South Carolina Law Review

Volume 18 | Issue 1 Article 14

1966

Domestic Relations

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DOMESTIC RELATIONS

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A. Common Law Marriages

Whenever domestic relations cases are reviewed, there is almost a certainty that their human interest aspects will overshadow whatever cold announcements of legal rules they may contain. *In re Greenfield*[1] is a good example of this, for if one witness had not forced a heart-to-heart talk with Mr. Duke Greenfield a few years before his death or had been less understanding and articulate in recounting that conversation from the stand, the decision might well have gone the other way.

Over the objection of blood relatives, the probate court of Greenwood County bestowed the administration of Mr. Greenfield's estate upon Mrs. Louise Greenfield as his common law wife, and the circuit court affirmed the appointment. The sole question was whether there had been in fact a common law marriage between Duke and Louise. Just from the looks of things, there clearly had been. Duke Greenfield, a Jewish gentleman, had lived in Greenwood for twenty years before his death, and was apparently an outstanding citizen, being a part-owner and operator of textile mills there. He owned a fine home overlooking Lake Greenwood and about ten years before his death Louise Sexton, a Gentile girl then living with her parents in Greenwood, moved into it with him. They lived there together, open and continuously, until his death. Louise, a person of unimpeached reputation, acted as the lady of the house and, as the court said, "carried out with fidelity and devotion the usual duties and responsibilities of a wife."[2] She bought the groceries, managed the servants and cared for Duke "in sickness and in health." Their photographs stood together on the living room mantel and a sign by the driveway read "Greenfield's—Private." They entertained prominent and respected married couples of Greenwood in their home and had this hospitality repaid in kind. There was nothing whatever in their conduct to suggest any illicit relationship. All of the objective elements pointed strongly to a common law marriage.

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1. 245 S.C. 595, 141 S.E.2d 916 (1965).
2. *Id.* at 598, 141 S.E.2d at 917.

After making this finding, Mr. Acting Justice Legge, who wrote the excellent opinion for the court, came to the difficult part of the case. Against these "outward and visible signs" of marriage, he said were two pieces of evidence which were subjective in nature: (1) the fact that in all of her business dealings (social security records, etc.) Louise used her maiden name; and (2) the fact that Duke had stated to several witnesses that he and Louise were not married and that he had no wife.

Judge Legge found a sufficient answer to these potential roadblocks—as he put it, "the impact of such inconsistency between conduct and statement"[3]—by his parallel conclusions (1) that many people, perhaps including Louise, never really comprehend the true significance of common law marriages, and (2) that Duke Greenfield had lived and died with a peculiar obsession about his Jewish surname.

In discussing the latter point, Judge Legge mentioned the fact that a fear of anti-Semitism was a common trait in Duke's family, as witness a brother and a sister adopting Gentile names; but his main reliance was upon the remarkably sensitive and perceptive testimony of a Mr. Donald McKellar, a close friend of Duke and Louise for many years. McKellar said that Duke was holding forth one day on his favorite topic of anti-Semitism and made the statement that he could not get in the Greenwood Country Club because he was a Jew—"I can't do this and I can't do that."[4] McKellar said he thought that this was the time to bring up a broader topic and he told him that if he was not accepted in certain quarters, it was not because he was a Jew but because he was living with a woman he was not married to. He told Duke that if he was overstepping his friendship, he could be told to shut up. Duke said in effect, "Well, shut up then," but McKellar said that he persisted and the conversation opened into a moving revelation of Duke's attitude toward his Jewishness and also towards his relationship with Louise, who was present during the whole conversation.

Space here does not permit a detailed analysis of Mr. McKellar's testimony. Judge Legge, obviously delighted with it, quotes it at length. McKellar told how Duke expressed amazement as to the source of the certainty on the part of McKellar and the other Greenwood people that he and Louise were not

3. *Id.* at 599, 141 S.E.2d at 917.
4. *Id.* at 599, 141 S.E.2d at 918.

married, gave his opinion that the law would consider Louise as his common law wife and permit her to inherit from him at his death, said that he considered her his wife, and that he would not mind her going by the name of Louise Greenfield except for the fact that she could get into some hotels easier with the name Sexton than she could with his name. It was a striking conversation strikingly recounted, and it weighed heavily in the court's conclusion that Duke, despite some statements to the contrary to people whose business it was not, actually considered that he and Louise were man and wife.

