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Domestic Relations

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DOMESTIC RELATIONS

VENABLE VERMONT*

During the review period the South Carolina Supreme Court dealt with five cases involving divorce, one case involving rights to real estate arising out of the legitimacy of a child, and one case involving conversion of an automobile owned by the husband sold by the wife in his absence.

The reviewer found no decisions in the field by any of the United States Courts during the review period.

Judicial Decisions

In *Davis v. Davis*[1] the Court reviewed an order below vacating a default judgment for divorce and permitting the defendant, now the respondent, to amend her answer or otherwise plead to the verified complaint. The attorney representing the husband brought action for divorce and then had the wife sign an unverified answer admitting the allegations and joining in the prayer for divorce. The answer was not filed and the attorney averred in the proceeding at hand that it was not so intended but was merely denominated as a "statement," having been read and explained to the wife in the presence of a witness prior to her signing. The attorney made an affidavit of default without any averment that the defendant had failed to answer or appear. The subsequent order of reference recited that respondent in her answer had admitted the allegations of the complaint. The master took testimony of the husband and two other witnesses apparently in the form of affidavits, without answers, questions, or cross examination, and recommended a decree of divorce, reporting that the defendant is in default having failed to answer, demur or give notice of appearance, etc. A subsequent decree was filed. The appellant had no notice of the application for order of reference, or motion, or application for the judgment, or the filing of it. Subsequently a petition to vacate the decree was heard and granted, supported by affidavits of respondents and others, showing prima facie that there had been no desertion by the wife and that the parties had lived together as husband and wife, except for a brief interval or intervals of

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1. 236 S. C. 277, 113 S. E. 2d 819 (1960).

separation, until the night before the commencement of the action, and that after the commencement the husband had assured his wife that the matter had been dropped and they lived together for some time. The affidavit of default and order of reference were dated at times when the couple was living together. Counter affidavits were in conflict with those of the respondent.

The court below held the proceedings fatally irregular for lack of notice of the application for order of reference, the reference and the application for the decree. Other grounds for vacation of the judgment were not passed upon by the Court.

The Court on appeal held that the respondent had properly moved to vacate the judgment, that any "mistake"[2] was that of the husband and his attorney rather than that of the respondent in retaining and not filing the answer and in representing to the court that she was in default, which might reasonably have been held to be extrinsic fraud on her part and upon the court. The Court added that the record indicated that this was a bona fide mistake of counsel and merely constructive rather than actual fraud. As might be presumed, other attorneys represented the husband in the present proceeding and appeal. The contention that the answer of the respondent was a nullity because it was not verified was held to have been waived by the actions of counsel for the plaintiff.

The most interesting point of the whole case is the fact that appellant attacks the constitutionality of the statute which requires a desertion for one year to constitute grounds for divorce,[3] as was done in *Holliday v. Holliday*.[4] As in the

2. CODE OF LAWS OF SOUTH CAROLINA, § 10-1213 (1952). "The court may, in its discretion and upon such terms as may be just, at any time within one year after notice thereof relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code the court may, in like manner and upon like terms, permit an amendment of such proceeding so as to make it conformable thereto."

3. CODE OF LAWS OF SOUTH CAROLINA, § 20-101 (1952) amended. "No divorce from the bonds of matrimony shall be granted except upon one or more of the following grounds, to-wit: (1) Adultery; (2) Desertion for a period of one year; (3) Physical cruelty; or (4) Habitual drunkenness. Habitual drunkenness shall be construed to include such drunkenness caused by the use of any narcotic drug." The complaint is that the requirement for desertion be for one year is in (Footnote 3 continued on page 35)

4. 235 S. C. 246, 111 S. E. 2d 205 (1959).

Holliday case the point was not raised in the court below, and would not be considered on appeal, but incidentally the Court pointed out that appellant seems to concede that the statutory grounds of desertion for one year did not exist in the case, and that will be for trial hereafter, if made an issue. The Court found no benefit to the wife by reason of estoppel, she presumably having failed to receive support during the one year of separation. The Court pointed out that collusion will not be allowed in a divorce proceeding and that no rights of innocent third parties had intervened, other than the giving of a mortgage by the husband without dower (upon which the wife had agreed to renounce dower) as further supporting grounds for the decision.

