February 1933

West Virginia Annotations to the Restatements of Conflict of Laws and Contracts

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Conflict of Laws Commons, Contracts Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol39/iss2/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
WEST VIRGINIA ANNOTATIONS TO THE
RESTATEMENTS OF CONFLICT OF
LAWS AND CONTRACTS

The following West Virginia annotations to some twenty sections selected from the American Law Institute's Restatement of the Law of Conflict of Laws and the Restatement of the Law of Contracts are published for the purpose of indicating the nature of the work that is being done to make the Restatements of greater practical value to the bench and bar of the State. There are between 600 and 650 sections to each of these Restatements and the annotations presented here are samples only. When the entire work is completed, the annotations will be published in book form by the American Law Institute and thus made available to West Virginia lawyers at a nominal price.

The rules and comments are reproduced herein as they appear in the Restatement by the American Law Institute. The illustrations given in the Restatement, however, are omitted. The West Virginia annotation to each section follows the comment.

The work of annotating the Restatement of the Law of Conflict of Laws is being done by Professor E. C. Dickinson of the West Virginia University College of Law in cooperation with the following committee from the West Virginia Bar Association: Nelson C. Hubbard, Chairman, Charles McCamie, Kent B. Hall, Robert T. Donley, L. S. Schweneck, A. G. Hughes. The annotations to the Contracts Restatement are being prepared by Associate Professor Thomas C. Billig of the College of Law in cooperation with the following committee from the Bar Association: O. E. Wyckoff, Chairman, L. A. Johnson, Fred L. Lemley, James R. Moreland, Jed W. Robinson.

RESTATEMENT OF THE LAW OF CONFLICT OF LAWS.

Chapter 4.

JURISDICTION OF COURTS.

TOPIC C. JURISDICTION OVER STATUS.

TITLE I. JURISDICTION OVER STATUS IN GENERAL.

Section 116. Notice and Opportunity to be Heard.

A state cannot exercise through its courts judicial jurisdiction over the status of a person, unless a method of notifica-
tion is employed which is reasonably calculated to give him knowledge of the attempted exercise of jurisdiction and an opportunity to be heard.

Comments:

a. A state has jurisdiction over the domestic status of persons domiciled within the state (Section 60).

b. Although a state has jurisdiction over the status of a person, a proper notice to the person is essential to the exercise of judicial jurisdiction over the status. Under the Fourteenth Amendment to the Constitution of the United States a decree affecting the status rendered without proper notice is invalid.

Annotation:

No West Virginia case directly in point has been found, but in Woodford v. Woodford, 161 S. E. 3 (W. Va. 1931) the court refused to recognize an Ohio decree of divorce entered within six weeks from the first publication of process, the Ohio Code providing that in a suit for divorce "the cause may be heard and decided after the expiration of six weeks from the service of summons, or the first publication of notice".

The requirement for notice finds statutory recognition in Code, 48 - 2 - 10; providing for order of publication in divorce litigation.

TITLE II. JURISDICTION FOR DIVORCE.

Section 117. JURISDICTION OF STATE OF DOMICIL OF SPOUSES.

A state can exercise through its courts jurisdiction to dissolve the marriage of spouses both domiciled in the state.

Comments:

a. Marriage is a status. While it is an intangible thing and without any situation in space, it is nevertheless of peculiar interest to the state in which the spouses have their domicil and where in the great majority of cases the family life is permanently carried on. The state of domicil is so peculiarly interested in the relation of marriage that it has jurisdiction over the status and may put an end to it.

b. Statutes which give particular courts the power to grant divorces often require that one party (usually the libellant, that

---

1When "Code", without date, is cited in annotations, reference is to the Official Code of West Virginia 1931.
is, the party bringing the proceeding) should have resided for a certain time within the state. Residence for this purpose ordinarily means domicil (Section 12, Comment c). The requirement that the residence must have continued for a certain number of months or years is not jurisdictional, in the sense in which that word is used in the Restatement of this Subject; and the finding of the court on the length of residence is conclusive in the courts of another state provided the jurisdictional requirement of domicil at the time suit is brought is satisfied.

c. As in the case of any judgment (Section ), a decree of divorce may be subject to attack on equitable grounds, such as fraud in obtaining jurisdiction.

Annotation:

In Carty v. Carty, 70 W. Va. 146, 150, 73 S. E. 310, 312 (1911), the court says: "It is the domicil of one or both the parties in this state, at the time of the suit, that gives jurisdiction under our statutes. No other basis of jurisdiction is fixed."

Code, 48 - 2 - 6, gives the circuit court jurisdiction for divorces. Code, 48 - 2 - 9, provides that "the suit . . . . for divorce, shall, if the defendant be a resident of this state, be brought in the county in which the parties last cohabited, or, at the option of the plaintiff, in the county in which the defendant resides; but if the defendant be not a resident of this state, the suit shall be brought in the county in which the plaintiff resides." Where suit was brought "in the county in which the parties last cohabited" the defendant being a resident of another county, but such facts were not alleged in the bill, the lower court was wholly without jurisdiction. Jennings v. McDougle, 83 W. Va. 186, 98 S. E. 162 (1919).

Ch. 64, Sec. 7, Code 1923, provided: "and in no case shall a suit for divorce be maintainable unless the plaintiff be an actual bona fide citizen of this state, and shall have resided in the state for at least one year immediately preceding the bringing of the suit." That residence and domicil of one foreign born are sufficient to give the status of "citizenship" required by this statute was held in Vachikinas v. Vachikinas, 91 W. Va. 181, 112 S. E. 316 (1922). That residence under this section meant domicil, see authorities cited in annotation under Section 12 of the
Restatement. Material changes in the subject matter of this section were made in the revised code of 1931. Code, 48 - 2 - 8. The requirement of citizenship was omitted and the period of residence "made to depend on the cause of divorce, whether the cause of action arose at a time when one of the parties was a bona fide resident of this state, or before becoming such, and whether personal service within the state may be had upon the defendant".

