South Carolina Law Review

Volume 19
Issue 4 *Survey of South Carolina Law 1967*

Article 6

1967

Domestic Relations

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DOMESTIC RELATIONS

I. MARRIAGE

Loving v. Virginia,[1] while mainly presenting issues of constitutional importance,[2] is nevertheless the most significant of the recent domestic relations cases surveyed. In June, 1958, two residents of Virginia, Mildred Jeter, a Negro, and Richard Loving, a Caucasian, were married in the District of Columbia pursuant to its laws. On their return to Virginia, however, they were convicted of violating that state's ban on interracial marriage.[3] Subsequently, the Lovings sought to set aside the sentence on the ground that the statutes in question were repugnant to the fourteenth amendment's equal protection and due process clauses. The Supreme Court of Appeals of Virginia upheld the constitutionality of the statutes, reasoning that marriage has traditionally been subject to state regulation without federal intervention, and that consequently, the regulation of marriage should be left exclusively to state control under the tenth amendment.[4] The Supreme Court reversed, holding that although marriage is a social relation subject to the state's police power, it is nonetheless subject to limitation under the fourteenth amendment;[5] and, as such, the freedom to marry or not to marry a person of another race resides with the individual and cannot be infringed by the state. The Court also rejected the state's argument that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial

1. 87 S. Ct. 1817 (1967).

2. For a discussion of the constitutional aspects of this case, *see* Comment, 19 S.C.L. REV. 253 (1967).

3. The statutes under which the Lovings were convicted and sentenced were part of a comprehensive statutory plan aimed at prohibiting and punishing interracial marriages. VA. CODE ANN. § 20-58 (1950) provides:

> *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

VA. CODE ANN. § 20-59 (1950) provides:

> *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

4. *See* Maynard v. Hill, 125 U.S. 190 (1888).

5. *Cf.* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race."[6] Rather the Court found that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States"[7] and held that the statutes in issue rested solely upon racial distinctions.

The Virginia statutes are similar to those of sixteen states, including South Carolina,[8] which prohibit interracial marriage. The South Carolina Attorney General has stated in a press release that the South Carolina statute will be left in the Code, but will cease to be enforced.[9]

II. Divorce

A. Proof of Adultery

In *Odom v. Odom*[10] the South Carolina Supreme Court, in reversing the court of common pleas, held that a finding of adultery in a divorce action was without evidentiary support. *Odom* presents no novel questions, for it is well settled that infidelity must be established by a clear preponderance of evidence and that proof of adultery must be sufficiently definite to identify the time and place of the offense as well as the circumstances under which it was committed.[11]

B. Desertion

Inabinet v. Inabinet[12] involved an appeal from a divorce action brought by the husband on grounds of desertion. The trial court held that the wife's refusal to respond to her husband's offer of reconciliation constituted desertion, entitling the husband to a divorce. The record in the instant case, as well as the court's opinion in a prior action between the parties,[13] shows that the Inabinets had occupied a room in the home of the husband's parents during marriage. Although the trial record is relatively brief, it reveals that the parties' difficulties were

6. Loving v. Virginia, 87 S. Ct. 1817, 1821 (1967).
7. *Id.* at 1823.
8. S.C. Const. art. III, § 33; S.C. Code Ann. § 20-7 (1962).
9. Columbia Record, June 13, 1967, § B at 1.
10. 248 S.C. 144, 149 S.E.2d 353 (1966).
11. *E.g.*, Lee v. Lee, 237 S.C. 532, 118 S.E.2d 171 (1961); Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949).
12. 249 S.C. 65, 152 S.E.2d 553 (1967).
13. Inabinet v. Inabinet, 236 S.C. 52, 113 S.E.2d 66 (1960).

further complicated by strife between the wife and her mother-in-law. In November 1958 the wife separated from her husband. Subsequently, the husband's mother died, leaving the home to her son subject to a life estate in his father. The husband offered testimony to the effect that he had a conversation with his wife at his mother's funeral, offering her a chance to return to the home if she desired.

The trial judge's ruling appeared to have been based on the proposition that rejection of a sincere offer of reconciliation and voluntary refusal to renew suspended cohabitation without justification constitutes desertion on the part of the party refusing to resume cohabitation.[14] On appeal the supreme court qualified this rule, holding that the offer of reconciliation must be a bona fide and genuine appeal to correct marital discord.

> The offer must be made with the desire and intention that it be accepted and carried out in accordance with the performance of the duties of matrimonial cohabitation. The offer must not be merely colorable or made merely to lay a foundation for, or to defeat an action for, divorce.[15]

The court opined that here the offer amounted to nothing more than mere permission for the wife to return to an unhappy home, there being no apology or excuse for the husband's shortcomings; and the court noted that during the same period the husband was still attempting to charge his wife with desertion. Thus *Inabinet*, while recognizing the general law on desertion, lays down a standard of reconciliation requiring a sincere and good faith effort to correct the difficulties leading to discord.

III. ADOPTION

Galloway v. Galloway[16] involved an appeal by Vera Jane Lusher (Keenum) to set aside a decree of adoption. In 1955 after a divorce proceeding, Ben Galloway received custody of Jeanette Galloway, his minor child. In April 1962 I. B. and Maggie Galloway instituted an action to adopt the child, who was their granddaughter. Answers to the complaint were filed by the parties and by a guardian *ad litem* on behalf of Jeanette

14. *See, e.g.*, Miller v. Miller, 225 S.C. 274, 82 S.E.2d 119 (1954); Mincey v. Mincey, 224 S.C. 520, 80 S.E.2d 123 (1954); Wolfe v. Wolfe, 220 S.C. 437, 38 S.E.2d 348 (1951).