As to Louise's continued use of her maiden name and statements that she was single, Judge Legge expressed the thought that this hesitancy to hold herself out as Mrs. Greenfield could well have come from the settled conviction on the part of a large segment of the population that the only marriages that really count are ceremonial marriages. He says in effect that two groups of people hold this view: those who are ignorant of common law marriages and those who disapprove of them. He pointed out, by quoting her testimony, that at least one of the witnesses who testified that Duke and Louise were not considered in the community as "married" refused to accept the idea that a marriage could be a marriage that was not ceremonial. Judge Legge indicated that if Louise, who did not testify, was herself of the group who do not comprehend the true legal effect of common law marriages, that this should not bar her from claiming a common law marriage if she had in fact made one. There may be a logical fallacy here. How can a person claim a contractual relationship such as a marriage if he does not know he has one? Mr. Justice Legge is saying in effect that it is what you do that matters, not how you yourself might characterize what you have done.

B. Desertion

Adams v. Adams,[5] like the 1963 case of *Boozer v. Boozer*,[6] upon which it relies, holds that one spouse does not establish "cessation from cohabitation for the statutory period of one year,"[7] one of the four essential elements of desertion under South Carolina law, unless he was actually living apart from the other spouse

5. 244 S.C. 143, 135 S.E.2d 760 (1964).
6. 242 S.C. 292, 130 S.E.2d 903 (1963).
7. 244 S.C. 143, 144-45, 135 S.E.2d 760, 761 (1964).

for the full year. The husband here claimed that his wife had refused him sexual intercourse for some months before the situation forced him to leave home and that this period of abstinence should be included in the required year of cessation from cohabitation. The court did not rule on this point however, because the husband failed to prove the factual basis for his claim. His testimony that his wife had left his bed was uncorroborated and was denied by the wife and another witness. On cross-examination, the husband had admitted himself that she "did not completely leave his bed"[8] until a date which did not square with his own theory.

C. Physical Cruelty

Godwin v. Godwin[9] was another case without any real legal significance, the court merely finding that the plaintiff had not established factually the claimed ground for divorce. The wife relied on the claim of physical cruelty. She claimed that her husband had mistreated her on two separate occasions, the first of which was a claim that the husband had pinched her on the arm, and the second that he had slapped her. The slapping incident occurred when the husband carried the wife from her parents' home in an effort to discuss their marital problems. She thereupon slapped *him* and the husband retaliated by slapping her.

D. Alimony

In *Nienow v. Nienow*[10] the circuit court, by an order dated July 14, 1964, had required the payment of temporary alimony commencing April 6, 1964, which was the date originally set for the hearing of the motion for the temporary relief. Each side blamed the other for the postponement of that hearing but the court held that fault in this connection was of no consequence since the trial judge had the right to make the payment of temporary alimony commence on any date not earlier than that of the institution of the main action. This is sound and is in keeping with the basic principle that temporary alimony is merely a substitute for the support which a husband owes a wife throughout matrimony. Payment may be required from the date

8. *Id.* at 145, 135 S.E.2d at 761.
9. 245 S.C. 370, 140 S.E.2d 593 (1965).
10. 245 S.C. 542, 141 S.E.2d 648 (1965).

on which the parties became adversary litigants rather than married people living together and may extend to the date on which the court makes a final adjudication of their future status. The husband, of course, should be given credit for the support payments which he made voluntarily during this period. The trial court had done that in the present case.

Cheatham v. Cheatham[11] was an appeal by a husband on the sole ground that the trial court had erred in increasing the amount of alimony and attorneys fees recommended by the master before whom the testimony had been taken. The court, speaking through Mr. Justice Brailsford, held that no court is ever bound in any fashion by the recommendations of a master and that, in determining the proper amount to be set for alimony, it is the court's duty to consider the whole record and make its own determination, with due weight being always given, of course, to the master's recommendation on the point. To reverse in the present case, Judge Brailsford said, that the trial court's findings as to the inadequacy of the sums found proper by the master would have to be determined to be without any reasonable support in the record. That was not possible on the present record, the circuit court's finding being amply supported by evidence.

E. Corroboration and Condonation

In *McLaughlin v. McLaughlin*[12] the court discusses at some length the requirement of corroboration of a party's testimony in a divorce case and also the defense of condonation. The case seems to have been actually decided on the condonation point. If so, the pronouncements in regard to corroboration would be dicta, but since they state the court's attitude on the subject, the practitioner would be well advised to consider them carefully. Since *Brown v. Brown*,[13] which was the first case to come before the court under the present divorce statute, the court has stated the rule to be that all elements testified to by a party as necessary to make out a cause of action for divorce must be corroborated by either direct or circumstantial evidence. The court has always said however that, since the corroboration rule is designed to prevent collusion, it may be relaxed when it is evident

11. 245 S.C. 579, 141 S.E.2d 813 (1965).
12. 244 S.C. 265, 136 S.E.2d 537 (1964).
13. 215 S.C. 502, 56 S.E.2d 330 (1949).

