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Domestic Relations

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DOMESTIC RELATIONS

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Ever since the passage of the South Carolina Divorce Law[1] in 1949 there has been curbstone debate among lawyers as to whether the legislature had the power, in view of the mandate of the constitutional amendment[2] of that year that divorce "shall be allowed" on the ground of "desertion," to limit the granting of divorces for desertion to cases where the desertion has continued "for a period of one year." The point was raised on the first appeal in the famous case of *Simonds v. Simonds*,[3] but the court did not feel it necessary to decide it and the feeling grew that the question would remain one of academic interest forever. However, in *Nolletti v. Nolletti*[4] the point was finally decided in the way that most practitioners had predicted. Mrs. Nolletti, whose husband had left her only one month before she brought her action, admitted that she was not entitled to a divorce under the language of the statute but maintained that its one-year requirement was unconstitutional. The South Carolina Supreme Court unanimously rejected the argument. It pointed out that our constitution is basically a limitation upon legislative power rather than a grant of such power, so that the effect of the 1949 amendment was to prohibit the legislature from authorizing divorces on any ground other than those enumerated, rather than to tie its hands in prescribing conditions for the granting of divorces on those grounds. The requirement that a desertion must continue for at least one year before it matures into a cause of action for divorce is in keeping with our public policy of refusing to dissolve marriages on trivial grounds and is analogous, according to Mr. Justice Lewis, who wrote the opinion, to the rule which the court has established in applying the statute, that a divorce will not ordinarily be granted on the uncorroborated testimony of a party. The date of the opinion was July 11, 1963, exactly one year from the day that Mr. Nolletti left home, which presumably allowed Mrs. Nolletti to obtain her divorce shortly after the mandate was handed down. The delay may not have been profitable to her but it permitted the solution of a long-standing debate.

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1. S.C. CODE ANN. §§ 20-101 to -148 (1962).
2. S.C. CONST., art. 17, § 3.
3. 229 S.C. 376, 93 S.E.2d 107 (1956).
4. 243 S.C. 20, 132 S.E.2d 11 (1963).

In *Murdock v. Murdock*[5] our court for the first time recognized the concept of "divisible divorce." This doctrine, founded upon the decision of the United States Supreme Court in *Vanderbilt v. Vanderbilt*,[6] provides that the full faith and credit which must be given to a foreign divorce decree when only the divorcing spouse is domiciled in that jurisdiction, does not require the the honoring elsewhere of the alimony provisions of the decree against a spouse who did not appear in the foreign proceedings. The decree is considered constitutionally "divisible." It must be recognized as dissolving the marriage but not as granting what amounts to a money judgment, either in the award of alimony against a non-appearing husband or a denial of alimony to a non-appearing wife.

The *Murdock* case illustrates the doctrine perfectly. The wife brought an action in South Carolina for a divorce and the husband, although living in Kentucky, answered and counterclaimed for a divorce. The referee found neither party entitled to a divorce but recommended a separate maintenance decree and lump-sum alimony to the wife. During the pendency of the reference, the husband filed a divorce action in Kentucky with constructive service upon the wife and by the time of the argument of exceptions to the referee's report in the South Carolina action, he had obtained his Kentucky divorce by default and had filed a copy of the decree, which denied alimony to the wife, in the South Carolina proceedings. The circuit judge thereupon sent the case back to the referee to consider the effect of the Kentucky decree. In his second report the referee found that the Kentucky order effected a dissolution of the marriage under *Williams v. North Carolina I*[7] but did not bar the wife's claim to alimony, recommending again that the amount be granted to her in a lump sum. The circuit court concurred in the findings and conclusions of the referee and the husband appealed on the ground that the court had not given the Kentucky decree the full faith and credit required by article IV of the United States Constitution.

The South Carolina Supreme Court, speaking through Mr. Justice Brailsford, affirmed, saying that the *Vanderbilt* case was a controlling precedent and quoting as follows from it at page 418:

5. 243 S.C. 218, 133 S.E.2d 323 (1963).
6. 354 U.S. 416 (1957).
7. 317 U.S. 287 (1942); Annot., 143 A.L.R. 1273 (1943).

> Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition.

Vanderbilt certainly concludes the constitutional question but the court might have had some little difficulty, if it had been required to do so, in squaring the present holding with its own rule as to the binding effect of alimony decrees. In *Taylor v. Taylor*[8] it had been held that if a final divorce decree does not make an alimony award or specifically reserve the right to make one later, no alimony may ever be granted in that action or any other. In other words, if the husband's decree in the *Murdock* case had been obtained in South Carolina rather than in Kentucky, the court would have considered itself powerless to give alimony to a woman who was no longer related to the defendant and who had been found, on the termination of the marriage, not entitled to alimony. The court was able to avoid the problem posed by its *Taylor* holding because the husband's exceptions in *Murdock* raised only the constitutional question, not the binding effect of the Kentucky decree under South Carolina law.

