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John R. Ingle

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be allowed to profit in his corporate capacity when he is guilty of some wrong, or is under some obligation, which would prevent him from so profiting in his individual capacity.³⁸

It is submitted that the result and the rationale of the principal case are to be commended as a desirable advancement in North Carolina corporation law. Certainly the ultimate effect of this decision is in line with the traditional principle that equity will look to the substance of the proceeding rather than to the form. The courts have consistently utilized their power to disregard the corporate entity where the sole shareholder seeks to use his inside position to work fraud or injustice.³⁹ The totality of the circumstances in this case clearly establishes that the sole shareholder had no equitable standing. Any contrary result would have had the effect of erecting a statutory shield behind which individuals with "unclean hands" could enforce their disqualified claims in equity.

SHERWOOD H. SMITH, JR.

Domestic Relations—Alimony Without Divorce and Absolute Divorce Based on Same Grounds

A wife in Missouri obtained a decree of separate maintenance on the ground of statutory desertion. Five years later she brought an action for absolute divorce based on the same ground. Her husband interposed as a defense the doctrine of election of remedies. *Held*, since an action for absolute divorce is not inconsistent with an action for separate maintenance based on the same ground, but is rather an action for further relief, the doctrine of election of remedies is not applicable. Consequently, the wife was granted an absolute divorce.¹

Ordinarily there is no ban on successive divorce actions unless the doctrine of *res judicata* may be invoked as a bar thereto.² For a subsequent action to be precluded it must appear that a court of competent jurisdiction rendered a final decree on the merits in a prior action in which the same relief was sought.³ Under this doctrine a decree of separate maintenance would not be a bar to a subsequent action for absolute divorce because the two remedies are not the same.⁴ However, grounds litigated or questions determined in the separate maintenance proceeding are *res judicata* in a subsequent action for absolute divorce.⁵ Thus, as of its date, a decree in favor of a wife in an action for separate

³⁸ *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 332 (1939).

³⁹ *Pepper v. Litton*, 308 U.S. 295 (1939); FLETCHER, PRIVATE CORPORATIONS § 41 (perm. ed. 1931).

¹ *Prough v. Prough*, 308 S.W.2d 294 (Mo. 1957).

² *Meegan v. Meegan*, 60 R.I. 131, 197 Atl. 221 (1938).

³ *Bidwell v. Bidwell*, 139 N.C. 402, 52 S.E. 55 (1905).

⁴ *Jenkins v. Jenkins*, 125 Cal. App. 2d 109, 269 P.2d 908 (1954)

⁵ *Gordon v. Gordon*, 59 So. 2d 40 (Fla. 1952).

maintenance establishes her as the innocent and the husband as the guilty party.⁶

In a few instances the question has arisen as to whether the doctrine of election of remedies bars the plaintiff in a prior support action from maintaining an action for absolute divorce.⁷ This question may arise, as in the principal case, where the husband has been guilty of misconduct for which the wife may obtain an absolute divorce or separate maintenance and she elects to sue for the latter and subsequently initiates an action for absolute divorce. The general rule in such cases is that the doctrine of election does not apply since the two remedies are not inconsistent inasmuch as they have different objects and effects.⁸ A decree awarding the wife separate maintenance affords her only partial relief whereas a decree granting her absolute divorce amounts to exaction of the full remedy.⁹ Thus, the result reached by the Missouri court in the instant case appears to be in line with the weight of authority.

While the problem before the court in the principal case has never arisen in North Carolina¹⁰ the laws of this state provide a perfect setting for it to rear its troublesome head. North Carolina, like Missouri, allows a wife to sue for alimony without divorce (another name for separate maintenance) when her husband has been guilty of misconduct for which the wife may obtain an absolute divorce.¹¹ Thus, when the husband commits adultery, for example, the wife has two courses of action which she may pursue initially, an action for alimony without divorce or an action for absolute divorce.¹² If she elects to sue for absolute divorce she may not obtain alimony.¹³ Therefore, she may elect to sue for alimony without divorce in order to receive continued support from her wrongdoing husband. If she then waits two years and seeks an absolute divorce on the grounds of two years separation,

⁶ *Jenkins v. Jenkins*, 125 Cal. App. 2d. 109, 269 P.2d 908 (1954).

