Infants–Change of Custody

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Infants—Change of Custody

Petitioner Holstein (wife) had been awarded custody of the children in a divorce action against defendant Holstein (husband). Defendant Holstein subsequently obtained custody of the children due to petitioner Holstein's indiscretions. Petitioner Holstein asked to regain custody of her children on the ground that since they were taken from her the circumstances of the parties had "materially changed." The trial court granted her petition. *Held,* reversed. A material change in circumstances is not sufficient to award a change of custody. It must be shown that such change would materially promote the welfare of the children. *Holstein v. Holstein,* 160 S.E.2d 177 (W. Va. 1968).

The dissent by Calhoun, J., in this case appears to be particularly well-considered. It rests primarily on the general principle that the discretion of a lower court with respect to changing the custody of minor children, while subject to review, should not be disturbed unless a clear abuse of discretion is shown. This principle is discussed in 27B C.J.S. *Divorce* § 324 (1959).

The dissent also questions the contention of the majority that the petitioner must show that the requested change of custody will materially benefit the children. It is pointed out that this principle seems to rest ultimately on a series of cases involving a parent seeking custody of a child whom the parent had voluntarily surrendered, not a child taken from the parent in an adversary proceeding as was the situation in the instant case. The cases are listed in *Whiteman v. Robinson,* 145 W. Va. 685, 116 S.E.2d 691 (1960).

Negligence—Leaving Keys in Unattended Vehicle

Defendant Bethea parked his automobile and left his keys in the ignition, an act prohibited by South Carolina statutory law. The automobile was stolen and the thief negligently collided with plaintiff Stone's car. Stone brought an action against Bethea, the car owner, to recover for injuries sustained in the collision. The trial court granted the motion of the defendant for a directed verdict. *Held,* affirmed. The leaving of his keys in the car by Bethea was not the proximate cause of the injuries sustained by the plaintiff. *Stone v. Bethea,* 161 S.E.2d 171 (S.C. 1968).

W. Va. Code ch. 17C, art. 14, § 1 (Michie 1966), is similar to the South Carolina statute considered in the principal case. That West