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Domestic Relations

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Liability of infant & father for infant's negligence in operating auto
 1. A, an infant, obtains his father's automobile, without his knowledge and takes some young friends out for a ride. In doing so, he negligently runs over and kills a smaller child. Is the father liable? Is A liable?

The father is not liable. A parent is not responsible for the torts of his child unless ordered or ratified by the parent, or committed within the scope of the child's authority while acting for the parent. Even if the infant was driving with the knowledge and consent of his father there would be no liability on the father because of the relationship of parents and minor child as Virginia has repudiated the family automobile doctrine.

A is liable as infancy is no defense to a tort since tort liability does not rest on consent or agreement, and hence there is no chance in tort cases for the infant to be imposed upon.

Doctrine of necessities

2. A forbids his wife to contract any bills. She does so, however, and the creditors sue A. What must the creditors prove in order to recover against A, and upon whom is the burden of proof?

The creditors must prove (1) that the wife had authority to act as she did and the creditors had not been notified of the withdrawal of the authority, or (2) that the goods were necessities which the husband had wrongfully refused to supply his wife. Necessities mean any articles suitable to his station in life. The burden of proof in (1) is on the husband to show that requisite notice was given. In (2) the burden of proof is on the creditor. Note that in (1) the husband's liability is based on agency established by a prior course of dealing or by implication as in the case of ordinary household matters. It is a true case of agency. In (2) there is an agency by operation of law and it is immaterial that the husband told the creditor not to sell to the wife on credit.

Divorce a mensa et thoro

3. Name the ground in Virginia for a divorce a mensa et thoro.

V20-95. "A divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, abandonment, or desertion."

Guardian has no right to convert ward's money (personalty) to realty
 4. A guardian without leave of court invests his ward's money in real estate and has the property deeded directly to the ward. What are the ward's rights on becoming of age?

A guardian has no right to convert the personality of his ward into realty without the previous sanction of a court of chancery, 79 Va. 73. If he does so the ward has an election to take the land, or to subject it to the amount of her money so applied, and to hold the guardian for any difference. See 75 Va. 200.

Divorce a vinculo - effect on marital rights

5. Mrs. Brown obtains a decree of divorce a vinculo, which is wholly silent as to the rights of either consort in the property of the other, and likewise silent on the question of alimony. The year after the divorce is granted, Mr. Brown dies leaving a tract of land containing 1,000 acres. Has she any rights in the premises?

V20-107 "Upon the entry of a decree of divorce from the bond of matrimony, all contingent rights of either consort in the real and personal property of the other then existing, or hereafter acquired, shall be extinguished."

Suit by wife and by infant
 6. Mrs. Mary Brown, wife of Thomas Brown, and their daughter, Sarah, fourteen years of age, are both personally injured in the same accident through the negligence of the Richmond Traction Co. In whose name should the suit be brought for the injury to each, and to whom should the recovery be paid in each case?

As for Mrs. Brown V. 55-35 "In an action by a married woman to recover for a personal injury inflicted on her, she may recover the entire damage sustained, notwithstanding the husband may be entitled to the benefit of her services about domestic affairs; and no action for such services shall be maintained by the husband." Note that this changes common law rule. (b) As for Sarah Brown V. 87-87 "Any wife or entitled to sue may do so by his next friend." Prochein Ami. The style of the suit is Sarah Brown, an infant, by her next friend, John Doe V. Richmond Traction Co., Inc.

The judgment is an asset collectible only by the general guardian as the duty of the next friend ends with the obtaining of judgment.

Note: "Since the parent is entitled to the service and earnings of the child so long as the latter is legally under his custody--an infant--cannot recover for the impairment of his earning capacity during infancy, or for loss of time--. However he may recover for his mental or physical pain--and for the impairment of his power to earn money after arriving at majority". 31 C.J.

Note: By V#8-751 sums not exceeding \$1,000 due an infant by way of principal or income; by court order, may be paid directly to the infant or to his parent for his benefit without the intervention of a guardian.

Note: By V#8-629 -Where there is pending any action for judgment by an infant plaintiff against a tort feisor for a personal injury, any parent, or guardian of such infant, who is entitled to recover from the same tort feisor the expenses of curing such infant from the result of such personal injury, may bring an action for such expenses, in the same court where said infant's case is pending, and upon motion of any party to either case, made to the court at least one week before the trial, both cases shall be tried together at the same time as parts of the same transaction, but separate verdicts where there is a jury trial shall be rendered in each case, and the judgment shall distinctly separate the decision and judgment in each case. In event of the cases being carried to the Supreme Court of Appeals which may be done if there be the jurisdictional amount in either case, they shall both be carried together as one case and record, but the Supreme Court of Appeals shall clearly specify the decision in each case, separating them in the decision to the extent necessary to do justice among the parties.

Tort of deceit - scienter
7. A, twenty years of age, represents himself to B, a young widow, as of full age and induces her to agree to marry him. After B has expended \$1,000 on the preparation for her wedding, A breaks the engagement without cause. Can B maintain an action against him in tort for misrepresentation, and reason?

No. To recover in a tort action for deceit plaintiff must show (1)that defendant made a false statement (2)that the statement was material and was meant to be relied on (3)that plaintiff did rely on it (4)and as a result suffered damage. It does not appear that the age of the infant(whether 20 or 21) was material and that she incurred her outlay in reliance upon his supposed legal liability for breach of contract, nor that defendant made the statement with intent that she rely on it to her damage. Even if all this were so, it is arguable that a court will not indirectly enforce a contract by allowing a recovery in tort where the essential matter is one of contract. Infancy is a status and the making of a statement by an infant that he is of age no more makes him of age than the statement of a convict that he is free, makes him free.

Note: Many authorities indicate that at law(as distinguished from equity)the defendant must know that the false statement was false(scienter),or at least he must have made the statement recklessly. But in 148 S.E.785 the court said, "Whether the misrepresentation is made innocently or knowingly, if acted upon, the effect is the same. In the one case the fraud is constructive; in the other it is actual. The real question in such a case is not what the party making the representation knew or believed, but, was the representation false and the other party misled by it.-- (While there is a conflict of authority)we perceive no difference in the principle involved in an action at law for damages and a suit in equity for rescission."

Grounds - Divorce a vinculo (Also Procedure - divorce for cruelty)
8. Name the grounds of divorce a vinculo in Virginia.

There are nine grounds of divorce a vinculo in Virginia. Four are for matters occurring before marriage,(these should be called grounds for annulment),and five for grounds that may arise after marriage. These are covered by V#20-91.

BE)1. Incurable impotency existing at time of marriage.

FO)2. Prior to marriage either party without the knowledge of the other,had been

RE) convicted of an infamous offense.

*Impot.
Suits of
Minors*

3. Wife with child by another at time of marriage. Husband did not know this.

4. Wife a prostitute without knowledge of husband before marriage.

AFT) 1. Adultery or sodomy or buggery.

ER) 2. Sentenced to confinement in penitentiary. (3) Repealed in 1964.

4. Willful desertion for one year.

5. Living separate for 2 years with no cohabitation. Note: In this case no plea of res adjudicata or of recrimination shall be a bar to either party obtaining a divorce on this ground.

→ Note: To get a divorce a vinculo for cruelty first get a divorce a mensa at thoro. After one year's time from the separation of the parties because of the cruelty (if no reconciliation seems possible) the court by V#20-121 may merge the decree a mensa into a decree a vinculo. The injured party need give no notice that he or she is applying for a merger. The guilty party must give ten days notice, and a merger at the request of the guilty party is within the discretion of the court. Note: The one year is not from date of the decree a mensa as that would penalize an injured party who had obtained a divorce a mensa rather than waiting a year to obtain a divorce a vinculo.

Legal Obligation of Father to Support Child

9. How, if at all, is the legal obligation of the father to maintain his infant child affected by the fact (a) that the infant himself earns enough for that purpose? (b) that the infant has independent means of his own sufficient therefor?

(a) Since the father is entitled to the child's earnings if he allows the child to keep them, and they are sufficient, he would have fulfilled his obligations. (b) This does not affect the father's liability as the father has no right to the infant's property.

Negro

10. What proportion of Negro blood constitutes a Negro in Virginia?

V#1-14 provides that every person in whom there is ascertainable any Negro blood shall be deemed a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian.

Effect of divorce & mensa on property rights

11. State the effect both at common law and in Virginia of a decree of divorce a mensa as to the property rights of the parties.

At common law no effect, as the parties are still regarded as married for all purposes except living together. Under V#20-107 the court may make a property settlement. Under V#20-116 the court may also decree that the parties be perpetually separated and protected in their persons and property. Such a decree operates to extinguish the marital rights of the spouses in all after acquired property but has no effect on property owned before the decree. If the court does not make a property settlement or enter a decree for perpetual separation the common law rule would apply. Note: By 1962 amendment the word "estate" as used in V#20-107 shall be construed to mean only those rights of the parties created by the marriage in and to the real property of each other. Hence any property settlement is limited thereto.

Infant's Sale of Land

12. William Smith, an infant, sells and conveys to Charles Wines a tract of land for the sum of \$1,500 cash. Discuss briefly the infant's rights on becoming of age.

(a) He may tender back the portion of the \$1500 he still has and regain the land, by avoiding the contract.

(b) He may ratify the contract. In Virginia mere silence by an adult as to a contract made while he was an infant, without any acts by which he recognizes or takes the benefit of it, does not constitute a ratification; but he can avoid his contract or bring a suit to recover the property which passed from him, at any time before his action is barred by adverse possession or the statute of limitations. (78Va.584) Note that ratification (1) needs no new consideration (2) must be made with full knowledge of the facts (3) relates back to the time of the making of the contract (4) is not binding on the infant unless made after becoming of age, (5) in Va. must be in writing when it consists of a promise (6) Infant must ratify or reject whole contract.

Bound Out Minor

13. By whom may a minor be bound out, and what formalities are necessary to make it valid?

V#40-133: "Any minor may be bound as an apprentice by his guardian, or if none, by his father, or if neither father nor guardian, by his mother, with the consent entered of record of the circuit or corporation court of the county or city in which the minor resides; or without such consent, if the minor, being 14 years of age, agree in writing to be so bound."

Custody
14. Mr. and Mrs. John Smith, on account of domestic troubles, are not living together. They have an infant child who is in the custody of Mrs. Smith. Mr. Smith institutes suit for the custody of the child. What are the leading principles which will govern the court in passing upon the question?

(a) The welfare of the infant is the most important factor, but not necessarily controlling as a parent will not be deprived of custody in favor of a third party merely because the latter might be richer materially and spiritually.

(b) By V#31-1 and 31-15 parents of legitimate children who have not abandoned the family have equal rights to custody there being no preference on the sole basis of sex.

(c) Other matters to be considered are preference of child where old enough to know its own mind, age of child (custody of young children is normally given to the mother especially if father must be away most of the time), ability of parent to care for child, temperament and character of parent, and interest or lack of interest shown by parent in the welfare of child.

Services rendered to member of family - Recovery of value thereof
15. A child furnishes a parent with a home, and supports, nurses and cares for the parent. Can the child recover of parent's estate the value of his services to parent, and value of parent's board and keep?

Not in the absence of an express contract, as services rendered by one member of the family to another are prima facie gratuitous and rendered not for money but for the love of helping ones dear ones.

Desertion
16. In a suit for divorce filed by husband upon the ground of desertion, the evidence showed that the wife had not lived with her husband for more than one year, and had repeatedly declared her intention never to return to him. It further showed that the separation had, in the beginning, been by mutual agreement, which had not been in any way abrogated. What should be the decree?

In Latham v. Latham, 30 Gratt(71 Va.) 307, the court held that a separation by mutual consent is not desertion by either party. Note: (1) Desertion must be willful (2) for one year (3) if due to husband's fault wife goes elsewhere this is desertion on part of husband (4) if offending party offers in good faith to return offer must be accepted, (5) Insanity after desertion not a defense by statute.

Jurisdiction of Divorce Status in rem
17. What decree, if any, may be validly entered by court having jurisdiction against a non-resident defendant in a divorce case, who has been summoned by order of publication, duly executed, for a ground of divorce a vinculo, and as to whom the allegations of the bill are fully sustained by the evidence, as to (a) annulment of the marriage, (b) alimony, (c) and costs?

(a) Decree for complainant. The Country or State in which a person is domiciled has jurisdiction of the status of that person i.e. whether alien or citizen, minor or adult, married, or single, colored or white. Note that this is a judgment in rem to fix the status of the person, and not a judgment in personam against the non-resident. If it were the latter the court could not constitutionally get jurisdiction of the defendant and the Decree would be void (Pennoyer v. Neff).

(b) V#20-107 gives the court power to grant alimony. But a decree for alimony is a judgment in personam and is void unless the defendant has been served personally. If however, the non-resident defendant has property in the state, and the Court has control of that property, alimony may be granted to the extent of that property. (See M.J. '70, page 344)

Note: Alimony is not generally awarded in real annulment cases. It is incon-

sistent for a party to claim there was never a marriage, and then claim alimony because a husband owes a duty to support his wife.

(c) The same reasoning as in (b) applies here. See 19 C.J.197.

Support of Children

18. A wife obtains a divorce from her husband on account of the misconduct of the husband. The decree in the case awards her the custody of the minor children, but no question as to their support is raised or passed on. The wife expends a considerable sum in the support of the children and sues the husband to recover the amount. Can she recover?

Most courts hold that a father cannot escape liability for the support of his children by his own wrong, and would hold him liable. A few courts hold that the right to the minor's earnings is a condition to the father's duty to support, and if deprived of the former, he is not liable for the latter. 19 C.J.354.

Doctrine of Necessities

19. A husband notifies a groceryman not to sell groceries to his wife on his account. The groceryman ignores his direction and sells groceries to the wife, which are consumed by the husband and his family. Is the husband liable for the price of the groceries?

(a) If the husband consumed them knowing the facts he would be estopped from denying liability.

(b) If the husband did not know the facts he would not be liable if he had provided for the family in another way, for he has the privilege of dealing with whatever grocer he wishes.

(c) If the husband refused to provide for the family at all he would be liable because of his duty to furnish necessities. He cannot escape his duties by giving notices.

Infant Sues by next friend; Defended by Guardian ad litem; when appears in person

20. If money be loaned to an infant to purchase necessities, and it is so expended can the lender recover it from the infant, and if so, what is his remedy? How may infants sue and be sued, and when is it necessary for them in a chancery suit to answer in person as well as by guardian ad litem?

(a) Yes. While money is not regarded as a necessity, when it is actually spent for necessities some courts of equity have allowed the creditor to recover from an infant. A fortiori, where the money actually is given for the purchase of necessities, and is so spent, a court of equity should grant relief. The maxim applicable is "Equity looks to the substance and not the form." The remedy would thus be by bill in equity.

(b) An infant sues by next friend; is defended by a guardian ad litem. In the case of bills in equity for the sale or lease of an infant's lands V#8-679 provides "-the infant (if over 14 years of age) shall answer the bill on oath in proper person--".

Creditor's procedure ag. W's realty, stocks & cattle

21. X, a married woman, owns \$5,000 of realty acquired from her father in 1874; \$10,000 in stocks and bonds, acquired in 1885; and a large number of horses and cattle worth \$5,000, purchased in 1896. She has contracted debts to the extent of \$25,000 since her marriage, which took place in 1895. Which of her property can be subjected to the payment of her debts, and how must the creditors proceed?

Today all this property could be subjected to the payment of her debts, except her husband's curtesy in the land. The real property may be reached by getting a judgment which becomes a lien on it. Then file a bill in equity to enforce the lien. The cattle may be reached by means of an execution (fieri facias), levy and sale. If the stock can be seized it can be levied upon; if not the creditor may proceed by a creditor's bill in equity. See V#13-178 and 13-179.

OTHER IMPORTANT MATTER

1. There are four defenses to a divorce: where one party is able to make out a prima facie case.

(1) **Connivance.** X takes affirmative action to get his wife to commit adultery. See V#20-94.

Defenses to Divorce

DOMESTIC RELATIONS *Subrogation* Torts-Gretakis Case 1200. 174 S.E.841 Cited in 4 S.E.2d 343.

Facts: The minor child of G was injured in a collision between an automobile driven by her father and a train of the N.Ry.Co., as a result of the concurrent negligence of both. The father was fully covered by liability insurance which provided that any judgment against him would be paid by the company. The child sued the Ry.Co. and recovered. Thereafter the Ry.Co. sued the father for contribution under our Code which allows contribution in cases of torts of mere negligence not involving moral turpitude V3-627.

Held: For defendant father, since a minor unemancipated child cannot sue his father for a personal tort and Ry.Co. can have no greater right than original plaintiff to the right of whom he is in effect subrogated by the Code referred to above. But be sure to be able to distinguish this case from the Worrell v. Worrell case 4S.E.2d 343, at p.349.

DOMESTIC RELATIONS *Alimony - Court control* Adapted from 190 S.E.314.

In 1917 W secured a divorce from H a mensa et thoro. The court put the case on the stet(standing)docket, and ordered H to pay W \$25 per month alimony. In 1918 W accepted a conveyance of land in full settlement of all claims for alimony. In 1934 W sought to re-open the case and obtain alimony on the ground that H now had a great deal of property, and that she was in desperate financial straits. H answered setting forth the above-mentioned contract. W moved to strike out the answer as insufficient at law. What ruling?

