a separate interest of his own which the courts should protect.

JEAN A. GALLOWAY.

EVIDENCE — Effect of Oath on Admissibility of Confessions. — Defendant, an eighteen year old Negro, after questioning by state and county law enforcement officers, confessed to the murder of an eighty-four year old Negro man. The confession was made voluntarily, and not under threat or duress, or in consequence of any inducements. The confession was reduced to writing, subscribed and sworn to by defendant before a notary public. Upon the trial court's refusal to exclude the written confession from evidence, defendant appealed to the Supreme Court. HELD: Affirmed. When an extrajudicial confession is otherwise admissible, the mere fact that such confession was made under oath does not render it inadmissible as evidence. *State v. Sanders,* 227 S.C. 287, 87 S.E. 2d 826 (1955).

The broad general rule was laid down in the earlier English cases that any confession made under oath was inadmissible as evidence. *Regina v. Wheeley,* 8 Car. & P. 250, 173 Eng. Rep. 482 (N.P. 1838); *Rex v. Wilson,* Holt, N.P. 597, 171 Eng. Rep. 353 (1817); Bull. N.P. 242 (1767). A small number of American courts followed this rule applying it to extrajudicial as well as judicial confessions which had been made under oath. *United States v. Basca-*

dore, 24 Fed. Cas. 1028, No. 14, 536 (C.C. D.C. 1811); *United States v. Duffy,* 25 Fed. Cas. 922, No. 14, 998 (C.C. D.C. 1804); *People v. Gibbons,* 43 Cal. 557 (1872); *Jackson v. State,* 56 Miss. 311 (1879). Such confessions were generally excluded on the grounds that the administration of the oath rendered the confession involuntary and compulsory. *Steele v. State,* 76 Miss. 387, 24 So. 910 (1899); *State v. Glass,* 50 Wis. 218, 6 N.W. 500, 36 Am. Rep. 845 (1880). However, it is now generally recognized that an extrajudicial confession which is otherwise admissible is not rendered inadmissible by virtue of the fact that it was made under oath or that it was taken down in writing and sworn to. *United States v. Brown,* 40 Fed. 457 (D.C. S.C. 1889); *United States v. Graff,* 26 Fed. Cas. 1, No. 15, 244 (C.C. S.D. N.Y. 1878); *Riley v. State,* 180 Ga. 869, 181 S.E. 154 (1935); *Commonwealth v. Wesley,* 166 Mass. 248, 44 N.E. 228 (1896); *People v. Kennedy,* 159 N.Y. 346, 54 N.E. 51, 70 Am. St. Rep. 557 (1899). A defendant in a criminal case can not be made to take the stand, be put under oath, and compelled to testify against himself. S. C. CONST. Art. I, § 17; South Carolina Code of Laws 1952 § 26-408. But a confession, merely because it was made under oath, does not become a deposition in a judicial proceeding, and hence, any constitutional provision that the defendant in a criminal case shall not be compelled to be a witness against himself can have no application. *People v. Owen,* 154 Mich. 571, 118 N.W. 590, 21 L.R.A. (N.S.) 520 (1908). Contra to the common law, it now appears to be the prevailing rule that a confession made under oath before a committing magistrate or a coroner is not to be excluded simply because such confession was sworn to. *Sheppard v. State,* 68 Ga. 127, 22 S.E. 2d 347 (1942); *Teachout v. People,* 41 N.Y. 7 (1869); *Commonwealth v. Clark,* 130 Pa. 641, 18 Atl. 988 (1890); *Pierce v. State,* 90 Tex. Crim. 302, 234 S.W. 537 (1921). The enactment of statutes allowing persons accused of a crime to testify in their own behalf has removed the element of compulsion and renders a confession made under oath admissible. *People v. Kelly,* 47 Cal. 125 (1873); *Steele v. State, supra; State v. Glass, supra.* However, such a confession is still subject to the rules requiring that any confession, to be admissible as evidence on trial of the accused, must have been voluntarily given without any compulsion or in consequence of any inducement. *Hendrickson v. State,* 229 P. 2d 196 (Okla. 1951); *Elliott v. State,* 185 Miss. 402, 189 So. 796 (1939); *People v. Chapleau,* 121 N.Y. 266, 24 N.E. 469 (1890); *Enoch v. Commonwealth,* 141 Va. 411, 126 S.E. 222 (1925). The confession should be preceded by proper warning that

