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Student Eligibility For The Virginia Barexamination: An Observation Onthe Recent Amendment

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FACULTY AND ALUMNI COMMENTS

STUDENT ELIGIBILITY FOR THE VIRGINIA BAR EXAMINATION: AN OBSERVATION ON THE RECENT AMENDMENT

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A recent legislative change[1] in the eligibility requirements for taking the Virginia Bar Examination has caused some consternation among students and to an extent among their teachers in the law schools of the State. The amendment has the effect of limiting to one the number of times a person may normally attempt the examination prior to graduation from law school—and obviously is for this reason thoroughly disliked by law students. (Of possible interest to prospective employers of these students is the effect of the amendment upon the likelihood that a student will have taken the examination at the time when he is seeking a job.)

Formerly it was provided by statute that a person who had "studied law for at least two years" at an approved law school was eligible to take the examination.[2] Since the examination is given twice each year, in June and December,[3] students in usual course were thus permitted to take it in June after the intermediate year and in December of the senior year, as well as in June after graduation. The new enactment, effective last January, provides that prior to graduation a student may take the examination only if he has successfully completed two years of study *and,* at the time of his application,[4] is regularly enrolled in his third year. This provision prevents students from taking the examination in June after the intermediate year.[5]

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[1]Va. Code Ann. § 54-62.1 (Supp. 1960).

[2]The prerequisites for licensing to practice have not been changed. In order to be licensed, one must have completed his formal education either in an approved law school or in the office of a practicing attorney in this State. Va. Code Ann. § 54-62 (Supp. 1960).

[3]Rules promulgated by the Board of Bar Examiners provide that the examination will be given in Richmond beginning on the second Monday in December and in Roanoke beginning on the last Monday in June.

[4]Applications must be completed and filed on or before April 15, for the June examination, and on or before October 15, for the December examination. Rule 17, Virginia Board of Bar Examiners.

[5]It will undoubtedly also be applied to eliminate students who at the time of

From the viewpoint of the faculties of the law schools, one probable result of the amendment will be a noticeable disruption of the third year curriculum during the Fall semester. Heretofore, most students interested in practicing in Virginia have taken the examination in June after the intermediate year. Because the examination is given late in the month of June, there was sufficient time after the close of the academic year to accommodate the usual pre-examination preparation and panic. Normally only a small group attempted the examination during the winter of the senior year. However, under the amendment it seems inevitable that a majority of the seniors will want to take it in December since that will be the first and only opportunity they will have prior to graduation. This exodus in December, preceded presumably by several weeks of intensive study, will almost certainly have an unhappy consequence in its effect upon the teaching and study of regular course work.

Perhaps the new requirement is premised on the assumption that students regularly enrolled in the third year will be better prepared to take the examination than they would have been at the end of only two years of law study. However, it is doubtful to this writer that a student who is in the midst of his fifth semester's work, on which he is yet to be examined, will be significantly more learned in the law than one who has just completed his fourth semester. As has been noted, what is more likely is that a goodly portion of that fifth semester will have been spent in "cramming" for and fretting over the impending ordeal, to the neglect of regular course work.

Both the former system and the present one are vulnerable to the argument that it is altogether illogical and impractical to examine students on their qualifications to practice law at any time before they have completed the formal education which is required of them. The law school curriculum is presumably designed to familiarize the student with legal concepts and methods of reasoning and at the

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making application have completed three full semesters and one summer session (1/2 semester) and who are enrolled in their fourth full semester. Such students probably will not be regarded as regularly enrolled in the third year at the time of making application.

Two other changes of some interest have been made in the statutes relating to the bar examination. Hereafter, one who fails the examination is limited to four additional efforts to pass it. Va. Code Ann. § 54-66 (Supp. 1960). Hereafter, one who has graduated from law school before making application to take the bar will apparently have to satisfy a six-month residence requirement before his application will be accepted. Previously, a student who had graduated within three months of making application could avoid this residence requirement. Cf. Va. Code Ann. § 54-60 (Repl. Vol. 1958) with Va. Code Ann. § 54-60 (Supp. 1960).

same time to leave him with something of a rounded view of the law in proper perspective. To permit the student to subject himself to an examination of crucial importance to him, which presumably is designed to test him on a number of matters to which he has not even been exposed, at a time when he still has a piecemeal view of the law is to encourage in him a deplorably artificial and superficial approach. Incidentally, the adoption of a requirement that formal education be completed before taking the bar examination would obviously eliminate the interference with the curriculum which, as noted above, will probably come about under the present statute.