The answer should be stricken since a contract as to alimony or in lieu of alimony is not binding on the court where it has retained control of the case by putting same on the stet docket and where not expressly approved by the court. Here the parties are still husband and wife and the decree is subject to modification according to the means of the husband and the needs of the wife. Decree for alimony does not merge into a contract by the parties. The amount is to be determined by the court and not by the parties.

DOMESTIC RELATIONS *Family Automobile Doctrine is rejected* 195 S.E.689.

In this case the reasoning being the family purpose doctrine is rejected.

"Accordingly, we hold that where the head of a family supplies an automobile for the use and pleasure of the family, permitting the members thereof to use it at will any member of the family thus using the automobile solely for his or her own recreation and pleasure does not become the agent of the head of the family, so as to make the latter liable for damages resulting from the negligent operation of such car.

"If public policy demands that the head of a family should be held liable in these circumstances, this should be accomplished, we think, by an appropriate act of the General Assembly, and not by judicial pronouncement."

DOMESTIC RELATIONS *Pleading Juris* 197 S.E. at p.430.

"The second major question presented, is whether, in an independent action at law instituted by minor children and a divorced wife, the court has jurisdiction or power to compel a father to pay out of his income a definite sum each month for the future support, maintenance, and education of his minor children."

Held: No such action at law, since it would tend to disrupt the family relations. Only a court of equity can determine such matters, and it is had enough there, without extending it to law. If, however, the father by his conduct has forfeited the right to participate in the supervision of his children, the mother may defray the expenses of their maintenance and recover at law for the monies so expended.

DOMESTIC RELATIONS *Pleading Continuing Juris. for Purposes of Child Support* 200 S.E. 622.

H deserted W and became domiciled in Montana. Danville, Va. was the last matrimonial domicile.

W secured a divorce for desertion. Service of process was made personally upon H in Montana which has the effect of constructive service by publication. The court also gave W custody of an infant child but did not award alimony because H never sub-

himself to the jurisdiction of the Va. court.

After W married again, H thought it safe to return to old Virginia to Rockbridge County. Whereupon W petitioned to re-open the case with respect to support of infant child, and H was personally served in Virginia.

Question: Has the Court of Danville jurisdiction over H to enter a decree in personam ordering him to support the infant child?

Held: The court having entered the original decree, had statutory power to revive and alter the decree, and hence court acquired jurisdiction over H's person upon filing of petition to reinstate and service of process upon H within the state.

DOMESTIC RELATIONS *Considerations in Alimony* 1 S.E.2d 328.

Where husband was retired minister around 70 years of age, was not in robust health, and had an afflicted son by a prior marriage to care for, while wife, a comparatively young woman, was more capable than he of making a livelihood, wife was awarded no alimony, though it was husband's fault that wife was compelled to ask for divorce.

In fixing alimony it must be born in mind that under modern conditions there is open to wife practically every avenue for making money that is open to her husband and that wife has no right to remain idle at the expense of her former husband, though it was through his fault that she was compelled to ask for divorce.

DOMESTIC RELATIONS 1 S.E.2d 340.

The trial court refused a divorce to either H or W on the ground that both were to blame. It also decreed that H pay W \$100 per month alimony. The evidence showed that W had refused to accept H's request that she return to him and live with him. Each claimed the other had deserted.

Discuss: (1) By Code 5111 as amended in 1938 the court "upon decreeing that neither party is entitled to a divorce may make such further decree as it shall deem expedient concerning the estate and the maintenance of the parties."

(2) But since W has refused the offer to return and in good faith she is the one to blame, so the trial court should have given H his divorce.

(3) Note: By acts of 1938 (p. 332) it is no longer necessary to allege and prove an offer of reconciliation where the divorce is sought on the grounds of abandonment or desertion thereby changing the rule as laid down in two earlier cases (See p. 343 of S.E.)

(4) "We have held that one spouse is not justified in leaving the other unless the conduct of the wrongdoer could be made the foundation of a judicial proceeding for a divorce. Nothing short of such conduct will justify a willful separation or a continuance of it."

DOMESTIC RELATIONS (Guardian and Ward) Equity 3 S.E.2d 162.

Q.1. If a guardian invests his ward's money in investments not expressly authorized by the Code is he liable for loss?

Q.2. Upon whom is the burden of proving the guardian's negligence?

Q.3. Is a guardian under a duty as a matter of law to require a surety or security when lending his ward's money?

A.1. The statute is permissive only. If the guardian uses due care even though invested in a way not mentioned in the statute he is not liable.

A.2. Upon the ward. He who alleges negligence must prove it.

A.3. The court said (p. 166) "we know of no law, statutory or otherwise which requires guardianship funds to be invested only in securities protected by a surety or secured by some form of lien."

Hence putting the funds in a bank where due care was used in selecting the bank was proper, and fact that the bank failed would not make guardian liable.

DOMESTIC RELATIONS *Tort suit by minor child against father* 4 S.E.2d 343.

Plaintiff was severely injured while riding as a passenger in a common carrier owned by her father. The driver of the bus in which she was riding was grossly negligent. By statute all bus owners that operate their busses as common carriers

Fract. case

must carry liability insurance. Can plaintiff recover from her father, plaintiff being a minor and unemancipated?

Held: Yes.--two judges dissenting. The common law rule must not be too strictly applied where the reasons for it do not exist. Those reasons are (1) it breaks down parental control leading to domestic discord (2) it injures other children by cutting down parents' ability to look after them. But if insurance company pays neither of these reasons apply. In three respects this case differs from Grotakis case 174 S.E. 2d. (1) Here the child occupied the position of passenger of a common carrier, the relation of parent and child being purely incidental; whereas in the other case the father was not a common carrier and the relation of parent and child was in no wise changed (2) Here the insurance was compulsory, there it was voluntary (3) Here the negligence was occasioned by the act of an agent in the service or his master, and the liability of the father was derivative, there the injury was inflicted by a personal act of the father and another, while the child was under his immediate parental control and discipline. Rule: Where the action is against the father in his vocational capacity and not for violation of a moral or parental obligation the unemancipated minor can recover, if liability insurance removes the reasons for immunity.

DOMESTIC RELATIONS Evidence Admissibility of Admissions 5 S.E. 2d 504.

Code 5106 provides in part that in divorce cases "the cause shall be heard independently of the admissions of either party in the pleadings or otherwise."

H wrote a vile letter to his wife telling her that she was unfaithful, and that she must leave his home and the children, and that he would never give her another penny.

Is this letter admissible in a divorce case as against the husband so as to entitle W to a divorce a mensa for desertion and cruelty?

Held: Over-ruling 12 S.E. 340, that the letter is admissible in spite of the phrase "or otherwise" for inadmissibility would lead to the most absurd and unjust results. For example a husband could write his wife that he was leaving her for good and the letter would be inadmissible to show intent to desert. Where a literal interpretation of a statute would produce such results no such literal interpretation will be given to such a vague expression as "or otherwise". So the letter is admissible as an admission not made in the pleadings.

DOMESTIC RELATIONS (Proof of Adultery) 5 S.E. 2d 504.

Proof offered to establish adultery, which is an intentional act and involves commission of a crime must be such as would lead the guarded discretion of a reasonable and just man to conclusion of guilt.

While adultery can be proved by circumstantial evidence, there must be more than mere indiscreet conduct or mere possibility.

DOMESTIC RELATIONS (Persons-Incapacity) H/C - Removal of Commitment 5 S.E. 2d 112.

P was adjudged insane and committed to W State Hospital and D qualified as Committee for P. Later P obtained his freedom by habeas corpus and demanded his property, but D insisted he was still incompetent.

Question: Is a judgment pronounced in habeas corpus proceedings, declaring a person sane without supporting or contradicting evidence, sufficient ground for the removal of a committee?

Held: While the judgment in habeas corpus is not conclusive that the ward is now able to manage his property, it is some evidence of that fact, and if no evidence to the contrary is introduced, the committee should be removed.

DOMESTIC RELATIONS Constitutional law Rt. to receive alimony 10 S.E. 2d 893.

(1) Mensa divorces were granted by the ecclesiastical law of England and alimony was always an incident thereto, and the amount of alimony could always be changed or modified by the court. This is Va. common law and per statutes on mensa divorces are declaratory thereof. Hence in Gloth v Gloth 155 S.E. 2d 112 it was held that alimony in such cases could be increased or decreased even though the statute gave no such express power and there was no reservation of a right to do so in the decree.

(2) but divorces a vinculo are purely statutory and unless there is a statute authorizing such a modification or the power to modify is reserved in the decree, the decree is immutable even if wife marries again.

(3) In 1934 the legislature changed the law so as to permit modification of a decree to pay alimony in the a vinculo case. The Supreme Court in 194 S.E.706 held this statute was not retroactive.

(4) In 1938 the legislature (V#20-109), expressly made it retroactive, whereupon one Eaton sought to have his old decree modified. The wife claimed the act was unconstitutional.

(5) Held: One judge dissenting--While there is a conflict of authority the act is constitutional. There is no contract to impair. The right to receive alimony is not a vested property right. Conditions may change greatly so that modifications ought to be allowed. Alimony is not property for the right to receive it cannot be sold, assigned, or levied upon. It is mere incident to the marital status.

Desertion & Non-Support Statutes - Domestic & Fam. Rel. Ct. has juris

DOMESTIC RELATIONS

Equity can award alimony to wife - and Va. 385.

W's husband, H, became infatuated with some female vampire and H left W. W does not want a divorce, but she does want alimony.

The desertion and non-support statutes make wife abandonment a crime. If the husband is convicted he may be fined as much as \$500 which fine can be turned over to the wife. If husband is acquitted wife has no appeal. If convicted he has an appeal. He may be sentenced to work on the roads at \$1 per day, the dollar to go to W who must be in necessitous circumstances. The domestic and juvenile relations court has exclusive original jurisdiction in all cases arising under the desertion and non-support statute.

Question: Does a court of equity have jurisdiction to award substantial alimony without any kind of divorce?

Held: Yes. Wife has no adequate remedy at law. She is entitled to support. Va. cases have recognized this right over and over. If equity once takes jurisdiction it does not give up until the legislature compels it do so. The desertion and non-support statutes only apply to the crime of the wife abandonment and were not meant to deprive a court of equity of its civil jurisdiction in such cases.

DOMESTIC RELATIONS

Equity can relieve by fraud which goes to 177 Va. 524.

S, a widow, and P, a widower, became engaged. S secretly only wished P's money so she required P to make a handsome marriage settlement in her favor which P did. Then they went through a formal marriage, S secretly intending never to let P have access to her. After marriage she became very cold towards P and refused to have any sexual relations whatever, so after 5 months P attempted to have the marriage annulled and the settlement in her favor set aside. The statutes list several grounds for annulment but fraud of the above sort is not mentioned. Can P succeed? *fraud not ad. for annulment by statute*

Held: (2 judges dissenting) Equity has general jurisdiction to relieve against fraud. The legislature in specifying some grounds for annulment did not mean to deprive equity of this jurisdiction, and where the fraud goes to the root of the marriage relationship itself as where there was really no intent to contract a marriage but only to go through the form and where the marriage has not been consummated by sexual relations, then equity will annul the marriage and rescind the settlement unless expressly forbidden by statute, for this power of equity is inherent and not created by statute.

DOMESTIC RELATIONS

Gift Subj. to Condition of Marriage 177 Va. 524, 554-555.

While S, a widow, and P, a widower, were engaged S told P she owed X some money and that this caused her embarrassment. P replied that he would pay it, and he did.

S later refused to really marry P. Is P entitled to a judgment against S for the money so paid (1, 128.57)?

Held: Yes. The gift was subject to an implied condition subsequent that she would in good faith marry him. "If an intended husband makes a present, after the treaty of marriage has been negotiated, to his intended wife, and the inducement of the gift is the fact of her promise to marry him, if she break off the marriage, he may recover from her the value of such present."

In the instant case P and S went through a marriage ceremony, but S secretly intended never to have any marital relations with P. This gross fraud went to the essence of the marriage justifying an annulment in equity.

DOMESTIC RELATIONS Contracts *Liability of estate of inmate* 177 Va. 684.

X was an involuntary patient in the SouthWestern Hospital for the insane. He was a resident of Virginia and a veteran. His committee refused to allow him to be transferred to the new Veteran's Hospital at Roanoke, Va. Is the veterans' estate liable for necessities furnished by the State?

The decision in this case has been overruled by Code ~~§ 67-125~~ which reads in part, "The estate of any person committed to any hospital for the insane shall be charged with any expense incident thereto, or for his maintenance therein," in an amount not to exceed \$40 per month.

DOMESTIC RELATIONS *Divorce* 178 Va. 285.

H and W were husband and wife. W went to Nevada and sued H for a divorce. It appeared to the merits and W was granted the divorce. H returned to Virginia and married a Miss Harper. Four years later W attacked the Nevada decree on the ground that it was based on perjured testimony and that the Nevada court had no jurisdiction.

Held: For H on a number of grounds.

1. He who comes into equity must do so with clean hands.
2. No one should profit by his own wrong.
3. She is estopped to attack a decree that she asked for with knowledge of all the facts.
4. Laches--Waiting 4 years and after H remarried would put Miss Harper in a terrible predicament. W should have acted promptly, if at all.

DOMESTIC RELATIONS *Duty to support*

An infant brought suit, by her mother as next friend, to require X to provide her support and maintenance. The Mother alleged that the infant was the legitimate child of X. X admitted infant was his daughter, but denied her legitimacy. X admitted living with the Mother for 20 years, but denied that any marriage had ever taken place. Is it X's duty to support the infant?

Held: Yes. Because under Sec. 61-7, "The Issue of Marriage Deemed Null in Law, or Dissolved by a Court, Shall Nevertheless be Legitimate". The evidence shows that there was at least a common law marriage, and while a common law marriage is void in Va., Code 6-7 is applicable, none the less, for it applies to a void marriage.

DOMESTIC RELATIONS (Pl and Pr) *Ties of SC over Alimony* 178 Va. 427

H and W were husband and wife. W secured a divorce a mensa because of H's cruelty and the court ordered H to pay W alimony for 1 year at the rate of \$10 per week. At the end of the year he extended the period for 6 months. He refused a further 6 months' extension. W appealed to Supreme Court of Appeals. Has it jurisdiction?

Held: Yes. While only \$260 is directly involved the right to receive alimony is a "matter not merely pecuniary" and hence the \$500 limitation is not applicable, as that limitation applies only to matters purely pecuniary.

DOMESTIC RELATIONS Pleading *Proceedings for support* 181 Va. 49

H and W were husband and wife. H failed to support W so she swore out a warrant for his arrest for a misdemeanor (V20-61). He was found guilty and fined \$500, but the court directed him to pay the \$500 to his wife in 12 a week instalments. Is he under any duty as a result of the above direction?

Held: No. Where a wife is destitute and the husband fails to support her she has two remedies (a) the statutory one, V20-62, in which she must proceed by petition verified by affidavit and, (b) by proceeding in equity under the inherent equity jurisdiction of an equity court to entertain such a bill. She cannot proceed by the issuance and execution of a warrant of arrest.

Juris of Divorce, Alimony

Good case

DOMESTIC RELATIONS Divorce-Pleading 1205. 181 Va.162.

H and W were husband and wife in Roanoke. H deserted W and their two children and went to Newport News. She went to her mother's home in Bedford, and sought a divorce a mensa et thoro, alimony, and a court order that H support the children. She was successful. What are the rights of the parties assuming that H was duly served but ignored the proceedings?

Held: (1) The divorce was void as it must be brought in the county or city of the last matrimonial domicile, or, at the option of complainant in the county or city in which defendant resides. There is no inherent power in a court of equity to grant any kind of a divorce. It has such powers solely as a result of statute. Hence the Bedford court had no jurisdiction and no plea in abatement was necessary. (2) But a court of equity does have inherent power to grant alimony and order support of children by the father. While Bedford County is the wrong county in which to sue for alimony this is a case of venue and not jurisdiction. Unless defendant files a plea in abatement he waives the correct venue. (3) As to the order to support the children, if the children are in Bedford County when the court of that county has jurisdiction and venue.

Conclusion: H and W are still fully married since the divorce was void, but he is under a duty to pay alimony and to support the children. The fact that part of the decree is void does not render the rest of it void where no good purposes would be accomplished by so holding.

DOMESTIC RELATIONS Desertion re: Workmens Comp 182 Va.14.

H and W were husband and wife. H was employed at the College of William and Mary. He treated his wife so cruelly that she left him in 1934. In 1942 H was killed in an accident occurring during and arising out of his employment, V# 65-68. of the Workmen' Compensation Act provides "The following persons shall be conclusively presumed to be next of kind wholly dependent for support upon the deceased employee:

(a) A wife upon a husband whom she had not voluntarily deserted or abandoned at time of the accident..."

Both the wife and the mother claimed the award. Who is entitled to it?
Held: The wife, W. If a husband drives a wife from his home by his cruelty that is his desertion of the wife, and not her desertion of him. Hence she has not deserted him and is conclusively presumed to be his dependent.