it may be used in evidence against the confessor and that he is not obliged to incriminate himself. *Tuttle v. People,* 33 Colo. 243, 79 Pac. 1035, 3 Ann. Cas. 513, 70 L.R.A. 33 (1905); *McNish v. State,* 45 Fla. 83, 34 So. 219, 110 Am. St. Rep. 65 (1903); *Adams v. State,* 129 Ga. 248, 58 S.E. 822, 17 L.R.A. (N.S.) 468, 12 Ann. Cas. 158 (1907); *State v. Needham,* 78 N.C. 474 (1878). It is not necessary that the person confessing shall have been accused of the crime at the time he made the confession. *Hendrickson v. People,* 10 N.Y. 13, 61 Am. Dec. 721 (1854); *State v. Glass, supra.* But, when a party under charge of committing a particular crime is called by the prosecution and compelled to answer, under oath, as to such crime, on the trial of another party, his testimony is regarded as given under compulsion, and cannot afterwards be introduced against him when he is on trial. The same privilege is applied to any case in which he is forced to answer, under oath, questions relating to the crime with which he is charged, and his confession resulting from such testimony is sought to be used against him. *State v. Meyer,* 181 Iowa 440, 164 N.W. 794 (1917); *Jackson v. State, supra; People v. McMahon,* 15 N.Y. 384 (1857). The confession of the commission of a criminal offense, when freely and voluntarily made under oath by a witness before a grand jury, may subsequently be used against the witness as substantive evidence upon the trial for the crime confessed. *United States v. Charles,* 25 Fed. Cas. 409, No. 14, 786 (C.C. D.C. 1813); *State v. Coffee,* 56 Conn. 399, 16 Atl. 151 (1888); *Padgett v. State,* 176 Ga. 314, 168 S.E. 53 (1933); *State v. Campbell,* 73 Kan. 688, 85 Pac. 784, 9 L.R.A. (N.S.) 533 (1906); *People v. Richter,* 182 Miss. 96, 43 N.Y.S. 2d 114 (1943). And it does not affect the admissibility of the sworn confession that the witness at the time was under arrest or subpoena. *Jenkins v. State,* 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267 (1895); *State v. Campbell, supra; Medlock v. State,* 108 Tex. Crim. 274, 1 S.W. 2d 308 (1927). *But cf. State v. Smith,* 56 S.D. 238, 228 N.W. 240 (1929). The earlier South Carolina cases admitted as evidence the testimony of a witness at a coroner's inquest or before a committing magistrate on the ground that a witness could claim the privilege against self-incrimination and refuse to answer any incriminating questions. This was held to be the rule whether the witness was the accused, a suspect, or an ordinary witness. *State v. Branham,* 13 S.C. 389 (1879); *State v. Vaigneur,* 5 Rich. L. 391 (S.C. 1852). However, in later cases the court ignored these cases and held that when a person is summoned before a coroner's inquest or a magistrate's proceeding and compelled to

testify, such testimony is inadmissible as evidence in a subsequent trial of the witness for the crime. This rule applied whether or not the witness was the accused, a suspect, or an ordinary witness. The holding was based on the theory that such a confession could not be regarded as free and voluntary, and further, that even though such a witness could refuse to answer questions on claiming the privilege against self-incrimination, his exercise of the privilege at once created a suspicion of his guilt. Still another reason was that the witness might not know of his right to refuse to answer incriminating questions. *State v. Perry,* 106 S.C. 289, 91 S.E. 300 (1917); *State v. Tapp,* 105 S.C. 55, 89 S.E. 394 (1916); *State v. Senn,* 32 S.C. 392, 11 S.E. 292 (1890). But other South Carolina decisions seem to have limited these cases. When the accused had been warned that he could refuse to answer incriminating questions and that anything he said might later be used against him, or when the accused voluntarily took the stand and waived his privilege against self-incrimination, testimony made by the witness at prior judicial proceedings has been admitted as evidence on the subsequent trial of the witness. *State v. Simmons,* 112 S.C. 451, 100 S.E. 149 (1919); *State v. Barwick,* 89 S.C. 153, 71 S.E. 838 (1911); *State v. Baker,* 58 S.C. 111, 36 S.E. 501 (1900). Although there appears to be a conflict of authority on this subject in South Carolina, it seems clear that whenever such testimony has been excluded from evidence, it was excluded on some ground other than the mere fact that an oath had been administered to the witness. Hence, the holding in the principal case should apply to judicial confessions meeting the above requirements, as well as to extrajudicial confessions made by the defendant.