It is possible that the recent amendment was intended as something of a compromise between the view favoring the former system and the view favoring completion of educational requirements before becoming eligible to take the bar examination. If so, it appears to have been one of those unfortunate middle views which effectively abandons the best features of both the positions intended to be compromised.

DESERTION DURING PENDENCY OF DIVORCE SUIT

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In the field of domestic relations, it is generally stated that a defendant in a divorce suit may, by cross-bill, assert a cause of action for divorce which has accrued in his favor subsequent to the filing of the complainant's original bill.[1] Thus a cross-bill is accorded the same dignity as an original bill, and this dignity is not impaired by the fact that the matter alleged therein did not occur until after the original bill was filed.[2] Such a statement of the law is not surprising; it

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[1]Neddo v. Neddo, 56 Kan. 507, 44 Pac. 1 (1896), Martin v. Martin, 33 W Va. 695, 11 S.E. 12 (1890); White v. White, 167 Wis. 615, 168 N.W 704 (1918); 19 C.J. Divorce § 305 (1920); 9 R.C.L. Divorce and Separation § 226 (1931).

"It is recognized and permissible practice for the defendant to file a cross-bill and ask independent relief in divorce suits. When he does so, his suit is as separate and distinct from that of his wife as if the wife had brought no suit, and the finding of the court should be upon each separately." Sloeum v. Sloeum, 86 Ark. 469, 111 S.W 806 (1908).

[2]Pettigrew v. Pettigrew, 172 Ark. 647, 291 S.W 90 (1927); Wiess v. Wiess, 135 Misc. 264, 238 N.Y.S. 36 (Sup. Ct. 1929); Roberts v. Roberts, 99 W. Va. 204, 128 S.E. 144 (1925); Heinemann v. Heinemann, 202 Wis. 639, 233 N.W 552 (1930)

"If the final decree in a cause fixes the rights of the parties as of its date, it

appears to be based on sound principles. The point in time at which an offense occurred would appear to have little bearing on the merits of a suit alleging such offense. It is interesting, however, to note that this principle is rarely applied where the offense alleged in the cross-bill is that of desertion or abandonment. The Supreme Court of Appeals of Virginia, for example, has consistently held that as a matter of law, physical separation occurring after one spouse files a bill for divorce cannot constitute the offense of desertion.[3] The most recent occasion for such a decision was the case of *Plattner v. Plattner*,[4] in which the Virginia court was confronted with these facts:

On January 15, 1957 W filed a bill praying for a divorce *a mensa et thoro*, for the reason that H constructively deserted and abandoned her. H filed an answer denying constructive desertion; thereafter, on April 10, 1957 H filed a cross-bill seeking a divorce from W on the ground that she deserted him on or about February 1, 1957. On November 15, 1957 the cause was referred to a commissioner in chancery. The commissioner heard the evidence and submitted his report on July 17, 1958 in which he found that W was not entitled to a divorce—that the original bill would not lie; but that H, as cross-complainant, was entitled to a divorce on the ground of wilful desertion and abandonment. The trial court confirmed the commissioner's finding that W's original bill would not lie; but ruled further that H's cross-bill, having been filed subsequently to W's original bill, must also fail. H appealed from this trial decree.

The Supreme Court of Appeals affirmed the decree of the lower court holding that H's cross-bill failed because the grounds asserted occurred after W filed her original bill. The court stated:

> "Thus it is disclosed that the alleged desertion on the part of the wife did not occur until after the filing of her suit and before the merits of the same had been determined, and was *insufficient in law to show wilful desertion and adandonment.*"[5]

In view of the fact that W's original bill was without merit, this would seem to be a rather broad statement of the law; yet the Virginia court was not without precedent.

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would seem to be consonant with the principles of justice that every right and every defense to which either of the parties was entitled at any time before the date of the decree should be considered. Von Bernuth, 76 N.J. Eq. 487, 74 Atl. 700, 702 (1909).

[3]Plattner v. Plattner, 202 Va. 263, 117 S.E.2d 128 (1960); Smith v. Smith, 202 Va. 104, 116 S.E.2d 110 (1960); Hudgins v. Hudgins, 181 Va. 81, 23 S.E.2d 774 (1943); Craig v. Craig, 118 Va. 284, 87 S.E. 727 (1916).