that collusion does not exist. The argument was made in *McLaughlin* that if a divorce action is contested, that fact in itself means there is no collusion, and corroboration of the party's testimony should not be required. The court refused to accept such a broad proposition, saying that the required degree of corroboration may be greater or less in any particular case, depending upon all of its facts and circumstances, including the possibility of collusion, but that if there is to be no corroboration at all, the burden is upon the moving party to show why. The court agreed with the plaintiff that it would be possible to find the requisite corroboration in the cross-examination of the adverse party but said that corroboration of this type would be looked upon with suspicion if there was no other. On the record before it, the court indicated that the wife's testimony as to the claimed acts of physical cruelty on the husband's part were not corroborated, even giving consideration to the husband's partial admissions concerning them, and passed on to discuss and apparently decide the case on her condonation of his conduct.

The parties had continued to live on as man and wife for five months after the last alleged act of physical cruelty on the husband's part and the court held that under established principles this fact established a condonation. It recognized that condonations are always conditioned upon there being no recurrence of the reprehensible conduct but was unable to find any subsequent misconduct on the husband's part of sufficiently serious nature to revive the condoned offenses. All that the husband did the night before the wife left home was to lose his temper and walk away from an argument.

The courts have never been able to state an exact standard by which to determine whether subsequent bad conduct of a spouse on probation is sufficient to revoke the earlier condonation and revive the original offense as a ground for divorce. In the present case, the South Carolina court says that although the new wrongdoing need not be of itself an offense which would constitute a ground for a divorce, it should be one "approaching a marital offense and partaking in at least a substantial degree of such an offense."[14]

One interesting thing about the condonation defense in the *McLaughlin* case is that the husband did not raise it in his pleadings or before the referee or in the circuit court. The court held

14. 244 S.C. 265, 275, 136 S.E.2d 537, 542 (1964).

that this made no difference and that if the evidence showed condonation "it is the duty of the court even without pleading to find to that effect."[15] This is the first time our court has taken this position but it is obviously sound. If we once say that the court is bound by positions which the parties take in divorce cases, we are agreeing to divorce by consent. We cannot admit that as possible.

F. Jurisdiction

Foster v. Nordman[16] was an action in the court of common pleas for York County to annul a marriage entered into in that county between North Carolina residents, the plaintiff alleging that he was forced into the marriage by duress and coercion and that it was never consummated. At the time the action was brought, he and the defendant were still residents of North Carolina and service was had upon her under section 20-45 of the South Carolina Code. The circuit court granted relief to the defendant on her counterclaim for a divorce a mensa et thoro with support for herself and her unborn child and the plaintiff appealed. The defendant appealed on the court's refusal to make the child a party to the action following its birth pendente lite. The court refused to hear the merits of either appeal, holding on its own motion that the South Carolina court never had jurisdiction to entertain an annulment action between North Carolina residents. In *Everly v. Baumil*[17] the court held that there was jurisdiction in the South Carolina court to annul a marriage which had been contracted in Georgia between residents of South Carolina, specifically reserving the question of whether the courts of the place of the celebration of the marriage would also have jurisdiction to annul it. This question is now answered in the negative. The authorities are in some conflict on the point but our court adopts what is apparently the majority view and one that is in keeping with the basic principle in all litigation involving marriage that domicile of at least one of the parties is necessary to establish jurisdiction.

In *Richland County Dept. of Welfare v. Mickens*[18] it was held in a carefully reasoned opinion by Mr. Justice Bussey that

15. *Id.* at 272, 136 S.E.2d at 540.
16. 244 S.C. 485, 137 S.E.2d 600 (1964).
17. 209 S.C. 287, 39 S.E.2d 905 (1946).
18. 246 S.C. 113, 142 S.E.2d 737 (1965).

the juvenile-domestic relations court for Richland County did not have jurisdiction to terminate the parental rights of a natural mother to her child, the action having been brought pursuant to the provisions of sections 31-51.1 to -56 of the South Carolina Code. Although some broader principles are discussed, the decision was primarily one of statutory construction and would not be of general interest other than as a reminder that the statutes creating our now numerous courts of limited jurisdiction should always be carefully examined before bringing any unusual litigation in them.

G. Legislation

Pursuant to the new policy of referring in these articles to recent legislation in the field of the topic surveyed, attention is called to an act requiring doctors who examine children to report to the proper authorities all injuries other than accidental which they might have cause to believe were inflicted by a parent or other person having custody of the child. It further provides that anyone making such a report shall be immune from any liability for his actions.[19]

19. S.C. Acts & J. Res. 1965, p. 105.