Most of the cases which hold that a confession made under oath was inadmissible as evidence arose prior to the enactment of statutes making defendants competent witnesses in their own behalf. With the removal of the disqualification of the accused as a witness for himself, the reason for the rule ceased. The oath can no longer be regarded as a form of legal compulsion which, with the fear of the consequences of perjury before the witnesses' eyes, renders a confession under oath, or testimony given under oath, involuntary. Further, there is no sound reason upon which such a rule can be based. Statements made by the accused out of court concerning the crime charged, if freely and voluntarily made, may always be proved against him on his trial. There would seem to be no logical reason for excluding such a confession simply because the confessor made it under oath. Again, why should statements made in court under

oath, and which are equally free and voluntary, stand upon a different footing? His voluntary testimony under oath, given in a proceeding in which he is authorized to testify, ought to stand upon at least as favorable a footing. Applying the test of reliability, there could scarcely be said to be anything in the nature of an oath calculated to make the defendant speak falsely against himself. There would appear to be no infringement of any constitutional provision against self-incrimination in the mere administration of an oath, so long as the accused is not compelled to testify. Hence, it would seem that the court in the instant case has reached the only logical and just decision possible on this novel question of law in holding that the test of the extrajudicial confession was not whether it was sworn to, but whether the statement was free and voluntary. For the reasons pointed out above it is desirable that the court apply the same rule to judicial confessions whenever the occasion arises.

CARY C. DOYLE.

EVIDENCE — TRIAL — Unfavorable Inference from Failure to Call a Witness. — Beneficiary brought an action to recover under the provisions of an accidental death insurance policy issued by the defendant insurer. Upon being notified of the death of the insured, the insurer informed the beneficiary that the policy had lapsed for nonpayment of the premium. Undisputed testimony of the beneficiary was that the time for payment of the premium had been extended by the insurer's manager and field agent. Upon the trial court's direction of verdict for the insured and refusal to grant a new trial defendant insurer appealed to the Supreme Court. HELD: Affirmed. Insurer's field agent was present but was not placed upon the stand to deny the testimony of the beneficiary thereby raising the inference that had such testimony been presented it would have been unfavorable to the insurer. *Matthews v. National Fidelity Insurance Company*, ... S.C. ...., 89 S.E. 2d 95 (1955).

The right is given to any party litigant to introduce witnesses of his own choosing, yet an unfavorable inference may arise against him for failure to produce a particular witness. *Killings v. Metropolitan Life Insurance Company*, 187 Miss. 265, 192 So. 577, 131 A.L.R. 684 (1940); 2 Wigmore, *Evidence* S 285 (3d ed. 1940). Such an inference arises from the unexplained failure of a party to produce the testimony of an available witness who has superior knowledge of the facts on a material issue in the cause and who would

apparently favor that party. *Fulson-Morris Coal & Mining Company v. Mitchell,* 37 Okla. 575, 132 Pac. 1103 (1913); 20 Am. Jur., *Evidence* S 187 (1939). Ever since the case of the chimney sweeper's jewel, this has been a recognized rule; in an action of trover, the jury was instructed that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages which they accordingly did. *Armory v. Delamirie,* 1 Str. (K.B.) 505, 93 E.R. 664 (1722). Earlier records of this mode of reasoning are found in *Ward v. Apprice,* 6 Mod. (K.B.) 264, 87 E.R. 1011 (1705). This rule was early recognized in most of the states and in South Carolina in both civil and criminal cases. *Clifton v. United States.* 4 How. 242, 11 L. Ed. 957 (1846); *Murray v. The South Carolina Railroad Company,* 10 Rich. 227 (S.C. 1857). This rule does not apply when plaintiff's evidence does not establish a prima facie case, since the inference does not rise to the level of a formal presumption. *Momeier v. Koebig,* 220 S.C. 124, 66 S.E. 2d 465 (1951); 31 C.J.S., *Evidence* S 156 (1942). The failure to call as a witness an employee who has knowledge of a material issue raises an inference that the testimony would be adverse. *Robinson v. Duke Power Company,* 213 S.C. 185, 48 S.E. 2d 808 (1948); *Mickle v. Dixie Security Life Insurance Company,* 216 S.C. 168, 57 S.E. 2d 73 (1949). There is authority that there should be no inference in such a case since the witness is subject to call by the opposing party. *Longacre v. Yonker's Railroad Company,* 236 N.Y. 119, 140 N.E. 215, 28 A.L.R. 1030 (1923). There seems to be no disposition to accept such a limitation absolutely or to enforce it strictly. 31 C.J.S., *Evidence* S 156 (1942); 2 Wigmore, *Evidence* S 288 (3d ed. 1940). Normally when a lawyer calls a witness he feels he is "vouching for his honesty and his testimony". Frost, *Presenting the Evidence,* 8 S.C.L.Q. 198 (1955). Furthermore the rules of evidence greatly circumscribe counsel in cross-examination of his own witness, and subject to narrow exceptions, forbid him to impeach. *Finch v. Weiner,* 145 Atl. 31 (Conn. 1929); *State v. Nelson,* 192 S.C. 422, 7 S.E. 2d 72 (1940). Some cases hold that when the person is no longer in the employ of the party, there is no inference that his testimony would be unfavorable. *Ellerman v. Skelly Oil Company,* 227 Minn. 65, 34 N.W. 2d 251, 5 A.L.R. 2d 886 (1948). No unfavorable inference can arise from failure to call a witness who although possessing peculiar knowledge of facts is adverse to a party or privileged. *State v. Vickers,* 226 S.C. 301, 84 S.E. 2d 873 (1954);