Revisers' Note to Code, 48 - 2 - 8.

In the absence of any showing of fraud upon the court, or lack of jurisdiction, a decree of divorce rendered by a court of competent jurisdiction in another state or territory of the United States, upon an order of publication duly executed pursuant to the laws of such state or territory, is entitled to the same faith and credit in the courts of this state as in the state and territory wherein rendered. Caswell v. Caswell, 84 W. Va. 575, syl. 2, 100 S. E. 482 (1919). And see State v. Goudy, 94 W. Va. 542, 119 S. E. 685 (1923).

Section 118. STATE OF DOMICIL OF NEITHER SPOUSE.

A state cannot exercise through its courts jurisdiction to dissolve a marriage where neither spouse is domiciled within the state.

Comments:

a. Neither the appearance of the defendant spouse nor a finding of domicil by the court can create jurisdiction, since the action of the court if valid is to dissolve the status, and therefore

---

The portion of annotation under Sec. 12 to which reference is made is as follows:

JURISDICTION FOR DIVORCE

As jurisdiction for divorce is based on domicil of at least one of the parties to the suit within the state, the requirement as to residence in Code, 48 - 2 - 8, would seem to be in addition to that of domicil. Ch. 64, § 7, Code 1923, required that the plaintiff be "an actual bona fide citizen" and have resided in the state for at least one year. That domicil and residence for the requisite period were sufficient to give the status of citizenship required by that statute was held in Vachikinas v. Vachikinas, 91 W. Va. 181, syl. 2, 112 S. E. 319 (1922). That both domicil and residence were required under that section before its amendment in 1915 is evident from the opinion in Carty v. Carty, 70 W. Va. 146, 73 S. E. 310 (1911); and the amendment requiring that the plaintiff shall be an actual bona fide citizen of this state, and shall have resided in the state for at least one year immediately preceding the bringing of the suit, has not changed its interpretation in this respect. Boos v. Boos, 93 W. Va. 727, 117 S. E. 616 (1933). To the same effect see Parks v. Parks, 109 W. Va. 138, 141, 153 S. E. 242, 243 (1930). While in the revised code a new term — "bona fide resident of this State" — is used, (Code, 48 - 2 - 8), it is not probable that a different interpretation will be placed upon "resident".

https://researchrepository.wvu.edu/wvlr/vol39/iss2/4
is in rem, and the thing to be acted on must be within the jurisdiction of the court if the action is to be effective and recognized in other states.

b. A person who has asked for and obtained a decree of divorce from a court which had no jurisdiction, or a person who takes advantage of the divorce by remarrying, is precluded from disputing the validity of the divorce in a matter concerning only claims as spouse against the other spouse.

Annotation:

For divorces granted in West Virginia, the statutory requirement of residence of one of the parties (Code, 48 - 2 - 8) is in accord with the principle of this section if the term "bona fide resident" is held to mean one domiciled in the state. For the meaning of residence in divorce statutes, see Section 12 of the Restatement and authorities cited in annotation thereunder.8

Whether a divorce granted in another state where neither party is domiciled will be regarded as void for lack of jurisdiction has not been passed upon by our court. One court has recognized the validity of such a divorce. Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923).

See annotation under Section 123 for jurisdictional requirement in suit for annulment.

Section 119. State of Domicil of One Spouse.

A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state
   (i) has consented that the other spouse acquire a separate home; or
   (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or
   (iii) is personally subject to the jurisdiction of the state which grants the divorce;
   or
(b) the state was the last state in which the spouses were domiciled together as man and wife.

---

8 See preceding note.
Comments:

a. Two interests are involved in the granting of a divorce; that of the state of domicile in the existence of the status and that of the defendant spouse in the plaintiff spouse. Since the result of the action is to deprive the defendant spouse of his interest in the other spouse, the court must in some way acquire jurisdiction over that interest.

b. If one spouse consents that the other spouse acquire a separate home, the interest of the former spouse is subject to the action of any state in which the other spouse may establish his home and thus acquire a domicile.

c. If the misconduct of one spouse is such that the other leaves him without being guilty of desertion and acquires a new domicile, the interest of the former spouse is subject to the action of any state in which the other spouse acquires a new domicile.

In cases where the misconduct of one spouse is necessary to give jurisdiction to a court at the domicile of the other spouse, such misconduct becomes a jurisdictional fact; and another court, finding the fact otherwise, will hold the former court to have been without jurisdiction, and will refuse to give effect to its judgment (see Section 82).

d. If a defendant spouse is served with process within the state in which an action for divorce is brought against him by a plaintiff spouse who is domiciled in the state, or appears in the action, or otherwise becomes subject to the jurisdiction of the court in which the action is pending (see Section 82), the court has jurisdiction to grant the divorce.

e. The plaintiff in a divorce suit always fills the requirements of Clause (a), Subclause (iii), since by bringing the suit he submits himself to the jurisdiction of the state in all matters concerning the suit (see Section 83).

f. If suit is brought at the last domicile where the spouses lived together, the party who has left that domicile cannot justly complain of being called back there to litigate the question of divorce by the spouse still domiciled therein.

g. Jurisdiction in this case is analogous to jurisdiction to deprive a person of ownership in a thing (see Section 52).