15. Inabinet v. Inabinet, 249 S.C. 65, 69, 152 S.E.2d 553, 554-55 (1967), *quoting from* 27A C.J.S. *Divorce* § 38(2)(e) (1961).

16. 249 S.C. 157, 153 S.E.2d 326 (1967).

Galloway. After a hearing which took place August 23, 1962, a decree was issued declaring Jeanette Galloway the legally adopted child of her grandparents. Approximately three and one-half years later, Ben Galloway's former wife brought suit to set aside the decree, alleging that the minor child had not been served personally as required by Section 10-434 of the South Carolina Code.[17] By way of an affirmative defense, the grandparents contended that no notice of the present action had been given Jeanette Galloway or her guardian *ad litem*, and that no appearance had been made on the child's behalf. The trial judge found on the merits that the child had been properly served in the adoption proceeding. The supreme court dismissed the appeal which followed, but without reaching the merits of the plaintiff's contention concerning failure of service on the minor. Ironically, the court found that since neither the minor nor her guardian *ad litem* had been served in the present action, one of the parties in interest was not properly before the court and that party's rights could not be adjudicated. Certainly paramount in the judgment of the court was the settled rule that the welfare of the child is controlling in all proceedings of adoption.[18] It was with this in mind that the court refused to divest the child of her rights under the adoption decree without notice and representation. The court's refusal to pass on the adoption procedure is in line with the principle that the rights of minors have precedence over procedural rules.[19]

IV. Domicile

Bowman v. DuBose,[20] the only federal district court case of significance in the surveyed area, involved a motion to dismiss a tort action for lack of jurisdiction. The question of jurisdiction frequently arises in domestic relations cases, and while the case at hand involves a tort action, this decision is equally applicable to jurisdictional disputes originating from domestic relations actions. The defendant contended that the plaintiff's domicile

17. In Clark v. Neves, 76 S.C. 484, 490, 57 S.E. 614, 616 (1907) the court said: "When it appears affirmatively on the face of the record that an infant has not been served with summons, the infant is not bound by the proceedings." *Quoted with approval in* Fouche v. Royal Indem. Co., 217 S.C. 147, 154, 60 S.E.2d 73, 75 (1950).

18. 2 Am. Jur. 2d *Adoption* § 82 (1962).

19. *See, e.g.*, Caughman v. Caughman, 247 S.C. 104, 146 S.E.2d 93 (1965); Jackson v. Walters, 246 S.C. 486, 144 S.E.2d 422 (1965); Cumbie v. Cumbie, 245 S.C. 107, 139 S.E.2d 477 (1964).

20. 267 F. Supp. 312 (D.S.C. 1967).

was South Carolina, not West Virginia as alleged, thus the federal court was without diversity jurisdiction. In 1942 the plaintiff, while domiciled in West Virginia, enlisted in the United States Army. From that date forward he was a member of the Armed Services, with his final station at Shaw Air Force Base, South Carolina, where he remained until his retirement, April 30, 1966. In denying the defendant's motion, the district court found that the defendants failed to prove a manifestation of intention on the part of the plaintiff to establish a new domicile on moving to South Carolina.

The word domicile may be defined as "the place with which a person has a settled connection for certain legal purposes, either because his home is there, or because that place is assigned to him by the law."[21] It is well settled that a serviceman, who is often in transit, retains his domicile as of the date of enlistment unless he indicates an intention to abandon it in favor of a new one.[22] The burden of proving such an intention on the part of military personnel can only be met by clear and unequivocal evidence.[23] Evidence that the plaintiff purchased a home near Shaw Field,[24] that he sought employment in the Sumter area after retirement, that he had an automobile registered with the South Carolina Highway Department[25] and had procured a South Carolina driver's license,[26] and that he had remained in South Carolina after retirement was held insufficient to prove domiciliary change.

The instant case reinforces the settled rule that domicile is primarily a matter of the individual's intent to be determined from the facts and circumstances of each case.[27] Moreover, this decision illustrates the court's hesitance to infer requisite intent from such specific acts as those related above.

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21. RESTATEMENT OF CONFLICT LAWS § 9 (1934).

22. Price v. Greenway, 167 F.2d 196, 199 (3d Cir. 1948); Finger v. Masterson, 152 F. Supp. 224 (W.D.S.C. 1957); 1954-1955 OP. S.C. ATT'Y GEN. 278 (1955); 1945-1946 OP. S.C. ATT'Y GEN. 201 (1945).

23. *E.g.*, Sweeney v. District of Columbia, 113 F.2d 25 (D.C. Cir. 1940); Kinsel v. Pickens, 25 F. Supp. 455 (W.D. Tex. 1938); *Ex parte* White 228 F. 88 (D.N.H. 1915).

24. *Compare* Humphrey v. Fort Knox Transit Co., 58 F. Supp. 362 (W.D. Ky 1945), *aff'd per curiam*, 151 F.2d 602 (6th Cir. 1945) *and* Kinsel v. Pickens, 25 F. Supp. 455 (W.D. Tex. 1938) *with* Deese v. Hundley, 232 F. Supp. 848 (W.D.S.C. 1964).

25. *See generally* S.C. CODE ANN. § 46-102 (1962).

26. *See generally* S.C. CODE ANN. §§ 46-152, -153(2) (1962).

27. *E.g.*, Deese v. Hundley, 232 F. Supp. 848 (W.D.S.C. 1964); Gasque v. Gasque, 246 S.C. 423, 143 S.E.2d 811 (1965).