[4]202 Va. 263, 117 S.E.2d 128 (1960).

[5]Id. at 266, 117 S.E.2d at 130. (Emphasis added.)

A bare two months before *Plattner* was decided, the same Virginia court, although considering slightly different facts, made an identical statement of the law. In *Smith v. Smith*[6] the court ruled on these facts:

W, at the instance of H, left their marital home and took up residence with her parents. While she was thus separated from H, W filed a suit against H for separate maintenance alleging cruelty, desertion and wrongful refusal to support her. Among other pleadings, H filed a cross-bill four months after W filed her suit alleging that W deserted him. The lower court held that W had failed to prove her case, but that H was entitled to an absolute divorce from W on the ground of desertion. W appealed from this decree.

The Supreme Court of Appeals held that H could not prevail on this cross-bill, for the sole reason that W's alleged offense occurred subsequent to the filing of her suit; accordingly the trial court's decree was reversed. "[T]he desertion relied on for divorce must be alleged and proved to have occurred prior to the bringing of the suit, not based upon some act or conduct alleged to have taken place during its pendency."[7] The court stated that H in his cross-bill had alleged an offense to have occurred while W's suit was pending and that such an allegation "*cannot* serve him as a ground for divorce in this suit."[8] Again, the cross-bill was defeated, not on its merits, but by the fact that a bill of complaint which had no merit was filed first.

The Virginia court in *Plattner* and *Smith* seemed to be primarily persuaded by the authority of an earlier Virginia case, *Hudgins v. Hudgins*.[9] Although the facts of the *Hudgins* case differ from those of the later decisions, the doctrine laid down by the court supports these decisions. In the earlier case the evidence was replete with examples of gross and shameful conduct on the part of W for a number of years preceding the suit. H filed a bill of complaint charging W with cruelty and constructive desertion and seeking a divorce *a mensa et thoro*. W filed a cross-bill alleging that H deserted her by leaving their home after he brought his suit. The trial court dismissed H's suit and granted W a divorce on the ground of the alleged desertion by H. The appellate court reversed this decree holding that the evidence compellingly showed that H was entitled to a divorce on his original bill, and that W could not be granted relief on her cross-bill. A final decree of divorce was granted to H.

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[6]202 Va. 104, 116 S.E.2d 110 (1960)
[7]Id. at 109, 116 S.E.2d at 113.
[8]Id at 110, 116 S.E.2d at 114. (Emphasis added.)
[9]181 Va. 81, 23 S.E.2d 774 (1943).

In ruling out W's cross-bill, the *Hudgins* court assigned the following reason:

> "It seems well settled that the absenting of one spouse from the other after the institution and during the pendency of a suit for divorce, as here, is not desertion in law and is not an act upon which a suit for desertion may be predicated. Indeed, in many cases it is highly proper that such physical separation should be, and under many circumstances it is, commendable."[10]

Such physical separation was no doubt commendable in the *Hudgins* case as W was shown to have been guilty of derelictions which would have justified H's leaving the marital home. H's original bill was held to have embodied a meritorious claim; his grievance was real. But what of the *Plattner* and *Smith* decisions, each of which dealt with a situation where the original bill had no merit? Is a spouse to be allowed to insulate himself against a divorce proceeding merely by filing a suit which may or may not have merit? In view of the interminable periods during which artful litigants may keep a case pending without securing a ruling on its merits, this latter question presents a perplexing problem.

The real issue would seem to be not whether the original suit for divorce was actually determined in favor of the complainant, but whether in fact the complainant was in *good faith* in bringing the suit—whether there was sufficient evidence to give rise to a reasonable belief by complainant that his cause had enough merit to entitle him to a judicial determination of the same. If such evidence exists, then the pendency of his suit is a bar to a cross-suit alleging his desertion during such pendency. "Where one spouse *in good faith* brings proceedings for a divorce against the other though in fact, as it may develop, there is no ground for divorce, it is the general rule that there can be no desertion by the one of the other pending the divorce proceedings, as it is presumed that no return would be then permitted; and futhermore, the complaining spouse, by a return to matrimonial cohabitation, might be held to have condoned the ground on which the proceeding for a divorce was based."[11]

The pendency of a sham suit, therefore, would not constitute a

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[10]Id. at 87, 23 S.E.2d at 777.