DOMESTIC RELATIONS Can parents of 14 yr. old girl annul marriage? 182 Va.111.

D, aged 21, took W, aged 14 of N.C. and by lying about her age secured a license, and the parties were married. They then returned to Newport News where they lived as man and wife.

Q.1. Can W's parents annul the marriage? Held: No, unless there is a statute to that effect. Va. has no such statute. At common law if girl is over 7 the marriage is not void but only voidable at the behest of the party who is not of the age of consent.

Q.2. Can P(W's mother) annul the marriage by suing as follows, "P as next friend of W." Held: No. This is not the proper style of the suit. Here P is really suing in her own right.

Q.3. Can W annul the marriage. Not in Va. as all infants must sue by next friend (who may be a total stranger). If there is doubt as to whether suit is for the best interest of the infant the court will appoint a commissioner to investigate and report.

Q.4. What should W's parents have done? She should have instituted a suit in the following style "W, an infant under the age of twenty-one years, who sues by P, her mother and next friend." The infant must be the plaintiff, and not the next friend. Then the suit will be on its merits and if it appears that it will be for the best interests of the infant to annul the marriage then it will be annulled whether the infant under the age of consent wishes it annulled or not.

Proper procedure for annulment

DOMESTIC RELATIONS *Adoption - Descent + Distribution* 1206. Revised April, 1957.

A, a woman of 25, adopted B, a 3 year old orphan, going through all the formal proceedings necessary for that purpose. A lived with her parents C and D. A died suddenly, a year after B's adoption, and C and D continued to care for B, treating him in every way as a grandchild, and frequently speaking of intention to provide for him. Twenty years later C died intestate and his administrator resists B's claim to share in the estate. The only other relative is a distant cousin, E. What are B's rights? B's rights, if any, will depend on the adoption statute, as adoption is unknown to the common law.

V#63-358 reads as follows: "For the purpose of descent and distribution, a legally adopted child shall inherit, according to the statutes of descent and distribution, from and through the parents by adoption from the time of entry of an interlocutory order or the final order if there is no interlocutory order and shall not inherit from the natural parents, except that a child adopted by a stepparent shall inherit from the natural parent or parents as well as from his parents by adoption. If an adopted child shall die intestate, without issue surviving him, his property shall pass, according to the statutes of descent and distribution, to those persons who would have taken had the decedent been the natural child of the adopting parents." Hence B has a child's share of C's property.

DOMESTIC RELATIONS *Contract by Infant*

A, an infant, sold an automobile to B, and warranted that it had been driven only 5,000 miles. As a matter of fact it had actually been driven more than 10,000 miles. A had bought the machine from C, and had been in possession of it for six months, during which time he had himself driven it only 2,000 miles. B seeks to rescind the sale and recover his consideration. Result? Here we have a contract that is voidable by each party, by A because of infancy, and by B because of breach of warranty going to the essence of the contract. While B cannot hold A for damages for breach of warranty (as that would be to enforce the contract against the infant) he can avoid (rescind) the contract and get his consideration back if A still has it. Even an infant is not allowed to enforce that part of a contract that is beneficial to himself and escape all liability on the part that is beneficial to the other contracting party.

DOMESTIC RELATIONS *Duty to support*

A and B were husband and wife. B, without any reason left her husband's home and went to reside with her brother, C. While there she contracted an illness which required the constant care of D, a doctor. D did not know that B was not living with her husband. A died and D sued his estate for the cost of the medical treatment. Result? Judgment for the defendant. A husband is under no duty to support a wife that has left him without cause while she is absent from his home. The husband has not misled the doctor in any way. It is immaterial whether the doctor knows the facts, or not. In such cases he is taking his chances on the question as to whether there was justification for the separation.

DOMESTIC RELATIONS *Desertion by W* 182 Va. 731.

H died intestate survived by a widow, W, and collateral relatives. W had left her husband inviting him, however, to come and live with her if he ever needed her. W, sought to be appointed administratrix. Is she entitled to be appointed?

Held: No. The husband is still regarded as head of the family and has the right to select the domicile, provided his wife is not thereby subjected to interference or indignities by third parties (or the choice is otherwise clearly unreasonable). Hence W was guilty of desertion. V#64-35. "now reads, "If a wife wilfully deserts or abandons her husband and such continues until his death she shall be barred of all interest in his estate as tenant by dower, distributee, or otherwise." Hence W has no rights.

Note on burden of proof. Who has the burden of proof in the above case on the issue of whether W's leaving her husband was justified?

W made the application for letters of administration after she had proven the marriage to decedent, the burden of going forward with, or producing, evidence was upon those opposing, and after all the evidence had been taken, the burden of proof was still upon the party who maintained the affirmative of the issue. This was W, so the burden of proving that she justifiably left H was on her.

DOMESTIC RELATIONS - Conflict of Laws *Juris: Alimony, custody, support* 182 Va. 775.

H and W married in Virginia and had a child, C. W procured a divorce and was awarded custody of the child, and alimony, and support of the child. W then went to Florida, and later re-married. C is now 13 years of age, and his father, H, who is now amply able to give him a good home wishes him at least part of the time. W claims that the Virginia court has no jurisdiction. Is this correct?

Held: Virginia courts do have jurisdiction. Code §20-109 expressly provides that further decrees affecting custody of children and amount of alimony and support money may be entered from time to time. This statute cannot be defeated by removing child from the state.

Query: Should H be required to pay back alimony and support money and attorney's fee to his former wife?

Held: Yes, provided W puts up a bond to assure that she will abide by decree as Va. court has no way to make W in Florida give H the child from time to time. H might have to resort to ancillary proceedings in Florida, and if W put him to all that trouble at expense she should pay for it.

DOMESTIC RELATIONS - *Constructive Desertion?* 183 Va. 96.

H and W were husband and wife. H allowed his mother to live in the house and showed her great affection. The mother wanted to know about all household matters, but refrained from taking charge of the house, and from criticizing the wife. However the mother so got on the wife's nerves that the wife left. Is this constructive desertion on the part of H?

Held: (2 judges dissenting) It is the right of the husband to choose the home and the members of the family circle as long as he protects his wife from imposition and allows her to be in charge of the house. In the instant case H owed a filial duty to his mother which he attempted to fulfill in a manner consistent with his duties as a husband. Hence he has not deserted his wife, and cannot be made to support her in another place other than his home.

DOMESTIC RELATIONS *Desertion has no effect on Death by Wrongful Act statute* 183 Va. 108.

H and W were husband and wife. H abandoned W and 12 years later W was negligently killed by D. Contest between H and W's mother as to the proceeds recovered under our death by wrongful act statutes. Who wins?

H wins. He is in class 1. The mother is in class 2. Widow cannot be construed as widower thereby putting widowed mother of deceased in same class as H (see last sentence of V. -638). The statutes declaring that desertion shall bar dower and curtesy, and deprive the offending spouse of any share in the other's estate have no application as the recovery in a death by wrongful act case where there is a statutory beneficiary is no part of deceased's estate, but belongs by the very terms of the statute to the statutory beneficiaries.

DOMESTIC RELATIONS *Brown v. Brown - Paternity* 183 Va. 353.

X promised to marry Y and because of this promise Y permitted X to have sexual relations. A child was born as a result. X refused to marry Y. The child filed a bill in equity against X to compel him to support her. X demurred. What ruling. Demurrer sustained. Va. has no bastardy act. Hence the common law is in force and at common law the father of an illegitimate child owes no duty of support. The child should address her case to the legislature and not to the courts. *cf: law by § 20-1.1, father is liable if he admits paternity before the court.*

DOMESTIC RELATIONS *Age of Consent Statutes* 188.

182 Va. 681.

H, aged 18½, married W aged 17 in Maryland. They both lived in Virginia but could not get the consent of their parents to the marriage so they went to Maryland and H swore he was 21 and W swore she was 19. Under Maryland law parental consent is necessary if the male is under 21 or the female is under 18.

H now wishes to annul the marriage. Can he do so?

Held: No. The provisions in the Maryland and Virginia statutes are directory and preventive, rather prohibitive of the consummation of the marriage status. In this case both parties were above the age of consent which in Virginia is 18 for the male and 16 for the female.

DOMESTIC RELATIONS

Tarr v. Tarr - Condonation as a bar to divorce 184 Va. 443.

H married W. She committed adultery. After H instituted divorce proceedings he cohabited with her for at least one night. He led her to believe he was going to drop the proceedings and forgive her. Instead he obtained the decree, had sexual relations with X a little later and married X a day after the expiration of the statutory waiting period (then six months). Both W and X became pregnant. After W's child was born she instituted this bill to vacate the divorce. In the meantime X's child had been born some four months after her marriage to H. Held:

(1) H condoned W's adultery if he had sexual relations with her even if only once. Under W's 20-94 such condonation was a bar to his right to a divorce.

(2) H was under a duty to tell the court about the condonation. Not to tell it was a fraud on the court.

(3) Condonation is more than a defense that has to be alleged by the respondent. It is a bar to the maintenance of the action.

(4) X and X's child by H are not necessary parties to the proceedings as there is no issue between W and them.

(5) H urged that W's delay in contesting the suit barred the present proceedings because the rights of innocent parties had intervened. But X would have had the child even if W had instituted the action as soon as she had had a reasonable time in which to do so. It is just as important to protect a first wife and child from fraud as to protect a second wife and child. Besides under Code 64-7 both children are legitimate. H brought all these troubles on himself by his own duplicity and incontinence.

DOMESTIC RELATIONS---Property---Wills

Funeral Expenses

184 Va. 502.

H and W were husband and wife. W made a will leaving all her property to her brother B. She had only personal property. B paid her funeral expenses. What are the rights of the parties?

Held: (1) By V's 64-11 & 64-13 H is entitled to one half the personal property. But, who pays the funeral expenses?

(2) Held that under V's 11 the funeral expenses (before a distribution of personalty) are to be paid from the estate of the deceased.

CE. *Hall v Steward*, 135 Va. 334 where wife's estate was realty and husband had paid her funeral expenses. It was there held that the husband had no claim against his wife's estate as it was the common law duty of a husband to pay the funeral expenses. But V's 64-171 & 64-1 relating to real estate make no mention of funeral expenses, and hence the two cases are distinguishable.

DOMESTIC RELATIONS *Father not liable for K's of Emancipated child* 185 Va.1.

X was an emancipated minor 20 years of age. He became sick and went to P's hospital for an operation from which he died. Is X's father responsible for the hospital bill?
Held: No. X made his own contract. He neither received or expected to receive any funds from his father. He was on his own. To hold that X was not emancipated would be most disconcerting to employers. Hence the father owed no duty. Criticism: Liability for support, and emancipation, can be entirely separate matters. Under V-20-61 and 20-83 there is a statutory duty on both parents and children to support each other regardless of age when they are unable to support themselves and the parents or children (as the case may be) are able to furnish such support. A violation of such statutes is a misdemeanor. Note: Emancipation of an infant does not make him sui juris. Hence his contracts are still governed by the rules applicable to infants' contracts.

DOMESTIC RELATIONS *Adoption* 185 Va.82.

H and W, husband and wife, promised X on her deathbed that they would adopt a little child X had taken from an institution. H and W raised the child as their own but never legally adopted it. On the death of H and W many years later the child claimed to be an heir. Is he? Held: No, the right to inherit as an adopted child cannot in Virginia be created by a private contract. The statutory steps are essential. The rights of inheritance cannot be left uncertain and dependent upon evidence of private, and perhaps secret agreements. Besides a contract to adopt a child is not per se a contract to leave the child property as both natural legitimate and adopted children may be totally disinherited.

DOMESTIC RELATIONS *Comity enforcement of foreign decree of support* 185 Va.108.

W divorced H in Florida and the court ordered H to pay W \$42 per month alimony for support of W and child and reserved the right to change the amount of such alimony as future events might make desirable. H skipped off to Virginia and refused to pay. W filed a bill in equity in Virginia against H and asked for a decree similar to the Florida decree. The court granted this relief, and when H still failed to pay, put him in jail for contempt of court. H contends a Virginia court of Equity had no jurisdiction and that W's only remedy is to sue at law for the amount of back alimony as she would for any other debt, and that the Florida decree was not a final one as the court reserved the right to modify it.

Held: Under principles of comity a Virginia court of equity could give the same effect to the Florida decree in Virginia that it would have in Florida as long as no local public policy was violated, and it was the duty of H to support his own child even if he left Florida, and it was immaterial that the Florida Court had reserved the right to modify its decree.

DOMESTIC RELATIONS *Presumption of death - Bigamy - Workmen's Comp* 185 Va.202.

W married H one in 1938. He left her a few weeks later and there is no proof as to whether he is living or dead. Without getting a divorce she married H2 in 1942. He was killed in an industrial accident in 1946. Is she entitled to workmen's compensation? (Note: She was tried on a bigamy charge and acquitted).

Held: No. The bigamy charge had to be proved beyond a reasonable doubt and the employer was not a party thereto. In the instant case the burden is on W to prove she is the wife of H2. Since there is no presumption of death until after the expiration of seven years and no proof the H one was dead in 1942 the marriage was void. H one was alive in 1938 and in the absence of any evidence to the contrary he is presumed to be alive until after the expiration of seven years. (Code 6239).

DOMESTIC RELATIONS *Ct. of Equity has no power to transfer A's property to W* 185 Va.269.

H and W were wealthy and unhappily married. W obtained a divorce and the court awarded her alimony in the sum of \$300 per month and impounded stock certificates owned by the husband to secure the payments and ordered the clerk to write on each certificate. "The stock evidenced by the within certificate is expressly subject to the lien and charge thereon provided for in the decree of the Court of Law and

Held: Under our statutes a court of equity has no power to transfer to the wife title to a specific portion of the husband's property. There is no such power without a statute expressly so allowing it.

Under V20-114 the court may compel the husband to enter into a recognizance in which he binds himself to abide by the court's decree, and upon his failure or refusal to do so, he is subject to commitment to a workhouse or to the State convict road force. This, plus the power to punish for contempt, should afford the divorced wife ample protection.

DOMESTIC RELATIONS *Kim lieu of Alimony - cannot be varied* 185 Va. 320.

H and W separated, and while divorce proceedings were pending they agreed in writing that H should pay W \$40 per month alimony. The divorce was granted and the contract approved by the Court in lieu of alimony. The amount of alimony in Virginia may be varied according to subsequent conditions. Some years after the above divorce was granted H sought to reduce his payments because of changed conditions. What decree assuming such changed conditions? Held: No change in the \$40 per month. This is not alimony but a contract in lieu of alimony, and since it was approved by the court its terms govern. As no provisions was made for reducing or increasing the sum due by H to W in the event of changed conditions the court cannot change the contract. Note: V:20-109 makes the above rule a statutory one: The Court may increase, decrease, or cause to cease any alimony thereafter accruing--as the circumstances may make proper; provided however, if a contract signed by the party to whom such relief might otherwise be awarded is filed with the pleadings or depositions then no decree or order directing the payment of alimony--shall be entered except in accordance with their contract unless such party raises objection thereto prior to entry of the decree."

DOMESTIC RELATIONS *"issue" does not include an adopted child* 185 Va. 409.

F, a father, conveyed land to S, a son to S for life, and then to his children, but if he die without issue then to S's next of kin on his father's side. F died, and fifteen years later S adopted A. S died and the land was taken by eminent domain proceedings. To whom should the proceeds of the land be paid?

Held: When F used the word child, and the expression die without issue he clearly had in mind those of his blood stream. He did not mean to include a stranger by adoption. In Virginia an adopted child is not "issue". Hence A receives nothing.

DOMESTIC RELATIONS *Evidence V: 9-268 Dead Man's Statute 151 Va. 755, 145 S. E. 249* *Quantum meruit - Step-child*

H married W who had a 12 year old child, P, by a former marriage. After P grew up he established a home of his own. W died and H was in poor health. H told P that if P would care for him for the rest of his life he would pay him for his services. P took care of H for three years. H died without having paid P. There is no corroboration of the express contract. P sued H's personal representative on the quantum meruit doctrine and not on the express contract. Defenses: (1) P cannot recover because he is suing a person incapable of testifying and under V9-268 there must be corroboration. (2) No agreement to pay will be implied as between parent and child in cases of this sort as it is presumed the services are given for love and not money.

Held: For P. Since he is not suing on the express contract it is immaterial that that contract can not be proven. P is entitled to recover under the quantum meruit doctrine since H was not his father but his stepfather. After the death of P's mother he owed no duty legal or moral to H and the rule relied upon by P's personal representative has no application to this case.

Note: A step-father, as such, owes no duty to support his step-children, but if he accepts them into his family and stands in loco parentis to them he has the rights and duties of a father as long as that relationship continues.

A zoning ordinance of Arlington County forbids two families to occupy a single family dwelling. Miss C, a lawyer, who lived in her home rented out the basement to a negro family much to the annoyance of neighbors. She was fined \$10 for violating the zoning ordinance.

Held: Reversed. Miss C was not a family. The ordinary meaning of that word connotes two or more people and an element of dependency legal or moral. The only way a single person living alone can become a family is by statute and then only for the purpose named (for example for the U.S. Census).

