

265-2

190-339

Record No. 3553

In the
Supreme Court of Appeals of Virginia
at Richmond

**WALTER RUSSELL BURTON AND
GRACE E. BURTON**

v.

DAVID DIXON RUSSELL

FROM THE HUSTINGS COURT, PART II, OF THE CITY OF RICHMOND

RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

190 VA 339

RULE 14—BRIEFS

1. **Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

(d) Argument in support of the position of appellant.

The brief must be signed by at least one attorney practicing in this court, giving his address.

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. **Form and contents of appellee's brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate reference to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

3. **Reply brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him, not referred to in his petition or opening brief. In other respects it shall conform to the requirements for appellee's brief.

4. **Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

(c) *Stipulation of counsel as to filing.* Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

5. **Number of copies to be filed and delivered to opposing counsel.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

6. **Size and Type.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

7. **Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he cannot be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

CLERK
SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 3553

WALTER RUSSELL BURTON AND GRACE E. BURTON,
Plaintiffs in Error,

versus

DAVID DIXON RUSSELL, Defendant in Error.

**PETITION FOR WRIT OF ERROR OR APPEAL AND
SUPERSEDEAS.**

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of Appeals of Virginia:*

Your petitioner, Walter Russell Burton and Grace E. Burton, respectfully represent that they are aggrieved by a certain judgment or decree of the Hustings Court, Part II, of the City of Richmond, Virginia, entered on the 13th day of October, 1948, in a certain *habeas corpus* proceeding then depending in the said Court, wherein the said David Dixon Russell was the petitioner and the said Walter Russell Burton and Grace E. Burton were the defendants. A transcript of the record of the said cause is filed herewith.

STATEMENT OF THE FACTS.

David Dixon Russell and Mildred Rachel Russell (now Mildred Rachel Steris) were married on August 30, 1940, in the City of Baltimore, Maryland. From the time of said marriage the parties lived together under rather unsatisfactory conditions, set forth in the testimony of Mildred Rachel Steris, for about two years. The said David Dixon Russell was a very unstable person shifting from place to place. He drank rather heavily (R., p. 30). On July 12, 1942, the subject of these proceedings, David Dixon Russell, Jr., was born 2* *in Baltimore, Maryland. About six weeks after the baby was born, Mrs. Russell (now Steris) was forced to leave her husband because he drank to great excess, ran around at night, and sometimes did not bother to come back at all (R., pp. 39 and 40). She and the child came to her mother and step-father at Fredericksburg, Virginia, where she stayed until March of 1943. She came to Richmond, Virginia, with the baby in July of 1943, and shared an apartment with her sister. Mrs. Russell found it impossible to live on the allotment which she received by reason of her husband's service in the army and found it necessary to have employment. In the first part of 1944 she was employed at DuPont. She found it impossible to work and take proper care of the child. Mrs. Gladys E. Rogers, whose husband worked at DuPont, was caring for several children at the time, and upon the recommendation of the employment or personnel office at DuPont, Mrs. Russell approached Mrs. Rogers and proposed that she take her child and care for it, for which she would pay her \$9.00 per week and provide clothing for the child. This arrangement was made in March of 1944.

Mrs. Gladys E. Rogers is a sister of the said Grace E. Burton, and after the child, David Dixon Russell, Jr., came to Mrs. Rogers, both of the appellants had occasions to see a great deal of him. Walter Russell Burton was seriously wounded in the invasion of southern France, and due to that he arrived back from overseas on August 22, 1944, and after that he lived at home and took daily treatments at McGuire's Hospital. He been employed at DuPont prior to his induction into the service. After his return to this country he could not for some time regain his employment at DuPont, but he worked at a service sation. He became devoted to the little boy and saw him regularly at the home of Mrs. Rogers, his sister-in-law, until July, 1945. At that time Mr. Rogers was transferred by DuPont to Wilmington, Delaware, and it be-

came necessary for other arrangements to be made for
3* the little boy, who was then three years old. *Mrs. Russell had seen much of Mr. and Mrs. Burton during the period that her child was with Mrs. Rogers. She came to see her child probably on an average of twice a week while he was with Mrs. Rogers, and regularly paid \$9.00 per week for his support. She knew the child would be well taken care of by Mr. and Mrs. Burton, and that they were devoted to the child and he to them. So in July, 1945, it was arranged that Mr. and Mrs. Burton would take the child and that Mrs. Russell would pay them \$9.00 per week as she had paid Mrs. Rogers.