Since it was not expressly raised on the record, the Court did not examine and made no finding upon the propriety of the undertaking of the original counsel to represent both plaintiff and defendant in the action.

In *Lee v. Lee*[5] the wife appeals an adverse decision in her husband's action for a divorce based upon the grounds of adultery, claiming that the charge of adultery was not established by the preponderance of the evidence and that the amount of support was totally inadequate. The court below had heard the evidence without a reference, and in reviewing the facts the court held that the charge had been proven sufficiently to support the decree, holding that a preponderance of the evidence was made out by one witness who viewed a single act of adultery on the part of the wife, noting other facts evidencing a predisposition to adultery on the part of the erring wife. The Court carefully reviewed the earnings of the parties and sustained the award for support for the two minor children left with the wife by the order of custody below. The Court found that the matter was within the discretion of the trial court and found no abuse thereof, pointing out that the adjudication might be modified in the face of changed circumstances and conditions in the future.

In the case of *Sherbert v. Sherbert*[6] the husband had brought an action for divorce alleging desertion and adultery,

conflict with Article 17, Section 3, Constitution of South Carolina, Amended 1949, "Divorces from the bonds of matrimony shall be allowed on grounds of adultery, desertion, physical cruelty or habitual drunkenness." The Constitution places no time limit on desertion, the one year requirement having been established by act of the General Assembly.

5. 237 S. C. 533, 118 S. E. 2d 171 (1961).

6. 237 S. C. 449, 117 S. E. 2d 715 (1960).

seeking custody of the children. The wife brought a cross action seeking divorce on the ground of physical cruelty, asking separate maintenance and custody of the children. On reference the master found that neither party under the proof was entitled to a divorce, recommending that separate maintenance to the wife be denied and that custody of the children be given the husband, with visitation privileges to the wife. On exceptions to the master's report the county court held the wife had established her charges of physical cruelty and was entitled to a divorce on that ground. It is interesting to note that while the parties were seeking their divorce the children's court was entertaining a proceeding relative to their custody, and a third child was born prior to the hearing before the master. The county court left the question of the custody of the two older children to the children's court and held that the mother was entitled to the custody of the third child, requiring the husband to pay $10.00 a week for the support of the wife and that child. On appeal the husband did not challenge the denial of the divorce sought by him, but merely questioned the holding that his wife was entitled to a divorce on the ground of physical cruelty and whether there was error in granting her separate maintenance.

The Court on appeal held that since the action was in equity it was at liberty to review the facts and weigh the evidence upon disagreement by the master and the county judge and determine its own view of the evidence.

The Court gave consideration to the master's opportunity to see the witnesses and hear the testimony. The parties were married when he was thirty-six and she fourteen years of age. The Court rejected the wife's contention of the physical cruelty sufficient to ground a divorce, and affirmed the holding of the master, concluding there was insufficient evidence to support the divorce.

The decree below was reversed as to divorce and alimony and since there was no exception to the portion of the decree holding that the father should support the child, the case was remanded to the county court for proceedings in accordance with the views of the opinion.

Ortowski v. Ortowski[7] originated in a divorce proceeding brought by the wife alleging physical cruelty. The court below referred the matter to the master who issued a report

7. 237 S. C. 499, 117 S. E. 2d 860 (1961).

recommending that plaintiff be granted a divorce, that the defendant be awarded custody of the two older children and the plaintiff have custody of the youngest whose paternity the father questioned. He recommended that the wife be given approximately $10,000.00 of the accumulated savings, that the remaining $18,000.00 be placed in trust for the use of the youngest child with the wife being given the right to withdraw $125.00 a month for the child's support, and that the award to the plaintiff be considered alimony in bulk. Upon exceptions, the circuit court modified the master's report slightly as to the disposition of certain furniture. From that order the husband served notice of intention to appeal and shortly thereafter gave notice of withdrawing the intention and consented to the order. Four days later the plaintiff married a man who obviously had been her paramour prior to the divorce proceedings.

Shortly thereafter the defendant filed a petition reciting these facts and prayed for an order setting aside the decree on the ground of after discovered evidence. At various points in the proceedings the court had impounded certain funds belonging to the parties, and did so again on the motion to vacate.