Annotation:

The statutes and decisions in West Virginia are not in entire accord with this section of the Restatement. Before the Revision of 1931 the statute governing the granting of divorces allowed
divorce at the domicile of the plaintiff and provided for order of publication where the defendant was not personally served. Ch. 64, § 7, Code 1923. Since the Statute required the plaintiff to be a resident, the domicile of the defendant alone in the state was not sufficient to give jurisdiction. White v. White, 106 W. Va. 569, 146 S. E. 376 (1929); Parks v. Parks, 109 W. Va. 138, 141, 153 S. E. 242, 243 (1930). But where a non-resident wife, whose husband was a citizen of West Virginia, sued him here for maintenance and he filed an answer in the nature of a cross bill praying for a divorce, the court held that she might then file an amended pleading asking for similar relief; the filing of the cross bill by the defendant conferring jurisdiction for that purpose. Hale v. Hale, 104 W. Va. 254, 139 S. E. 754 (1927). A material change in the law in this respect is made by the Code of 1931. By 48 - 2 - 8, a suit for divorce can be maintained when either of the parties has been a bona fide resident of this state for the required time.

No reported case has been found in which the West Virginia court in granting a divorce has exceeded the bounds prescribed in this section. In both Carty v. Carty, 70 W. Va. 146, 73 S. E. 310 (1911), and Vachikinas v. Vachikinas, 91 W. Va. 181, 112 S. E. 316 (1922), the husband by his misconduct had ceased to have the right to object to the acquisition of such separate home (see (a) (ii) above). It is not clear whether jurisdiction in Boos v. Boos, 93 W. Va. 727, 117 S. E. 616 (1923) is to be sustained on this same ground or on the theory of "matrimonial domicile" (see (b) above). An attitude less liberal than expressed in the Restatement is shown in the case of State v. Goodrich, 14 W. Va. 834, 847 (1878), where Judge Green says: "The true position is I think that a state court, where the parties married and resided, and one of them continues to reside there, though one of them deserts the other and removes to another state, may grant a divorce, though the grounds of the divorce, such as adultery, may have occurred outside the state. If, however, after the marriage both parties move to another state, and one of them commits adultery, and afterwards the other again removes to the State where the parties were married, in such case it is doubtful whether a divorce could be granted by the courts of the State in which the parties were married." Under the later decisions this doubt would seem to be removed. Carty v. Carty; Boos v. Boos, supra. And by Code, 48 - 2 - 8 a divorce certainly could be granted in such a case.
That the West Virginia court will recognize the validity of a decree from another state, the domicile of one party, even though the defendant was not before the court, is indicated by the following: In Campbell v. Switzer, 74 W. Va. 509, 510, 82 S. E. 319 (1914), the court says: "Under the full faith and credit clause of the federal Constitution, the Kentucky decree has the same effect in this State as it has in the State in which it was pronounced." And in Caswell v. Caswell, 84 W. V. 575, 584, 100 S. E. 482, 485 (1919) the following language is found: "The copy of the proceedings from the district court of Logan County, Oklahoma, being duly and properly certified, and it not appearing therefrom that the court was without jurisdiction, and the decree being such as is entitled to full faith and credit in the courts of that territory, now the State of Oklahoma, the policy of our law as declared in Sec. 19, Ch. 130, Code, (Code, 57 - 1 - 12) entitles it to the same faith and credit in the courts of this State . . . . But the policy of our State as shown in the Statute above referred to, differs from the policy of the State of New York." As the Restatement professes to follow the rule of Haddock v. Haddock, (supra), the West Virginia law would seem to go further in the matter of recognition of foreign divorce decrees than this section of the Restatement.

TITLE III. JURISDICTION TO ENTERTAIN OTHER MARITAL SUITS.

Section 120. Judicial Separation.

A state can exercise through its courts jurisdiction to grant judicial separation to any spouse petitioning therefor.

Comments:

a. The order for judicial separation, or divorcee from bed and board, does not affect the existence of the marriage, but only protects the spouse against certain acts of the other spouse while they are within the state.

b. If a court is to do more, and affect the marriage relation by permanently depriving one spouse of the right to have the other live with him, the proceeding becomes a qualified dissolution of the marriage, and the requirements of jurisdiction are the same as in the case of divorce. This is the type of relief provided in many American States.
Annotation:

The West Virginia Statutes providing for limited divorce clearly fall within the description in Comment (b). Code, 48 - 2 - 5, 16, and 20. The nature of this relief under the former statute is set out in Chapman v. Chapman, 70 W. Va. 522, 525, 74 S. E. 661, 663 (1912) as follows: "A decree of divorce a mensa is by Sec. 12, Ch. 64, of the Code, a decree of perpetual separation; it operates on the after acquired property of the parties, and upon the personal rights and legal capacities, the same as a decree a vinculo, except that neither party is permitted to marry again during the life of the other." (See criticism of this opinion in Revisers' Note to Code, 48 - 2 - 16.) Jurisdictional requirements are the same as for a divorce a vinculo. Code, 48 - 2 - 6.

Section 121. Restitution of Conjugal Rights.

A state can exercise through its courts jurisdiction to grant against any spouse subject to its jurisdiction restitution of conjugal rights.

Comment:

a. This proceeding, by its nature, can be effective only within the state. This proceeding is not one which under the laws of the various States is employed in the United States. But where courts are empowered to grant restitution of conjugal rights, the jurisdiction to exercise the power is as stated in this Section.

Annotation:

Analogous to this type of litigation is the suit to affirm a marriage where doubt exists as to its validity, provided for in Code, 48 - 2 - 2.

Section 122. Nullity from the Beginning.

A state can exercise through its courts jurisdiction to nullify a marriage from its beginning only in so far as the marriage, in respect to the requirement for its validity which it is claimed was not satisfied, was governed by its law.

Comments:

a. As is stated (Section 129), a marriage is in most particulars governed by the law of the place of marriage; and if invalidity is claimed in one of these particulars, and the decree of
nullity will operate to make the marriage invalid from its inception, a decree of nullity can be granted only by a court of the state where the marriage took place.

b. If a policy exists in the state of domicile of one party, based on strongly held grounds, which does not permit the parties to marry one another, the law of the state of domicile will not create the status of marriage as a result of the contract (Section 140). If nullity of marriage is claimed on such a ground, only the state of domicile at the time of marriage has jurisdiction to grant nullity.