Mrs. Russell instituted divorce proceedings against David Dixon Russell in the Hustings Court, Part II, Richmond, Virginia, in the fall of 1945. She testified that "he asked for it" (R., p. 46). However that may be Mr. Russell knew of the pendency of the divorce proceedings. He was discharged from the army in December, 1945, and about the middle of that month he came to visit the child at the home of Mr. and Mrs. Burton in Chester, Virginia. He took the child to Baltimore to visit his mother with the understanding that he would bring the child back to Chester within about a week, which he did. So during the pendency of the divorce suit, Mr. Russell was fully advised of the situation with David Dixon Russell, Jr., and Mr. and Mrs. Burton. He made no appearance in the said suit. On January 26, 1946, Judge Pulliam, then judge of the Hustings Court, Part II, of the City of Richmond, Virginia, granted divorce *a vinculo* to Mrs. Russell on the grounds of her desertion and abandonment by David Dixon Russell. At the time of the granting of said divorce the child was with Mr. and Mrs. Burton under the arrangement aforesaid. It must be presumed that the Court was advised of this arrangement. The said decree awarded custody of the said child to Mrs. Russell, thus confirming and approving the existing status with reference to the child being with Mr. and Mrs. Burton under the aforesaid arrangement. The child continued to live with Mr. and Mrs. Burton, and they as always continued to care for him as their own, and to love him as their own and be loved by him. Mr. Russell was fully

4* *aware of the situation relative to his son, and tacitly approved it. He knew that such sums as were paid for the support and maintenance of the child was paid by Mrs. Russell. He has at no time since the birth of the child, six and one-half years ago, contributed one cent towards its support. He visited the child once in Fredericksburg, in the early part of 1943, when it was ill with pneumonia. Of course, while he was in the army he could not visit his son.

During the year following his discharge from the army in December, 1945, he visited the child at the Burton's three times. These were: December, 1945, when he took him to Baltimore for a week, June, 1946, and Christmas, 1946. So, for the past two years he has not put himself out to see the child. He testified that on a trip from Florida to Baltimore last summer, 1947, he stopped by the Burton's going and coming but found them out on each occasion, and that he did not bother to make any inquiries but continued his trip without bothering to find out about the child or to see him.

Subsequent to the divorce decree of January 26, 1946, and some time thereafter, Mrs. Russell remarried, and she is now Mrs. Mildred Rachel Steris. Since her remarriage, she and her husband live in Lorraine, Ohio. After her remarriage she continued to pay the Burton's \$9.00 per week until July, 1947. She then was vested with full legal custody of David Dixon Russell, Jr., pursuant to the decree of January 26, 1946. At that time the Burton's informed her that they wished to adopt the little boy, that they had become so devoted to him that they could not continue to care for him unless they could have him permanently, and that they would bear all expense for his support and maintenance. The mother, considering that the child had come to know no parents except Mr. and Mrs. Burton, thought that the best interest of the child lay in his adoption by the Burton's. She therefore signed a paper consenting to the adoption. Since July, 1947, the Burton's have continued to care for the child as their own, and have received no contribution from any source to help with the child's support and maintenance.

5* *Mr. and Mrs. Burton attempted to communicate this adoption plan to Mr. Russell, addressing him in Florida according to information received from his mother in Baltimore. Some of the letters came back. However, Mr. Russell received one which was registered to him. He did not extend the courtesy of a reply. For more than a year, pursuant to the arrangement and agreement with the child's mother, who was then vested with full legal custody of the child under the decree of January 26, 1946, the Burton's not only cared for the child as their own, as they always had, but looked upon him as their very own. The tender ties of parent and child became, during that year, more and more inextricable interwoven around the hearts of the foster parents and the child. All this the natural father, David Dixon Russell, by his silence and by his callous refusal to communicate his intentions to the Burton's, permitted to grow and develop.

The record shows the tender concern of these foster parents of this child, and the fine prospects that lay in store for him by continuing his life with those who know him and are known and loved by him. These witnesses are among the best people in the fine community of Chester, and are disinterested. On the other hand, the natural father has seen the child on only four occasions, the last time two years ago, and he and his present wife are total strangers to him. The record shows that he has always been unstable and has moved from place to place and from job to job, and this by his own admission. All of the evidence relative to his fitness to have the custody of this child was the testimony of himself and his present wife. And this testimony must be considered against the background of six and one-half years of almost total neglect, and his failure ever to contribute one cent to the support of the child. By the decree of January 26, 1946, Mr. Russell was adjudicated to have abandoned and deserted the mother and the child.

6* *PROCEEDINGS IN THE LOWER COURT.

David Dixon Russell filed petition in the divorce suit of *Mildred Rachel Russell v. David Dixon Russell* praying that so much of the said decree of January 26, 1946, as awarded custody of David Dixon Russell, Jr., to the mother and complainant in that suit be set aside, and that custody of the child be awarded to him. Walter Russell Burton and Grace E. Burton were not parties to this suit, but they were ordered to bring the child to the Court on October 9, 1948, which order they obeyed. By decree entered in this divorce suit on October 9, 1948, the Court awarded custody of the child to the said David Dixon Russell, the mother, Mrs. Steris, not appearing at the hearing. David Dixon Russell on October 9, 1948, in open Court made formal demand upon Walter Russell Burton and Grace E. Burton to deliver possession of the child to him, his intention being to take the child to Florida and beyond the jurisdiction of the Courts of this Commonwealth. The appellants refused to comply with said demand. On October 11, 1948, the appellee filed petition for writ of *habeas corpus* (R., p. 1) praying that the appellants be commanded to bring the body of David Dixon Russell, Jr., at the time specified in the writ. The said petition for writ of *habeas corpus* was predicated solely upon the decree of October 9, 1948, and contained no allegation that best interests of the child would probably be advanced by taking him from the Burton's and turning him over to the petitioner to be taken to Florida. In