Certain affidavits were filed alleging that the plaintiff had engaged in adultery with the man she subsequently married. Others tended to impugn the fitness of the plaintiff to have custody of the children. Proper allegations were made that the evidence was unknown to him until after the final decree of divorce; that he had exercised due diligence; that the evidence was material and could not have been timely discovered by him through the exercise of due diligence.

The circuit court refused the motion to vacate and upon appeal the defendant alleged an abuse of discretion, and that the court below should have taken into consideration the interest of the state in an action involving the sanctity of marriage.

The Court reviewed the requisites for securing a new trial based upon after discovered evidence.[8]

8. In a motion for a new trial based upon after-discovered evidence, the moving party must show (1) that the evidence is such as will probably change the result if a new trial is granted, (2) that it has been discovered since the trial, (3) that it could not have been discovered before the trial by the exercise of due diligence, (4) that it is material to the issue, and (5) that it is not merely cumulative or impeaching. *McCabe v. Sloan*, 184 S. C. 158, 191 S. E. 905.

The Court pointed out that the defendant had not used due diligence in discovering the evidence, since it was completely available to him prior to the trial. Thus there was no abuse of discretion amounting to an error of law on the part of the circuit court.

The defendant on appeal maintained that in passing upon the motion for a new trial upon after discovered evidence concerning a divorce, the circuit court should have taken into consideration the interest of the state and that the sanctity of marriage and the public interest are involved.

The Court reviewed its two prior decisions in *Fogle v. McDonald*[9] and *Grant v. Grant*[10] and declared that those two decisions in no wise contravene the established rules governing motions for new trial based upon after discovered evidence, affirming the court below.

The decision of *Mitchell v. Smyser*[11] had its genesis in a partition proceeding involving real estate in which the plaintiff alleged an interest in such property by reason of descent from her father, Wellington Perkins, who died intestate.

The defendant claimed title through James and Walter Perkins, admittedly sons of Wellington Perkins, alleging they were the sole heirs at law.

The plaintiff sought to establish a showing of a common law marriage between her father and Martha Perkins. The circuit court found that Martha Perkins was not the wife of Wellington Perkins. The plaintiff appealed. The matter being at law the Court was not at liberty to pass on conflicting evidence but merely reviewed the circuit decree and determined there was evidence reasonably warranting the factual conclusions reached by the circuit judge and affirmed the decision below taking judicial notice of the fact that divorces were not permitted in South Carolina at that time and holding that since the plaintiff admitted that James and Walter Perkins were lawful heirs of Wellington Perkins and since Wellington's first wife survived him, Martha could not have been his lawful wife and her children should not have been lawful heirs.

In *Collins v. Collins*[12] the plaintiff wife brought a divorce action alleging desertion and physical cruelty and serving

9. 159 S. C. 506, 157 S. E. 830 (1931).
10. 233 S. C. 433, 105 S. E. 2d 523 (1958).
11. 236 S. C. 332, 114 S. E. 2d 226 (1960).
12. 237 S. C. 230, 116 S. E. 2d 839 (1960).

the summons by publication. The husband-appellant filed a notice of motion supported by various affidavits and exhibits to change the venue of the action from Kershaw county to Horry county upon the grounds that he was a resident of Horry and not Kershaw county. The motion was refused by the circuit judge and this appeal followed. The husband was tried and convicted previously for failure to support his wife and child.[13] Prior to the indictment the wife had brought an action for divorce and incidental relief in "The Juvenile, Domestic Relations and Special Court of Kershaw County" which was dismissed without prejudice to the wife, "to bring an action for divorce in Horry County or to file such other actions as she may be advised."

Thereafter an action for separate maintenance and support of the wife and child was brought by the wife in the Kershaw County Court which terminated in a voluntary nonsuit upon objection to jurisdiction and filing of a motion for change of venue. Thereafter in November of 1959, the wife instituted an action for divorce in the Court of Common Pleas for Horry county. The sheriff was unable to serve the defendant or to determine his whereabouts and the action was subsequently on motion dismissed. The action was begun February 12, 1960, in Kershaw county.

The motion for a change of venue in the instant case was supported by affidavits of appellant asserting that he has been a resident of Horry county since he was a small boy, and that he is presently a student at the University of Georgia. Other supporting evidence showed that the husband considered his residence to be Horry county and at least during some of the time he was absent partly in this State and partly in North Carolina.