Annotation:

On facts similar to those in illustration 3,4 above, a Virginia judgment declaring a marriage a nullity on the ground of relationship was held to be valid although the marriage had been performed in Washington, D. C., where it was legal. Kelly v. Scott, 5 Gratt. 479 (Va. 1849).

Under Ch. 109, § 1, Va. Code of 1860, in force in West Virginia until superseded by Ch. 64, § 1, Code of 1868, two kinds of defective marriages were recognized. Marriages between a white person and a negro, and between persons either of whom had a husband or wife living, were absolutely void without any decree. Marriages prohibited because of consanguinity or affinity and marriages of insane or physically incapable persons, were void from date of decree of nullity. It was held in Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736 (1890), that a marriage occurring while § 1, Ch. 109, Code of Va. 1860, was in force, between persons, one of whom had a husband then living, is absolutely void without a decree; and although suit to declare the nullity of such marriage was brought under the Code of 1868, no alimony could be decreed.

Section 123. Nullity from Date of Decree.

A state can exercise through its courts jurisdiction to annul from the date of the decree the marriage of spouses if it would have jurisdiction to grant a divorce.

Comment:

a. This proceeding is provided for by statute in some states.

---

4 Illustration 3 in the Restatement is as follows:
"A and B, aunt and nephew, domiciled in state X, are married in state Y. A brings suit for nullity in X on the ground of relationship. The decree may be granted."
It differs from that described in Section 122, in that it destroys the marriage not from its inception, but only from the date of the decree. It differs from divorce in that the cause existed at the time of the marriage instead of arising after it. As its effect on the marriage is the same as that of divorce, it requires the same jurisdiction in the court.

Annotation:

Annulment under the present West Virginia statutes in of the type covered in this section of the Restatement. Code, 48-2-1, 2, 3. Under the former statute, Ch. 64, § 7, Code 1923, jurisdiction was the same as in suits for divorce. A material change in this respect has been made in the revised code. Code, 48-2-7, is as follows: “No suit to annul or affirm a marriage shall be maintainable unless at the commencement of the suit one of the parties is a bona fide resident of this State, except that in the case of a suit to annul a marriage that was performed in this State it shall not be necessary, if a matrimonial domicile has not been established elsewhere, that one of the parties be such a resident.” As a suit for annulment can be maintained under this statute when neither party is a bona fide resident of the state, the jurisdictional requirement is not the same as for divorce and the statute is clearly contrary to the rule of the Restatement. Whether full faith and credit would be given in other states to a decree so rendered would be doubtful.

Jurisdiction to annul an incestuous marriage consummated in Pennsylvania was exercised in Martin v. Martin, 54 W. Va. 301, 46 S. E. 120 (1903). Both plaintiff and defendant apparently were domiciled in West Virginia both at the time of marriage and when suit was brought. See also Perkey v. Perkey, 87 W. Va. 656, 106 S. E. 40 (1921), as to annulment on the ground that plaintiff was under age.

Section 124. Alimony.

A state can exercise through its courts jurisdiction to grant alimony to one spouse if it has jurisdiction over the other spouse; or, if it has jurisdiction over his property, to the extent of such property.

Comments:

a. Alimony is ordinarily granted in connection with divorce proceedings; but may be given when no divorce is granted, or even asked for,
b. Alimony may be granted by a personal decree against a spouse, or by a decree that binds his property only.

c. The decree for alimony being the creation of a purely personal duty of the spouse, like a judgment for damages, there must either be jurisdiction over the person himself to create the duty, or jurisdiction over a thing to apply it to the payment of the claim for alimony.

Annotation:

No West Virginia case directly in point has been found. However, in Coger v. Coger, 48 W. Va. 135, 35 S. E. 823 (1900), it was held that a decree awarding alimony to the wife, rendered before the service of process upon the husband, although he was within the jurisdiction of the court, was void, and the court quoted with approval the following from the Enc. of Plead. & Prac., vol. 1, page 413: "And although a divorce ex parte may be obtained on constructive service, yet no alimony can be decreed, unless the defendant appears to the action in person or by attorney or has been duly served with process within the jurisdiction of the court."

By Ch. 64, § 11, Code 1923, a court was authorized to award alimony "upon decreeing the dissolution of a marriage and also upon decreeing a divorce." The words "upon decreeing the dissolution of a marriage" apply not to marriages absolutely void without decree but to those declared void from the time of decree, which until such decree are valid. Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736 (1890). This made it possible, apparently, to decree alimony in any annulment suit in West Virginia, since the statute (Ch. 64, § 1) purported to annul only from the date of decree. In the section of the revised code providing for alimony (Code, 42-2-15), the term "dissolution of marriage" is not used. While the avowed purpose of this omission was "to provide for maintenance of the parties only in case of divorce" (Revisers' Note to Code, 48-2-15), it would seem that it will merely prevent the decreeing of alimony in annulment proceedings, as a new section (Code, 48-2-29) expressly authorizes the Circuit Court in Chancery to decree alimony and separate maintenance independently of proceedings for divorce. Such right has been recognized in Purcell v. Purcell, 4 Hen. & M. 507 (1810); Almond v. Almond, 4 Rand. 662 (Va. 1826); Lang v. Lang, 70 W. Va. 205, 73 S. E. 716 (1912); Huff v. Huff, 73 W. Va. 330, syl. 4, 80 S. E. 846 (1913); State v. Maxwell, 89
W. Va. 31, 108 S. E. 418 (1921). What appears to be a contrary holding in Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461 (1909), cited in Revisers' Note to Code, 48 - 2 - 29, is explainable on the ground that in that case the husband had previously obtained a divorce from bed and board and was thereby relieved from further duty to maintain his wife.