obedience to the writ (R., p. 3) the appellants appeared before the Court with the body of David Dixon Russell, Jr., and thereupon, by leave of Court, filed their demurrer to the petition (R., p. 7), which said demurrer the Court overruled, and the appellants, by leave of Court, filed their answer to the said petition. Thereupon, the appellee filed in evidence a certified copy of the decree of October 9, 1948, in the divorce suit, of which the appellants were not parties, and rested. The appellants thereupon moved the Court to strike the evidence (R., p. 24), which motion was overruled. The evidence, which is set forth in the record, was then heard *ore tenus*, and 7* *then Court entered the judgment or decree which is complained of (R., p. 4).

ASSIGNMENTS OF ERROR.

The appellants respectfully make the following assignments of error:

1. The Court erred in overruling the demurrer to the petition.
2. The Court erred in overruling the motion of the appellants to strike the evidence, thus placing the burden upon the appellants, and holding that the decree of October 9, 1948, made out a *prima facie* case for the appellee against the appellants.
3. The Court erred in entering the decree or judgment of October 13, 1948 (R., p. 4), which is complained of.

ARGUMENT.

1. The Court erred fundamentally in adjudicating that the decree of October 9, 1948, entered in the divorce suit of *Mildred Rachel Russell v. David Dixon Russell*, of which the appellants, Walter Russell Burton and Grace E. Burton were not parties, had effect in this cause.

The first two assignments of error may be considered together because they involve the same proposition of law. While the Court had jurisdiction to determine matters of custody as between the parties to the suit, it had no jurisdiction in the divorce suit to determine the best interests of the child where it had not lived for many years with either parent. In this case the child was living with the appellants on January 26, 1946, when it was finally adjudicated that the father had abandoned and deserted the child and its mother, and the mother was awarded custody of the child, presumably

with the understanding the child would continue with Burtons. The appellants had no right to be heard in the proceedings resulting in the decree of October 9, 1948, and all that the Court could determine was the relative fitness as between the mother and the father for the custody of the child. But the child was not living with either of its natural parents. The mother, during the period in which she was vested with the legal custody of the child, voluntarily relinquished her parental rights to the appellants, and the father had not 8* cared for *the child ever, and had abandoned and deserted him. The question as to the rights of the appellants, or as to the best interests of the child as between the appellants and either or both of the natural parents, under the circumstances existing, could not have been determined in the divorce case. We, therefore, submit to the Court the following propositions:

(a) The Petition for Writ of *Habeas Corpus*, being predicated solely on the said decree of October 9, 1948, and containing no averment or allegation as to the best interests of the child is fatally defective. It did not state a cause of action. We think that the petition stands on same basis as if there had never been a divorce suit and the marriage between the natural parents had been dissolved by death of the mother, and the natural father, after having abandoned and deserted the mother and child, failed during the child's whole lifetime to contribute one cent towards the child's support and maintenance, had not seen the child except on four occasions, and having paid little attention to the child or concern for its welfare during his whole lifetime, should petition the Court writ of *habeas corpus* against foster parents, stating only that he was natural father and making no allegation as to the best interests of the child. In *Buchanan v. Buchanan*, 170 Va. 458, 197 S. E. 426, the Court stated the object of *habeas corpus* as follows:

"The primary object of *habeas corpus* is to determine the legality of the restraint under which a person is held. As applied to infants, the primary object is to determine in whose custody the best interests of the infants will probably be advanced. In determining such custody, the natural rights of the parents are entitled to due consideration."

It is clear that, while the natural rights of the parents are entitled to due consideration, they are not controlling, and a petition for writ of *habeas corpus* which states only the

fact of natural parenthood is fatally defective, and would not confer jurisdiction upon the Court to adjudicate the probable best interests of the child, where foster parents are concerned. We submit *that the decree of October 9, 1948, upon which alone the appellee predicates, has no effect upon the issues involved in this controversy, and that its only effect was to restore the natural rights of custody which had been taken from the father by the divorce decree of January 26, 1946. It gave him no rights in so far as the appellants are concerned, and could not form the basis of *habeas corpus* proceedings against the appellants. It simply removed the impediment which the decree of January 26, 1946, had placed against him. We submit that the Court erred in overruling the demurrer to the petition, and that this case should be reversed.

(b) By placing in evidence a certified copy of the decree of October 9, 1948, the appellee did not introduce evidence which had any bearing at all upon the issues between the parties to this *habeas corpus* suit, and the failure to sustain the appellants' motion to strike the evidence was highly prejudicial to the appellants. This ruling of the Court wrongfully placed the burden upon the appellants, and probably resulted in the final judgment complained of. The appellee was seeking to disturb the status quo which had existed for many years, and the burden was upon him to establish that the best interest of the child would be advanced by removing him from the kindly influences of his fine home with the appellants and the devotion which had developed during the years, and changing the whole course of his life simply because of the accident of natural parentage.