[11]9 R.C.L. Divorce and Separation § 147 (1915). (Emphasis added.) See also Easter v. Easter, 75 N.H. 270, 73 Atl. 30 (1909) wherein it is stated that while "the pendency of a libel for divorce is an evidentiary fact, bearing upon the question whether the absence complained of is such an abandonment as the statute makes a cause for divorce . one honestly prosecuting a supposedly sound suit for divorce cannot be found guilty of desertion while so engaged. . . ."

defense to a cross-suit alleging desertion of the defendant by the complainant, for there was in fact no justification for leaving. In the New Jersey case of *Von Bernuth v. Von Bernuth*,[12] W filed suit against H alleging cruelty and malicious acts by H. At the trial there was no evidence to support W's allegations. W's leaving home subsequent to the filing of her suit, therefore, was held to constitute actionable desertion on her part. In another New Jersey case, *Weigel v. Weigel*,[13] W filed a suit for divorce alleging cruelty; her suit was dismissed for insufficient evidence. In a subsequent suit by H against W, it was alleged that W wrongfully deserted H by leaving the matrimonial home during the pendency of her suit. H's contention was upheld, and he was granted a divorce for the reason that W's original suit was not in good faith. The New Jersey court stated that as a general rule there can be no desertion by one spouse of the other during the pendency of a suit for divorce. "But in all the cases which state the proposition in general terms there is an assumption that the case which relieves from the duty of cohabitation during its pendency is one brought in good faith. . . In such a case it is of no significance whether the complainant succeeds or fails in the suit by which she presents her claim. Her separation during its pendency is not obstinate, for the reason that there is a justifiable cause for it, and that it is her right to have a judicial determination of what she believes to be real grievance, unembarrassed by presumptions adverse to her which would necessarily attend upon continued cohabitation with her husband. When, however, it is shown that the wife's previous suit, the pendency of which is set up to excuse her apparent desertion, was based on allegations which were known by her to be false when they were submitted to the court, and when her testimony in that suit in support of those allegations is proven to have been untrue by many disinterested witnesses . . the excusatory effect of the pendency of the previous suit is wholly lost."[14]

The true test, then, would seem to be one of good faith as an element of the original suit for divorce. If this element exists, then desertion is a legal impossibility during the pendency of the suit. If, however, it does not exist, the complainant leaves at his peril. The purpose of this comment, then, is not to take exception to the rulings of the Virginia court in *Plattner* and *Smith*, but to point out the vague area of law in which these decisions lie. On the one hand,

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[12]76 N.J. Eq. 487, 74 Atl. 700 (1909).
[13]63 N.J. Eq. 677, 52 Atl. 1123 (1902).
[14]Id. at 679, 52 Atl. at 1124.

there are numerous decisions to the effect that any matrimonial offense which may be alleged in an original bill of complaint may be the subject of a cross-bill notwithstanding the fact that the offense alleged occurred after the original suit was filed.[15] On the other hand, there is abundant language to the effect that as a matter of law an offense alleged in the cross-bill to have occurred subsequent to the filing of the suit for divorce cannot constitute a ground for divorce.[16] Each such statement is needlessly broad. It is certainly true that a cross-complainant may be granted relief on the ground of adultery committed by the original complainant pending the outcome of the original suit.[17] The difficulty seems to arise only where desertion is the ground alleged in the cross-bill. In this context is it a legal impossibility for desertion to occur during the pendency of a divorce suit? It is submitted that on the authority of the *Von Bernuth* and *Weigel* cases, the answer must be in the negative. There is nothing magic about the filing of a suit; if there exists no reasonable justification for such complaint, then there is no legal excuse for the complainant's leaving his matrimonial home.

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[15]See note 1 supra.

[16]Renner v. Renner, 177 Md. 689, 12 A.2d 195 (1940); Criser v. Criser, 109 W. Va. 696, 156 S.E. 84 (1930); see also Virginia cases cited in this comment.

[17]Blanc v. Blanc, 67 Hun. (N.Y.) 384, 22 N.Y. Supp. 264 (Sup. Ct. 1893); Roberts v. Roberts, 99 W. Va. 204, 128 S.E. 144 (1925).

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