South Carolina Law Review

Volume 19
Issue 1 *1966-1967 Survey Issue*

Article 9

1967

Domestic Relations

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DOMESTIC RELATIONS

I. Child Support

A. *Termination of Obligation to Foster Child*

In *Chestnut v. Chestnut*[1] the plaintiff sought to compel her husband to contribute to the support of a child which had been left in the custody of the plaintiff and the defendant shortly after its birth. The child was never adopted by the couple but it was given the family name of Chestnut and was voluntarily supported by the defendant as a member of the family. The question of support arose after the parties separated, and the husband refused to continue to support the child. The trial court held that the defendant had assumed an obligation to support the child by providing a home for it as a member of the family and the obligation could not be divested by the separation of the plaintiff and defendant. The supreme court, finding no South Carolina authorities in point, reversed, assuming for purposes of the decision, that the defendant, while living with his family, had placed himself in loco parentis to the child and adopting the majority view that, in the absence of an agreement or other circumstance indicating that the obligation was permanent, the status of one standing in loco parentis is of a temporary nature and terminable at will.[2]

B. *Support of Illegitimate Child*

The defendant in *State v. Montgomery*[3] was convicted in the lower court for the nonsupport of an illegitimate child, a misdemeanor.[4] The indictment merely charged that the defendant was an able-bodied man and capable of earning and making a livelihood and that he did without just cause or excuse "fail to supply the actual necessaries of life to his minor, unmarried child who was and is dependent on him. . . ."[5] In reversing the

1. 247 S.C. 332, 147 S.E.2d 269 (1966).

2. *E.g.*, State *ex rel.* Gilman v. Bacon, 249 Iowa 1233, 91 N.W.2d 395 (1958); McDonald v. Texas Employers' Ins. Ass'n, 267 S.W. 1074 (Tex. Civ. App. 1925). See generally, 67 C.J.S. *Parent and Child* § 80 (1950).

3. 246 S.C. 545, 144 S.E.2d 797 (1965).

4. S.C. Code Ann. § 20-303 (Supp. 1965). This section provides in part:
> Any able-bodied man or man capable of earning or making a livelihood who shall, without just cause or excuse, abandon or fail to supply the actual necessaries of life to his wife or to his minor unmarried legitimate or illegitimate child or children dependent upon him shall be guilty of a misdemeanor. . . .

5. State v. Montgomery, 246 S.C. 545, 547, 144 S.E.2d 797, 798 (1965).

conviction the court applied the well settled rule that "an indictment should allege the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and an acquittal may be pleaded in bar to any subsequent prosecution."[6] The indictment in this case was fatally deficient in failing to designate the child as illegitimate and failing to indicate the date of birth or other description of the child so that it could be identified.[7]

II. DIVORCE

A. *Condonation*

Buero v. Buero[8] was an action brought by the wife for divorce on the ground of physical cruelty. The record disclosed that the wife continued to live in the same home with the husband after each incident and throughout the divorce proceedings, that she prepared the meals, washed the clothes, took hot meals to the husband at work, went grocery shopping with him and that the husband continued to pay all living expenses. The husband interposed the defense of condonation. The findings of a special master, adopted as the judgment of the circuit court, were that the husband had been guilty of physical cruelty and, although the couple continued to occupy the same house, they were not living as man and wife so there was no condonation. The only testimony to support the claim that there were no marital relations came from the wife. On appeal the court reversed since it is generally presumed that sexual intercourse has taken place between a married couple where the evidence shows they occupied the same living quarters[9] and the presumption is not overcome by the unsupported testimony of one of

6. *Ibid; accord,* State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). See 42 C.J.S. *Indictment and Information* § 100 (1944).

7. It should be noted that there was testimony that this was the sixth illegitimate child of the prosecutrix by the defendant and that the defendant was married to another woman and the father of six legitimate children. Furthermore, the court said it was inferable from the record that the prosecutrix had illegitimate children other than those by defendant and that the defendant had illegitimate children by other women.

8. 246 S.C. 355, 143 S.E.2d 719 (1965).

9. Boozer v. Boozer, 242 S.C. 292, 130 S.E.2d 903 (1963); see 27A C.J.S. *Divorce* § 123 (10) (1959).

10. Boozer v. Boozer, 242 S.C. 292, 130 S.E.2d 903 (1963).

the parties.[10] The voluntary cohabitation by the wife after the acts of physical cruelty conclusively showed condonation.[11]

B. *Jurisdiction*

In *Gasque v. Gasque*[12] the court, in accord with the weight of authority, construed the word "resided" as used in the residence requirement section[13] of the South Carolina divorce statute to be equivalent in substance with the term "domociled."[14] The husband brought an action for divorce which was dismissed in the lower court on the ground that he had not resided in South Carolina for at least one year prior to the commencement of the action. The husband was a native of South Carolina but had been employed by the United States Government, first as General Counsel of the United States Senate and subsequently as Assistant Director of the Administrative Office of the United States Courts, in Washington, D. C., for approximately fourteen years. He had lived with his family in the District of Columbia during most of this time. The court reversed, quoting the definition of "domicile" from *Phillips v. South Carolina Tax Comm'n*[15] which was "the place where a person has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent, an intention of returning."[16] There was testimony and substantial documentary evidence to show that the husband considered himself a resident of the state and never intended to become a resident of any other state. Moreover, the cases generally hold that a person who holds public office or employment may retain his domicile in the state from which he comes until the service terminates even though he may be absent for several years.[17]

11. McLaughlin v. McLaughlin, 244 S.C. 265, 136 S.E.2d 537 (1964); see 1 NELSON, DIVORCE AND ANNULMENT, § 11.02 (2d ed. 1945).