⁷ *Id.*

⁸ *Id.*; *Kunze v. Kunze*, 153 Minn. 5, 189 N.W. 447 (1922).

⁹ *Jenkins v. Jenkins*, 125 Cal. App. 2d 109, 269 P.2d 908 (1954).

¹⁰ Perhaps the reason for this was stated by the court in the principal case where it opined that its inability to find a similar case in Missouri might be due to the fact "that in most instances the husband—loser in the suit for separate maintenance,—is content, if not highly pleased, to exchange that status for absolute divorce." *Prough v. Prough*, 308 S.W.2d 294, 297 (Mo. 1957).

¹¹ N.C. GEN. STAT. § 50-16 (Supp. 1957).

¹² The latter is not immediately available, however, since in her complaint for absolute divorce the wife must allege that to her knowledge the "facts set forth therein as grounds for divorce have existed . . . for at least six months prior to filing the complaint." N.C. GEN. STAT. § 50-8 (Supp. 1957). There is no such time requirement in the case of alimony without divorce and the wife can properly institute such action as soon as the grounds are discovered. N.C. GEN. STAT. § 50-16 (Supp. 1957); *Cunningham v. Cunningham*, 234 N.C. 1, 65 S.E.2d 375 (1951).

¹³ *Livingston v. Livingston*, 235 N.C. 515, 70 S.E.2d 480 (1952).

she will have her divorce but will lose her continued support.¹⁴ But, suppose she initially sues for alimony without divorce on the ground of adultery. Then, immediately after obtaining her alimony decree, she brings an action for absolute divorce using the same adultery as her ground. Would our court not grant the divorce? Since the weight of authority appears to indicate that the divorce would not be defeated because of the doctrine of *res judicata* or the doctrine of election of remedies, and since there does not appear to be anything in our statutes or case law to prevent this procedure, it is surprising not to find a case among our supreme court decisions discussing this possibility. This is especially surprising since this procedure, if allowed, would afford the injured wife a means of getting around our questionable policy¹⁵ of not allowing the wife any alimony in an action for absolute divorce.

That the better reasoning militates in favor of allowing an injured wife to maintain a subsequent action for absolute divorce on the same ground for which she has previously obtained alimony without divorce seems to admit of little doubt. The General Assembly has seen fit to authorize a wife both alimony and absolute divorce when her husband commits adultery. Nowhere have they indicated that they intended to deny one by granting the other. Moreover, as already indicated, whenever similar situations have arisen in other jurisdictions the courts have almost unanimously held that the wife may use the same ground for obtaining both forms of relief.

So long as the policy of this state is to deny alimony in actions for absolute divorce, but not to prevent an alimony decree previously obtained from surviving an absolute divorce except in certain instances,¹⁶ it would appear desirable for our General Assembly to pass a statute making it clear that a wife who has grounds for both alimony without divorce and absolute divorce can obtain both remedies. This would resolve any uncertainty which presently exists and could be accomplished by simply adding to the statute providing for alimony without divorce (G.S. § 50-16) a provision to the effect that

Any action initiated pursuant to, or judgment obtained under, the provisions of this section on grounds that would also constitute grounds for absolute divorce shall not bar the plaintiff in such action, or who obtains such judgment, from maintaining an action for absolute divorce on the same grounds.

JOHN R. INGLE

¹⁴ N.C. GEN. STAT. § 50-11 (Supp. 1957).

¹⁵ See Note, 36 N.C.L. REV. 203 (1958).

¹⁶ N.C. GEN. STAT. § 50-11 (Supp. 1957).