Actually, as the general authorities show,[9] a distinction between *Taylor* and *Murdock* would not have been difficult to make. If the wife was not personally subject to the jurisdiction of the divorce court, as she was not in *Murdock*, the court's failure to give her alimony or to reserve the right to give it to her later could hardly be held against her. *Taylor* rests on res judicata principles. It is self-evident that an adjudication which results in a money judgment should not bind one not truly in court.

8. 241 S.C. 462, 128 S.E.2d 910 (1962).

9. See generally 17 AM. JUR. *Divorce and Separation* § 710 (1957).

The third case to be discussed is *Ford v. Ford*,[10] in which the South Carolina Supreme Court made the same disposition of a custody problem that it had made two years earlier under an erroneous belief that it was under constitutional compulsion to enforce a decree of a court in Virginia in the matter. The parties were originally domiciled in North Carolina but separated because of an adulterous affair on the part of the wife. She moved to her mother's home in Richmond and shortly thereafter, without the husband's permission, removed the children from his home and took them to Virginia. The husband immediately instituted a habeas corpus proceeding in the Virginia courts to have custody returned to him. While the action was pending, the parties, each being represented by competent counsel, worked out an agreement as to the custody and caused the habeas corpus action to be dismissed by what is known in the Virginia practice as a "dismissed agreed" order. By the agreement, the husband, still living in North Carolina, was to have custody for nine months and the wife for three. The wife moved to Greenville, South Carolina, and, at the beginning of the next summer, the husband delivered the children to her there. During the summer she commenced an action for custody in the juvenile and domestic relations court of Greenville and served process on the husband during an emergency visit by him to the children. Neither the juvenile court nor the circuit court found themselves bound by the Virginia order or the agreement on which it was based; and the circuit decree, exactly reversing the terms of the agreement, gave nine months custody to the wife. On appeal, the South Carolina Supreme Court reversed,[11] holding that the "dismissed agreed" order constituted a final judgment on the merits, was res judicata in Virginia, and therefore was entitled to full faith and credit in this state. Upon petition by the wife, the United States Supreme Court granted *certiorari*[12] and, after a hearing on the merits, reversed.[13] It pointed out that the custody agreement had not been specifically approved by the Virginia court or even examined and that the "dismissed agreed" order was purely perfunctory. It concluded that under the circumstances such a disposition of a custody action would not have bound the hands of a Virginia court later called upon to pass on the issue and therefore it could not bind the South Carolina court. The

10. 242 S.C. 344, 130 S.E.2d 916 (1963).
11. Ford v. Ford, 239 S.C. 305, 123 S.E.2d 33 (1961).
12. 369 U.S. 801 (1962).
13. Ford v. Ford, 371 U.S. 187 (1962).

cause was remanded to the South Carolina Supreme Court "for further proceedings not inconsistent with this opinion."

The South Carolina Supreme Court, thereby required to weigh the merits, made the same disposition of the matter as it had before. Starting from the basic proposition that in custody matters the welfare of the child outweighs all other considerations, the court compared the characters of the parents and the care and attention which the children would likely receive in the two homes. According to Mr. Justice Moss, who wrote the opinion, the most favorable argument for the mother, under any comparison, was the so-called "tender years" doctrine, a policy which is never immutable. Although the Virginia custody agreement and the Virginia order were recognized as not judicially binding, the court expressed the strong feeling that they were morally binding upon the parties and that one who seeks to have such an agreement abrogated must show strong grounds. The mother here had shown no change of any great importance in the circumstances surrounding herself, her husband, or the children since the day she had agreed that her husband should have custody for nine months of the year, presumably after careful consideration and advice of counsel. The court was careful to point out that it was only passing on the record that had been made in 1960 and that any change in circumstances since that time could, as in every case, be brought to the court's attention by the wife in subsequent proceedings.

Grossman v. Grossman[14] was a very practical decision involving the enforcement in South Carolina of a foreign support decree. Mr. and Mrs. Grossman had been divorced in Ohio in 1935. The decree provided, in accordance with a formal agreement between the parties, that the husband should make payments to the wife in the amount of one hundred and thirty dollars per month for the support and maintenance of the wife and their then minor children. Mr. Grossman moved to Charleston in 1936, remarried there and accumulated property. Mrs. Grossman moved to the same city in 1951. The younger of the two children came of age in 1944. Mr. Grossman had made no alimony payments since 1948 and was sued for the arrearage in the court of common pleas for Charleston County in 1956.

