NORTH CAROLINA LAW REVIEW

Volume 48 | Number 1 Article 17

12-1-1969

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James Lee Davis

arrested earlier, why would he not be entitled to have excluded from use against him any evidence acquired by the state during the delay? Taken to its logical conclusion, such a new interpretation of the sixth amendment leads to an illogical result because the right to a speedy trial as a shield for the defendant's protection will have become a sword for his escape.[52]

By extending the right to a speedy trial to the period before indictment, the North Carolina court has opened "a Pandora's box of nice distinctions":[53] problems of proof, the precise point at which the right attaches, and the possibility of an exclusionary rule. But at least North Carolina has faced the problem of the potential defendant's right to a speedy trial. Other courts have availed themselves of the protective cloak provided by statutes of limitations[54] to avoid resolution of this problem. Such a cloak will have to be shed in the future, for a statute of limitations merely puts a maximum limit on the time for indictment; only the sixth amendment right to a speedy trial can put the minimum limit on it. North Carolina, in this area among the legal pioneers, has taken its first, and therefore the most difficult, step in recognizing that a potential defendant has, just as a defendant already under indictment, a basic right to a speedy trial.

JOAN G. BRANNON

Domestic Relations—Evidence—Testimony by One Spouse against the Other of Adultery Excluded under North Carolina Law

At common law neither husband nor wife was a competent witness in any action to which the other spouse was a party.[1] Except in criminal cases, this rule of disqualification has been largely overturned by statute or by judicial decision in American jurisdictions.[2] In North Caro-

[52] State v. Patton, 260 N.C. 359, 364, 132 S.E.2d 891, 894 (1969); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 853 (1957).

[53] *Lagging Right to Speedy Trial* 1617.

[54] *See generally* Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954).

[1] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 66 (1954) [hereinafter cited as MCCORMICK]; D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 58 (2d ed. 1963) [hereinafter cited as STANSBURY].

[2] Note, *Competency of One Spouse to Testify Against The Other in Criminal Cases Where The Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359-60 (1952). Both husband and wife are fully competent to testify either for or against their respective spouses in civil cases in the majority of jurisdictions. MCCORMICK § 66.

lina husband and wife are generally "competent and compellable to give evidence, as any other witness on behalf of any party" in a civil action.[3] The purpose of this section, North Carolina General Statutes § 8-56 (1953), is to abrogate the common law disability in civil actions and to list the exceptions thereto. One exception is that neither spouse is competent to testify "for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery."[4]

Though worded differently, a similar exception is found in North Carolina General Statutes § 50-10 (1966):

> The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial *neither the husband nor wife shall be a competent witness to prove the adultery of the other,* nor shall the admissions of either party be received as evidence to prove such fact . . . .[5]

It is significant that this provision in Chapter 50, Divorce and Alimony, is cross referenced to section 8-56 and that these statutes are often considered together.[6]

The proper application of these statutory rules of evidence was questioned recently in *Hicks v. Hicks.*[7] The plaintiff husband sued for absolute divorce on the grounds of a one-year separation.[8] The defendant wife answered by denying plaintiff's allegations. Alleging abandonment and indignities on the part of the plaintiff, she sought temporary alimony and alimony without divorce by cross action.[9] Plaintiff replied denying her

[3] N.C. GEN. STAT. § 8-56 (1953).

[4] *Id.* The other exceptions are not material to this note.

[5] N.C. GEN. STAT. § 50-10 (1966) (emphasis added).

[6] *E.g.,* 1 R. LEE, NORTH CAROLINA FAMILY LAW § 65 (3d ed. 1963) [hereinafter cited as LEE].

[7] 275 N.C. 370, 167 S.E.2d 761 (1969).

[8] The plaintiff also alleged his wife's adultery; however, he was nonsuited on this cause of action.

[9] N.C. GEN. STAT. § 50-16 (1966), providing for alimony without divorce, was repealed by the 1967 General Assembly. Ch. 1152, § 1 & ch. 1153, § 1 [1967] N.C. Sess. L. 1766, 1772. Mrs. Hicks had filed her cross action prior to Oct. 1, 1967, the effective date of repeal, and the court held that she had proceeded pursuant to this section. 275 N.C. at 373, 167 S.E.2d at 762-63. The court also held that an action for alimony without divorce under section 50-16 was a divorce action within the purview of that portion of N.C. GEN. STAT. § 50-10 (1966) that prohibits the husband or wife from testifying to prove adultery of the opposing spouse. *Id.* at 375, 167 S.E.2d at 764.

allegations and asserting defendant's adultery as a bar to them[10] and as justification of his separation from her.