2. We submit that the Court erred in entering the judgment or decree of October 13, 1948, and in finding therein that the interests of the child would be advanced by being reared by the appellee, rather than by the appellants.

Cases of this kind present grave difficulties. Although we condemn the unnatural neglect of this child by the natural father during its whole lifetime, we cannot but be somewhat sympathetic to his seemingly earnest desire to have and care for the child now. But it has been the appellants who have day by day administered to the needs and wants of this child, and they are the ones who have by daily contact developed an actual and devoted affection for *the child.

This sure and abiding devotion and affection is the solid rock upon which the future welfare can be unerringly counted. The appellee has no case except such as might arise from

the fact of actual fatherhood. But there are good fathers and bad fathers, and there are those who love their children and those who do not. Mr. Russell and his present wife are absolute strangers to the child. The future of the child with them is left to chance and is at best experimental. On the other hand, the child's life with Mr. and Mrs. Burton has been tested in the crucible of time. His wellbeing with them is as certain as anything human can be. We think the case of *Wyatt v. Gleason*, 117 Va. 196 83 S. E. 1069, is quite in point with this case. While there are some technical differences, which we will refer to, on all questions relative to the best interests and welfare of the child the two cases are very similar. The following language used concerning the foster parents in that case could be used with equal force about the appellants:

"The record abundantly shows that the plaintiffs in error, Mr. and Mrs. Wyatt, are people of the highest moral character, not rich, but with sufficient means to maintain a comfortable Christian home, where this child of their deepest love not only can, but will, so far as human foresight can tell, be tenderly cared for; that her foster parents are not only fit and proper persons to raise and provide for her, but in the highest sense mother and father to her; that she is well cared for physically and morally, and is happy and contented in the love of the only mother and father she has ever known, and that she could have no more suitable home."

The only distinctions in that case and this is the fact that in the Gleason case the foster mother was aunt of child involved and sister-in-law of the natural father, and that Mrs. Wyatt, the foster mother, originally took the child at the request of the natural father. In both cases the father had remarried, and only sought the child after the remarriage. In the

Gleason case the marriage of the child's actual parents 11* was dissolved by the death of *the child's mother, while in this case the marriage was dissolved by divorce granted to the mother because of desertion and abandonment of mother and child by the father. In the Gleason case, no legal rights was or could have been accorded the foster mother on account of her relationship to the child, for an aunt has no legal right to the custody of her niece or nephew. In the Gleason case the father had requested the foster mother to take the child, so that it be properly cared for. In this case the father deserted and abandoned the child, has contributed not a cent to its support and maintenance, and until recently,

has expressed no concern at all for the child. What father has the better moral standing? What rights could Russell, as the natural father, have that Gleason, as the natural father, did not have? In both cases, the trial Court decided for the natural father, but in the Gleason case, your Honorable Court, holding that the best interest of the child was controlling, reversed the trial Court, using the following language, which we submit is applicable to this case:

“We are of opinion that under the evidence in the case before us the conclusion cannot be escaped that it would be an unwise exercise of judicial discretion to take this little girl from her present happy surroundings, where she has lavished upon her the devoted love of her mother’s sister, and turn her over to those who are strangers, at least to her. All of her environments are suitable and safe, and her future welfare seems assured. The proposed change would be, at best, but an experiment, which does not, from the evidence, appear to promise a better life. It is a case where, in the interest of the child’s welfare, it is clearly best to let well enough alone.

“We are further of opinion that the weight of the evidence shows that the relinquishment of this infant to its mother’s sister was the voluntary act of the father, with the tacit, if not expressed, understanding that his sister-in-law, was to keep the child and raise it. By his own acquiescence he 12* has *allowed the affection on both sides to become engaged in a manner that he could not fail to have anticipated. He has permitted a state of things to arise which cannot be altered without risking the welfare and happiness of the child.

“For these reasons, the judgment complained of must be reversed and set aside, and this court will enter such judgment as the lower court should have entered, dismissing this *habeas corpus* proceeding, with costs.”

Your Honorable Court has at all times held that the interest and best welfare of the child is the controlling concern in cases of this kind. It seems unnecessary to cite the numbers of cases so holding. It does seem that the Court has at all times brushed aside the technical and legalistic matters which loomed so large in the mind of the learned Judge of the trial court. For instance, the Court held (R., p. 5) “that the petitioner has neither voluntarily surrendered nor wilfully abandoned the said child”. Of course the appellee did not expressly enter into an agreement with the appellants relinquishing the child to them. He simply paid no attention to

the child at all, and seemed perfectly willing for the appellants to undertake all of the burdens of rearing the child, while he entertained a secret intention of asserting his parental "rights" if and when it should suit his convenience. His actions amounted to a tacit surrender, though not express. Whether his abandonment of the child was "wilful" or not, it certainly was actual. The Court has never treated a father who abandoned his child to others on a higher plane than one who voluntarily relinquished it to others. The law is set forth in *Fleshood v. Fleshood*, 144 Va. 768, 130 S. E. 648, as follows:

"Many cases hold that where the parent or custodian has voluntarily surrendered the custody of the child, *or abandoned it to others*, and subsequently seeks to regain possession, and it appears that it is for the child's best interests to remain with those to whom its custody has been given, the court will so order. *This especially true where it is shown that*
 13* *the child is well *provided for in its new home, is surrounded by influences likely to promote its best interests, and where tender relationships and affections have sprung up between the child and those with whom it has been living.*" (Emphasis ours.)