H and W were husband and wife. W assaulted H with a whiskey bottle while he was asleep. He managed to escape but was reasonably afraid to return to his home. Soon thereafter he was killed while at work. Is W entitled to Workmen's Compensation?

Held: No. Under the act a spouse who has deserted is not entitled to compensation. By desertion is meant desertion of the marriage relationship and not desertion of the home. Here W has deserted that relationship. It is immaterial whether the erring spouse leaves the home or forces the other to do so. It is desertion in either case.

H and W were husband and wife and had two small children. H was a reasonably good man but he had his faults, one of which was cruelty to his wife. She left him and took the children with her and went to live with her parents. She started divorce proceedings but suddenly died before a decree was entered. The maternal grandparents have become very attached to the children and the children to them and they are ideal people to raise the children. H wants his children. What judgment?

Held: For H. A father will not be deprived of his children so far as grandparents are concerned except under extreme circumstances. Third parties are not entitled to their custody merely because they can provide a better home. The fact that the children prefer the grandparents may be considered but is not conclusive. The father (and not the grandparents) is the natural guardian of his own children.

For the first time in the history of the Supreme Court of Appeals the Court was called upon to pass upon a question involving the measure of punishment which may be lawfully inflicted upon a child by a parent, or one standing in loco parentis. D and his wife were entrusted with a 7 year old girl by the girl's mother. She filched some candy from a box in the house and was so severely beaten with a switch and a belt that she had marks all over her from some of which blood was running. D and his wife had otherwise been extremely good to the little girl. D was convicted of a criminal assault and battery. The court instructed the jury that if D's punishment exceeded the bounds of due moderation he was guilty. Was this error?

Held: Not error. Under the minority view a parent is not liable unless he acts maliciously, or inflicts a permanent injury. But by the great weight of authority if the punishment exceeds due moderation (an elastic term depending on many circumstances) the parent is liable criminally. Here the punishment did exceed such moderation and it is immaterial that D has otherwise been good to the child.

W secured a divorce from K and then married H before the expiration of four months. C, a child, was born to this union. Three years later H and W quarrelled. H sought a divorce or decree of nullity and custody of C.

(1) Did the court have jurisdiction to declare the marriage void: Held: Yes, even though the parties know it is void a judicial decree to that effect may be very desirable. V/20-33 & 20-96 make provision for this situation. (2) After the court declared the marriage void did it have jurisdiction to further decree as to the care and custody of C? Held: Yes. If a court of equity has a case it will give complete relief. Moreover, the statutes involved make no distinction between a divorce decree and a decree of nullity.

Domestic Relations(cont)

(3) Does the father have as much right to be considered as the mother as custodian of the child, or is C legitimate only for purpose of inheriting? Held: V# 84-7, to the effect that issue of marriages deemed null in law, or dissolved by a court, shall nevertheless, be legitimate) though a part of the chapter on descent is a broad statute legitimating such children for all purposes and hence the father of the child has as much right to be considered as has the mother. The decree of nullity absolves H from any further duties to W but not to C.

DOMESTIC RELATIONS

Workman's Comp

187 Va. 844.

V# 5-63 is part of the Workman's Compensation Act and includes among those conclusively presumed to be wholly dependent upon a deceased employee "parents in destitute circumstances", provided there be no total dependents pursuant to other sections of the act such as a wife or dependent child. P had a wife and three sons all unmarried whom we will call A, B, and C all of whom lived at home. P was 58 years old and in extremely poor health and found it impossible to get a job he could keep. C was killed in an accident occurring during and arising out of his employment. He had never contributed a penny to P's support. P's wife was the pillar of the family and made \$2,000 a year with which she supported them. A made \$1940 a year, and B made \$1680. Neither A nor B paid a cent for room and board, nor turned a hand about the place. Under V# 20-8, if a child is capable of supporting a destitute parent he is under a legal duty to do so. The Industrial Commission held that a man who was being supported by his wife, and had two children living at home able to pay for room and board and whose aggregate income was over \$5500 annually was not in destitute circumstances. What judgment on appeal?

Held: Industrial Commission is all wrong. The Workman's Compensation Act puts the burden on the industry and not on a faithful wife, or children who may soon get married and need the money for themselves. Wife was under no duty to support husband so P's support is precarious indeed. The duty of the Employer's Insurance Carrier takes priority over the duty of the child. Since P is deprived of the benefit of the death by wrongful act statutes if his son is killed when Workman's Compensation applies it is only fair to give him the sums allowed under this portion of the Compensation Act.

DOMESTIC RELATIONS

IMPORTANT*Jur. s. of Custody*

188 Va. 312

, 49 S.E. 2d 270.

In 1943 the Corporation Court of the City of Alexandria granted W a divorce from H and gave her the custody of their child, D. W later moved to Fredericksburg. H visited D at W's habitation there and was shocked at conditions. W agreed to let H have the custody of the child and H took the child away. After W married again she decided she wanted D back so D was brought back by one S against H's wishes. H then brought habeas corpus proceedings in Fredericksburg for the recovery of D. The evidence showed D much preferred to live with her father and that W was not a fit person to keep the child so the Fredericksburg circuit court granted H's petition. What result on appeal?

Held: Reversed and dismissed. The Fredericksburg court had no jurisdiction. The Corporation Court of Alexandria under our laws retains jurisdiction over custody cases. Other courts of concurrent jurisdiction cannot act as appellate courts over the Alexandria Court. Otherwise we would have the utmost confusion. The parties cannot oust the Alexandria Court of its jurisdiction by moving out of Alexandria or even out of the State except under extreme circumstances. D remained a ward of the Alexandria Court. If the Fredericksburg court lacked jurisdiction the evidence considered by it has no legal effect. W's agreement with H is void. The custody of children is not the subject of barter.

DOMESTIC RELATIONS *Considerations for Custody* 49 S.E.2d 349, 188 Va.259.

H and W were husband and wife and had a six year old daughter. W left H and went home to live with her mother without just cause. She took their daughter with her and refused to return to H. Both H and W came from socially prominent homes. H makes some \$12,000 a year as a scientist. His scientific work takes most of his time. H stays at his parents' home. His father is 71 and his mother 67 and they are both devoted to their granddaughter. W is 26 years of age, lives with her divorced mother in Princeton, N.J. is of good moral character, and has no income of her own. W's mother is well off financially. The trial court gave custody of the child to H for the school year and to W for the summer vacation. What result on appeal?

Held: (Two judges dissenting) that since the daughter is so young; since H is away at work; and since a mother is much nearer her own child than a grandmother; and since the welfare of the child (rather than the punishment of a deserting wife) is the principal consideration; and since the decree can be modified if desirable after the child is older, the mother should have custody of the child from August 15th to June 15th of each year and receive \$110 per month for the support of the child, and H should have custody for the remaining two months each to have a right of reasonable visitation.

Dissenting judges said the discretion to be exercised was that of the trial court; and that a deserting wife with no income of her own and little sense of marital responsibility was not a proper custodian.

DOMESTIC RELATIONS *Contempt* 188 Va.511

W secured a divorce from H and the court ordered him pay some \$300 to W's lawyer. H refused to pay the lawyer and he was sent to jail for contempt of court. H appeals claiming that he cannot be imprisoned for debt.

Held: H is not being imprisoned for debt but for willful failure to obey the court. The \$300 fee is analogous to alimony, and can be enforced by contempt proceedings. Moreover V2-378 expressly provides that the judge of every court having common law jurisdiction in civil cases shall have power by process of contempt to punish disobedience. Held also that the contempt in this case is civil contempt and not criminal and hence that V/19-3 laying down a 1 year statute of limitations for the prosecution of suits to collect any fine, forfeiture or penalty has no application.

DOMESTIC RELATIONS *Recrimination* ✓ 20-117 188 Va.526.

H was guilty of cruelty and desertion (less than 2 years) during which desertion W committed adultery. Is H entitled to a divorce a vinculo as against the defense of recrimination?

Held: Yes. The reason is of necessity historical. Many jurisdictions including Virginia (138 Va.132) have held that any ground for divorce (whether absolute or from bed and board only) may be successfully pleaded in recrimination against a charge otherwise justifying an absolute divorce. But in 1934 V20-117 was passed. "The granting of a divorce from bed and board shall not be a bar to either party obtaining a divorce from the bonds of matrimony---, unless the cause for absolute divorce was existing and known to the party applying for the divorce from the bonds of matrimony before the decree of divorce from bed and board was entered". This statute now declares our public policy and 138 Va.132 is over-ruled for if a ground for divorce from bed and board, sufficiently proved in court is insufficient upon which to base the defense of recrimination a ground merely justifying such a divorce is certainly insufficient. To hold otherwise would place one who had secured such a decree in a position less favorable than if it had not been obtained. The result would be unjust and so unreasonable as to amount to an absurdity.

H and W borrowed \$4,000 on their joint note and bought a house in their joint names. They then became estranged. H spent \$1,000 on improvements on the house and paid off the note taking an assignment of the same. H died. H's personal representative claims that W owes him \$500 for her share of the improvements and \$2,000 for her share of the note. Is this correct?

Held: (1) As to the improvements the presumption is that if a husband improve his wife property he is doing this as a gift in fulfillment of his moral and legal obligation to support his wife which obligation exists even in case of estrangement. (2) As to the note, payment by one joint maker discharges the note, but if H paid more than his share he will be entitled to contribution independently of the note unless he meant a gift to his wife. Such a gift is presumed for the reason stated above, but the presumption is rebutted here as H did not ask to have the note cancelled when he paid it, but took an assignment instead. Hence W owes H's estate \$2,000.

H and W were husband and wife. They became estranged and W became sick and required extensive hospital treatment. W's brother asked H to foot the bills. H refused to pay the bills as long as W had any money of her own. As a result W paid \$700 of her own money. H died. W put in a claim against his estate for \$700. Should the claim be allowed? Held: Yes. H owes a duty to support W. He does not fulfill that duty by telling W to use her own money. If W had voluntarily used her own money that would indicate a gift to the husband. But the facts as above stated do not indicate a voluntary gift.

H married W in 1923 and had nine children by her. They separated in 1936. H married X in 1941 stating at the time he secured the license that he was divorced. H was killed in the course of his employment in 1948 and X claimed to be his widow. W testified that as far as she knew H had never gotten a divorce from her and that she had never been served with papers of any kind. She had, however, remarried. Is X entitled to workmen's compensation?

Held: Yes. H was either innocent or else a perjurer and bigamist. The law presumes innocence rather than crime. Presumptively the second marriage was valid--a rebuttable presumption of law. This presumption was not overcome as a matter of law by W's statement that as far as she knew H had never procured a divorce. Twelve years separation without making any claim on H and her own remarriage without getting a divorce do not add to her case. So H and two minor children of H by W were held to be his dependents.

H and W were husband and wife. W was seriously injured due to the negligence of T, and H paid \$1300 in hospital and doctor bills. Va. 5134 (now Va. 55-36) reads in part, "In an action by a married woman to recover for a personal injury--she may recover the entire damage sustained including the personal injury and expenses arising out of the injury whether chargeable to her or her husband, notwithstanding the husband may be entitled to the benefit of her services about domestic affairs and consortium; and no action for such injury, expenses or loss of services or consortium shall be maintained by the husband." W recovered a judgment of \$2500 which admittedly included the \$1300 hospital and doctor bill. W is now mentally incompetent. Does her committee hold \$1300 of the sum so recovered in trust for H?

Held: (3 judges dissenting) He does not. H only paid his own debt as he is liable for his wife's necessities. To hold otherwise would be to legislate rather than to construe a statute that is perfectly plain. Note: As a result of the above decision the 1950 Legislature promptly changed the statute as follows, "and any person, including the husband partially or completely discharging such debt shall be reimbursed out of the sum recovered in the action" by the wife whenever paid to the extent that such payment was justified provided that written notice shall have been served on the married woman and on the defendant prior to any settlement of the sum recovered by her.

H entitled to reimbursement out of W's recovery in order to pay W's hospital expenses if adequate notice given

W secured a divorce from H on the ground of desertion and asked for the custody of their child. H knew of the divorce proceedings but failed to appear. Before these proceedings as well as afterwards the child had been with the Burtons who had taken care of him for \$9 per week. W remarried and went to Ohio. The Burtons became attached to the child and obtained W's consent to an adoption. H then reopened the case as far as the custody of the child was concerned. W did not return to defend as she had no available funds, and the Burtons were not made parties. H was awarded the custody and when the Burtons (who are admitted to be worthy in every way) refused to surrender the child H brought habeas corpus. It further appeared that H had remarried and was going to Florida to live, that outside of forced allotments while he was in the Service and a few trifling Christmas presents, he had never given a penny for the support of the child even when the child was critically ill with pneumonia. Held: The Burtons have the superior right. The father has lost most of his equities by his indifference. The father and his new wife would be strangers to the child in a completely different environment and outside the jurisdiction of the court. Such a change would be at best only an experiment apt to turn out unsuccessfully. The best interests of the child require that well enough should be left alone.

DOMESTIC RELATIONS Alienation of Affections and Criminal Conversation *allowed in Va.* 190 Va. 389.

H married W when W was about 21 years of age. H left home every day at 1 P.M. to go to work and returned about midnight. W became infatuated with D who was 58 years of age, quite wealthy, married, and the father of three daughters all in college. In an action to recover damages for alienation of affections and criminal conversation there was sufficient circumstantial evidence to lead the guarded discretion of a reasonable and just man to a conclusion of guilt of adultery. The court admitted evidence of D's wealth. The jury awarded H \$5,000 compensatory damages and \$10,000 punitive damages. Was this proper?

Held: Yes. In Virginia actions for alienation of affections and criminal conversation have not been abolished. D's conduct showed a reckless and wanton disregard of H's marital rights. In cases involving punitive damages evidence of D's wealth is admissible and \$10,000 is not clearly out of reason.

DOMESTIC RELATIONS Inheritance by Adopted Children *Before statute* 190 Va. 1006.

B died in 1937 devising his property to his wife for life, remainder to C in fee, but if C predeceased his wife then to C's son, D, in fee, and if both C and D should predecease his wife then to D's heirs. C died in 1938 and D died in 1940. W died in 1947. Contest between D's first cousin and D's foster sister who was legally adopted by C before the testator's death. What result?

Held: For the cousin. When D died in 1940 his heir or heirs took a vested remainder. This was prior to the 1942 changes in our adoption laws, and the law of 1940 applies. At that time we had no statute that dealt specifically with the problem and by the great weight of authority in the absence of statute one cannot make an adopted child some one else's heir by adopting the child. So while D's foster sister was C's heir, she was not D's heir. Note: The court expressly refrained from expressing an opinion on the present law which purports to allow an adopted child to inherit from and through its adoptive parents as well as from and through its natural parents.

DOMESTIC RELATIONS Contracts to relinquish marital rights 1216. 191 Va.654.

D's wife refused to leave Pennsylvania and live with him in Virginia unless he would first sign a statement that in consideration thereof he would relinquish all marital rights in her property. He signed such a statement, and as a result thereof, his wife came to Virginia. She died a few years later and left the bulk of her estate to her sister, S. D renounced the will, but S claims he is barred from taking anything by the signed statement mentioned above.

Held: There was no consideration for D's signing the statement. She was already under a duty to live with him. "The law--will not allow married persons to discard this relation without justification and renew it for money." Nor is D estopped. One of the elements of an estoppel is injury, and the wife's doing what she was under a duty to do is no legal injury.

DOMESTIC RELATIONS Contracts Fraud Damages for void marriage 192 Va.8.

P sued D for damages arising from the consummation of a void marriage. Will such an action lie, and, if so, is the proper remedy in quasi-contract or in tort for fraud?

Held: Such an action will lie. P has been done a great wrong and has suffered untold grief and humiliation, and an irreparable injury. But an action on quasi-contractual principles is not the proper remedy as marriages are not commercial transactions and a wife is more than a housekeeper. P's damages are not limited to the reasonable value of her household services less the value of room and board she has received. She may sue for the tort of fraud and deceit. Note: If the marriage is voidable rather than void no action for damages will lie.

DOMESTIC RELATIONS Meaning of reconciliation 193 Va.156.

After H and W had been married for some seven years they separated and made a valid property settlement. A year later W was killed in an automobile accident. She left a will leaving all her property to X. H renounced the will and claimed a husband's portion on the theory that the parties had been reconciled and that the reconciliation avoided the property settlement. The only evidence of reconciliation was a desire on W's part to return to H, that she had accompanied him on a few business trips, and that H had given her a wrist watch as a present.

Held: "More casual cohabitation between the parties, after the separation, unaccompanied by resumption of normal married life together, or reasonable explanation for their failure so to do, is not sufficient to show a reconciliation * * *".

DOMESTIC RELATIONS Divorce Corroboration 193 Va. __, 70 S.E.2d 339

"The main object of the provision of the statute requiring corroboration is to prevent collusion. Where it is apparent that there is no collusion, the corroboration needs to be very slight." "Confirmation is not necessary for that removes all doubt, while corroboration only gives more strength than was had before. It need not rest in the testimony of witnesses but may be furnished by surrounding circumstances adequately established."

Held: Refusal of wife to live with her husband in the home selected by him, without legal justification, constitutes desertion, and proof that the refusal has been uninterrupted and continuous for the statutory period, without more, is sufficient to establish an intent to break off the marital relation.