At trial the plaintiff offered testimony of his wife's adultery both as recrimination[11] to her cross action and as rebuttal to her defense of willful abandonment. If allowed to testify, the plaintiff would have stated that on January 8, 1964, he returned home and discovered his wife engaged in an act of adultery.[12] The trial court ruled that this evidence was excluded by statute.[13] The record does not indicate upon which statute the trial court was relying nor does it include any judicial interpretation of either pertinent statute.

The court of appeals reversed,[14] reasoning:

> At the time the challenged testimony was offered, plaintiff's action for divorce on the grounds of adultery had been dismissed; Therefore, it was not offered "in any action or proceeding for divorce on account of adultery" as forbidden by G.S. 8-56. For the same reason, the prohibition set forth in G.S. 50-10 was not applicable because a divorce action grounded on adultery was not being tried at the time.[15]

The remainder of the court's opinion is concerned chiefly with whether the challenged testimony offended that portion of section 8-56 barring spousal testimony *"in any action or proceeding in consequence of adultery."* Hence, for all practical purposes, the court of appeals dismissed section 50-10 with only a sentence. In arriving at the conclusion that the testimony did

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[10] N.C. GEN. STAT. § 50-16 (1966) in part provided "that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony . . . ."

[11] The doctrine of recrimination provides, in effect, that "if both parties have a right to a divorce, neither of the parties has." 27A C.J.S. *Divorce* § 67 (1959). The court in *Hicks* considered the plaintiff's plea in bar as provided for in section 50-16 as a defense of recrimination, though the defendant was asking for alimony without divorce.

Recrimination has often been criticized and many jurisdictions have limited its application. It is not the purpose of this note to analyze the validity of the doctrine. However, for a thorough discussion of recrimination and its applicability to modern society, see Moore, *Recrimination: An Examination of the Recrimination Doctrine*, 20 S.C.L. REV. 685 (1968). It has been observed that this doctrine tends to breed collusion. 24 AM. JUR. 2D *Divorce and Separation* § 226 (1966). Thus, recrimination appears to be in direct conflict with the legislative intent of N.C. GEN. STAT. § 8-56 (1953) and N.C. GEN. STAT. § 50-10 (1966). See note 22 *infra*.

[12] Brief for Appellant at 6, Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

[13] Record at 56, Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

[14] Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

[15] *Id.* at 32, 165 S.E.2d at 683.

not offend section 8-56, the court of appeals explored the former North Carolina case law on the subject and emphasized that the purpose of the statute is to prevent collusive divorces.

The Supreme Court of North Carolina reversed,[16] although it agreed that section 8-56 was not controlling for the reasons given by the court of appeals.[17] However, the court distinguished section 50-10 from section 8-56 on the basis that:

> The provisions of N.C. Gen. Stat. § 50-10 are not limited to "any action or proceeding for divorce on account of adultery" or "actions or proceedings in consequence of adultery," but includes "every complaint asking for a divorce."[18]

The court relied heavily upon the statement of Justice Ruffin in *Perkins v. Perkins*:[19]

> The provision of the statute is so pointed and its language so plain—that in such trials, neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact—as to leave no room for doubt or construction.[20]

However, *Perkins* needs to be explored only to the next sentence of that opinion for an authoritative statement of the legislative intent behind the statute:

> This prohibition, as has been often said by the court, proceeds out of . . . that interest which society has at stake in the preservation of the marriage relations of its members, . . . and *it is the duty of the courts to see that neither this policy of the law nor public interest is impaired through the collusion of the parties, and in fact that it shall not even encounter the risk of being so impaired: for . . . this policy of excluding the admissions of the parties depends, not so much upon the ground that there is collusion between them, as upon the danger that there may be.*[21]

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[16] Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

[17] *Id.* at 374, 167 S.E.2d at 763.

[18] *Id.* at 378, 167 S.E.2d at 766.

[19] 88 N.C. 41 (1883).

[20] *Id.* at 43, *quoted in* Hicks v. Hicks, 275 N.C. 370, 378, 167 S.E.2d 761, 766 (1969). The court in *Hicks* pointed out that Justice Ruffin in *Perkins* was interpreting what is now N.C. GEN. STAT. § 50-10.

[21] 88 N.C. at 43 (emphasis added).