CONCLUSION.

In conclusion, we submit that the appellee by abandoning the little boy to others, and by failing to be at all concerned about his support and maintenance, lost the right to assert the claim of parenthood, and could gain custody of the child, as between himself and the appellants, only by clearly showing that the best interests of the child would be promoted by such change; that the burden of proof as to the best interests of the child was upon him, since he was seeking to disturb the status quo; that under the evidence the transfer of this child to his actual father, who would take him to Florida and completely change his life, would be at best but an experiment; that his best interests and welfare are as surely assured by continuing his life with the appellants as anything human can be, and that the court erred in holding that his best interests would be promoted by transferring him to the appellee; and that this case should be reversed, and the petition for writ of *habeas corpus* dismissed.

PRAYER.

Wherefore, and for the reasons set forth above, the appellants, Walter Russell Burton and Grace E. Burton, respectfully pray that they may be granted a writ of error and *supersedeas*, or an appeal and *supersedeas*, to the judgment or decree entered in this cause on the 13th day of October, 1948; that the said judgment or decree and this cause may be reviewed and reversed; and that final judgment for the appellants may be entered by your Honorable Court. Counsel for appellants state that a copy of this petition was mailed to counsel for appellee on the 10th day of January, 1949, and that this petition, which will be filed with the Clerk of your Honorable Court in Richmond, is hereby adopted as the opening brief on behalf of the appellants. Counsel 14* *desires to state orally the reasons for reviewing this case before the Court or before a Justice thereof, and respectfully requests that opportunity be afforded therefor.

WILLIAM OLD,
Attorney-at-law,
Chester, Virginia.

I, William Old, an Attorney-at-law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that I have examined the record of the above case, and that I am of the opinion that the judgment complained of should be reviewed.

Given under my hand this 10th day of January, 1949.

WILLIAM OLD

Received January 10, 1949.

M. B. WATTS, Clerk.

March 2, 1949. Writ of error and *supersedeas* awarded by the court. Bond \$300.

M. B. W.

RECORD

VIRGINIA:

Pleas before the Honorable M. Ray Doubles, Judge of the Hustings Court of the City of Richmond, Part II, held for the said City at the Courtroom thereof in its Courthouse at Tenth and Hull Streets in the City of Richmond, on the 9th day of December, 1948.

Be It Remembered that heretofore, to-wit: In the Clerk's Office of the said Hustings Court of the City of Richmond, Part II, the 11th day of October, 1948: Came David Dixon Russell, by counsel, and by leave of Court, filed his Petition for a Writ of *Habeas Corpus Ad Subjiciendum* against Walter Russell Burton and Grace E. Burton, which Petition is as follows:

Virginia:

In the Hustings Court of the City of Richmond, Part II.

David Dixon Russell, Petitioner,

v.

Walter Russell Burton and Grace E. Burton, Respondents.

PETITION FOR WRIT OF *HABEAS CORPUS*

To the Honorable M. Ray Doubles, Judge:

Now comes the petitioner, David Dixon Russell, and sheweth unto Your Honor that by virtue of a decree of the Hustings Court of the City of Richmond, Part II, entered at 5:30 P. M., on Saturday, October 9, 1948, in the suit of Mildred Rachel Russell v. David Dixon Russell, your petitioner was awarded custody of David Dixon Russell, Jr., infant child of the parties in the said suit; that your

page 2 } petitioner in open Court demanded of Walter Russell Burton and Grace E. Burton, his wife, the respondents herein, that they turn custody of the child over to your petitioner and that the respondents refused to comply with the petitioner's demand.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted him directed to the said Walter Russell Burton and Grace E. Burton, commanding them to produce the body of the said David Dixon Russell, Jr., before

this Court at the time specified in the writ, together with the cause of their detention of the said David Dixon Russell, Jr., and to show cause why the body of the said David Dixon Russell, Jr., should not be turned over forthwith to your petitioner.

DAVID DIXON RUSSELL
Petitioner.

State of Virginia,
City of Richmond, to-wit:

This day David Dixon Russell, the above named petitioner, personally appeared before me, Thelma M. Liebert, a Notary Public in and for the City of Richmond, in the State of Virginia, in my City aforesaid, and made oath that the matters and things stated in the foregoing petition are true.

Given under my hand this 9th day of October, 1948.