DOMESTIC RELATIONSp-Creditors Rights--Wills *Support of child after father's death* 193 Va. 631.

H committed adultery, and W secured an absolute divorce. There was one child and H was ordered to pay \$40 per month alimony and support money for the child. Three months later H conveyed his realty to his father and soon thereafter died intestate. W later remarried. Is the realty subject to a lien for alimony and support money to date of child's becoming twenty one or otherwise self-supporting?

Held: (1) Duty to pay alimony to W ceased on H's death but portion of \$40 per month allocable for support of minor child continued despite fact this might prevent H from disinheritng such child. The father owes a high moral duty to provide for support of his child. The welfare of the child is just as important as the right to disinherit. By statutes in Virginia the decree creates a debt, and creditors whether children or not should take before devisees. (2) A decree for alimony and support money is a lien on the husband's land. Otherwise he could flout the court by conveying or encumbering his realty. Note: V#8-388 provides that in a decree for alimony payable in future installments the court may provide that such payments shall not be a lien on the real estate of the person liable, or may designate the real estate on which there shall be a lien, or may subsequently on petition release such lien whether accrued or to accrue. V#20-114 provides that the court may require the giving of a recognizance, with or without surety, to secure compliance with its decree for support or alimony.

Note: The rule laid down above to the effect that the husband's estate may be made liable for the support of his minor children has been changed by statute. V#20-107 now reads in part, "the court shall have no authority to decree support of children or alimony to continue after the death of the father or husband."

DOMESTIC RELATIONS Honest Man's or Fool's Bastardy Act (1952) V#20-61.1

By statute in proceedings for non-support whenever the court finds that the parents of a child are not married but that the father admits before the court that he is the father of the child, or admits that fact in writing, under oath, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock.

DOMESTIC RELATIONS

193 Va. 727.

Before their marriage and while H was courting W he injured her by driving a car in a grossly negligent manner. After marriage W sued H. Result?

Held: No action lies. The Virginia statute emancipating married women (55-36) creates no substantive rights but merely means that if the wife had an existing cause of action at time of suit, then she can sue in her own name. No statute in Virginia gives a wife a right to sue her husband for an ante-nuptial personal tort.

DOMESTIC RELATIONS

Domicile for Divorce

72 S.E.2d 321, 194 Va. 165.

H secured a Nevada divorce from W1 in 1946, and soon thereafter married W2 who had also obtained a Nevada divorce from her husband. H and W2 returned to Virginia. W1 secured an admittedly valid North Carolina divorce from H in 1947. In 1950 H was killed in an accident covered by workmen's compensation. He was survived by M, who was H's dependent child by W1, and by W2. M contends that his father's Nevada divorce was void because of fraud practiced on his mother and hence that he is the sole dependent. W2 claims that a divorce decree cannot be attacked by third parties.

Held: The decree of a sister state is presumed to be valid. The instant decree at best is voidable only, and can only be avoided by someone who had an extant right at the time the decree was rendered. At that time H was not an employee covered by workmen's compensation, and hence M had no existing right under such a law. Hence he cannot now attack the validity of the Nevada divorce and W2 is also one H's dependents.

Note: (1) If a person is domiciled in Nevada it is immaterial that his motive for being so domiciled was to get a divorce. The fact of domicile and not the motive for the choice is the controlling question. (2) The domicile of one party to a divorce creates an adequate relationship with the state to justify its exercise of power over the marital relation.

Miss P, aged 29 and a nurse, before giving birth to an illegitimate child made arrangements for putting it out for adoption as soon as the child should be born. The baby was born at 8:42 a.m. She signed papers consenting to its adoption at 7p.m. while she was still under the influence of drugs given her during childbirth, but the evidence indicated that she knew what she was signing. The foster parents are excellent people and have become devoted to the child. Miss P has now changed her mind and wants the child back.

Held: She is not entitled to get it back except for "good cause". A mere change of mind is not good cause. Even if she still was somewhat under the influence of drugs when she formally consented to the child's adoption she had already made up her mind when she was not under their influence. It would not be for the best interests of the child or fair to the foster parents to take him from a fine home and bastardize him in return for a bare chance that someday he might be better off if that were done.

DOMESTIC RELATIONS- - Pleading and Practice *Necessity to plead Alleged fraud* 194 Va. 313
 W wished to get her marriage to H annulled on the ground of fraud. Her bill alleged "(3) That the defendant fraudulently made love to her; took the money which she had collected as a widow of a World War II veteran, had no idea of staying married to your complainant, but merely to take her money and property to the extent of \$5,000; and that he wilfully deserted your complainant in addition to his fraudulent scheme * * *". W later took depositions to the effect that at the time of the marriage, and unknown to her, H entertained a preconceived and fixed purpose to have no children. H failed to put in an appearance. Is W entitled to an annulment? *in annulment*

Held: No. "Where fraud is relied on, the bill must show specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defense accordingly, and since it must be clearly proved it must be distinctly stated." "Though appellee failed to answer the bill, it could not be taken for confessed. Thus the necessity clearly to allege and prove the fraud relied upon was in no wise lessened by appellee's failure to appear and plead." (The Court refused to decide one way or another as to whether such an intent if properly alleged and proved would be ground for annulment.)

DOMESTIC RELATIONS *Divorce A mensa or Annulment* 194 Va. 313, 317.

W was a widow of a soldier killed in action, and was entitled to a \$75 a month pension as long as she remained unmarried. She also had some \$3,000. H courted her, married her, ran through with her money in the restaurant business, and then deserted her. He had told X that if lost money in the restaurant business he could "blow". She charged that H married her solely for her money and she now wishes the marriage annulled so she can again get her \$75 per month. The trial court gave her a divorce a mensa instead of an annulment.

Held: Correct. The alleged fraud is not proved. "The testimony does show that appellee was interested in appellant's financial status and that he did, both prior and subsequent to the marriage, prevail upon her to expend her money upon him. Yet it also shows that they lived together for several months, and he desired to and did enter into a business and did not leave until that venture wholly failed." Case distinguished from one where W married H, a soldier, solely to get his allotment, and more if he died, with no intention of ever living permanently with him.

DOMESTIC RELATIONS *Torts Emancipation must be evident before child can sue father; unless injury intentional* 194 Va. 577
 P's mother died when she was 11 years old. D, her father, turned her over to his mother who took care of her, supported her, and made all decisions of a domestic nature on his income tax return. He stated that he "had not washed his hands of her" and would have taken her back had his mother died, and that he had not contributed to her support because he had gotten into debt as a result of his wife's illness and death. Nothing was ever said or done about adoption. P was injured due to D's gross negligence while driving his automobile. Is he liable?

Held: No. The above facts only constitute a temporary custody in P's mother because of an emergency, and at best only amount to a partial emancipation. A child, in order to sue her father for a personal injury arising from a parental situation, must have been fully emancipated. It makes no difference that the negligence was gross, or that the father carried insurance. The Gretakis case was followed. Note: The court said that if the father had intentionally injured his daughter the case might be different, but expressly refrained from ruling on that point. Cases are collected in 19 A.L.R. 2d, at p.451.

DOMESTIC RELATIONS *Generally, Alimony is payable only while both parties live.* 194 Va. 102.

W secured a divorce and a decree for alimony directing the husband to pay her \$125 per month until her death or remarriage. Several years later H died. Is W still entitled to collect until she dies or remarries?

Held: No. "Until she dies or remarries" is surplusage and does not by implication change the usual rule that alimony is personal and is payable only as long as both parties are alive. Note: If the parties had made a contractual settlement providing for \$125 per month until the wife died or remarried, and the court had approved that settlement then W would have been entitled to collect from H's estate until she did die or remarry.

DOMESTIC RELATIONS *Interlocutory decree of adoption* 195 Va. 125.

P, an 18 year old girl had an illegitimate child. She consented to D's adopting it. An interlocutory decree to that effect was entered and D took the child. Shortly thereafter the natural father, H, married P and acknowledged the child as his own. P and H then demanded the return of the child. H proved that he had never consented to its adoption while D claimed that an acknowledgment after adoption could have no retroactive effect.

Held: For P and H. An interlocutory decree of adoption does not become final until at least a year after its rendition. During the year the decree can be set aside for legal cause. In the case of a legitimate child the consent of both parents is necessary. Marriage of the parents plus acknowledgment by the father legitimates by V#64-6 and constitutes good legal cause for the setting aside of the interlocutor decree unless the father also consents to the adoption.

DOMESTIC RELATIONS *Torts Workmen's Compensation* 195 Va. 239.

H and W were husband and wife. H owned and operated a small saw mill. He hired his 18 yr. old son, S, at a \$1 per hour to work in the mill. The workmen's compensation law applied. S was killed in an accident occurring during and arising out of the employment. S had been contributing \$11 a week towards his mother's support and the mother claimed she was entitled to an award. The Insurance Co. claimed that a minor unemancipated son could not sue his father in tort in Virginia.

Held: For the mother. She is not suing for a tort. S and his dependents are entitled to the benefits of the law just as are any other industrial workers, and liability under the act does not depend on the tort law of negligence. Hence the rule relied on by the defendant has no application.

DOMESTIC RELATIONS *Child's rt. to testify in custody proceedings* 1220. 195 Va. 611.

H and W were divorced. H wished a decree with reference to custody of one of the three children modified so that he would have sole custody of said child who was 12 years of age, polite, exceptionally intelligent, and devoted to his father. The court refused to allow said child to testify in these proceedings stating that he realized how children are about such things.

Held: This was error. The evidence was competent and relevant since the child had reached an age of some discretion. While the child's wishes are not necessarily controlling they are entitled to some weight in such a case and evidence thereof should not be excluded.

DOMESTIC RELATIONS *H entitled to custody of child #5 W dies* 81 S.E.2d 432.

W obtained a divorce from H and also custody of C, a four year old child. W died unexpectedly and W's mother obtained temporary custody. W and the child had been living with W's parents. H now wishes custody.

Held: Unless H is clearly morally or financially unfit to have the custody of his child, he is entitled to such custody as the natural guardian of his child. The law presumes that child's best interests will be served in that manner. Note: In 151 Va. 136 it was held that this rule was applicable even in the case of a bastard child.

DOMESTIC RELATIONS--Dower--Alimony *1150 1060* 81 S.E.2d 605.

H sought a divorce from W. It was properly refused. In her cross bill W did not ask for a divorce, but she did ask for alimony and support money for three minor children. H was in the real estate business and it was necessary for him to get W's signature to numerous deeds. The trial court in effect (1) granted W's request for alimony and support money, (2) absolved all of H's realty from the lien of the decree except one specific piece which had been the home place and (3) extinguished W's inchoate dower in all of H's realty.

Held: (1) The court in Virginia can grant separate maintenance without a divorce of any kind; (2) both alimony and separate maintenance are decrees in personam and specific property of the husband cannot be allotted to the wife, (3) but under V#8-388 the court can free all or part of the husband's land from the lien created by the decree; (4) V#20-107 allows a court to make a decree with respect to the estate of the parties (a) upon decreeing any kind of divorce and (b) upon decreeing that neither party is entitled to a divorce. In the instant case neither of these conditions were satisfied so the decree absolving H's realty from W's contingent dower is erroneous. It was also unfair to the wife as alimony ceases on H's death while dower lasts as long as W lives.

DOMESTIC RELATIONS *Merger of mensa into a vinculo denied* 196 Va. 26.

Compare these two cases. (1) H and W are separated under a decree a mensa. They make a valid property settlement. Later they have sporadic sexual relations. Held in 193 Va. 156 that the property settlement was not voided by the above conduct.

(2) In the instant case W secured a decree a mensa from H for desertion. While this decree was in force H returned home over week ends and lived with W as husband and wife. After the expiration of the statutory period, H, the guilty party, sought to merge the a mensa decree into an a vinculo decree. Held: He cannot do so. More latitude is granted the parties with reference to their private contracts than with reference to their marital status as the State has an interest in this last. W could not have gotten a merger since the separation must have continued by V#20-121 without interruption for the statutory period from the date of the a mensa decree, A fortiori H, the guilty party, is not entitled to have a decree for a merger.

DOMESTIC RELATIONS--Contracts *Separation K held void here* 196 Va. 86

Neither H nor W had grounds for divorce, but at H's insistence H and W agreed to separate on the following terms which were reduced to writing and signed by each. H gave W \$6,000 and each surrendered his or her marital rights in the others property. W sought and still seeks a reconciliation, but H stated that he had made up his mind. H now wants a divorce and W wants \$50 per month support money until H will take her back.

Held: Separation by mutual consent is not desertion so H is not entitled to a divorce; also that the separation contract was void as tending to disrupt families. Hence W is not bound by it and is entitled to reasonable support money. Note: If the parties had already separated, or were about to separate for a justifiable cause then a separation contract determining the rights of the parties is permissible.

DOMESTIC RELATIONS Pleading and Practice 196 Va.97.

(1) H brought divorce proceedings against W. An officer served same by tacking the notice on the front door of W's home while no one was there. Is this a good service? Yes, since W, or no one over the age of 16 who was a member of W's household, was present. Substituted service on an individual, when permissible is the same as personal service.

(2) In the above case W had already filed a bill in a proper court for separate maintenance. She did not file her answer to H's bill for divorce within twenty one days. She applied to the court for an extension of time which was granted on condition that she drop her separate maintenance case in the other court and file it as a cross bill in the court in which H instituted his divorce proceedings.

Held: An abuse of discretion to attach such a condition. She had a right to pursue her case to its end in the other court as those proceedings were prior to the divorce proceedings.

DOMESTIC RELATIONS Conflict of Laws 196 Va.117.

H and W, husband and wife, both domiciled in Virginia entered into a separation agreement that was contrary to our public policy because it was made in furtherance of a plan to secure a divorce. H then went to Nevada, established a bona fide domicile, and secured a divorce which incorporated the separation agreement in the decree. W appeared by attorney and made no objection. Now W wishes the separation agreement to be declared void because against our public policy.

Held: The Nevada decree had made the separation agreement of greater effect than a mere contract. It is now part of the decree to which full faith and credit must be given and our public policy must yield to federal constitutional requirements. Note: The court distinguished this case from the McFarland Case 179 Va.418 in which H and W were domiciled in Virginia. H sued W for a divorce and lost. H then established a bona fide domicile in North Carolina and then sued again alleging no new grounds for divorce and won an uncontested case at which W made no appearance. Held that the North Carolina decree was void in Virginia at least for some purposes. The full faith and credit clause does not require any state to give more credit to an out of state decree than to its own prior decree. But in the principal case there was no Virginia prior decree while there was in the McFarland Case, supra.

DOMESTIC RELATIONS What constitutes Mutual Consent 196 Va.698.

H and W were husband and wife. W left H without cause but H made no objection. The trial court refused H a divorce because of the rule that separation with mutual assent is not desertion.

Held: Case reversed. If W did desert, H is not bound to seek a reconciliation. It is her conduct and purpose and not his state of mind that determines whether there is desertion. There was no evidence that there was a pre-arranged plan agreed on by both that they would henceforth live separately.

DOMESTIC RELATIONS MCFARLAND CASE CREDITORS RIGHTS 196 Va. 889.

H sued W for divorce in Virginia in 1935 and lost. H then went to North Carolina and established a bona fide domicile there. He then sued W again for a divorce although there were no new facts. W did not learn of the proceedings in time to defend and H was granted his divorce. W then obtained a decree from a Virginia court that the divorce was invalid in Virginia, which decree was affirmed by the Supreme Court of Appeals so she was married to H in Virginia but not in North Carolina. After the two Williams v. North Carolina cases were decided by the United States Supreme Court H filed proceedings in the federal courts to set aside the Virginia decree that he was still married to W in Virginia. It is admitted that no one knows what the outcome of this litigation will be. While things were in this status the parties drew up a contract whereby W agreed to procure a Virginia divorce

from H to which she was clearly entitled, and H agreed to pay off an \$8600 deed of trust obligation on W's home at the rate of \$60 per month. A divorce decree was entered and the contract above set forth was approved and adopted by the Court. H continued payments until his death. In the meantime he had transferred all his property to his second wife who refused to make further payments after H's death. She successfully contended in the trial court that the contract was invalid as against public policy in that its object was to facilitate divorce by agreement.

Held: Reversed. Public policy cannot be accurately defined but in general is a principle of law under which freedom of contract is restricted by law for the public good. Here no public good would be promoted in further upsetting the status of the parties after years of complicated litigation, remarriages, and no chance of reconciliation. Besides when the court adopts the agreement of the parties they are vested with the property rights therein stated by virtue of judicial sanction and not by mere contractual agreement. Note: While such a decree, unlike alimony, creates no lien, it does give equitable rights. It would seem to follow that the conveyances made by H to his second wife of insurance, savings bonds, and realty as tenants by the entireties with survivorship are subject to W's rights in the event that the deed of trust is not paid off as H had agreed.

DOMESTIC RELATIONS Torts suits by H. vs W. 89 S.E.2d. 69, 197 Va.216.

H and W were husband and wife. H owned a car which was insured by I against loss by fire. W set the car on fire on purpose. H collected \$900 insurance. I now claims that it is subrogated to H's rights against W, but W claims that one spouse cannot sue the other for a tort.