In *Perkins* the husband's divorce action on the grounds of adultery was pending at the time he proposed to testify that his wife had admitted to him her commission of an act of adultery. Thus, there existed a possibility of collusive divorce on those grounds. In the words of Justice Ruffin:

> It is impossible to conceive of a case more certainly coming within the mischief of the statute than the present, or one in which its enforcement could be more necessary, *because of the opportunity for collusion* afforded by the very nature of the accusation and the length of the time since the offence is said to have occurred.[22]

In a collusive divorce the parties are working together through a corrupt agreement toward a common goal of divorce.[23] The collusion may consist of "(1) the commission of an offense for the purpose of obtaining a divorce, or (2) the introduction of false evidence of an offense not actually committed, or (3) the suppression of a valid defense."[24] In any instance, the objective of collusion is divorce by mutual consent.[25] In such a case, the court, which is an interested party in every divorce action because of society's high regard for the marital relationship,[26] must assume the role of adversary, "probe for . . . collusion and deny a divorce if [it] seems to be present."[27]

[22] *Id.* at 44 (emphasis added). For further authority that "[t]hese statutes are designed not only to prevent collusion where the same exists, but to remove the opportunity for it," see 1 LEE § 65, at 265. *See* Biggs v. Biggs, 253 N.C. 10, 16, 116 S.E.2d 178, 182 (1960); Hooper v. Hooper, 165 N.C. 605, 608, 81 S.E. 933, 934 (1914); STANSBURY § 58.

An argument may be found in Broom v. Broom, 130 N.C. 562, 564, 41 S.E. 673, 674 (1902), that "in view of the strong feeling incident to contested divorce proceedings," a further purpose of the statutes is to prevent perjury. The possibility of perjury may be great in all contested divorce proceedings and does not appear to warrant a disqualification statute in the area of adultery alone. The argument in *Broom* has not been cited in recent opinions nor by the scholars in the field.

[23] 1 LEE § 85.

[24] Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1122-23 (1936).

[25] Divorce is not to be granted upon mutual consent of the parties alone. *Id.* at 1121. N.C. GEN. STAT. § 50-6 (1966), which allows divorce after a voluntary separation for a period of one year, is an indication of a breakdown in the historical requisite of fault before divorce. Approximately ninety-seven percent of divorces in North Carolina are granted under this statute. 1 LEE § 68. This change in policy in both North Carolina and other jurisdictions may foreshadow adoption of divorce by mutual consent. The thrust of such legislation would definitely mitigate the mandate against collusive divorces. Interestingly enough, though the court warns constantly of the danger of such divorces, a divorce has never been refused in North Carolina on the basis of collusion. *Id.* § 85.

[26] 1 LEE § 85.

[27] *Id.*

As reaffirmed in the supreme court's opinion, North Carolina recognizes the doctrine of recrimination[28]—a common law rule that bars the moving party's right to divorce (or, as interpreted in *Hicks*, alimony without divorce)[29] if it is proved that the moving party has himself been guilty of misconduct that would entitle the opposing spouse to a divorce.[30] Though offered in this context—to bar his wife's cross action for alimony without divorce—the husband's testimony was excluded as incompetent under section 50-10, a statute drafted to prevent collusion. Where one spouse pleads recrimination, however, the relationship of the parties is different from their relationship in a collusive proceeding. Successful recrimination precludes divorce, thereby frustrating the ultimate result of successful collusion.

Where such a plea is offered as a bar to the moving spouse's action, there is a true adversary proceeding. The parties, rather than being allied, are opposing one another; and the integrity of the court is not in jeopardy through collusion. Furthermore, it is quite doubtful that a husband would ever collude in his wife's action for alimony without divorce or that society is greatly concerned in a proceeding where the marital bond is not to be severed completely. Allowing the husband to testify to his wife's adultery in this instance would in no way offend the purpose of the statute.

The challenged testimony was also offered to justify the husband's leaving his wife. In this regard, such testimony would serve two purposes. First, it would be invaluable as a defense to his wife's cross action on grounds of abandonment. One issue presented to the jury was whether the plaintiff had unlawfully abandoned his wife *"without adequate provocation."*[31] Certainly, if the husband's contentions were believed by the jury, it should not have been answered in the affirmative.[32]

In addition, the testimony would have been beneficial to the husband's action for divorce on the basis of a one-year separation. The plaintiff would normally have been entitled to divorce upon a finding by the jury that the plaintiff and defendant had lived separate and apart within the meaning of North Carolina General Statutes § 50-6 (1966) for a period

[28] Hicks v. Hicks, 275 N.C. 370, 373, 167 S.E.2d 761, 763 (1969).

[29] See note 11 *supra*.

[30] 275 N.C. at 373, 167 S.E.2d at 763.

[31] Record at 19, Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969) (emphasis added).