Dallar v. Johnston, 87 Ga. App. 261, 73 S.E. 2d 336 (1952); 31 C.J.S., *Evidence* S 156 (1942). A variance of opinion exists as to when and how to raise the question of failure to produce the testimony of a particular witness. *Killings v. Metropolitan Life Insurance Company, supra;* 20 Am. Jur., *Evidence* S 187 (1939). The propriety of an instruction that the jury may draw reasonable and natural inferences from the facts proved to their satisfaction has been recognized. *Vandalia Coal Company v. Moore,* 69 Ind. App. 311, 121 N.E. 685 (1919); *Hornly v. State Life Insurance Company,* 184 N.W. 84 (Neb. 1921). Where the evidence indicates that there are witnesses seemingly accessible to the accused, or under his control who are or should be cognizant of material and relevant facts and whose testimony would presumably aid his story, if it were true, the prosecuting attorney may comment upon the accused's failure to produce them. *State v. Cook,* 204 S.C. 295, 28 S.E. 2d 842 (1943); *State v. Shackelford,* 88 S.E. 2d 778 (S.C. 1955). The basis for the rule in the principal case is that under all of the circumstances when evidence is peculiarly within the defendant's knowledge and reach and no effort is made to procure that testimony, the inference that it would be unfavorable would rest in the common knowledge and conviction of all. *State v. Grebe,* 17 Kan. 458 (1877); *Carter v. Chambers,* 79 Ala. 223 (1885); 2 Wigmore, *Evidence* S 286 (3d ed. 1940).

An inference that "something is rotten in Denmark" is a natural and proper reaction from such failure to call an available witness who possesses knowledge of important facts. Although such an inference supplies no positive evidence, it places a defensive burden upon the opposing party. Such an inference merely gives greater credence to the positive evidence of the opposing party on any issue concerning which it is shown that the witness might have had some knowledge. Complete advantage from such an inference would be gained from counsel's argument and from instructions to the jury as to the burden of proof. Moreover, if the inference commends itself to reason, born of common judgment and experience, the jury will apply it without hint or argument from the court.

A dissenting opinion by Mr. Justice Frankfurter suggests a broadening of the trial judge's role by making his failure to call material witnesses in cases involving *res ipsa loquitur* grounds for a new trial. *Johnson v. United States,* 333 U.S. 46, 92 L. Ed. 468 (1947). In cases where an obvious material witness is missing, the trial judge should exercise his power to call and examine such witness and elicit the truth. In such a case, the person called as a witness by

the court is not a witness for either side, and is subject to examination and cross-examination by both sides. *United States v. Young,* 26 F. Supp. 574 (W.D. Tex. 1939). The parties then would not be bound by the application of the archaic rules of evidence which would govern if the party concerned called the witness.

W. C. PARLER.

RECEIVERS — Appointment on Dissolution of Partnership Other Than by Death. — Plaintiff and his two brothers entered into a partnership at will, the agreement resting in parol with no provision for dissolution. Becoming dissatisfied, plaintiff commenced an action for dissolution and the appointment of a receiver. Subsequently defendants formed a corporation and began using partnership effects in the new business of the same nature. From an order of the trial judge dissolving the partnership and providing for the management of its affairs during the period of dissolution by one of the defendants, but denying the appointment of a receiver, plaintiff appealed. HELD: Modified, and remanded for the appointment of a receiver. The court erred in the exercise of its discretion, as the effect of the lower court's order was to constitute the defendant a receiver without bond to liquidate the partnership and to exclude plaintiff from participation therein. *Wrenn v. Wrenn,* .... S.C. ...., 91 S.E. 2d 267 (1956).