My commission expires on the 29th day of October, 1949.

THELMA M. LIEBERT
Notary Public.

page 3 } Virginia:

In the Hustings Court of the City of Richmond, Part II, the
11th day of October, 1948.

David Dixon Russell, Petitioner,

v.

Walter Russell Burton and Grace E. Burton, his wife, Re-
spondents.

This day came David Dixon Russell, the petitioner, and presented to the Court his petition for a writ of *habeas corpus* against Walter Russell Burton and Grace E. Burton, his wife, to recover possession of his infant child, David Dixon Russell, Jr., whom it is claimed is illegally held by the said respondents; and the Court having maturely considered the petition, and being of opinion that there is probable cause to believe that the said infant child, David Dixon Russell, Jr., is being illegally withheld from the custody of the petitioner, it is ordered that the said petition be, and the same is hereby, filed; and it is further ordered that a writ of *habeas corpus* be, and the same is hereby, ordered to be issued by the Clerk of this Court, directed to the said Walter Russell Burton and

Grace E. Burton, his wife, commanding them to have and produce the body of the said David Dixon Russell, Jr., together with the day and cause of his being taken and detained, before the Hustings Court of the City of Richmond, Part II, in the Courtroom of the said Court at 9 o'clock A. M. on the 13th day of October, 1948, to do and receive what is then and there considered concerning the said David Dixon Russell, Jr., and that they then and there have said writ of *habeas corpus*.

page 4 } (Writ of *Habeas Corpus Ad Subjiciendum*.)

To: Walter Russell Burton and
Grace E. Burton
Chester, Virginia.

We command you to take the body of David Dixon Russell, Jr., detained by you and under your custody as it is said, together with the day and cause of his being taken and detained, and him have before our Hustings Court of the City of Richmond, Part II, in the Courtroom thereof, at 10th and Hull Streets, Richmond, Virginia, at 9:00 o'clock A. M., on Wednesday, October 13, 1948, do, submit to and receive all and singular those things which shall then and there be considered of him in this behalf. And have then and there this writ.

Witness, Charles R. Purdy, Clerk of our said Court, at the Courthouse thereof, in the City of Richmond, the 11th day of October, 1948, and in the 173rd year of the Commonwealth.

CHAS. R. PURDY, Clerk.

And at another day, to-wit: at a Hustings Court of the City of Richmond, Part II, held the 13th day of October, 1948.

This day came Walter Russell Burton and Grace E. Burton, his wife, respondents herein, and, in obedience to the Writ of *Habeas Corpus* heretofore issued, produced before the Court the body of David Dixon Russell, Jr., infant child of David Dixon Russell, the petitioner herein.

page 5 } And by leave of Court, the said respondents, by counsel, filed their Demurrer to the Petition of the petitioner, which Demurrer the Court doth overrule, and to which action of the Court, the respondents object and note their exception.

Whereupon, by leave of Court, the said respondents filed

their Answer to the Petition and Writ of *Habeas Corpus* herein.

Whereupon, the Court heard the testimony introduced on behalf of the parties, and the Court being of opinion that the petitioner is a proper and suitable person to have custody of his infant child, as heretofore awarded to him in the case of *Mildred Rachel Russell v. David Dixon Russell*, and that the petitioner has neither voluntarily surrendered nor wilfully abandoned the said child, and that the respondents, although they have likewise proven themselves to be suitable and proper persons to have custody of said infant child by reason of the care and attention they have bestowed upon the said infant child, nevertheless, they have not thereby gained any legal or equitable rights to the custody of said child; and the Court being of opinion that all things considered, it is for the best interests of the said infant child that it be reared by its natural parent rather than by a foster-parent,

Therefore, the Court doth adjudge, order and decree that the respondents, Walter Russell Burton and Grace E. Burton, his wife, do relinquish custody of the said infant child, David Dixon Russell, Jr., to the petitioner, David Dixon Russell, to which actions of the Court, the respondents object and note their exceptions.

page 6 } And the respondents, having noted their intention to petition for a Writ of Error to the aforesaid judgment, and it being represented to the Court that the petitioner intends, after receiving custody of the said child, to move him to the home of the petitioner in the State of Florida, which action might seriously embarrass the jurisdiction of this Court, in the event of a reversal of its judgment, the Court doth repose temporary custody of the said infant child with the respondents, and they are hereby enjoined from removing, or suffering the said infant child to be removed, from the jurisdiction of this Court, to which action of the Court, the petitioner objects and notes his exception.

And the Court doth suspend execution of its judgment for a period of sixty-five (65) days from the date of this order, and if said petition is presented within said period, the operation of this judgment is suspended thereafter until the Supreme Court of Appeals shall have acted upon the petition, all provided that the said respondents, or some one for them, within fifteen (15) days from this date, shall enter into a bond in the penalty of \$1,000.00 with security to be approved by the Clerk of this Court, conditioned and payable as the law directs.

page 7 }

(Filed October 13, 1948.)

