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Domestic Relations

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DOMESTIC RELATIONS

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By far the most interesting case decided by the South Carolina Supreme Court during the review period in the field of domestic relations was *Simonds v. Simonds,*[1] a vigorously contested divorce case from Charleston.

It appears that the husband had been an excessive user of alcohol for many years prior to December 17, 1952. On that day the wife, claiming that she had reached the end of her rope in dealing with his drinking, left the family home with their children. Almost immediately the husband moved to a hotel and the rest of the family returned to the home. On or about the same day, the husband surprisingly brought into existence the legal situation which, some three and one-half years later, was to cause the Supreme Court to deny the wife the divorce to which she had been entitled for years. He stopped drinking. It was admitted in the record that between December 17, 1952, and December 7, 1953, when the divorce action was instituted, the defendant had not touched a drop. Presumably he was still not drinking at the time of the lengthy references in 1954 and 1955.

The wife's suit for divorce was on the ground of habitual drunkenness and during the course of the reference she was allowed to amend her complaint to include the ground of constructive desertion. The Charleston County Master recommended that the plaintiff be granted a divorce upon both grounds and that she be awarded a large lump sum alimony settlement. Judge Brailsford declined to follow the Master's recommendations and held that neither ground for divorce was established. In his view, unless habitual drunkenness continues to the time of the commencement of the action, it is no legal ground for divorce and there can be no constructive desertion if the erstwhile offending party has, by reformation,

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1. 229 S. C. 37, 93 S. E. 2d 107 (1956).

made the home situation such that the offended party could properly return to it.

The Supreme Court, in an opinion by Mr. Justice Moss, affirmed. It held, as Judge Brailsford had, that habitual drunkenness is not made out unless the plaintiff shows that the condition exists "at or near the time of the filing of the action." This seems to be easily the majority rule of the jurisdictions which have decided the point without the benefit of statutory assistance, but we are in a field here where theoretical arguments abound. No matter which way such a decision goes, the theorist could show possible injustice in the rule adopted. Why, it could be asked, should one past, but uncondoned, act of adultery constitute a ground for divorce, whether the offender has repented or not, while the ground of habitual drunkenness, no matter how long existent, is wiped out by the drinker's going on the wagon for a period of time? Is abstinence from an illicit liaison less praiseworthy than abstinence from drink? Is a husband who strikes his wife forever at fault in the divorce courts, but a husband who has ruined his family by drink forgiven if he manages to stay sober for a few months before the summons and complaint are served?

On the other hand, should not a drunkard be allowed to reform and keep his family? Should the law permit one spouse to hold over the head of the other the threat of divorce for some past period of alcoholic indulgence on the other spouse's part? It is obvious that the spirit of the law must conform to the real situations which exist between the supposed extremes. Without legislative standards, which many states have in statutory requirements that "habitual drunkenness" must exist within a certain stated period prior to the institution of the action or within "a reasonable time" prior thereto, the Courts must, of necessity, find and state some socially acceptable rule. It may be that the rule announced in the *Simonds* case may deny a divorce to a grievously wronged party on occasion, but the Court must have felt that the rule would avoid more injustices than it caused.

Perhaps the soundest legal argument against the position of the plaintiff lies in the reasoning expressed by the Circuit Judge. He held that, unlike physical cruelty and adultery, which are actual offenses against the other spouse as well as against the marriage, habitual drunkenness is a "condition"

and is a ground for divorce only because of its interference with an acceptable married life. Unless that condition is actually interfering with the continuation of the marriage at the time suit is instituted, it is not a ground for dissolving the marriage.