[32] "The general rule is that the commission of adultery by one of the spouses justifies the other in leaving, or in remaining away from, the matrimonial domicile . . . ." 27A C.J.S. *Divorce* § 56(4) (1959).

of one year next preceding the filing of the complaint. A recognized defense to divorce under section 50-6 is that the separation was brought about by the plaintiff's willful abandonment.[33] The burden of proof on this latter issue was upon the defendant wife,[34] and she presented evidence to the effect that she had been abandoned. The husband sought to testify, as rebuttal to his wife's defense, that he felt justified in leaving upon finding her in the act of adultery. This testimony was also ruled incompetent for purposes of such rebuttal.

The policy of the statute by which the testimony was excluded would not have been violated if such testimony were ruled admissible in either of the above two instances. As a successful defense, the testimony would have defeated the wife's cross action based on abandonment. Collusion cannot succeed without a prevailing party. If the testimony were allowed as rebuttal to the wife's abandonment defense, and if such testimony were found as a fact by the jury, the husband would have succeeded in his divorce action—not on the grounds of adultery, but on the grounds of separation. It is doubtful that the policy against collusive divorces is applicable to proceedings under section 50-6,[35] for the nature of the statute presupposes an agreement between the parties to do an act that will entitle them to divorce. Furthermore, it is self-evident that if the wife had agreed to divorce on these grounds, she would not have raised the defense.

In analyzing *Biggs v. Biggs*,[36] a decision in which testimony offered in a different context was held to violate neither section 8-56 nor section 50-10 Justice Branch said in his opinion in the instant case: "[The] [d]ecision in *Biggs* rested largely on the interpretation of N.C. Gen. Stat. § 8-56 and upon the reasoning that *the public policy against collusion or the opportunity for collusion in divorce actions was not violated.*"[37] The

[33] O'Brien v. O'Brien, 266 N.C. 502, 504, 146 S.E.2d 500, 502 (1966).

[34] Taylor v. Taylor, 257 N.C. 130, 132, 125 S.E.2d 373, 374 (1962).

[35] *See* 1 LEE § 85. Certainly the court would refuse a divorce if it determined that the parties had colluded to defraud the court by testifying falsely to the fact of separation or in regard to the residency requirement. However, in *Hicks* the "separation" was established, and the issue before the court was whether the plaintiff was at fault in bringing it about.

[36] 253 N.C. 10, 116 S.E.2d 178 (1960).

[37] Hicks v. Hicks, 275 N.C. 370, 377, 167 S.E.2d 761, 765 (1969) (emphasis added). Justice Branch continued, *"In instant case it would seem that public policy would also demand that the wife be protected against the absolute defense of adultery which the husband sought to prove by his own testimony." Id.* at 377, 167 S.E.2d at 765 (emphasis added). It is unclear to what public policy Justice Branch referred in the above-quoted portion of the opinion. Certainly, "the public

opinion in *Hicks* indicates that the court, though appearing to approve the decision in *Biggs* and to recognize the policy behind section 8-56 upon which that decision was based, either overlooked or dismissed the fact that the policy behind section 50-10 is the same and should be controlling. The court turned from any discussion of policy, distinguished the two statutes on the fact that they are worded differently,[38] and rested its holding upon the quotation from *Perkins*[39] while ignoring completely the policy that Justice Ruffin found so important to that decision.

The effect of *Hicks* is that section 50-10 is extended beyond its policy-oriented base. Such an extension can lead only to future injustice and underhanded methods of procuring "competent" testimony. The insignificance of collusion in North Carolina divorce law[40] may indicate the advisability of repeal of both this statute and its counterpart in section 8-56. At least, *Hicks* suggests the need for a closer look by both the legislature and the court.

JAMES LEE DAVIS

Federal Jurisdiction—Federal Court Intervention as Protection Against Illegal Police Harassment

"I found there's no correlation between a clean-shaven cheek and morality—and there's no correlation between long hair and immorality."[1] The words might well have been those of the district judge who in the recent case of *Wheeler v. Goodman*[2] observed:

> Hippies, like more conventional householders, are entitled to the protection of the constitution, and the court would be remiss if it allowed

policy against collusion or the opportunity for collusion in divorce actions" was not violated.

Historically, preservation of family harmony has also been an important policy consideration of the court. There is no indication, however, that this policy has valid application to the statutory disability under consideration. Certainly, if the facts are as the husband contended, the parties in *Hicks* are beyond reconciliation.

[38] 275 N.C. at 378, 167 S.E.2d at 766.

[39] See text at note 20 *supra*. The court also relied partially upon Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964), a case presenting a similar factual situation, in which the testimony was summarily excluded without any discussion of policy.

[40] See note 25 *supra*.

[1] NEWSWEEK, Sept. 1, 1969, at 22A, quoting Beverly Hills, California, police chief Joseph Kimble after observing the White Lake, New York, rock festival.

[2] 298 F. Supp. 935 (W.D.N.C. 1969) (McMillan, J.)