Virginia:

In the Hustings Court, Part II, of the City of Richmond.

David Dixon Russell,

v.

Walter Russell Burton and Grace E. Burton.

DEMURRER.

The named respondents, Walter Russell Burton and Grace E. Burton, by counsel say that the PETITION FOR WRIT OF HABEAS CORPUS filed in these proceedings is not sufficient in law, and state the following grounds for the said demurrer:

1. The prayer of the said petition and the relief sought is predicated upon a certain decree entered in this Court at 5:30 P. M. Saturday, October 9, 1948, in the suit of Mildred Rachel Russell v. David Dixon Russell, awarding custody of David Dixon Russell, Jr., infant child of the parties to said suit to the petitioner. The said named respondents not being parties to said suit, the Court was without jurisdiction in said suit to adjudicate the rights of the said respondents or to adjudicate the rights and interests of the said David Dixon Russell, Jr., except as between the parties to said suit, and the said decree could confer no right upon the petitioner to make any demand upon the said respondents.

2. The said petition is fatally defective in that it contains no allegation that the best interest of the said infant, David Dixon Russell, Jr., will probably be advanced by placing his custody in the petitioner, and causing his removal beyond the jurisdiction of this Court.

WILLIAM OLD, p. d.
Counsel for Respondents.

page 8 }

(Filed October 13, 1948.)

Virginia:

In the Hustings Court, Part II, of the City of Richmond.

David Dixon Russell

v.

Walter Russell Burton and Grace E. Burton.

ANSWER.

The joint and separate answers of Walter Russell Burton and Grace E. Burton to a certain PETITION FOR WRIT OF *HABEAS CORPUS* exhibited against them by David Dixon Russell in the Hustings Court, Part 11, of the City of Richmond, Virginia.

For answer to the said Petition, or to so much thereof as they are advised that it is material that they should, these respondents answer and say.

They are husband and wife and reside in the Village of Chester, Chesterfield County, Virginia. The said David Dixon Russell, Jr., referred to in the said petition, was born on July 12, 1942, and after his birth he was cared for exclusively by his mother Mildred Rachel Russell until the month of March, 1944, at which time the said mother being unable to provided for herself and the said child without gaining employment provided that the child should be cared for by Mrs. Rogers, a sister of Grace E. Burton, in Chesterfield County. The mother paid to Mrs. Rogers the sum of \$9.00 per week for the care and support of said child. Mrs. Rogers continued to care for the said child at her home until July, 1945, at which time she and her husband went to Delaware to live. During that time the said mother continued page 9 } to pay Mrs. Rogers the sum of \$9.00 per week.

While the said child was at the home of Mrs. Rogers as aforesaid, these respondents visited Mrs. Rogers regularly and often, and grew very fond and devoted to him, and when in July, 1945, Mrs. Rogers removed to Delaware, they discussed with the mother the possibility of their taking the child. The mother knowing that the child would be in good hands, and being unable to work and care for the child properly, considered it to be for the best interests of the child that this be done. Accordingly, she placed the child under the care and custody of these respondents in the month of July, 1945. The mother continued to provide for the said child by paying these respondents the sum of \$9.00 per week until July, 1947.

These respondents aver that from July, 1945, until the present time they have continuously cared for the said child in all respects as though he had been their own child. They being without children of their own in July, 1945, and knowing the little boy who is the subject of this suit with deep and abiding affection, were delighted to have him. The said Walter Russell Burton had been seriously wounded in the invasion of southern France, and in July, 1945, while living at home with his wife, was constantly or daily in attendance at

McGuire's Hospital for treatment. Consequently, he was not at that time able to regain his employment at DuPont, and had not then been technically discharged from the army. The mother recognized that she should help regularly with the support of the child under these circumstances. These respondents were not moved by any mercenary considerations in taking the child, but wanted to love him as their own child and be loved by him. This was the situation during the pendency of the suit of *Mildred Rachel Russell v. David Dixon Russell* in this Court. The petitioner was fully aware of the pendency of the said suit and talked to counsel for Mrs. Russell. About a week before Christmas, 1945, the petitioner, having been discharged from the army, came to the home of these respondents to see the child, and with their consent took the child to Baltimore to see the mother of the petitioner. The petitioner was then and there advised of the arrangement between the mother and these respondents. Although have full knowledge of the pendency of the said suit he made no appearance therein, and on January 24, 1946, this Court entered decree granting the mother divorce from the petitioner and awarding custody of the child to the mother, thus confirming and approving the existing arrangement and agreement between the mother and these respondents. Subsequent to the entering of said decree, these respondents continued to care for the said child as though he were their own, and to love him and be loved by him.

The said Walter Russell Burton continued to recover somewhat from the wound mentioned above, and was able to regain employment at DuPont. In July, 1947, these respondents notified the mother, who had remarried and was living in Lorraine, Ohio, that they no longer needed any assistance from her in the support of the said child whom they loved as their own, and that they wished to assume full and complete responsibility for the care, custody and support of the said child, looking forward to the legal adoption of him. The mother, feeling that the child would always be given a good home and cared for with love and affection, and knowing the tender ties which had grown up and developed between these respondents and the said child, considered that the best interest of the said child would be advanced by its remaining with and growing up under the affection and the parental care which had developed through the long and devoted association. All of these arrangements were made and effected by agreement between these respondents and the mother while the mother was

vested with complete custody of the child by decree of this Court.