The circuit court held, in accordance with the plaintiff's contentions, that the Ohio decree was a final judgment bound to be enforced in South Carolina under the full faith and credit

14. 242 S.C. 298, 130 S.E.2d 850 (1963).

clause. It gave a money judgment against the defendant in the amount of the unpaid alimony plus some seventy-three hundred dollars of interest[15] and established the Ohio decree as a final judgment of the South Carolina court as to future payments. The defendant appealed.

The South Carolina Supreme Court, in an opinion by Mr. Justice Lewis, reversed by holding that the Ohio decree was not required to be given full faith and credit by the South Carolina courts. The question turned on whether the decree was subject to modification by the Ohio court and Judge Lewis determined that under Ohio law it was. Although the Ohio decisions hold that an alimony decree is not ordinarily subject to modification as to past-due installments,[16] an exception is made where, as here, the payments are partly for the support of a minor child who has reached maturity by the time the application for modification is made.

Judge Lewis realized that the problem here would not be solved by a simple reversal on the constitutional point and he therefore went on to examine the question of whether the Ohio decree should be enforced as a matter of comity. He held that it should, recognizing that there is a difference of opinion on the question but concluding that the fact that the Ohio decree was subject to retroactive modification by the courts of that state should not make it unenforceable in this state. He was apparently impressed by the argument in *American Jurisprudence*[17] that if a modifiable alimony decree could not be enforced in the jurisdiction of the husband's residence, it might well not be enforceable at all because of the inability of the court originally granting the divorce to get effective jurisdiction over the husband. It was pointed out that it was to the practical advantage of both Grossmans to settle their differences in the state where they now live and where Mr. Grossman owns property.

15. Supporting the statement of the late John Hughes Cooper of the Columbia Bar, in reply to a friend's praise of the inventors of radio, that "the fellow who invented interest was no slouch."

16. The South Carolina rule is to the contrary, as Judge Lewis recognized. See Jeter v. Jeter, 193 S.C. 278, 8 S.E.2d 490 (1940). It should also be borne in mind that under such decisions as Johnson v. Johnson, 196 S.C. 474, 13 S.E.2d 593 (1941) our courts may in many cases effectively "modify" a foreign alimony decree, even when it is entitled to full faith and credit, by declining to jail the husband for contempt so long as he pays an amount set by the South Carolina court, even though it is less than the payment fixed in the foreign decree.

17. 17A Am. Jur. *Divorce and Separation* § 978 (1957).

After going this far, there still remained the question of whether the South Carolina court could modify the amount of the support payments on the specific ground that the children, for whose support the Ohio order in part provided, were now of age and no longer entitled to support from their father. Judge Lewis had no difficulty in holding that it could and should. The Ohio decree and the agreement which it rested upon were clear as to the periodic payments being for both the wife and the children, and, with the parties now before the South Carolina court, there was no reason why it could not determine the amount which should be allocated to the wife for her support alone. Accordingly, the money judgment was reversed and the cause remanded to the circuit court for a determination of the amount properly due to the plaintiff under the Ohio decree.

The holding in *Grossman* that a South Carolina court may modify an Ohio alimony decree should be contrasted with the holding in *Clinkscales v. Clinkscales*[18] that the Greenville common pleas court may not change a custody order of the Anderson County common pleas court. The parties had been divorced in Anderson and the wife awarded custody of their two children. She then moved to Greenville and the husband brought a new action against her there, alleging serious misconduct on her part since the date of the divorce and claiming custody. The wife moved to dismiss the action for want of jurisdiction in the Greenville court. The court refused the motion and the South Carolina Supreme Court reversed, Mr. Justice Brailsford pointing out that section 20-115 of the Code expressly provides that it is the *divorce* court which may "from time to time after final judgment" make orders concerning the custody of the children of the marriage. Since the same circuit judges preside in Anderson and Greenville counties, the legislature may be thought to have been overly strict in requiring the parties to go back to the original county to obtain a modification of the decree as to custody or alimony, but the rule has at least one practical advantage. The circuit judge to whom the application for change is made will of necessity read the old judgment roll.