The court has the power, in the exercise of sound discretion, to appoint a receiver in proceedings arising out of the dissolution of a partnership. *Kennedy v. Hill,* 89 S.C. 462, 71 S.E. 974 (1911); *Vaughan v. Vaughan,* 101 W. Va. 561, 133 S.E. 158 (1926). In the leading English case, the court held that a receiver would not be appointed merely on the ground of dissolution, but that there must be a breach of duty to a partner, or the contract of partnership. *Harding v. Glover,* 18 Ves. Jun. 281, 34 Eng. Reprint 283 (1810). In America, several early decisions were to the effect that the appointment of a receiver was a matter of course, *Allen v. Hawley,* 6 Fla. 142, 63 Am. Dec. 198 (1855); *Law v. Ford,* 2 Paige 310 (N.Y. 1830); but this rule was not generally accepted. *Tomlinson v. Ward,* 2 Conn. 396 (1818); *Wilson v. Fitchter,* 11 N.J. Eq. 71 (1855). In the exercise of its discretion, the court is governed by the facts of the case. *Bliss v. Griswold,* 222 Minn. 494, 25 N.W. 2d 302 (1946); *Norris v. Lake,* 89 Va. 513, 16 S.E. 663 (1893). A case for appointment is readily made out where a

partner is found to be wasting, misusing, or misappropriating firm property. *Reid v. Freed,* 100 Miss. 48, 56 So. 278 (1911); *Ellis v. Commander,* 1 Strob. Eq. 188, 192 (S.C. 1846). In *Harding v. Glover, supra,* the English court held that the appointment was proper where the defendant partners had been carrying on trade on their own account with the partnership effects. In many cases a receiver is appointed where irreconcilable differences exist between the partners. *Creel v. Creel,* 73 F. 2d 107 (App. D.C. 1934); *Childers v. Neely,* 47 W. Va. 70, 34 S.E. 828 (1899). The dominant principle, as regards the remedy of receivership in South Carolina, is stated in *Christ Church v. Fishburne,* 83 S.C. 304, 307, 65 S.E. 238 (1909), an action for partition among persons not partners:

> The authority of the Court to appoint a receiver when a proper case is made in causes for settlement of estates, or for partition, or for partnership adjustment, when the property is owned by different interests, is well settled and a most salutary one; where the parties who are the owners of the property cannot agree among themselves as to its disposition pending the litigation, it is entirely proper for the Court to step in and put an end to waste or to prevent the threatened loss by appointing a suitable person to act as receiver to hold the property for the benefit of all concerned until its final distribution, as may be directed by the ultimate decision of the Court.

See Karesh, *Partnership Law and the Uniform Partnership Act in South Carolina,* 3 S.C.L.Q. 471, 472 (1951).

The appointment of a receiver in the principal case was justified by the defendants' use of the partnership effects in the corporation business. Even so, it is apparent that in this case, as in previous South Carolina cases concerning the appointment of a receiver on the dissolution of a partnership, the Court proceeded on the assumption that a partner's interest should not, over his protest, be placed in jeopardy by the use or control of the firm property by the other partner. Though the trend of the decided cases in the United States has been toward a reticence on the part of the courts to appoint a receiver, Annot., 23 A.L.R. 2d 583 (1952); however, South Carolina seems to adhere to the principle stated in *Christ Church v. Fishburne, supra.*

HARRY R. EASTERLING.

TORT — Liability of Unincorporated Fraternal Organization to a Member for Injuries Received in Initiation. — Plaintiff was injured during an initiation ceremony when a heavy electric current was passed through the bench on which he was seated. Action was brought against the organization and eleven individual members. Plaintiff recovered against all defendants. Defendants appealed. HELD: Affirmed as to the organization and reversed as to the individuals. An unincorporated fraternal association is liable for the negligence of its agents in carrying on an initiation program. It is immaterial that plaintiff had already been declared a member and that the part of the initiation in which he was injured was not part of the ritual but was "horseplay". *Thomas v. Dunne,* 179 P. 2d 427 (Colo. 1955).

