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Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

ATTORNEY AND CLIENT—SUFFICIENCY OF EVIDENCE TO JUSTIFY ANNULMENT OF ATTORNEY'S LICENSE.—Committee on Legal Ethics of the West Virginia State Bar instituted proceedings in the circuit court of Hancock County for the purpose of annulling *D*'s license to practice law in West Virginia on grounds of fraud in dealings with a client. Client employed *D* on contingent basis to prosecute a personal injury action, which *D* settled out of court. Client contends that *D*'s fee was to be one-third of the recovery, that *D* falsely represented to him that to enable *D* to obtain a substantial settlement of the claim it would be necessary to pay a bribe to the insurance company's attorney, and that in supposed furtherance of the bribery scheme *D* induced client to indorse to him a check which was kept by *D* for himself. *D* contends that he was to receive one-half of the recovery, that he did not mention a bribe to client, and that he was legally entitled to the amount of the check, it representing the difference between one-third of the recovery and one-half of the recovery. In two prior felony cases against *D* on substantially the same set of facts, *D* was convicted by jury verdict of larceny, although both convictions were set aside on technical grounds. The circuit court ordered *D*'s license annulled. On writ of error to the Supreme Court of Appeals, *held,* that to *annul* an attorney's license to practice law the misconduct must be shown by full, clear and preponderating evidence, and that the evidence against *D* does not meet this test. Judgment reversed. *Committee on Legal Ethics v. Pietranton,* 95 S.E.2d 643 (W. Va. 1956).

This case points out the high degree of proof required in a disbarment proceeding to convince the West Virginia court that it is full, clear and preponderating. Although the juries in the felony cases found the evidence convincing beyond a reasonable doubt, the court in the principal case felt that the evidence was not even full, clear and preponderating, a less stern test. In a convincing dissent Judge Lovins agreed with the test to be applied, but expressed the view that the evidence presented in this case was sufficient to meet the test. See *Williams* v. *Sullivan,* 35 Okla. 745, 131 Pac. 703, 1915D L.R.A. 1218 (1912). For a collection of cases and pertinent discussions, see 5 AM. JUR. § 295 (1936); Annot., 7 A.L.R. 93 (1920); Note, 40 L.R.A. (N.S.) 801 (1912).

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BASTARDS—WOMAN UNWED AT BIRTH OF CHILD BUT WED AT TIME OF BRINGING ACTION.—*P*, unwed mother, subsequently married a man other than the father of the child. After her marriage, but within three years of the birth of the child, *P* caused a warrant to be issued for the arrest of *D*, the alleged father of the child, under W. VA. CODE c. 48, art. 7, § 1 (Michie 1955). After preliminary proceedings the warrant was quashed upon retrial as insufficient in law, the grounds being that *P* was at the time of the issuance of the warrant a married woman and there was no showing that she had not lived or cohabited with her husband for at least one year prior to the birth of the child as required by the statute in the case of a married woman. The State's application to the circuit court for a writ of error was denied. Upon petition of State the Supreme Court of Appeals of West Virginia granted writ of error. *Held*, the Code provision that an unmarried woman may accuse any person of being the father of a child of which she is delivered relates to her marital status at the time of the birth of the child, and not at the time when she makes the accusation. Judgment reversed and case remanded. *State v. Mercer*, 92 S.E.2d 745 (W. Va. 1956).

The reasoning behind the court's decision is that the main purpose of a bastardy proceeding is to prevent an illegitimate child from becoming a public burden, which it well might become if born while the mother is unwed, even though she later marries. This is the generally accepted construction of this type of statute. For full discussion and collection of cases, see Annot., 14 A.L.R. 974 (1921).

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DIVORCE—DECREE *a Vinculo Matrimonii* FOR DESERTION SUBSEQUENT TO DECREE *a Mensa et Thoro*.—*D*, wife, was granted divorce *a mensa et thoro* from *P* in 1933. *D* allegedly did not exercise the rights thus conferred upon her, but resumed normal marital relations with *P* and lived with him as his wife until 1944 when she deserted *P*. *D* contends that since the prior decree *a mensa et thoro* has not been revoked by the court as provided by W. VA. CODE c. 48, art. 2, § 16 (1931), as amended by W. Va. Acts 1935, c. 35, *D* is justified in leaving and *P* is precluded from seeking divorce *a vinculo matrimonii* on grounds of desertion. The circuit court of Wood County dismissed *P*'s bill of complaint. On appeal to the Supreme Court of Appeals of West Virginia, *held*, that while the

Code provides for revocation by court action of decree *a mensa et thoro*, such procedure is not exclusive; and if the two parties become reconciled and live together as man and wife, the offended spouse in the *mensa et thoro* suit waives his or her right to live separate and apart from the other spouse and can thereafter be guilty of desertion. Judgment reversed. *Scott v. Scott*, 91 S.E.2d 621 (W. Va. 1956).

The court's holding that the statute providing for a court decree to dissolve a prior decree *a mensa et thoro* does not mean this is the exclusive method by which to terminate a separation decree is certainly contra to the construction that most courts have made of similar statutes. In most jurisdictions the courts have held that a court decree is the only way to terminate a decree of separation, although it is generally held that a mere separation agreement can be terminated by reconciliation and cohabitation. Annot., 40 A.L.R. 1227 (1926), 85 A.L.R. 420 (1933), 35 A.L.R.2d 707 (1954).

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DIVORCE—DIVISIBLE DIVORCE PROCEEDINGS—AWARD OF ALIMONY WITHOUT PERSONAL JURISDICTION.—*D*, husband, filed suit for divorce in New Hampshire to which *P*, wife, filed cross-petition for separate maintenance. *D* herein subsequently applied for and was granted *ex parte* divorce in Nevada with an alimony award to the wife of $50.00 per month. Subsequently, the New Hampshire court ordered *D* herein to pay *P* herein $250.00 per month for separate maintenance. *P* sues for separate maintenance arrears owed *P* by *D* under the New Hampshire decree. *Held*, that the award of alimony by the Nevada court was void, because of lack of personal jurisdiction over *P* and not, therefore, entitled to full faith and credit; but that the New Hampshire court gained personal jurisdiction over *D* by reason of his filing there for divorce and its award of separate maintenance payments is binding on *D* and entitled to full faith and credit, even though the Nevada decree had previously granted a valid *ex parte* divorce. *Dorney v. Dorney*, 145 F. Supp. 281 (S. D. W. Va. 1956).

This case presents a good picture of the operation of the doctrine of divisible divorce. The subject is fully treated in 59 W. VA. L. REV. 193 (1956).

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