Held: Under present law both H and W can hold property as separate individuals. Thus it has been held that a wife who owned realty could bring an action of trespass against her husband. Since a husband is no longer liable for his wife's torts he would not be suing himself. So one spouse may sue the other for property damage wrongfully done by one against the other. Note: The court expressly reaffirmed its prior decisions that no such action will lie for personal torts such as assault and battery, false imprisonment, defamation, malicious prosecution, or negligent injury to the person of the other.

DOMESTIC RELATIONS Right of H to determine family home 197 Va.465.

W lived with her mother with the consent of her husband, H, for many years. He visited her week ends until they had an argument. H, whose work required him to live in the City of X, repeatedly requested W to come to X to live with him and was even willing for W to bring her mother along. W declined the offers and was granted a divorce and alimony.

Held: Reversed. H has the right to determine where the family home will be as long as he acts reasonably and in good faith.

DOMESTIC RELATIONS Action for fraud & deceit for misrep of Law & Fact 197 Va.667

D who had been married three times and was not yet divorced from his third wife falsely told P that he had obtained a final decree of divorce from wife number three and could legally marry P at once if they went to Maryland for the ceremony.

Held: P has an action for fraud and deceit. Even if the statement made by D be regarded solely as one of law they were in a fiduciary relationship and in such a case a misrepresentation of law is treated in the same way as a misrepresentation of fact.

Query: Is it true that persons divorced in Virginia cannot marry (unless they re-marry their divorced spouses) within four months? Not always, for this restriction (V#20-118) is applicable only to divorces granted on grounds arising subsequent to the marriage.

→
4 yrs. restriction
as marriage
following divorce

DOMESTIC RELATIONS

Evidence Pleading and Practice*Deposition; Best Evidence*
197 Va. 681.

H married W and they lived together as husband and wife for one day after which H entered the Service. H deposed that on his return from the Service he wrote W who was with her mother in New York requesting W to come to Richmond to live with him, but that W wrote back that she preferred to stay with her own folks in New York. X testified that he saw such a letter but admitted that he did not know W's handwriting. No explanation was given as to why the letter itself was not introduced. A copy of the bill for divorce, accompanied by proof of service, was served on W in New York on Nov. 3rd. W made no appearance. No notice of the time and place of taking the depositions was given W. These were actually taken in Richmond on Nov. 29. The trial court granted the decree. W contends, (1) the depositions were inadmissible because she was given no notice, (2) also because they were taken prematurely since she was a non-resident, and (3) that the proof of desertion was not sufficient.

Held: As to (1) since she did not make an appearance within 21 days she was not entitled to notice of the taking of depositions unless the court ordered such notice. V#8-73 and 8-74 as modified by Rule of Court 2:21. As to (2) personal service on a non-resident has the same effect as an order of publication duly executed and under Rule 2:6(c) the twenty-one day provision applies. As to (3) W is right as H has not been corroborated. The letter itself was the best evidence, and, in the absence of a proper explanation, must be produced before secondary evidence of its contents is admissible.

DOMESTIC RELATIONS

Alimony

197 Va. 795.

Husband aged 26 earned \$50 per week. He had a wife 40 years of age who had two daughters, one aged 16 by a prior marriage and one aged 4 by her present marriage. Husband without justification deserted his wife. The trial court granted wife a divorce, \$12.50 per week for support of the child, but no alimony.

Held: It was an abuse of discretion not to give the wife reasonable alimony taking into consideration her needs and the husband's ability to pay.

DOMESTIC RELATIONS

Custody

197 Va.

Held: All other things being equal custody of an eight year old daughter should be awarded to the mother if she is a fit person rather than to the father. Note however, that the welfare of the child takes precedence over the "rights" of either parent as between the parents.

DOMESTIC RELATIONS

Divorce

197 Va.

H testified that W left him without cause, was an alcoholic, neglected their child, refused frequently to do the housework, and embarrassed him by making false charges to his superiors with respect to the way in which he treated her. There was no corroborative evidence. W charged that a few days before she left him he threatened to take her life with a butcher knife.

Held: H is not entitled to a divorce for desertion on his own uncorroborated testimony as to why his wife left him. It is simply his word against hers. And W is not entitled to a divorce for cruelty. Reprehensible as were H's alleged acts, he inflicted no physical injury, nor were the acts of a repetitious nature, nor did W have reasonable ground to anticipate their continuation. Each party was refused a divorce.

DOMESTIC RELATIONS Evidence Custody of Children

198 Va.403.

H and W both contracted tuberculosis. H died of the disease but W recovered as did their two daughters who at the time of this controversy were nine and ten years of age. During W's sickness H's brother and his wife took care of the children. They were treated well and their Uncle and Aunt became greatly attached to them. The mother has now recovered her health and can provide them with a good home.

Held: The mother is prima facie entitled to her own children as against a non-parent and the burden is on third parties to show that she is unfit. While the welfare of the children is an extremely important thing to consider, so is the right of a parent to her own flesh and blood. Note: The court stated that the wishes of the children, if of an age of discretion, should be considered if either side wishes to offer the children as witnesses. Whether they have reached such an age is a matter to be determined on the facts of each case. Such matters as the capacity, information, intelligence and judgment of the child must be considered, unaffected by favor, persuasion, or coercion. Hearsay reports of their wishes are not admissible. In the instant case the evidence of the children themselves was not taken and no objection was made. It cannot be made for the first time on appeal.

DOMESTIC RELATIONS Alimony *Byrto v Byrto*

199 Va.388.

The principle of law laid down in 1 S.E.2d 328 on page 1201 of these notes to the effect that a court should not compel an aged and sick husband to pay alimony to a wife who is able to work even though the husband's conduct was ground for the divorce, was extended to a case where the husband was neither aged nor sick. (2 judges dissenting) Alimony is not given as a reward to the wife nor as punishment to the husband. If the wife is able to support herself according to the standard to which she is accustomed she should not be allowed something extra at the expense of a husband to whom she no longer owes any duties.

DOMESTIC RELATIONS --Pleading and Practice

Pl. to bring cross-bill for divorce in suit for separate maintenance

199 Va.626.

W filed a bill in equity for separate maintenance and stated therein that no divorce was sought. H filed a cross-bill seeking a divorce. W demurred on the ground that no cross-bill seeking a divorce could be filed to a bill seeking separate maintenance only. H contended that Rule 2:13 gave him such a right as it reads in part, "A defendant may file *** a cross bill which seeks relief against the plaintiff ***". He also argued that he had such a right regardless of Rule 2:13.

Held: While he has no such substantive right by virtue of Rule 2:13 which is purely procedural, he does have such a right under the general principles of equity. H's cross-bill was germane to, and an outgrowth of the original bill. W's rights will not be prejudiced by allowing it, and a multiplicity of suits may be prevented. W's demurrer should be overruled.

DOMESTIC RELATIONS Adoption

199 Va.864.

An elder married sister adopted her 13 year old brother, B, with the consent of their parents, and an interlocutory decree was entered. During the year before a final decree can be entered the sister also adopted a boy who had been released from a reform school. It is also alleged that B is not happy in his new home and wishes to come back to his own parents who now wish him back. The trial court refused to hear evidence on these matters.

Held: Error. The welfare of B is the prime consideration of the law. The purpose of the years delay before a final decree can be entered is to make as sure as possible that the adoption is no mistake. Whether or not the other boy is a bad influence on B, and B's wishes, and his happiness or the reverse, are all relevant. Reversed and remanded.

H and W were husband and wife and owned two separate houses as tenants by the entirety with survivorship. W died, and W's sole devisee alleged in a bill for specific performance of a contract that H was cruel to W, that W on her doctor's advice counselled W to leave H because of his cruelty, that W had good grounds for a divorce a mensa and intended to obtain such a divorce, that on the day of separation they contracted in writing that H was to convey his interest in one of the houses to W, and that W was to convey her interest in the other house to H, and that before the deeds were actually drawn or any divorce obtained W died. H demurred to the bill on the ground that contracts entered into before separation of the parties and made to facilitate separation or divorce are void as against public policy. The Chancellor sustained the demurrer.

Held: For W's devisee. While the rule stated above is valid, it does not apply to a case in which one of the parties is entitled to a divorce and has definitely determined to get it and the object of the contract is not to facilitate separation but merely to settle property rights consequent upon the separation. Whether the contract was made for the one purpose or the other is a question of fact, and not one of law to be determined by a demurrer.

DOMESTIC RELATIONS--Property *Rts upon divorce* 200 Va. 77

Mr. and Mrs. S owned their house as tenants by the entirety with survivorship. Mrs. S had inherited \$7,000 which she put into the purchase price of the home and Mr. S had put in \$1,000. Mr. S secured a divorce a vinculo. Since the home was not susceptible to partition in kind the court in the divorce case ordered the place sold (unless one of the parties wished to buy it) and the proceeds divided equally. Mrs. S appeals claiming (1) That the court had no jurisdiction over the land in the divorce case, and (2) that even if it did she should get a larger portion of the proceeds than her husband because of her larger contribution.

Held: (two judges dissenting). Affirmed. It is admitted that all divorce jurisdiction is the creature of statute and hence specially limited as per the terms of the statutes, and that in Virginia a divorce court cannot take the property of one spouse and give it to the other. The statutes expressly provide that a divorce changes property owned by the spouses with survivorship to property owned by them as tenants in common (V#20-111). They also provide that upon decreeing a divorce the court may make such further decree as it shall deem expedient concerning the "estate" and maintenance of the parties (V#20-107). The dissenting judges took the view that this latter statute applied only to marital property rights, but the majority of the court held that it applied also to all property held as co-owners. Otherwise an additional suit would be necessary to settle such rights, and there would be a repetition of the same evidence. If the legislature had meant to limit the word "estate" to marital rights only, it could have easily made such an intention clear. As to the proportion awarded Mrs. S she apparently meant to make a gift of half of any contribution over and above her husband's to the husband. In such a case there is no resulting trust so a fifty-fifty distribution of the proceeds was proper. "Equitable principles do not require the return of a gift voluntarily made by a wife to her husband, who was the natural object of her bounty at the time of her gift."

DOMESTIC RELATIONS *Custody* 200 Va. 107.

A trial court decided to give a father the exclusive custody of his child, the mother only to have a right of visitation. The trial court gave as one of its reasons that divided custody generally was unsatisfactory since it caused the child to become upset and each parent would often try to turn the child against the other.

Held: Reversed and remanded. While divided custody has both advantages and disadvantages there is no hard and fast rule that it cannot be the proper solution to the custody problem raised by a broken home. The child is entitled to know both his parents and to have their love if it is available. Then if one of the parents dies he still has the other. And parents are also ordinarily entitled to an opportunity to rear, in part at least, their own offspring. While it is only natural that changes in custody during the year will "upset" a child at first, the magnitude of these upsets should gradually diminish with time. Besides, if things do not work out as well as the court hoped, the custody decision may always be reviewed and modified if it is found that a modification will be for the child's best interest.

In this case the Supreme Court of Appeals held that alcoholism and/or drug addiction without more did not constitute cruelty or constructive desertion, but did when coupled with other acts such as repeatedly insulting the innocent spouse's friends and relatives, inflicting gross public humiliation, and causing untold worry and sickness.

DOMESTIC RELATIONS Guardian and Ward *Transfer to Del. Guard* 200 Va. 405.

R was a childless woman 78 years of age and mentally and physically unable to care for herself or her property. D was appointed guardian of her property in Virginia. This property consisted of a farm and corporate stock. R's sister, S, from Delaware visited her and took her to Delaware. R had no other close relatives. There was much evidence that R wished to live with S, and that S treated her well. One L qualified as her Delaware guardian. Under the Delaware statute the ward must have property in Delaware for the court to have jurisdiction to appoint a guardian of the ward's property. L petitioned the Virginia Circuit Court of the county in which R owned her farm to compel D to transfer to him all of R's property. The court refused to grant the petition on the ground that the Delaware Court had no jurisdiction as R had no property in Delaware.

Held: Reversed. R is domiciled in Delaware and "Movables follow the person". R's property belongs to her and not to her Virginia guardian who merely manages it. Hence the corporate stock is owned by R in Delaware. The Delaware guardian is in a better position to manage the property for R's benefit as he will know her needs first hand.

DOMESTIC RELATIONS--Custody of Child 106 S.E.2d 611, 200 Va. 530.

Held in this case (1) Fact that mother permitted her three-year-old child to cross a secondary road unattended, while showing poor judgment, was insufficient ground to deprive mother of custody of the child, and (2), Where child is of tender years and will be equally well cared for by either mother or father, the mother, in preference to the father, should be awarded its custody.

DOMESTIC RELATIONS--Adoption *Wishes of child* 201 Va. 1.

Held that where a sixteen year old boy violently objected to being adopted by his older married sister and her husband (the boy's natural parents having remarried each other and withdrawn the consent given to the original adoption) it was clearly not in the best interests of the boy to be adopted. While the wishes of a child are not necessarily controlling, had he been over fourteen when the petition for adoption was originally filed his consent would have been necessary under V#63-351. His desire to return to and remain with his parents, and their desire to have him do so, are natural and instinctive. The desire of the sister to adopt this half-grown boy against his will is strange and unnatural and probably would lead to much trouble.

DOMESTIC RELATIONS *Dist. Ant. v. Comm.* Virginia's Bastardy Statute 201 Va. 23

V#20-61.1 provides that the father of an illegitimate child may be forced to contribute to its support and maintenance if he admits in a proper court that he is the father, or the court finds that he has voluntarily admitted paternity in writing under oath. X and Y lived as man and wife illicitly and two children were born to them. X signed State and Federal income tax returns "under the penalties of perjury" in which he stated that the two children were his. Is he liable for their support?

Held: No. The statements were not voluntarily made as the returns were required by law. Nor did he make the statements under oath, since no oath was administered or required. It is immaterial that the penalties for falsehood are the same as they would have been had the taxpayer made material false statements under oath.

DOMESTIC RELATIONS *Adoption* Criminal Law Stat *incorrectly applied* 110 S.E.2d 252, 201 Va. 209.

D, a 37 year old bachelor, proposed marriage to a 12 year old girl who was apparently much older. She accepted him and he took her to Maryland and married her by representing that she was eighteen years of age. D was convicted of violating V#18-47 which makes it a felony for any person, other than the father or mother, to illegally seize, take, or secrete a child from the person having lawful charge of such child.

Held: For D. The statute has no application to elopements. While the girl was under the age of consent, the marriage is not void but only voidable at the girl's election. The statute is aimed at abductions for improper purposes.

DOMESTIC RELATIONS--Legitimacy *Marriage + acknowledgment* 201 Va.441

After the jury had retired in a criminal seduction case D admitted he was the father of W's baby and decided to marry her in order to give the baby a name and to escape the consequences of the criminal case. The marriage took place in the court room and then D and W went their separate ways. D never gave the child, C, a penny.

W divorced D for desertion. Years later W told C about his father and C called on him and asked him if he ever knew W. D replied that he did. C then said "Did you marry her?" and D said "Yes". "Did you have any children by her?" "Yes, I had a son." "Well, I am your son." To which D made no reply. Later D died intestate. He was survived by C and by eleven brothers and sisters. ~~D had told some of his sisters.~~ D had told some of his brothers that C was not his child, and others said that they had never heard of C. Contest between C and D's brothers and sisters. W testified positively that D was C's father.

Held: For C. Marriage plus acknowledgment legitimates. Once these two factors are present, all the denials in the world will not change a legitimate child into a bastard. D's acknowledgment in court and his implied admission when C told him that he, D, was his father are sufficient acknowledgments. All other things being equal, the law favors legitimacy over illegitimacy.

DOMESTIC RELATIONS *Alimony* 201 Va. 668.

H, a widower, married W, a widow. W had been supporting herself as a seamstress earning \$75 per week. She also sold her furniture when she married H. Within the first ninety days of this marriage H treated W so cruelly that his acts constituted constructive desertion and W was made so sick that she became incapable of work. W also had the responsibility of looking after her 16 year old son who was still in school. H was worth \$125,000 and had a net income of over \$9,000 per year before taxes. The trial court granted W a divorce and \$15 a month alimony.

Held: It was an abuse of discretion to award only \$15 a month alimony when H was comparatively wealthy and W could not work and had the burden of looking out for her son by a prior marriage. The Supreme Court of Appeals reversed and remanded, with directions to award W \$50 per week while conditions remained as they were.

DOMESTIC RELATIONS--Custody and Support 201 Va.731.

H sued W for divorce and custody of C, an eight year old child, and W filed a cross bill for divorce and also sought custody, alimony, and support money for the child. The chancellor erroneously granted H the relief he asked for and W appealed. The Supreme Court of Appeals reversed and remanded with direction to award W a divorce, alimony and support money and custody of her son, with leave to the husband to visitation with the child at reasonable times and places. So the chancellor then granted W her divorce and provided that W was to have custody from Monday morning before school until Friday after school, that W was to deliver the child at a certain public place each Friday, and pick up the child at that place on each Monday.