Unincorporated associations are required to exercise the same care to avoid injury to others as are corporations and individuals. *Pandolfo v. Bank of Benson,* 273 Fed. 48 (9th Cir. 1921); *Feldman v. N. British & Mercantile Ins. Co.,* 137 F. 2d 266 (E.D. S.C. 1943). Although the common law rule, that an unincorporated association may not sue or be sued in its own name, *Brown v. United States,* 276 U.S. 134, 72 L. Ed. 500 (1928); *Pickett v. Walsh,* 192 Mass. 572, 78 N.E. 753 (1906), has been modified or completely changed in most jurisdictions by statute, *Mitchell v. Church of Christ,* 221 Ala. 315, 128 So. 781, 70 A.L.R. 71 (1930); *Bruns v. Milk Wagon Drivers' Union, Local 603,* 242 S.W. 419 (Mo. 1922); *Edgar v. Sou. Ry. Co.,* 213 S.C. 445, 49 S.E. 2d 841 (1948); these statutes have not created legal entities of such associations, *Medlin v. Ebenezer Methodist Church,* 132 S.C. 498, 129 S.E. 830 (1925); nor have they established the substantive liability of unincorporated associations to their members. *Huth v. Humboldt Stamm, No. 153,* 61 Conn. 227, 23 Atl. 1084 (1891); *Koogler v. Koogler,* 127 Ohio St. 57, 186 N.E. 725 (1933). As members of an unincorporated association are engaged in a joint enterprise, *Devillars v. Hessler,* 363 Pa. 498, 70 A. 2d 333, 14 A.L.R. 2d 470 (1950); *Gilbert v. Crystal Fountain Lodge,* 80 Ga. 248, 4 S.E. 905 (1887), and as a principal may not sue his co-principal for the misconduct of a common agent, *Marchitto v. Central R. Co. of N. J.,* 9 N.J. 456, 88 A. 2d 851 (1952); *McClees v. Grand International Brotherhood,* 59 Ohio App. 477, 18 N.E. 2d 812 (1938), most jurisdictions, which have reported such cases, will not allow a member to maintain an action against an association for personal injuries resulting from the tortious conduct of another member, or an agent, of the association. *Koogler v. Koogler, supra; Hromek v. Gemeinde,* 238 Wis. 204,

298 N.W. 587 (1941). Some jurisdictions have allowed persons, injured while being initiated into unincorporated local lodges or chapters, to maintain actions against the incorporated national organizations on the basis of agency relationships between the national and local associations. *Thompson v. Supreme Tent, K.M.*, 189 N.Y. 294, 82 N.E. 141 (1907); *Mitchell v. Leech*, 69 S.C. 413, 48 S.E. 290 (1904). Other jurisdictions have refused to recognize the agency in similar situations and have denied the injured initiates the right to indemnity from the national organization. *Jumper v. Sovereign Camp, W.O.W.*, 62 C.C.A. 361, 127 Fed. 635 (5th Cir. 1904); *Kaminski v. Great Camp, K.M.M.*, 146 Mich. 16, 109 N.W. 33 (1906). South Carolina held the national order liable when it had authorized the local lodge to initiate, even though it had not authorized the use of the type of contrivance which led to the injury. *Mitchell v. Leech, supra.* Another court held the national organization not liable where the tortious act was not a part of the ceremony, but was the independent act of one of the initiators, although he was the duly constituted agent of the association. *Grand Temple v. Johnson*, 135 S.W. 173 (Texas 1911). Still another court held that the fact that the initiate knew that he was going to be subjected to some sort of electric shock did not mean that he was assuming the risk of injury by the negligent application of said shock. *DeGooyer v. Harkness*, 70 S.D. 26, 13 N.W. 2d 815 (1944). The Ontarion Court of Appeals held an unincorporated association liable in a situation factually similar to the instant case. That court reasoned that although the injured party had sought admission into the organization, he had not consented to the injury. *Kiwer v. Phoenix Lodge, I.O.O.F.*, 70 O.R. 377 (C.A. 1885), cited in *Jumper v. Sovereign Camp, W.O.W., supra.*

There is very little authority on the subject of the tort liability of a fraternal association to a person injured while being initiated into the organization. Almost all of the cases deal with the liability of incorporated national organizations for the tortious conduct of unincorporated subordinate chapters. Consequently, it is difficult to draw an accurate analogy from these cases which would be applicable to the circumstances of the instant case. It cannot be determined from these cases whether the actions were brought against the larger entities because of: (1) the procedural difficulties in proceeding against unincorporated associations; (2) the substantive problems encountered when one attempts to maintain an action against an organization of which he is a member; or (3) the simple, practical expediency of bringing an action against the more prosperous principal in lieu