In Lang v. Lang, supra, at 210, the court says: "The venue of a suit for maintenance without divorce is in no wise controlled by the statute in relation to jurisdiction in divorce suits. The place of suit is governed by the laws applying to ordinary suits for the vindication of legal or equitable rights." This seems to be changed by Code, 48 - 2 - 29, which authorizes "the circuit court of any county that would have jurisdiction of a suit for divorce between the parties" to decree alimony and separate maintenance to the wife.

Code, 48 - 2 - 15, also gives the court the right to alter or revise the decree "concerning the maintenance of the parties, or either of them, and make a new decree concerning the same, as the altered circumstances or needs of the parties may render necessary to meet the ends of justice." Under the earlier statute no such right was given. Cariens v. Cariens, 50 W. Va. 113, 73 S. E. 332 (1901). But the court had the power to reserve the right to make such changes as the changed circumstances of the parties and the principles of justice might require. Henrie v. Henrie, 71 W. Va. 131, syl. 1, 76 S. E. 337 (1912); and in Sperry v. Sperry, 80 W. Va. 142, syl. 6, 92 S. E. 574 (1917), it was held that the court should reserve this power and if it failed to do so, the error could be corrected on appeal. See Revisers' Note to Code, 48 - 2 - 15.

Alimony orders from courts of other states are treated subsequently under judgments. See, however, Stewart v. Stewart, 27 W. Va. 127 (1885).

**TITLE IV. JURISDICTION OVER CUSTODY.**

**Section 125. Guardianship of the Person.**

A state can exercise through its courts jurisdiction to determine the custody of children or create the status of guardian of the person only if the domicil of the person placed under custody or guardianship is within the state.
Comment:

a. A guardian of the person may be the guardian of an infant, or the guardian of an adult person of unsound mind; or without the appointment of guardian of an infant the same status may be created by awarding the custody of a child to one of its parents. The question of custody and guardianship is fully considered later in Sections 152 to 159 inclusive.

Annotation:

Ch. 64, § 11, Code 1923, gave to the court, upon rendering a decree of divorce, authority to make an award of the custody of the children, and subsequent modifications thereof. It further provided: "And whether the divorce be granted or not, if the parties are living separate and apart from each other, the court may make such order or decree . . . . as to the court may seem proper", concerning the custody and maintenance of minor children. In the face of this clear language, it was held in Lord v. Lord, 80 W. Va. 547, 553, 92 S. E. 749 (1917), that this statute confers no authority upon the court to disturb the custody of the child or children of the parties to a divorce suit on refusal to decree a divorce. Code, 48 - 2 - 15, gives this authority to the court.

In Post v. Post, 95 W. Va. 155, 159, 120 S. E. 385, 387 (1923), the court uses language which supports the requirement of domicil in this section of the Restatement. It said: "Such conditions and circumstances may develop from time to time as would warrant the court in entering new orders relative to the welfare of the children. To make this possible it may be necessary for the circuit court to require both children to be kept within its jurisdiction". But in Anderson v. Anderson, 74 W. Va. 124, syl. 1, 81 S. E. 706 (1914), it was held that a decree in an Indiana divorce suit "was valid and binding upon the parties in this state, in the award of the custody of the children, even though so much of it as grants the divorce may be void and the children may have been beyond the jurisdiction of the court at the time of the rendition thereof". This seems to be clearly contrary to the rule of this section of the Restatement.

Section 126. Temporary Guardianship.

A state can exercise through its courts jurisdiction to protect from harm a person found within its territory by appointing a temporary guardian of such person.
Comment:

a. While this relation does not create the status of guardian and ward, and gives the person appointed no power outside the state, it gives to the temporary protector complete power within the state of his appointment in anything relating to the protection and welfare of the person to be protected; but it does not supersede the right of the parent or guardian to appear and claim the child (Sections 155, 159).

Annotation:

Applications of the exercise of jurisdiction dealt with in this section are found in Code, 49 - 3 - 1 to 28, dealing with delinquent and dependent children.
Chapter 3.

FORMATION OF INFORMAL CONTRACTS

TOPIC B. MANIFESTATION OR ASSENT

Section 20. MANIFESTATION OF MUTUAL ASSENT.

A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, except as qualified by Sections 55, 71 and 72, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

Comment:

a. Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested. Moreover, if the manifestation is at variance with the mental intent, subject to the slight exception stated in Section 71, it is the expression which is controlling. Not mutual assent but a manifestation indicating such assent is what the law requires. Nor is it essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not.

Annotation:

West Virginia, in effect at least, is in accord with this section. There is an apparent difficulty with the “manifestation” element as the Supreme Court of Appeals ordinarily has not used that particular word. See the following cases for pertinent and interesting terminology:


Weaver v. Burr, 31 W. Va. 736, 744, 8 S. E. 743 (1888). (Assent must be mutual and intended to bind both sides).


Hunter v. Tolbard, 47 W. Va. 258, 262, 34 S. E. 737 (1899). (Drunkenness resulting in absolute want of understanding).


Martin v. Ewing, 164 S. E. 859, 861 (W. Va. 1932). ("A sine qua non of all contracts is that there must be mutuality — a meeting of the minds of the parties").

McCully v. Phoenix Ins. Co., 18 W. Va. 782, 786 (1881). (All the terms must be mutually agreed upon).


Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, Syl. 2 (1894). ("A mere proposal to sell land does not become a sale until acceptance and notice of acceptance given the proposer").

Meredith v. Shakespeare, 96 W. Va. 229, 122 S. E. 520 (1924). (Marriage annulment in which mental or real intent prevailed over the objective or manifested intent).

Although the West Virginia cases do not speak of "manifestation," of assent it seems likely that "manifested" or "expressed" assent is understood. See Richmond Eng. Corp. v. Loth, 135 Va. 110, 152, 115 S. E. 774 (1923), quoting Williston, Contracts, § 22; Weaver v. Burr, 31 W. Va. 736, 759, 8 S. E. 743 (1888), quoting 1 Benj., Sales, § 39, and 1 Story, Contracts, § 498.