The appellant contends he is a resident of Horry county and the action should be tried in such county pursuant to Section 20-106 of the 1952 Code.[14] The respondent wife contends the action should be tried in Kershaw county where

13. See State v. Collins, 235 S. C. 65, 110 S. E. 2d 270, *cert. denied*, 361 U. S. 895, 4 L. Ed. 2d 152 (1959).

14. Venue in divorce cases is fixed by Section 20-106 of the 1952 Code: "Actions for divorce from the bonds of matrimony shall be tried in the county (a) in which the defendant resides at the time of the commencement of the action, (b) in which the plaintiff resides if the defendant is a nonresident or after due diligence cannot be found or (c) in which the parties last resided together as husband and wife unless the plaintiff is a nonresident in which case it must be brought in the county in which the defendant resides."

she resides for the reason that appellant after due diligence cannot be found in Horry county.

The Court found that due diligence had been used in the attempt by the deputy sheriff to serve the appellant and pointed out that one of the prior actions had been dismissed because of ineffectual service. The Court found the evidence conclusive that an effort was made to locate the appellant in the county of his alleged residence, and being unable to do so under the peculiar facts of this case, the respondent has the right to bring the action in Kershaw county.

In *Barber v. Carolina Auto Sales*[15] the plaintiff appeals an order of nonsuit in an action for actual and punitive damages for the alleged conversion of an automobile.

The plaintiff, a sergeant in the army, owned a 1950 Oldsmobile registered in his name. In October, 1958, he was transferred to Germany, leaving his automobile in charge of his wife for family use. On January 5, 1959, while plaintiff was still in Germany the wife, without his knowledge or consent, traded the 1950 Oldsmobile to the defendant for a 1956 Oldsmobile, using the plaintiff's automobile as a down payment, giving a mortgage on the 1956 Oldsmobile for the balance of the purchase price and registering it in her name. Shortly thereafter the defendant sold the 1950 Oldsmobile to a third party. A few months later plaintiff, upon information that his wife was going out with other men and neglecting his children, secured an emergency leave from his commanding officer in Germany, returning to Columbia on March 23, 1959, where he learned for the first time that his car had been sold by his wife, who was then working in a Columbia restaurant, and that his children were at the home of his parents in West Virginia. On the night of his return he went to the place of business of the defendant to see if he could locate his automobile, but was unable to do so, and the next day asked his wife to drive him to West Virginia to see about his children, who were ill. She drove him in the 1956 Oldsmobile. Upon arriving in West Virginia the plaintiff found it necessary to hospitalize his children and while there brought suit against his wife for divorce. The couple stayed approximately two and one-half weeks in West Virginia. The wife drove him back to Columbia. A week after his return he consulted counsel in reference to his automobile, and thereafter on April

15. 236 S. C. 594, 115 S. E. 2d 291 (1960).

20, 1959, this suit for conversion was commenced. Shortly after the action was brought, a representative of a finance company which purchased the conditional sales contract, sought to have the appellant assume the indebtedness and make the payments on the 1956 Oldsmobile, which he declined to do. The car was thereupon repossessed. The county court found no evidence that plaintiff ever drove his wife's automobile or assumed any dominion or control over it. The nonsuit was granted on the grounds that the wife had implied authority to trade the automobile, and if not, the appellant had, on returning from Germany, acquiesced in and ratified the transaction.

Pointing out that the wife is not the agent of her husband by virtue of the marital relationship, but that the husband may make her his agent and be bound by her acts as such when the agency is expressed, implied or ostensible, or perhaps arising by implication of law, the Court on appeal found no agency. The Court further pointed out that the fact that her husband is away from home does not clothe his wife with implied authority to sell and dispose of his property as if it were her own.

The Court further held that whether or not there had been a ratification of the unauthorized act by an acceptance or retention of the benefits thereof is a question of fact for the jury and reversed, remanding for a new trial.

Legislation

In its 1961 session the General Assembly passed several acts in the field of Domestic Relations. Section 15-1012, CODE OF LAWS OF SOUTH CAROLINA (1952), was amended by an act[16] to provide that testimony given in investigations of incorrigible and destitute children by certain municipal courts need not be signed by the witnesses when the testimony is recorded by a sworn stenographer.