of proceeding against the agent. Probably the most serious obstacle to recovery in cases of this nature would be reluctance of the courts to find substantive liability flowing from an unincorporated association to its members. At least one court has hurdled this obstacle by distinguishing between full-fledge members and individuals in the process of becoming members. A more realistic view would seem to be the approach of the court in the instant case. To hold that a member may not seek indemnity from an unincorporated association for injuries resulting from the misconduct of persons acting for the association, when he may have no control over these individuals, even though he may object to their actions, is to sacrifice reason and logic on the altar of judicial precedent. By restricting recovery to the funds in the organization treasury — funds which no individual member can claim — it cannot be said that the plaintiff is suing himself when he sues the association. Whether jurisdictions such as South Carolina, which do not recognize unincorporated associations as legal entities, would accept this view is a question that must await determination by the courts. The questions of consent and assumption of risk should not be real problems. One presenting himself for an initiation ceremony may logically expect reasonable care to be exercised to protect him from anything more serious than the customary physical discomfort and loss of dignity inherent in such ceremonies.

WILLIAM T. IVEY, JR.

TORTS – PARENT AND CHILD – Right of the Child to Recover Damages from One Who Has Negligently Injured Either Parent. — Plaintiffs, five minor children, brought an action for the loss of support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort, and solace occasioned by defendant's negligent act resulting in injury to plaintiff's mother. Defendant's motion to dismiss the case for failure to state a cause of action was denied. HELD: A cause of action is not founded upon the degree or quantity of the loss but upon the invasion of a right. Because such rights have not heretofore been recognized, is not a conclusive reason for denying them. Redress may be had for a temporary impairment as well as for the total destruction of a right incident to the family relationship by a wrongdoing third party. *Scruggs v. Meredith,* 134 F. Supp. 868 (Hawaii 1955).

It is clear that before a person can assert a cause of action, he

must have a right of action. Common law has long recognized the husband's right to maintain an action against a negligent third party for damages sustained by his wife resulting in the loss of her consortium, *Guy v. Liversey,* Cro. Jac. 501, 79 Eng. Rep. 428, (K.B. 1629); *Vernon v. Atlantic Coast Line R. R.,* 218 S.C. 402, 63 S.E. 2d 53 (1951); *Cook v. Atlantic Coast Line R. R.,* 196 S.C. 230, 13 S.E. 2d 1, 133 A.L.R. 1144 (1941). But not for the so-called sentimental elements of consortium. *Feneff v. N. Y. Cent. and H. R. R.,* 203 Mass. 278, 89 N.E. 436, 24 L.R.A. 1024 (1909). The cause of action is not for the injury to the wife, but for the invasion of the legal right. *Chicago, Burlington, and Quincy R. R. v. W. O. Honey,* 63 Fed. Rep. 39, 26 L.R.A. 42 (1894). It grows out of the marital relations and is incident to the rights thereby acquired, 42 A.L.R. 720; although recent cases hold that the cause of action does not stand on subrogation but arises directly from the tort, *Hitaffer v. Argonne Co.,* 183 F. 2d 811 (App. D.C. 1950). These rights to the wife's services, aid, comfort, society, and companionship remain despite the so-called Married Woman's Acts. *Cook v. Atlantic Coast Line R. R., supra.*

A few jurisdictions have recently recognized the wife's right for loss of consortium due to a negligent injury to the husband. *Hitaffer v. Argonne Co., supra; Brown v. Georgia-Tennessee Coaches Inc.,* 88 Ga. App. 759, 77 S.E. 2d 24 (1953); *Cooney v. Moomaw,* 109 F. Supp. 448 (D. Neb. 1953). Even though the husband had recovered under the Workmen's Compensation Act, where the remedies and procedures provided are exclusive, *Cummings v. McCoy,* 192 S.C. 469, 7 S.E. 2d 222 (1940); *Gainey v. Coker's Pedigreed Seed Co.,* .... S.C. ...., 87 S.E. 2d 583 (1955) a wife was allowed to recover in a separate suit at common law for the loss of consortium with the court declaring that where a third party brings an action for the breach of an independent duty owing her, the Act will not deprive her of her action. *Hitaffer v. Argonne, supra.* A wife has also been allowed to recover for the loss of means of support against one furnishing intoxicating liquors to her husband, *Pratt v. Daly,* 55 Ariz. 535, 104 P. 2d 147, 130 A.L.R. 341 (1940); *Neu v. McKechnie,* 95 N.Y. 632, 47 Am. Rep. 89 (1884). However, the general rule at common law is that neither the wife nor child has a cause of action for an injury inflicted upon the husband or father. *Eschenbach v. Benjamin,* 195 Minn. 378, 263 N.W. 154 (1935); *Lurie v. Mammone,* 200 Misc. 320, 107 N.Y. 2d 182 (1951); *Hinnant v. Tidewater Power Co.,* 189 N.C. 120, 126 S.E. 307 (1925); *Jeune v. Del E. Webb Constr. Co.,* 269 P. 2d 723 (Ariz. 1954). The