Note that Meredith v. Shakespeare, supra, and perhaps Hunter v. Tolbard, supra, are exceptions to the rule that manifested assent prevails over mental intent.

Section 21. Acts as Manifestation of Assent.

The manifestation of mutual assent may consist wholly or partly of acts, other than written or spoken words.
Comment:

a. Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise, and where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of a promise whether it is expressed (1) in writing, (2) orally, (3) in acts, or (4) partly in one of these ways and partly in others.

Annotation:

West Virginia is in accord with this section.


See Richmond Engineering Corp. v. Loth, 135 Va. 110, 152, 115 S. E. 774 (1923), quoting Williston, Contracts, Section 22a, to the effect that assent may be shown by acts as well as by words.

Section 22. Offer and Acceptance.

The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties.

Comment:

a. This rule is rather one of necessity than of law. In the nature of the case one party must ordinarily first announce what he will do before there can be any manifestation of mutual assent. It is theoretically possible for a third person to state a suggested contract to the parties and for them to say simultaneously that they assent to the suggested bargain, but such a case is so rare, and the decision of it so clear that it is practically negligible.

Annotation:

The West Virginia Supreme Court of Appeals has stated many times that a contract requires an offer and an acceptance. As to this elementary point, see the following cases: McCully's Adm'r v. Phoenix Ins. Co., 18 W. Va. 782, Syl. 6 (1881); Dyer

No West Virginia decision was found involving the simultaneous assent of two parties to a bargain suggested by a third.

Section 23. Necessity of Communication of an Offer.

Except as qualified by Section 70, it is essential to the existence of an offer that it be a proposal by the offeror to the offeree, and that it becomes known to the offeree. It is not essential that the manifestation shall accurately convey the thought in the offeror's mind.

Comment:

a. Two manifestations of willingness to make the same bargain do not constitute a contract unless one is made with reference to the other. An offeree, therefore, cannot accept an offer unless it has been communicated to him by the offeror. This may be done through the medium of an agent; but mere information indirectly received by one party that another is willing to enter into a certain bargain is not an offer by the latter.

Annotation:

The first illustration used by the Restatement indicates that at this point it is concerned primarily with the so-called "reward" cases. It adopts the majority view of Fitch v. Snedeker, 38 N. Y. 248, 97 Am. Dec. 791 (1868) requiring knowledge by the offeree of the promised reward at the time he performs the requested service in order to bind the offeror contractually, rather than the opposite minority view expressed in Dawkins v. Sappington, 26 Ind. 199 (1866). No West Virginia "reward" case was found, but language contained in several of the decisions cited in previous annotations indicates that the Supreme Court of Appeals would follow the majority view.
The second illustration employed reads as follows: "A sends B an offer through the mail to sell A's horse for $500.00. While this offer is in the mail, B, in ignorance thereof, mails to A an offer to pay $500.00 for the horse. There is no communication of A's offer, and there is no contract." No West Virginia case was found which involved "crossed offers".

Section 24. Offer Defined.

An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance. An offer is also a contract, commonly called an option, if the requisites of a formal or an informal contract exist, or if the rule stated in Section 47 is applicable.

Comment:

a. In an offer for a unilateral contract the offeror's promise is conditional upon an act other than a promise being given except in cases covered by Section 57. In an offer for a bilateral contract the offeror's promise is always conditional upon a return promise being given. The return promise may be in the form of assent to the proposal in the offer. In order that a promise shall amount to an offer, performance of the condition in the promise must appear by its terms to be the price or exchange for the promise or its performance. The promise must not be merely performable on a certain contingency.

b. All offers are promises of the kind stated in this Section and all promises of this kind are offers if there has been no prior offer of the same tenor to the promisor. But if there has already been such an offer to enter into a bilateral contract, an acceptance thereof, like the offer itself, will be a promise of the kind stated in the Section.

Special Note: The word "option" is often used for a continuing offer although it is revocable for lack of consideration; but more commonly the word is used to denote an offer which is irrevocable and therefore a contract.

Annotation:

No West Virginia case found contained a definition of the word "offer". However, in Richmond Eng. Corp. v. Loth, 135 Va. 110, 152, 115 S. E. 774 (1923), the Virginia Supreme Court of Appeals quotes Williston, Contracts, Section 25, as follows: "An offer is a statement by the offerer that he will give a
return for some promise or act of the offeree, etc.” And further “. . . . an offer is always a conditional promise and it may be a contract.”

The West Virginia decisions illustrate the tendency — commented upon in the “Special Note” — of some courts to use the word “option” in describing a continuing offer which is revocable for want of consideration. In Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743 (1888), the Supreme Court of Appeals termed such an offer an “option.” And in Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 542-543 (1894), the Supreme Court of Appeals, per Brannon, J., used the following language in commenting upon a similar revocable offer: “It was an option to purchase, a proposal, — as the letter itself calls itself, an ‘option’, — and under the language of the offer, as well as the general law of contracts touching a proposal, it must be accepted, and acceptance made known, and within a reasonable time.”

In the following cases the word “option” was used to describe a continuing offer made under seal for which a valuable consideration had been given: Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701 (1905); Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150 (1905); Womaek v. Agee, 79 W. Va. 22, 90 S. E. 792 (1916).

Section 25. WHEN A MANIFESTATION OF INTENTION IS NOT AN OFFER.

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

Comment:

a. It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered, as well as the customs of business, and indeed all surrounding circumstances.
Annotation:

The West Virginia cases are in accord with this section, which seeks to distinguish an offer from an "invitation to treat".