Two cases during the review period reversed findings of desertion and emphasized how subjective the desertion concept is. In *Brown v. Brown*[19] the husband sued for divorce and proved that his wife had left home more than a year earlier and not

18. 243 S.C. 377, 134 S.E.2d 216 (1963).
19. 243 S.C. 383, 134 S.E.2d 222 (1963).

returned. The South Carolina Supreme Court, speaking through Mr. Justice Bussey, held that although the one year cessation from cohabitation had been established, the plaintiff had failed to prove the equally important element of desertion—"absence of the opposite party's consent." It was undisputed that the wife on several occasions, by letter and telephone, had attempted reconciliation but the husband had refused to see her. Her lawyer forced him to admit on cross-examination that "he didn't want Hazel to come back." There was testimony that at the time of the original separation he told his wife that she had had her chance to live with him and that she would never get another one. It was clear to the court that the plaintiff had completely failed to prove that his wife stayed away from him for a year without his consent. Judge Bussey took occasion to point out that the record contained no certificate by the trial judge that he had made an effort to reconcile the parties as required by the statute.[20] He emphasized the importance of the certificate in cases like the present and stated that the judgment could have been reversed on that ground alone.

The other reversal of a finding of desertion was also under an opinion of Judge Bussey's in *Boozer v. Boozer*.[21] In this instance he found that the plaintiff husband had failed to prove cessation from cohabitation for the statutory period. The wife left the family home in Aiken, moved with the children to Union and had lived there for longer than a year when the husband's action was instituted; but the parties had been too often reunited during that time for the supreme court to consider their cohabitation ended. On every other weekend the husband was off work for three or four days and had regularly spent the time with his family in Union. With considerable frequency the wife likewise took the children back for visits in Aiken. They all lived under the same roof on these occasions and there were also two vacation trips taken by the entire family. The only conflict in the testimony was as to whether there was sexual intercourse between the spouses on these occasions. The husband said there was not; the wife that there was. Under the South Carolina Supreme Court's view, it made little difference whether there was or not. Cohabitation, according to the court, means something more than sexual intercourse; therefore "cessation from cohabitation is not established by proof of lack of intercourse alone." The opinion admits

20. S.C. Code Ann. § 20-110 (1962).
21. 242 S.C. 292, 130 S.E.2d 903 (1963).

that there is authority[22] for the proposition that "individual or isolated acts of cohabitation will not operate to break the continuity of a statutory period of desertion," but observes that the regular occupancy of family quarters by the parties here could hardly be considered as isolated acts.

Case v. Case,[23] an appeal from Greenville County, has some rather amusing aspects. The judge of the juvenile and domestic relations court of that county had announced, following the hearing of the wife's action for divorce on the ground of desertion, that he would grant the divorce when a formal order was presented to him by the lawyers.[24] The husband must have later heard that the wife was changing her mind, for the next action in the cause was a motion by him for the issuance of the promised order. At the hearing of this motion the plaintiff moved for a "nonsuit." The judge dismissed the divorce action and continued the order granting the plaintiff temporary relief. The husband appealed, but the South Carolina Supreme Court affirmed the lower tribunal's order, holding in effect that the husband had no vested right in his adversary's victory. Mr. Chief Justice Taylor, who wrote the opinion, held that there is no finality to any judicial act until some formal written evidence of it is filed. He said further that the policy of the South Carolina courts to protect marriages would hardly lead to the court's requiring a wife to take a divorce which she no longer wanted.

The remaining cases decided by our court during the review period were all run-of-the-mill. Some were rich in human interest[25] but none of them involved any edifying applications of the law. They are listed for the sake of completeness:

Todd v. Todd[26] reversed the award of custody of children to the husband and the denial of support to the wife.

Gilfillan v. Gilfillan[27] affirmed findings of physical cruelty as sufficient grounds for divorce.

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22. See generally 17 AM. JUR. *Divorce and Separation* § 240 (1957); Annot. 155 A.L.R. 132 (1945).

23. 243 S.C. 447, 134 S.E.2d 394 (1964).

24. Apparently he went somewhat further than that. His final order recited that "a divorce was granted verbally."

25. *E.g.*, Todd v. Todd, 242 S.C. 263, 130 S.E.2d 552 (1963) in which the court drew the definite impression from the testimony that a husband was doing his clever best to send a wife back to the state hospital.

26. 242 S.C. 263, 130 S.E.2d 552 (1963).

27. 242 S.C. 258, 130 S.E.2d 587 (1963).

Rooney v. Rooney[28] held evidence of habitual intoxication sufficient to justify a divorce.

Smith v. Smith[29] affirmed an alimony award against the husband's contention that it was more than he could pay.

Hodges v. Hodges[30] reversed the granting of a divorce to a wife on the grounds of her husband's habitual intoxication and physical cruelty.

Cleveland v. Cleveland[31] considered the propriety of certain allowances for support and attorneys' fees.

28. 242 S.C. 503, 131 S.E.2d 618 (1963).
29. 242 S.C. 517, 131 S.E.2d 692 (1963).
30. 243 S.C. 299, 133 S.E.2d 816 (1963).
31. 243 S.C. 586, 135 S.E.2d 84 (1964).