Held: This was no compliance with the Supreme Court's order. This was not custody in the mother with a reasonable visitation in the father, but split custody--four days with the mother and three days with the father. This eternal shuttling back and forth would not give the child a feeling of security and was obviously not in its best interests. Remanded with specific directions to the chancellor.

DOMESTIC RELATIONS--Torts--Insurance *Brother Suing Brother* 201 Va.829

A 13 year old boy was injured as a result of the gross negligence of his 17 year old brother who was driving their father's car. He sued his brother. Does such an action lie assuming that neither child had been emancipated.

Held: Yes. Brothers have never been held to be one as have husband and wife. There is no question of interference with parental discipline. There is no more likelihood of fraud and collusion than between a minor brother and an adult brother, or

between close friends. "It is more important to protect an infant in his person than to avoid the possibility of fraud and collusion by the denial of such protection". An infant is liable for his torts.

DOMESTIC RELATIONS. Desertion after suit has been started 202 Va.104

In January of 1957 W filed a bill for separate maintenance against H charging cruelty. She asked for support money for herself and their two children. H filed a crossbill asking for a divorce for desertion as of 1953. The evidence which was heard by a commissioner showed that the separation in 1953 was because of W's poor health and was by mutual consent, and hence was not desertion. On May 7, 1957 W testified before the commissioner that while she did not want a divorce because of religious reasons she no longer wished to resume marital relations with H. On June 25, 1957 H filed a supplemental bill alleging desertion as of May 7, 1957 when W testified as above stated.

Held: For W. Desertion while the suit is pending is not a ground for divorce in that suit. In fact it is frequently desirable for the parties to keep entirely apart while divorce litigation is before the courts.

DOMESTIC RELATIONS. Separation Agreements for support are subj. 202 Va.229

H was the father of W's three children. They were divorced in 1951 and it was agreed that H would pay W \$50 each month for each child and do what he could to give them a college education. At that time the children were aged 9, 7, and 6. Both H and W have remarried. H is worth \$200,000 net and has a substantial annual income. W seeks to recover \$3,000 for arrears of support money, and an allowance of \$300 per month for the oldest child (now 18) for her college education, and general relief. The Court granted the relief asked and also increased the \$50 payments to \$75 per month.

Held: For W. Separation agreements for the support of children are subject to modification from time to time as conditions change. The sums granted are reasonable under the circumstances. It costs more to support 16 and 15 year old children than 7 and 6 year olds and even though the \$25 increase was not specifically asked for it can be granted under the prayer for general relief. The trial court's decree will not be set aside unless there has been an abuse of discretion.

DOMESTIC RELATIONS. Chancellor's decrees - effect of Com's recommendations 202 Va.263

In a divorce case the chancellor, (1) refused to adopt all the recommendations of a commissioner in chancery to whom the matter was referred, (2) refused to grant a divorce to the husband despite the fact that the wife refused to live with him after she had instituted divorce proceedings, (3) awarded the wife support money despite the fact that he had refused to give either one of them a divorce.

Held: Affirmed. As to (1) the chancellor is the judge, and not the commissioner who is appointed to aid the judge and not to supplant him. As to (2) it is perfectly proper for the parties to live apart while divorce proceedings are pending. As to (3), Code 20-107 provides, inter alia, "Upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the maintenance of the parties."

DOMESTIC Relations. H cannot determine whether wife has violated support decree 202 Va.515

H secured a divorce from W for desertion. By agreement approved by the Court W was given custody of their two children and \$350 per month for support money for them. In the event W lost custody of one of the children certain modifications were to be made. H inadvertently overpaid W after she ceased to have custody of one of the children. He then stopped paying the amounts properly due on the ground that W had violated the decree in refusing him certain visitatorial rights. W filed a petition to collect the alleged arrearage which, in any view, was less than the overpayments. The Court below held (1) that H was under a duty to pay W whether or not she had violated the decree, and (2) that no set-off for the overpayments could be allowed.

Held: Affirmed. H cannot be permitted to determine ex parte whether or not W has breached the decree. That is a question for the Court. If he wishes a reduction

because of such breach he should petition the Court. Nor can H overpay at one time and underpay at another. Overpayments are presumed to be gifts. It would work a hardship on the children to expect them to go without, because their guardian received and spent too much at another time. Besides H knew all the facts, and if he misinterpreted the separation agreement that is a case of money paid under a pure mistake of law, and such payments cannot be recovered as he had the same chance as W to find out what the law is or was, and she has not been guilty of any fraud or imposition.

DOMESTIC RELATIONS--Divorce--Corroboration

202 Va.769.

The main reason for requiring corroboration in divorce cases from some one besides the parties is to prevent collusion. Where it is clear that there is no collusion, the corroboration needs to be only slight. It need not rest in the testimony of witnesses but may be furnished by surrounding circumstances adequately established.

DOMESTIC RELATIONS--Rule 2:22--Alimony

202 Va.849.

W secured an absolute divorce from H in 1958. The decree awarded no alimony, but the last paragraph thereof read, "and nothing further remaining to be done herein it is ordered that this cause be stricken from the docket and placed among the ended causes with leave to either party to have the same reinstated for good cause shown." V#20-109 provides that the court may "increase, decrease or cause to cease" any alimony that may accrue after the date of the decree. In 1960 W sought to re-instate the case and get alimony.

Held: She cannot do this. This was a final decree which could only be modified under Rule 2:22 within 21 days from date of entry. A statute authorizing modification of alimony has no application to cases in which there is no alimony. Silence on the question of alimony is a denial of all alimony. While a court of equity can reserve the right to modify a decree, and thereby prevent that portion thereof from becoming final it has not done so in this case as no mention of alimony is made in the decree or in the alleged reservation.

DOMESTIC RELATIONS

Custody to guilty party in divorce

203 Va.61

Held: Even though the mother is the guilty party in divorce proceedings, and the divorce has been granted to the father, the custody of children of tender years (and especially a daughter) will be given to the mother unless she is not a morally fit person. The welfare of the child is the controlling consideration, and as between parents, all other matters are subordinate. The object of custody proceedings is to do what is best for the child,--not to punish a guilty parent.

DOMESTIC RELATIONS--Pleading and Practice*5/ my infant w/o Guardian ad litem is void*

203 Va.130.

P, an infant, was riding in a car which was being driven by D, another infant. P was injured as a result of D's gross negligence. P, by her next friend, sued D and recovered a \$2,000 verdict and judgment. D or D's insurance company employed a lawyer to defend her, but no guardian ad litem was appointed. The trial judge refused to allow P to present evidence as to the amount of her doctor, dentist, and hospital bills which were incurred as a result of the accident.

Held:(1)"It is the settled law of this Commonwealth that a personal judgment rendered against an infant for whom it does not affirmatively appear of record that a guardian ad litem has been appointed is void." Hence the judgment below is void and the case is remanded for a new trial.(2) When an unemancipated infant is injured there are two causes of action. One is on his behalf to recover damages for pain and suffering, permanent injury and impairment of earning power after attaining majority.

The other is on behalf of the parent for loss of services during minority and necessary expenses incurred for the infant's treatment. The damages claimed by P for sums charged by doctors, dentists and hospitals can only be recovered by her parent. Hence it was not error to refuse to admit evidence of the amount of such bills in a suit by P alone.

Note 1: The two causes of action in Virginia may be consolidated by V#8-629, but separate verdicts must be rendered. Note 2: The infant may recover for such items if (1) he has paid or agreed to pay them, or (2) he alone is responsible by reason of his emancipation or the death or incompetency of his parents, or (3) the parents

have waived the right of recovery in favor of the infant, or (4) recovery therefor is permitted by statute. None of these exceptions applied in the instant case.

DOMESTIC RELATIONS--Adoption--Pleading and Practice *Appointment of GAL* 203 Va.168.

P's husband died leaving her with a young child. P became an alcoholic and grossly neglected the child custody of which was given to the proper agency of Public Welfare hereinafter called W. Soon thereafter W petitioned Juvenile Court for permission to place the child for adoption. This permission was granted. In violation of a statute (V#16.1-173) requiring the appointment of a guardian ad litem ⁱⁿ adoption proceedings in the absence of its surviving parent, the child was placed with D for adoption. It was urged that since W obviously had the best interest of the child at heart the reason for requiring a guardian ad litem did not exist. P has recently married again and has, at least for the time being, won her battle against alcohol and now wishes her child back. The Circuit Court refused the request on the ground that insufficient time had elapsed to be reasonably sure that P had rehabilitated herself. P appealed.

Held: The adoption proceedings were void since no guardian ad litem was appointed. W was in reality sponsoring D, and should not be allowed to represent both D and the child. In a case of this sort it is important for a discreet disinterested party to investigate and report. Case remanded to Juvenile Court for such action as it shall think best.

DOMESTIC RELATIONS--Depositions *Notice required* 203 Va.526.

In a divorce case defendant was notified that depositions would be taken at a certain place on October 8, 1960, at 10a.m. subject to adjournment. There was no evidence that any depositions were taken on that date. They were, however, taken on Feb. 21, 1961 although defendant was given no new notice to that effect and neither she nor her attorney was present.

Held: (a) For depositions to be admissible the record must affirmatively show that proper notice was served, accepted or waived. (b) Case reversed and remanded as the Chancellor based his decision on improperly admitted depositions. The taking on Feb. 21 was at a new time and not an adjournment from or continuance of the original October 8th time.

Note: If defendant in a divorce case is served by publication and he fails to appear, no notice of the time and place of the taking of depositions is required.

DOMESTIC RELATIONS--Alimony *No obligation to use up own estate* *But not entitled if capable of supporting herself* 203 Va.677.

W secured a divorce from H because of H's misconduct. She was unable to obtain employment. She had personal property of her own worth many thousands of dollars. Is that fact relevant on the issue of the amount of alimony?

Held: No. H is under a duty to support her as she was accustomed to live during their married life. She is under no obligation to use up her separate estate in order to cut down on the alimony needed. Note: If she were able to obtain employment her actual or probable earnings therein should be taken into consideration as a husband owes no duty to support his former wife in idleness when she is fully capable of supporting herself.

DOMESTIC RELATIONS--Alimony or Lien 1231. Alimony 204 Va.61

H deserted W1 and she obtained a divorce. The two agreed on the amount that H should pay W1 each month until W1 died or remarried, and their contract was ratified by the court. Both the parties and the court stipulated that the sum agreed upon was alimony and not a contract in lieu of alimony. Later H married W2, conveyed Blackacre to her without consideration, and shortly thereafter died. W1 then filed a bill in equity to set aside the above conveyance as a fraud on her. W2 demurred.

Held: Demurrer sustained. Since the parties and the court expressly stipulated that the sums awarded were alimony, and since alimony ceases on the death of the husband, W1 is not a creditor of H, and hence has no standing to maintain the suit.

Note: The Supreme Court of Appeals contrasted alimony with a contract in lieu of alimony as follows: The former constitutes a lien on all the husband's real estate. Payment thereof may be enforced by contempt. It is not dischargeable in bankruptcy. It is not assignable. It ceases on the death of the husband. None of these are true with respect to a contract in lieu of alimony where the rules with reference to ordinary contracts would be applicable.

DOMESTIC RELATIONS--Venue for Divorce--Meaning of "cohabit" 204 Va.225

Venue
V#20-98 provides that a suit for divorce shall be brought in the county or corporation in which the parties last cohabited, or, at the option of the plaintiff, in the county or corporation in which the defendant resides, if a resident of this State. This provision is mandatory and jurisdictional. H and W were husband and wife and lived at their home in X County. They left that home for a few days to visit H's parents in Y County and while there they had marital relations. Shortly after such relations they had a violent quarrel and H refused to go back to X County. W instituted divorce proceedings in X County and the Chancellor dismissed them for lack of jurisdiction on the ground that they last cohabited in Y County.

Held: Error. The meaning of "Cohabit" must depend on the context. Its broad meaning is to live together as husband and wife and this denotes some period of permanency. Its narrow meaning is to have sexual relations. So far as condonation is concerned, one voluntary act of sexual intercourse anywhere with knowledge of the errant spouse's prior misconduct, is cohabitation. But it would be ridiculous to suppose that as far as venue and jurisdiction for divorce are concerned, the legislature intended any chance location of the last copulation to be determinative thereof. So H and W last cohabited in X County.

DOMESTIC REALTIONS Insanity after Desertion Pollard v. Pollard 204 Va.316.

→ Wife deserted husband, and became insane a month later. The chancellor refused to give husband a divorce after the expiration of one year on the ground that if wife had not lost her sanity she might have returned to husband before the year was up.

Held: Reversed and remanded. V#20-93 passed in 1926 changed the Virginia law which used to be as per the Chancellor's reason. It reads in part, "When the suit is for divorce from the bond of matrimony for wilful desertion or abandonment, it shall be no defense that the guilty party has, since the commencement of such desertion, and within one year thereafter, become and has been adjudged insane...". It is the plain duty of the courts to recognize and give effect to this legislative rule.

DOMESTIC RELATIONS Equity--Laches 1232.

204 Va.462.

H and W1 were married in 1902. W1 secured a divorce a mensa in 1933. The decree awarded W1 \$180 per month alimony. In 1939 H secured a Nevada divorce although he was not domiciled there, and immediately thereafter married W2. W1 was personally served in Florida but chose to take no action for fear H would stop paying the \$180 per month. But after the death of H in 1960 she sought a declaratory judgment that the Nevada divorce was void and that she was entitled to a widow's portion of H's estate.

Held: She is barred by her laches. The chief witness, H, has died. W2 was led to believe that W1 had acquiesced in the Nevada divorce and altered her life accordingly

DOMESTIC RELATIONS

204 Va.580.

Effect of Acts of Cruelty during Pendency of Suit

H sought a divorce from W on the ground of constructive desertion. He alleged that W continually nagged and cursed him, but was not corroborated in any way. However, after the suit was instituted there was corroborated evidence that W fired a shot near H's car and threw soft drink bottles at it. The Chancellor granted H a divorce a mensa.

Held: Reversed. "The act relied upon for divorce must be alleged and proved to have occurred prior to the bringing of the suit, not based on some act or conduct alleged to have taken place during its pendency."

DOMESTIC RELATIONS Conflict of Laws Custody of Children

204 Va.839.

H married W and while domiciled in Indiana had four children by her. H then ran away with a Miss C and eventually came to Virginia where he had one child by her. W procured a divorce from H in Virginia and requested alimony and support money for herself and their four children although she and the children were domiciled in Indiana. H's father was giving W substantial sums each month to help her out. H contended (1), that a suit involving the custody of children was in the nature of an in rem proceeding and since the court did not have jurisdiction over Indiana children it could not award custody and support money to the mother, and(2), even if it could, it should take into consideration the fact that H's father is already supporting them to quite an extent.

Held:(1) The Virginia and better view is that a court having jurisdiction over the parents also has jurisdiction over the custody of the children even if they are domiciled elsewhere. The children are not the litigants, and the court is acting in personam rather than in rem when it enters custody orders and decrees. (2) It is not up to H's father to support H's children, so it is immaterial that he is donating money for that purpose.

DOMESTIC RELATIONS

Agreement in lieu of alimony

205 Va.181.

W secured a divorce from H. The parties agreed upon a property settlement and amount H was to pay W each month. The Court in its final decree confirmed the agreement and incorporated it into its decree which further stated that the parties were to have no further rights other than those set forth in the agreement. After a few years H ceased making his payments. He was held to be in contempt of court and sentenced to serve on the road force.

Held: Reversed. An agreement in lieu of alimony even when approved by the court is not a decree for alimony. A decree approving such an agreement is not a lien on H's land, nor can it be enforced by the court granting the divorce on the theory that it is a decree for alimony. W's only remedy is to sue for breach of contract.

Canaves v Canaves 1233.
DOMESTIC RELATIONS Rights of Guilty Party to Divorce Alimony 205 Va.744.

Prior to 1960 a guilty party could not get a divorce. Since then V#20-91 has been amended to the effect that a divorce may be granted to either the husband or the wife if they have lived apart without any cohabitation for three (and now two) years.

Held: Under the above amendment (despite a North Carolina decision interpreting a similar statute to the contrary) the party in the wrong is entitled to a divorce "on the theory that society will be better served by terminating marriages in law which have ceased to exist in fact."

It was also held that the amount of alimony to be awarded a wife who was unable to work is not limited by the husband's actual earnings if the husband could reasonably earn more. In the instant case alimony was increased from \$17.50 per week to \$35 per week.

DOMESTIC RELATIONS Res Judicata Constitutional Law 205 Va.791.

In 1961 W sought separate maintenance from her husband, H, who by a cross bill sought a divorce. W won and a property settlement was duly decreed. Eleven months later the divorce laws were amended to allow either party a divorce if they had lived separately without any cohabitation for 3 years (now 2 years). See V#20-91(9). This statute also provides that the doctrine of res judicata is inapplicable. As soon as the three years from the separation (which was 2 years and one month from the passage of the statute) H sought and received an absolute divorce which did not modify the property settlement that had already been made. W contends that the statutory inapplicability of res judicata applies only to divorce proceedings and that her suit was one for separate maintenance, and, that the change in the divorce laws if made retroactive is unconstitutional as applied to her.