The plaintiff had another string to her bow which just avoided being a stout one. She claimed that under *Machado v. Machado*[2] *and Mincey v. Mincey*[3] she was entitled to a divorce on the ground of constructive desertion because the conduct of the defendant which caused her to leave their home was in itself a sufficient ground for divorce. The husband's condition of habitual drunkenness certainly existed on that date. The Supreme Court disposed of this contention by simply pointing out that if there was any constructive desertion it occurred on December 17, 1952, and not quite the full statutory year for desertion had elapsed between that date and the institution of the action. Suppose it had; would the defendant's abandonment of his objectionable conduct during the year bar the plaintiff from claiming that she continued for the year in the status of an offended party and the defendant in the status of a constructive deserter? The Circuit Judge had indicated that it would, holding in effect that if abstinence wipes out habitual drunkenness as a ground for divorce, it also wipes it out as an offense sufficient to support constructive desertion.

Plaintiff's counsel maintained in the Supreme Court, particularly in the petition for rehearing, that Article 17, Section 3, of the Constitution, which is the 1949 Amendment, is self-executing and that when it says that divorces *"shall be allowed* on grounds of adultery, desertion, physical cruelty, or habitual drunkenness", the language is inviolable and neither the Legislature nor the Courts can limit the constitutional grant by saying, as the Legislature has done in Section 20-102 of the Code, that desertion is not a ground for divorce unless it continues for a year or, as the Court has done in this case, that habitual drunkenness shall not be a ground unless it exists at or near the time of the bringing of the action. The Court did not discuss this point, which has been the subject of much informal legal debate ever since our divorce statute was passed.

2. 220 S. C. 90, 66 S. E. 2d 629 (1951).
3. 224 S. C. 520, 80 S. E. 2d 123 (1954).

The other marital discord cases which the Court decided during the year were run-of-the-mill. *Oswald v. Oswald*[4] was merely an affirmance of concurrent findings of desertion as a ground for a divorce. In *Harvey v. Harvey*,[5] there were no concurrent findings and the Court used its equitable review powers to reduce a support award. *Sanders v. Sanders*[6] was an appeal from the Circuit Court's refusal to grant a husband's motion for a reduction in the support payments fixed by a divorce decree. The Court affirmed, applying the settled principle that neither the remarriage of a divorced wife nor the resulting betterment of her financial condition is a sufficient ground of itself for reducing the amount which the divorced husband pays to her for the support of their minor child where there is no proof of any assumption by the second husband of the obligation to support the child.

In the field of adoption, we had two cases. *Wright v. Alexander*[7] was simply a finding that the language of the statute establishing the Domestic Relations Court of Laurens County did not grant jurisdiction to that court to order the adoption of minors. *Butler v. Whitt*[8] involved the unhappy question of whether a deeding mother, a pair of dissatisfied foster parents, or the Department of Public Welfare had prior claim to the custody of a child. The Department of Welfare properly prevailed and there are no legal issues of interest in the case.

Parker v. Parker[9] involved the question of whether an administrator could maintain a Survival Statute action against his intestate's minor son on account of the son's gross negligence which allegedly caused his father's death while riding with him in an automobile as a guest. It has been settled for a long time in this state[10] that an unemancipated child has no right of action against his parent for personal injuries caused by the parent's negligence. The Court in the present case had no difficulty in holding that the factors of public policy which support that rule also prohibit a tort action by a parent against an unemancipated child. The question therefore became whether the defendant was an unemancipated minor.

4. 230 S. C. 299, 95 S. E. 2d 493 (1956).
5. 230 S. C. 457, 96 S. E. 2d 469 (1957).
6. 230 S. C. 263, 95 S. E. 2d 440 (1956).
7. 230 S. C. 286, 95 S. E. 2d 500 (1956).
8. 230 S. C. 279, 95 S. E. 2d 496 (1956).
9. 230 S. C. 28, 94 S. E. 2d 12 (1956).
10. Kelly v. Kelly, 158 S. C. 517, 155 S. E. 888 (1930).

The Court pointed out that emancipation of a child is established not only from the acts of the child, but "primarily from agreement of the parent." Emancipation may be either partial or complete, but partial emancipation will not suffice to remove the bar to a tort action between parent and child. It was held that the facts as to the alleged emancipation of the defendant presented an issue for the jury and the verdict, which presupposed a finding of emancipation, was sustained, although the Court recognized that the testimony as to the emancipation was meager.