Section 15-1184, CODE OF LAWS OF SOUTH CAROLINA (1952), was amended[17] to correct a typographical error striking the word "case" and inserting in lieu thereof the word "cause." The section itself deals with making additional parties to cases under the jurisdiction of children's court of certain counties.

Section 20-1, CODE OF LAWS OF SOUTH CAROLINA (1952), pertaining to those who may lawfully contract matrimony was

16. Act No. 6 of 1961.
17. Act No. 58 of 1961.

amended[18] by substituting the words "mentally incompetent persons" for the words "idiots" and "lunatics."

A Controversial Act

An Act[19] effective May 4, 1961, has given a great many lawyers some concern. Its title claims that its purpose is to amend Section 19-111, CODE OF LAWS OF SOUTH CAROLINA (1952), relating to renunciation of dower so as to simplify the provisions thereof; and *to require the official seal of the officer before whom the renunciation was made.* The amended section itself reads as follows:

> Any woman who has an inchoate right of dower in any lands in this State, whether she be of lawful age or minor, may renounce and relinquish her right of dower by acknowledging it in writing before any officer of this State, or of the state in which the renunciation is executed, or of the United States, who is authorized by law to administer oaths. The officer shall append to the writing his certificate *in the form prescribed by Section 19-114, and affix his official seal, if any.* [Emphasis supplied.]
>
> When recorded in the county where the real estate is located, the renunciation shall be effective to convey away, bar and terminate the dower right of the woman, although she has executed no deed of conveyance for that purpose.

(Section 19-114 merely provides a standard form of certificate for the renunciation of dower.)

Whether or not this statute was intended to repeal Section 49-6, CODE OF LAWS OF SOUTH CAROLINA (1952), which provides that the lack of a Notary Public seal affixed to an instrument shall not render his acts invalid if the official title of the Notary be affixed thereto, is questionable.

Certainly a Notary has an official seal and the implication is that the amendment requires the affixation of the official seal wherever a renunciation of dower is taken. Certainly the careful practitioner would insist upon the affixation of a seal to every dower until the General Assembly amends the statute to clarify the matter and ratifies whatever dowers may have been taken in the interim period without the affixation of a seal.

18. Act No. 61 of 1961.
19. Act No. 217 of 1961.

Another Act[20] provides for the renunciation of dower in regard to land subject to conveyance or mortgage by an attorney in fact by the endorsement upon the power of attorney of a certificate in a form set up by statute by which the wife renounces dower upon the premises described in the power of attorney or by specifically identifying the power of attorney if the renunciation is in a separate document.

Section 10-451, CODE OF LAWS OF SOUTH CAROLINA (1952), as amended, provides, *inter alia,* for publication of service in actions where the defendant is a party to a proceeding for the determinations of parental rights and is either a nonresident or a person upon whom service cannot be had within the State after due diligence. An amendment[21] provides for service of process by publication upon the defendant who is a party to an annulment proceeding or where the subject of the matter involves the custody of minor children, support of minor children or wife, separate maintenance, or legal separation.

A Much Needed Act

Another Act[22] provides for the termination of parental rights in regard to any child voluntarily abandoned by its parents for a period in excess of twelve months. The act provides that any interested person, persons or agency may petition the court of competent jurisdiction in the county in which the child resides or is residing for an order determining whether or not the child was voluntarily abandoned. The summons and petition shall be served upon the parents of the child and upon the child and the person or agency with whom it resides in the manner provided in ordinary civil actions. Thereafter the court shall hold a hearing to determine the merits of the petition and if it finds that the child has been voluntarily abandoned for a period in excess of twelve months, it may issue an order forever barring parental or guardianship rights as to such minor and may award custody of the child as it deems proper and said child shall be eligible for adoption.

Sections 55-741 through -747, CODE OF LAWS OF SOUTH CAROLINA (1952), establishing a detention home for children in Spartanburg county have been repealed.[23] No detention home had ever been established under the act.

20. Act No. 244 of 1961.
21. Act No. 245 of 1961.
22. Act No. 366 of 1961.
23. Act No. 417 of 1961.