Held: Against W on both contentions. H's right to a divorce when he was the guilty party could not have been passed on in 1961 because V#20-91(9) was not then in effect and hence the doctrine of res judicata is not applicable even independently of the statute. Nor does anyone have a vested right to prevent his or her spouse from securing a divorce. The grounds for divorce are for the legislature to determine and such laws will be valid even if retroactive unless vested rights have been interfered with. W had two vested rights: (1) To live apart from H, (2) The rights given her by the property settlement. The absolute divorce given to H did not interfere with either of these.

DOMESTIC RELATIONS Cancellation of Arrearage of Payments 205 Va.834.

H, who had been ordered to pay W \$255 per month for support and alimony petitioned the court to reduce the payments to \$150 per month and to cancel his obligation to pay arrearages of \$1,325. V#20-108 permits a court to revise and alter decrees concerning the care, custody, and maintenance of children, and make new decrees concerning the same, as the circumstances of the parents and the benefit of the children may require. The Chancellor, relying on the above statute, absolved H from any liability for the arrearage. W appealed.

Held for W. She and the children had a vested right to the arrearage. The power to alter and revise and make new decrees can operate prospectively only. It does not include the power to cancel the duty to pay an arrearage.

DOMESTIC RELATIONS Refusal of Divorce for Failure to Comply with Interlocutory Decree 206 Va.381.

H and W were husband and wife. After they had lived separately for more than three years H applied for a divorce on that ground (The period has since been reduced to 2 years). There was a six year old child. H was properly served by the City Sergeant with respect to suit money, temporary alimony, support money for the child, and counsel fees. H ignored all this, and an interlocutory decree was entered ordering him to pay everything but the alimony. H did not abide by the interlocutor, decree, and, although he proved his case (and was corroborated) the chancellor dismissed the complaint because of his failure to make the payments he had been ordered to make.

Held: Reversed and remanded. The Chancellor acted improperly in dismissing the complaint. H's failure to abide by the interlocutory decree would have justified the Chancellor in refusing to proceed further until he did comply but did not amount to a defense to the divorce on the merits thereof.

DOMESTIC RELATIONS -- Adultery-Condonation *McKee v. McKee* 206 Va.527

P, a naval officer, returned home on Jan. 19, 1964 from a naval assignment to find his house closed and his wife gone. That evening he found his wife's car in front of X's house and, in company with local police he knocked repeatedly at the door before getting an answer. Finally X appeared and admitted that P's wife was there but when the police entered and told her that her husband was outside she refused to return home with him and remained in X's home overnight. The next day P and his wife had a discussion in which she stated she was absolutely innocent of any misconduct with X and P forgave her on her promise to behave. On Feb. 8 P returned home from another naval assignment and was unable to locate his wife until the following day when, with a detective he found her in a tavern with X. Later, at P's request, this detective introduced P to one R who admitted having relations with P's wife on the preceding Labor Day and New Year's say. At the divorce trial the detective testified that P's wife had a general reputation "of going out with men, different men, on many occasions."

The lower court granted P a divorce on the ground of adultery. On appeal P's wife contends that the husband's condonation of her alleged misconduct barred his right to a divorce.

Held: Decree affirmed. While condonation was not pleaded as an affirmative defense in wife's answer as it should have been, the court, on its own motion, may and should deny a divorce where it appears from the record that the injured party has condoned the acts complained of. Code 20-94 reads in part as follows: "When the suit is for divorce for adultery, the divorce shall not be granted if it appears that the parties voluntarily cohabited after the knowledge of the fact of the adultery..." To constitute condonation knowledge is necessary. One cannot condone what one does not know about. Therefore P, by forgiving his wife on Jan. 19, did not condone the adulterous acts with R. Moreover, wife's acts in going out with X "4 or 5 times" after the Jan. 20 forgiveness by P had the effect of nullifying P's forgiveness. "Condoned adultery is revived where the guilty party has resumed his association with his or her former paramour, even without strict proof of an actual repetition of the offense."

DOMESTIC RELATIONS--Adultery-Condonation 206 Va.535

P became suspicious of his wife's conduct with T and after questioning her several times she admitted that T had been coming to see her and that on one occasion he had made a "clumsy attempt at intercourse" with her. On that night June 6, 1962 P took his wife to her father's home and told him that they were separating because she was pregnant by another man. On June 10, upon advice of counsel, P returned home and resumed marital relations with his wife. However, P remained suspicious that wife was pregnant by T and after getting two inconclusive reports from different doctors on June 18 and 25, he left home on June 26, since which time the parties have remained separated. The trial court sustained the wife's motion to strike P's evidence on the ground that his own testimony showed that he had condoned and forgiven his wife's misconduct.

Held: Decree affirmed. The uncontradicted testimony shows that P's wife confessed her adulterous conduct on June 6 and that, after this knowledge of the fact of adultery on the part of the wife, the couple resumed voluntary cohabitation on June 10. Under these circumstances, the trial court was right in holding that the condonation by the husband of his wife's infidelity barred his right to a divorce on the ground of her alleged adultery under Code 20-94.

DOMESTIC RELATIONS--Presumption of validity of second marriage 206 Va.602.

H's insurance policy provided that the proceeds would be payable to the insured's widow if no beneficiary was named. H died in 1956 without having designated a beneficiary. And the D Insurance Company paid the proceeds to N who claimed to be his widow. P claims that she is H's widow and that D wrongfully paid the proceeds to N. P testified that she married H in Orange County, N.Y. in 1924, that Orange County was the only place they cohabited, that H abandoned her in 1930, that the records of Orange County, where she continued to reside, as well as the records of Norfolk, Hampton, and Elizabeth County, Virginia (where H resided after the abandonment, except for the time he was in the Seabees during W.W.II) show that no divorce was granted to the parties. D's testimony showed that H told N in 1933 and again during the war that he was going to get a divorce, that N thought that he did, that when he entered the Seabees in 1942, he was stationed at Camp Peary in York County for several months at which time he was domiciled in and had been a resident of Virginia for at least one year, and that H and N were married in 1945. The trial court struck P's evidence and entered summary judgment for D.

Held: Judgment affirmed. Where two marriages of the same person once shown the second marriage is presumed to be valid and the person who attacks it has the burden of rebutting this presumption. The record does not show whether H resided in York County, James City County, or the City of Williamsburg during the several months he was assigned to Camp Peary. H could have established a legal residence in any one of these places and obtained a divorce from P under the provisions of Code 20-96. P offered no evidence to show that a divorce was not obtained in any of these places and thus has failed to rebut the presumptions that H's second marriage to N was valid and that his first marriage to P was dissolved by divorce.

DOMESTIC RELATIONS--No Permanent Alimony for Deserting Wife 206 Va.782.

H and W were husband and wife. In a suit brought by H the court granted him a divorce on the grounds of W's willful desertion and directed him to pay W \$300 alimony for 36 months. While H's appeal was pending W moved the Supreme Court of Appeals to request the trial judge to submit an opinion to clarify his action in the case.

Held: Decree reversed as to alimony payments. Under the settled law of Virginia, a divorced wife has no right to permanent alimony if the divorce was granted to her husband because of her misconduct. (1) The Supreme Court does not have the authority to request a trial judge to submit an opinion to clarify his action. Action taken by a court is conclusively evidenced by its decree or judgment.

DOMESTIC RELATIONS *Custody* 206 Va.899.

P sued D for divorce and the parties were granted a decree a mensa et thoro. D retained custody of the child. P later obtained a decree granting him custody on the grounds that D had failed to deliver the child to him once a month as specified in divorce order and that D was the guilty party in the breaking of the marriage.

Held for D. There is substantial evidence to show that D is a fit mother for the child and the court should not grant custody of the child with a view to punishing the guilty party.

DOMESTIC RELATIONS *Miscegenation Statute* 206 Va.924.

Ds were convicted of leaving the Commonwealth to avoid the effect of the miscegenation statute and thereafter returning and cohabiting as man and wife (Code #20-58). Punishment was fixed at one year each in jail, but the sentences were suspended for a period of 25 years upon the condition that Ds leave the state at once and do not return together or at the same time for a period of 25 years. Ds

filed a motion to vacate judgment on the grounds that the miscegenation statute was unconstitutional and that the sentence imposed was invalid.

Held: The miscegenation statutes are not violative of the Constitution of Virginia or the Constitution of the United States and do not deny due process and equal protection of law. There is an overriding state interest in the institution of marriage and this has always been subject to control of the legislature. As yet there has been no new decision by the U.S. Supreme Court reflecting upon the validity of the miscegenation statutes of the several states and the court is bound by stare decisis.

However, the conditions of the suspensions of the sentences are so unreasonable as to render the sentences void. The purpose of Code #53-272 in authorizing the suspension of sentences is to secure the rehabilitation of the offender and here nothing more was necessary to secure the rehabilitation than that D's not again cohabit as man and wife in this state.

DOMESTIC RELATIONS *Alimony — Juris. for modification* 207 Va.288.

W obtained a divorce decree from H in Virginia, with H making a personal appearance before the court. Ten years later W gave notice that H was in arrears of his alimony payments. H was then domiciled in Illinois and was personally served there. H demurred on the ground that Virginia had no jurisdiction over him.

Held: Reversed. It is generally agreed that once personal jurisdiction has been acquired in a divorce suit in which there is a decree for alimony, subsequent judgments concerning that decree are considered to conform with all requirements of due process, and entitled to recognition in other jurisdictions. This is not a new cause of action but merely correlative to the first.

DOMESTIC RELATIONS *Presumption of legitimacy — Non-Access* ^{Gibson v. Gibson} 153 S.E.2d 189.

P asked for divorce from D on May 6, 1964. On March 16, 1965 (314 days later) P gave birth to a child while the action was still pending. D, in answer, claims he has not cohabited with P since May 6, 1964, and denied having had sexual relations with P since that time, which fact was corroborated by P in her pleadings. There was ample testimony that P and D had remained separated. P had accompanied other men on various occasions during the period since May 6, 1964, and had been seen to have nightly visits by men. The lower court awarded P support money for the child.

Held: Reversed. There is a very strong presumption in law of the legitimacy of a child born during wedlock. Even though P and D had been separated, they were still married. The improbability of known access of the husband is not of itself sufficient to overcome this presumption. However, when evidence such as that produced in the court below forces a conclusion of non-access beyond all reasonable doubt, it is sufficient to overcome the presumption.

DOMESTIC RELATIONS *Wimbrow v. Wimbrow* 156 S.E.2d 598.

H, finding W going through his wallet, beat her severely. W left H charging cruelty and constructive desertion. H charged W with desertion in a cross action. Lower court found for H. W appeals.

Held: For W. H's retaliatory act of beating W was out of proportion to her provoking act and thus her act did not disentitle her to a divorce on grounds of cruelty.

Family Law Problems

1. (a) A's wife left him and went to live with a married man. Three months later A became engaged to B; he promised to petition for divorce straight away and it was agreed that they should get married as soon as possible afterwards. Anticipating an early marriage A and B became lovers and B is in fact pregnant by A. A obtained a decree of divorce last December, but has now told B that he will not marry her because of her being a woman of "easy virtue." Advise B.

(b) Adam on his deathbed begs his wife to marry his twin brother Bill, who has been helping the family during Adam's illness and is present at the bedside. Bill thereupon offers marriage to Alice who accepts his offer. Bill gives her a ring and spends a large amount of money on a house and various household goods and furniture. Has Bill any legal redress should Alice subsequently refuse to marry him?

Would your answer differ if Bill suffered occasionally of epileptic fits and Alice knew about it?

2. (a) What is "marriage by repute"?

(b) Charles induced Delia to marry him by pretending to be an attorney and a bachelor whereas in fact he was without any occupation, had a criminal record and went through a polygamous marriage in Pakistan with a lady domiciled in Pakistan. Five years after their marriage Delia, having discovered the truth about Charles, left him and went to live with Fred. Advise Delia who is anxious to marry Fred.

3. (a) Distinguish between a "void" and a "voidable" marriage.

(b) George, after ten years of cohabitation, left his wife Hilda in the belief that their marriage was void because Hilda was under age of consent at the time of the ceremony and was incapable of consummating the marriage. He subsequently went through a ceremony of marriage with Irma describing himself as a widower. In the meantime Hilda had given birth to a child who, she claims, was conceived by artificial insemination, George being the father.

In answer to Hilda's petition for divorce on the ground of his adultery with Irma, George wishes to petition for annulment. Advise him.

1 (a) Capacity to k a valid marriage. Might be able to squeeze in the law of deceit - but negative bec. she knew what she was doing. Could not k a valid marriage bec. of existing marriage.

(b) Affinity. Affect of consent. Intention to marry
! epileptic fits - she knew about it so no vices.
Was she fit in equity to repudiate

2 (a) Marriage by "repute"

(b) Question of state law.

Fraud, deceit

Polyg. marriage may be impediment to a subseq. marriage.

Question of form of validity - governed by Patrimonial Law.
Now being public policy in first - a corrective brought in -
the back door.

Whether Julia's marriage void or voidable -
depend on state law.

3 - (a) void & voidable marriage

(b) Cohabitation after reaching the age of consent
Benson has no ground for annulment.

Time allowed: 3 hours

Answer five questions
(at least two questions from
Section B)

SECTION A

1. (a) Comment on the view expressed by an English court in *R. v. Millis* (1844) that "consent not cohabitation constitutes a marriage." Is that a correct statement of the law of Virginia?
 - (b) H, having previously obtained a license to marry W, aged 21 years, brought her to their parish church, told her that they were going to get married and that he would "beat the life out of her" should she say 'no'. They lived as husband and wife for ten years when W met X who asked her to leave H and marry him. Advise W.
2. Explain the legal position in each of the following cases:
 - (a) W, in a state of mental depression, was persuaded by H to join Mr. and Mrs. X at a drinking party, in the course of which the husbands "exchanged wives." Sexual intercourse took place between Mr. X and W. Mrs. X, who refused to play her part, now brings a suit for divorce on the ground of her husband's adultery with W. *Consentation*
 - (b) W with her husband's approval, joined a nudist club. Her club whilst camping in California was disbanded by the police and W incurred adverse publicity in the town of her matrimonial residence. As a result her husband, who is a federal government employee, has been cold shouldered by his superiors and ridiculed by his colleagues. He has suffered a mental breakdown and feels now that his chances of promotion have vanished. He has also lost interest in W and contemplates divorcing her. *W/o consent*
 3. (a) Is it true to say that where a suit for divorce on the ground of cruelty fails, the petitioner may yet succeed on substantially the same facts, on the ground of constructive desertion? *W/o justifi*
 - (b) After ten years of happy marriage W became so obsessed with cleanliness that she dusted and cleaned the matrimonial home several hours a day and insisted that H and their two children spend at least one hour a day each on the various cleaning operations she planned for them. When H objected or tried to reason with her she screamed and raged. As a result of the atmosphere which developed the children began to show symptoms of excessive tiredness and neurosis. *Cruelty*
Is W guilty of cruelty? *life, limb, or health*
If she is not, what advice would you give to H, who finds the position unbearable? *based on consent not considered prop*
4. H and W married on the understanding that they should have no children. Five years later W developed a strong desire of having a child of her own but H refused to cooperate. W became neurotic and refused sexual intercourse unless H abandoned contraceptives. H continued to claim his marital rights on his terms contending that since there has been mental disease in his family he would not like to have a mentally defective child. The parties separated and W wishes to bring a suit for nullity, or alternatively, for divorce. H contends that W approbated the marriage and that there is no ground for divorce. Explain the legal position.
5. (a) Explain the nature and effect of judicial separation.
 - (b) In what circumstances can a decree of judicial separation be granted in Virginia?
 - (c) In what circumstances can such a decree be merged into an absolute decree? *20-121*
 - (d) What, if any, is the effect of the plea of recrimination on the suit for separation and on the application for merger? *20-117*

SECTION B

6. H and W, both domiciled in Virginia were married by proxy in Mexico and the news of this marriage was broadcast over the radio during a social gathering at which both H and W were present. W, believing to be married to H, had sexual intercourse with him but the parties did not cohabit as husband and wife.

W gives birth to a child and claims that H is the father. H refuses to accept W as his wife or to acknowledge the child as his own.

Explain the legal remedies W may have in respect of herself and the child.

*Va. Must prove actual
acknowledgment of legit.
child
is the father of the
child*

7. (a) Describe briefly the procedure governing the adoption of children in Virginia

(b) X is an illegitimate child of A and B. B neither acknowledged nor supported X but claimed tax exemption in respect of X as his "child".

A now consents to X being adopted by Mr. and Mrs. Z. B, having heard about this, consults you as to his rights in respect of X whom he would like to bring up. Advise him.

Adams

Stepano case

Would your advice differ if B had acknowledged X but failed to contribute towards his maintenance?

8. (a) Explain the juristic basis of the parental obligation of support and maintenance of children born in wedlock.

No C.L. it. Doctrine of succession

(b) A, now 16 years of age, is a legitimate child of H and W. When 6 years old A was abandoned by his parents and for the last 10 years was in an orphanage. Recently A learned that his father has inherited a considerable fortune. Advise:

(I) A as to his right for maintenance and provision for a college education, and

(II) the governors of the orphanage (a church institution) as to their right to claim \$10,000 which they consider to represent the cost of keeping A in the orphanage during the last 10 years.