12. 246 S.C. 423, 143 S.E.2d 811 (1965).

13. S.C. CODE ANN. § 20-103 (1962). The section reads:

> In order to institute an action for divorce from the bonds of matrimony the plaintiff must have resided in this State at least one year prior to the commencement of the action or, if the plaintiff is a nonresident, the defendant must have so resided in this State for such period.

14. *E.g.*, Tate v. Tate, 149 W.Va. 591, 142 S.E.2d 751 (1965); Gromel v. Gromel, 197 N.Y.S.2d 941 (Sup. Ct. 1959); see 2A NELSON, DIVORCE AND ANNULMENT, § 21.13 (2d ed. 1961). See also Phillips v. South Carolina Tax Comm'n, 195 S.C. 472, 12 S.E.2d 13 (1940).

15. 195 S.C. 472, 12 S.E.2d 13 (1940).

16. *Id.* at 477, 12 S.E.2d at 16.

17. *E.g.*, Richardson v. Richardson, 258 Ala. 423, 63 So. 2d 364 (1953); Wilburn v. Wilburn, 260 N.C. 208, 132 S.E.2d 332 (1963). See 1939-40 OPS. ATT'Y GEN. S.C. 238; 24 AM. JUR. 2d *Divorce and Separation* § 255 (1966).

In *Porter v. Porter*[18] the Juvenile and Domestic Relations Court of Greenville County entered a decree granting the wife a divorce, awarding to her custody of the couple's minor daughter with visitation rights afforded the husband, alimony, support of the minor child and attorneys' fees. On appeal to the Common Pleas Court of Greenville County, the visitation rights of the husband were increased and the alimony and award for support of the daughter were reduced although the circuit judge found no facts at variance with those found by the trial court. The supreme court held, in line with the general rule, that the matters of visitation rights,[19] alimony[20] and child support[21] are all addressed to the sound discretion of the trial court and will not be disturbed unless an abuse thereof is shown. And since "this case was carried by appeal from the decree of the Juvenile and Domestic Relations Court of Greenville County to the circuit court, the latter could only exercise appellate jurisdiction therein."[22] The circuit judge, sitting in appellate capacity, therefore, erred in increasing the visitation rights of the husband and in reducing the alimony and award of child support when he did not find that the trial judge had abused his discretion.

C. *Motion for Dismissal by Party Bringing the Action Before Issue Joined*

In *Knopf v. Knopf*[23] the husband commenced an action for divorce against the wife in the Richland County Court. Twenty days after the commencement of the action and before service of any responsive pleadings by the wife, the husband served a motion for an order of dismissal. Pending hearing of the motion, the wife filed an answer in which she denied the allegations of the complaint, and, "by way of affirmative relief,"

18. 246 S.C. 332, 143 S.E.2d 619 (1965).

19. See, *e.g.*, Griffin v. Griffin, 237 N.C. 404, 75 S.E.2d 133 (1953); Joslin v. Joslin, 45 Wash. 2d 357, 274 P.2d 847 (1954). See generally 27B C.J.S. *Divorce* § 312 (1959).

20. Murdock v. Murdock, 243 S.C. 218, 133 S.E.2d 323 (1963). See generally 27B C.J.S. *Divorce* § 288(3) (1959).

21. See, *e.g.*, Reese v. Reese, 26 Ill. App. 2d 244, 167 N.E.2d 812 (1960); Kamphaus v. Kamphaus, 174 Kan. 494, 256 P.2d 883 (1953). See generally 27B C.J.S. *Divorce* § 324(14) (1959).

22. Porter v. Porter, 246 S.C. 332, 338, 143 S.E.2d 619, 623 (1965); see S.C. CODE ANN. § 15-1281.9 (1962) and § 15-1281.32 (Supp. 1965) together with S.C. CONST. art. 5, § 15.

23. 247 S.C. 378, 147 S.E.2d 638 (1966).

sought custody of the parties' two children. The county judge heard and refused the motion to dismiss the action and the husband appealed. The court reversed, holding that the refusal to grant the husband's motion to dismiss was an abuse of discretion where there was no evidence that to allow the motion would result in legal prejudice to the wife.[24] Under section 20-115[25] of the South Carolina Code, "an action of divorce brings with it the issue of child custody, and the divorce court has continuing jurisdiction of such as incident and subsidiary to the principle issue of divorce."[26] The wife's "affirmative" plea which contained no allegation of fact sufficient to invoke the jurisdiction of the court on the issue of child custody had vitality only as ancillary to the divorce action, in which the wife denied the critical allegations of the divorce action and sought its dismissal. The wife could not "insist on the maintenance of the action as a means of preserving the county court's jurisdiction of the custody issue, which, under the facts, it may properly exercise only as a divorce court."[27]

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24. See Gulledge v. Young, 242 S.C. 287, 130 S.E.2d 695 (1963).
25. S.C. CODE ANN. § 20-115 (1962).
26. Knopf v. Knopf, 247 S.C. 378, 382, 147 S.E.2d 638, 639 (1966); see Jackson v. Jackson, 241 S.C. 1, 13, 126 S.E.2d 855, 862 (1962).
27. Knopf v. Knopf, *supra* note 26 at 382, 147 S.E.2d at 640.