Parks v. Morris, Layfield & Co., 63 W. Va. 51, 59 S. E. 753 (1907). An inquiry only concerning price plaintiff would take for his timber. Brannon, J., (p. 53, 59 S. E. 735-754): "Was this a contract? We say not. Morris made no actual proposal to buy. Parks simply asked Morris what he was paying Sterne for timber, and Morris asked him if he would take the same. He made only an inquiry, but he made no acceptance of the proposition of Parks to take $6 per acre. A contract cannot bind a party proposing it until acceptance of the other party. The minds of the parties must meet in a consummated contract. If anything remains to be done to make a contract, if the agreement is not consummated, if all the terms have not been mutually agreed upon, no contract arises between the parties."

Pickens v. Stout, 67 W. Va. 422, 68 S. E. 354 (1910). "Loose conversation" on subject of purchase. Poffenbarger, J., (p. 429, 68 S. E. 358): "Taken all together, we think this evidence of purchase is too uncertain and contradictory as to time and is altogether silent as to the price and terms. No doubt B. B. Stout expected to buy it, and likely Mrs. Jarvis looked upon him as a prospective purchaser. There may have been some loose conversation on the subject, as there seems to have been between B. B. Stout and some of the other heirs; but the evidence falls short of the establishment of a contract of sale, fixing the price and terms and the execution of a written contract or memorandum, and there was no change of possession within the lifetime of Mrs. Jarvis, of which she had any notice, disclosed by the evidence. To sustain a bill for specific performance of an oral contract of purchase, the evidence must be clear, full, and free from suspicion."

Herman v. Goddard, 82 W. Va. 520, 96 S. E. 792 (1918). (Terms of payment left for future negotiations).

In Three States Coal Co. v. Superior Elkhorn By-Products Co., 110 W. Va. 455, 158 S. E. 661 (1931), annotated (1931) 38 W. Va. Law Quarterly 76 the following letter was construed as an offer: "Would you be interested in an order for 40,000 tons of Elkhorn Steam Mine Run — net you $1.30 net ton mines shipment from date until November 15th — in approximately equal
monthly installments, with the exception of July and August, and during these months 10,000 to 11,000 tons would be required to be shipped? If your position is such that you are not inclined to handle the order for the entire tonnage possibly you would consider the acceptance of 15,000 to 20,000 tons — shipment over the period. Doubtless this or similar tonnage will be attractive to you, considered in the nature of a back log . . . . If interested, kindly wire us upon receipt of this letter, stating quantity of tonnage you will accept, and we will telegraph you billing."


Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial therof; but other facts may show that the manifestations are merely preliminary expressions as stated in Section 25.

Comment:

a. Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it, and often before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisites for the formation of a contract. On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.

b. The matter may be put in this way: If the parties indicate that the expected document is to be a mere "memorial" of operative facts already existing, its non-existence does not prevent those facts from having their normal legal operation. What that operation is must be determined largely by oral testimony,
or by preliminary or only partially complete writings. If the parties indicate that the expected document is to be the exclusive operative consummation of the negotiation, their preceding communications will not be operative as offer or acceptance. This also must be shown largely by oral testimony.

c. If the written document is prepared and executed, the legal relations of the parties are then largely determined by that document, because of the so-called "Parol Evidence Rule," even though there was a binding informal contract previously made.

Annotation:

West Virginia is in accord with this section. The decision of Brown v. Maryland Ry. Co., 92 W. Va. 111, 114 S. E. 457 (1922) is a square holding on the point. Ritz, J., after listing the authorities, stated the following conclusion (p. 119, 114 S. E. 460): "From these authorities it is very clear that a binding oral contract may be made between parties, though there is an understanding that it is to be subsequently reduced to writing, which writing is never completed, where it appears that all of the terms of the contract are fully understood and agreed to, and there is no agreement that their validity depends upon their being reduced to writing."

The principle involved in this section is thus stated by Woods, J., in the leading case of Virginian Export Coal Co. v. Rowland Land Co., 100 W. Va. 559, 581, 582, 131 S. E. 253, 262 (1926): "This leads us to consider the remaining question: Was the understanding of the parties that they were not to be mutually bound by any negotiations until the same had been reduced to a formal contract of lease and signed? The circuit court answered this question in the affirmative. As contended by counsel for the plaintiff, it is an undoubted principle of law that a valid contract may be made by memorandum, telegrams, and correspondence, but the authorities as expressly hold that care should always be taken not to construe as an agreement that which the parties only intended to be a preliminary negotiation. The question in such cases always is, say all the books, did they mean to contract by the memorandum of agreement, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound? No positive rule can be laid down to guide the court in arriving at the intention in all cases. Such intention must necessarily depend upon
the nature of the transaction, the circumstances and surroundings appearing in each particular case. W. Va. O. & O. L. Co. v. Vinal, 14 W. Va. 637.”

The problem raised by this section is also considered in Monongah Coal & Coke Co. v. Fleming, 42 W. Va. 538, 26 S. E. 201 (1896); Friend v. Mallory, 52 W. Va. 53, 43 S. E. 114 (1903); Merchants’ Coal Co. v. Billmeyer, 54 W. Va. 1, 46 S. E. 121 (1903). The decision of Hardwood Package Co. v. Courtney Co., 253 Fed. 929 (C. C. A. 4th, 1918) is in accord with this section.

As to the signatures to a contract where the agreement contemplates that all the parties are to sign and that unless all parties sign there is no completed contract, see Herndon v. Meadows, 86 W. Va. 499, 103 S. E. 404; Hoon v. Hyman, 87 W. Va. 659, 105 S. E. 925 (1921); Ely v. Phillips, 89 W. Va. 580, 109 S. E. 808 (1921).


That this is a rule of evidence which may be waived by failure to invoke, see McGraw v. First Nat. Bank, 85 W. Va. 298, 101 S. E. 474 (1919).

Section 27. Auctions; Sales Without Reserve.

At an auction, the auctioneer merely invites offers from successive bidders unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder.