most common reasons for denying this right are the remoteness of the wife's injury, *Brown v. Kistleman,* 177 Ind. 692, 98 N.E. 631, 40 L.R.A. (N.S.) 963 (1912); *Feneff v. N. Y. Central and H. R. R., supra;* the fear of double recovery, *Bernhardt v. Perry,* 276 Mo. 612, 208 S.W. 462 (1918); the wife is owed no services, *Stout v. Kansas City Terminal Ry.,* 172 Mo. App. 113, 157 S.W. 1019 (1913); *Smith v. Nicholas Bldg. Co.,* 93 Ohio St. 101, 112 N.E. 204 (1915); the upsetting of settlements, *Ripley v. Ewell,* 61 So. 2d 420 (Fla. 1952); the inability to measure damages, *Marri v. Stamford Ry.,* 84 Conn. 9, 78 Atl. 582 (1911); *Denver Consol. Tramway Co. v. Riley,* 14 Colo. App. 132, 59 Pac. 476 (1899); and the courts are powerless to create new causes of action. *Ripley v. Ewell, supra.*

Unlike the common law relationship of husband and wife, there is no conception of unity of legal identity of parent and child. *Dunlap v. Dunlap,* 84 N.H. 352, 150 Atl. 905, 71 A.L.R. 1055 (1930). Generally, no action will lie against a third person for depriving a child of his source of support by means of an injury to his parent and to allow a minor child an action for loss of consortium would open our courts to a flood of litigation by "everyone whose cheek is tinged by the blush of shame". *Morrow v. Yannantuono,* 152 Misc. 134, 273 N.Y. Supp. 912 (1934). A very few jurisdictions have allowed a minor child to recover for the alienation of a parent's affections, *Daily v. Parker,* 152 F. 2d 174 (7th Cir. 1945); *Johnson v. Luhman,* 330 Ill. App. 598, 71 N.E. 2d 810 (1947); *Miller v. Monsen,* 228 Minn. 400, 37 N.W. 2d 543 (1949); *Russiek v. Hicks,* 85 F. Supp. 281 (W.D. Mich. 1949), but more recent cases have denied the child this right. *Lucas v. Bishop,* 273 N.W. 2d 397 (Ark. 1954); *Elder v. MacAlpine-Downie,* 180 F. 2d 385 (App. D.C. 1950). The reasons advanced are that the courts are powerless to create new causes of action, *Elder v. MacAlpine-Downie, supra; Scholberg v. Itneyere,* 264 Wis. 211, 58 N.W. 2d 698 (1953), and that the courts fear excessive litigation. *Morrow v. Yannantuono, supra.* But, if there is a wrong without remedy, it is the judicial function to find the remedy, *Henson v. Thomas,* 231 N.C. 173, 56 S.E. 2d 432 (1949); it is to decide, not to avoid the question. *Daily v. Parker, supra.*

The right of a child to recover for the alienation of affection, an intentional tort, has been allowed by but a small majority of the jurisdictions. In the principal case, the children are asking to recover, not for an intentional tort, but for a negligent tort. In *Hill v. Sibley Memorial Hospital,* 108 F. Supp. 739 (App. D.C. 1952), the court indicated that its hesitancy to grant relief was because it

felt that if there was to be any change in the doctrine, the court should not be the one to initiate it. This, unfortunately, has been the trend in many cases involving novel questions. Courts which take this position leave several questions unanswered. First, if the court feels that the plaintiff in a suit involving a novel question is entitled to a remedy, but that there currently exists no declared legal basis for such a remedy based on the invasion of that right, why should the court deny this plaintiff a recovery? What more moral right does a subsequent plaintiff in a similar case have for recovery than does the plaintiff in the original case? Second, in these days of crowded legislative calendars, who is going to take the necessary time to draft, introduce, and crusade for such legislation, and where will the support come from to offset the concentrated efforts of the highly organized professional lobbyist? Thus, for the courts to await legislative action to create a remedy will often result in great inequities of justice. On the other hand, is it wise for a few men, sitting as a court, to establish the common law precedent on such important questions without the benefit of the extensive investigating committees available to the legislative branch? Each case must be separately considered. In these days, the common law should be constantly reappraised to meet changing conditions. The courts must be willing to decide the question, not to avoid it. In the principal case, the Hawaiian Court has shown courage in its decision to establish this new cause of action.

EARL R. SHORT.