The proposed Final Draft No. 13 to the Restatement of Contracts contains the following suggested addition to Section 27: “In that case after a bid has been made the auctioneer cannot withdraw. Even though the sale is announced to be without reserve any bidder may withdraw his bid until the auctioneer by fall of the hammer, or in other customary manner, announces that the sale is complete.”

Comment:

a. An auction as ordinarily conducted furnishes an illustration of the principle stated in Section 25. The auctioneer, by beginning to auction property, does not impliedly say: ‘‘I offer to
sell this property to whichever one of you makes the highest bid,' but rather requests that the bidders make offers to him, as indeed he frequently states in his remarks to those before him.

b. It is corollary of the principle stated in this Section taken in connection with Section 41 that, where the auctioneer merely invites offers, a bidder may withdraw his bid at any time before the fall of the hammer. A bid in such a case is a revocable offer. If the auctioneer has made an offer inviting acceptances, a bid is an acceptance and completes a contract, binding both auctioneer and bidder; but the contract is conditional on no higher bid being made before the fall of the hammer.

Annotation:
No West Virginia case directly in point was found. The following quotation from Wharton on Contracts, Section 10, is cited with approval in the opinion of the Court in Weaver v. Burr, 31 W. Va. 736, 744, 8 S. E. 743, 747 (1888) "... The right to revoke before acceptance is one which prior conditions cannot limit. Thus, at an auction sale, the bidder may at any time recall his bid before the hammer falls, though the conditions of sale are that no bidding shall be retracted, and the seller may retract, though the sale was to be without reserve. It would be a petitio principii to say that the party retracting was bound by contract not to retract, since it is to this very contract not to retract that his retracting applies."

Section 28. To Whom an Offer May be Made.
An offer may be made to a specified person or persons or class of persons, or it may be made to anyone or to everyone to whom it becomes known. The person or persons in whom is created a power of acceptance are to be determined by the reasonable interpretation of the offer.

Comment:
a. An offer may give many persons a power of acceptance. In some such cases the exercise of the power by one person will extinguish the power of every other person; in other cases this will not be true. The decision depends on interpretation of the offer.

Annotation:
No West Virginia cases were found which involved offers to a class of persons. In Martin v. Rothwell, 81 W. Va. 681, 95 S.
E. 189 (1918), and in Windsor Hotel Co. v. Schenk, 76 W. Va. 1, 84 S. E. 911 (1915), it was held that an offer (stock subscription) might be made to a corporation to be formed in the future. This type of case is, of course, remote from the situations contemplated in Section 28.

Section 29. **How an Offer May be Accepted.**

An offer may invite an acceptance to be made by merely an affirmative answer, or by performing or refraining from performing a specified act, or may contain a choice of terms from which the offeree is given the power to make a selection in his acceptance.

Annotation:

The West Virginia decisions are in accord with this section. In the first situation of acceptance by mere affirmative answer, see Watson v. Coast, 35 W. Va. 463, 14 S. E. 249 (1891). In that case the Supreme Court of Appeals said, per Brannon, J., (p. 470, 14 S. E. 251): "The first question I shall consider is, does the written offer or option made by Watson and the telegram sent to him by Coast constitute a contract? Looking at this offer, it conveys a clear, distinct proposition; looking at the telegram, it conveys an equally clear and distinct acceptance of that proposition. From this proposition on the one side, and its unqualified acceptance on the other, results a complete contract, according to the well-established law of contracts." See also Catlett v. Boyd, 83 W. Va. 776, 99 S. E. 81 (1919); Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692 (1895). The cases illustrating this very ordinary situation are numerous.

In the second situation of acceptance by performing or failing to perform a specified act, see Wood & Brooks Co. v. D. E. Hewit Lumber Co., 89 W. Va. 254, 109 S. E. 242 (1921). In that case the Court said, per Lynch, J., (p. 260, 109 S. E. 244): "The proposal was to buy basswood timber for 1916 delivery, and as such it was a valid offer to purchase, and the acts of defendant in cutting and shipping part of the timber, viewed in the light furnished by the written correspondence, constituted an effective acceptance or ratification of the offer." To the same effect is Duquesne Lumber Co. v. Keystone Mfg. Co., 90 W. V. 673, 112 S. E. 219 (1922), especially Syl. 1, and Coal & Coke Ry. Co. v. Nease, 207 Fed. 237 (C. C. A. 4th, 1913).
In the third situation of acceptance by choice of terms, see Morris v. Risk, 86 W. Va. 30, 102 S. E. 725 (1920), where "plaintiff had under the option a right to buy or sell any one or all of the lots, or the right to buy some of them and sell the others."

Section 30. Offer May Propose a Single Contract or a Number of Contracts.

An offer may propose the formation of a single contract by a single acceptance or the formation of a number of contracts by successive acceptances from time to time.

Comment:

a. An offer may request several acts or promises as the indivisible exchange for the promise or promises in the offer, or it may request a series of contracts to be made from time to time. Such a series may be a series of unilateral contracts or a series of bilateral contracts, depending upon the terms of the offer. Whether several promises create several contracts or are all part of one contract is determined by principles of interpretation stated in Chapter 9.

Annotation:

No West Virginia cases squarely in point were found. Language appearing in some of the cases, however, indicates that this jurisdiction is in accord, on principle, with the section. In Lawrence v. Potter, 91 W. Va. 361, 370, 371, 113 S. E. 266, 270 (1927), for example, the following statement appears: "That claim and equity, taken in connection with the other facts and circumstances, and uncontradicted testimony found in the record, conclusively demonstrate the unsoundness of the contention that the agreement here involved was an independent one, or a mere offer of sale, subject to withdrawal before consummation of the other agreements with which it was clearly connected. The real transaction was a composite one, made up of several elements and subsidiary agreements. Potter could properly accept it only in its entirety, and he could not reject any part, while holding on to another, to the detriment of the party as to whom he desired to reject."