These respondents are informed, they believe and therefore aver, that the petitioner has never given to the said child any of the affectionate regard which should characterize the natural father. They aver that since March of 1944 the said petitioner has not seen the child but three times, each of which being while the child was with these respondents. They were: December, 1945, June, 1946, and Christmas, 1946. During all of this time he contributed nothing to the support of the child, and with the exception of a few toys and some underclothes he gave nothing to the child. While the petitioner has not by express agreement voluntarily relinquished the child to the mother or to others, he has abandoned the child, and this Court on January 24, 1946, adjudicated that he had abandoned the mother and the child, which decree constitutes a final judicial determination of that fact. These respondents, therefore, aver that the petitioner by his abandonment and neglect of the said child, has permitted the warmest and most natural ties of love and affection to grow around these respondents and the child, which ties can only be broken with accompanying pain and sorrow. The petitioner is a
page 12 } complete stranger to the said child, with no assurance that any bonds of affection may develop.

These respondents aver that the petitioner during his service in the army was such as to show him to be an unstable and reckless character. Since his discharge in December, 1945, he has demonstrated anew his unstable character, shifting from position to position. The only place he has held for any length of time has been with the Post Office in Clearwater, Florida, which he retained for about a year, and relinquished about four months ago. He is now engaged in selling aluminum ware on commission. On the other hand the said Walter Russell Burton has a permanent position with DuPont and receives a pension from the government for the wound mentioned above. The petitioner's second wife, who is a stranger to the child, works regularly while the said Grace E. Burton gives her entire time and effort to making a home for her husband, the said child and another child which these respondents adopted in June of 1947, when it was nine days old. The said child regularly attends school and Sunday school and is being brought up under kindly influence in a fine community. In view of all of the foregoing, these respondents aver and allege that the best interests of the child will be advanced by continuing its life with these respondents.

And now having fully answered the said Petition for Writ of *Habeas Corpus*, these respondents pray that they may be hence dismissed with their proper costs in this behalf expended and that the said petition may be dismissed. And these respondents will ever pray, etc.

WALTER RUSSELL BURTON
GRACE E. BURTON

Respondents

WILLIAM OLD, p. d.

page 13 } Mr. Old: I wish to file at this time the following demurrer.

“The undersigned respondents, Walter Russell Burton and Grace E. Burton, by counsel, say that the petition for writ of *habeas corpus* filed in these proceedings is not sufficient in law, and state the following reasons for said demurrer:

One: The prayer of the said petition and the relief sought is predicated upon a certain decree entered in this Court at 5:30 p. m., Saturday, October 9, 1948, in the suit of *Mildred Rachel Russell v. David Dixon Russell*, awarding custody of David Dixon Russell, Jr., infant child of the parties to said suit, to the petitioner. The said named respondents not being parties to said suit, the Court was without jurisdiction in said suit to adjudicate the rights of the said respondents or to adjudicate the rights and interests of the said David Dixon Russell, Jr., except as between the parties to said suit, and the said decree could confer no right upon the petitioner to make any demand upon the said respondents.

Two: The said petition is fatally defective in that it contains no allegation that the best interests of the said infant, David Dixon Russell, Jr., will probably be advanced by placing his custody in the petitioner, and causing his removal beyond the jurisdiction of this Court.”

Now with reference to an allegation that the best interests of the infant will be promoted by or advanced by the father taking the child, I cite the opinion of Justice Hudgins, in *Buchanan v. Buchanan*, 197 S. E. 426, wherein the Court says: “The primary object of *habeas corpus* is to determine the legality of the restraint under which a person is held. As applied to infants, the primary object is to determine in whose

custody the best interests of the infant will probably be advanced. In determining such custody, the natural rights of the parents are entitled to due consideration."

This proceeding, of course, for *habeas corpus* is rather limited in its scope, but *habeas corpus* has been the proceeding used in any number of cases to determine where the interest, the best interest of the child lies. Therefore, we say that a petition which fails to make any allegation regarding the best interest of the child is fatally defective, and we take this position and urge it with all seriousness before this Court that the decree of Saturday in the suit of *Mildred Rachel Russell v. David Dixon Russell*—this Court had no jurisdiction in that suit to determine the rights or the status or the conditions which have developed over the years during the time the child had been cared for by these respondents, and, therefore, we contend that so far as that decree is concerned, it does not meet this issue and we bring that before this Court in this demurrer.

The Court: You are familiar with the terms of the decree entered Saturday?

Mr. Old: I heard Your Honor read it. I have not seen a copy of the decree.

(Whereupon, the Court hands counsel a copy of the decree and allows time for its perusal.)

The Court: I will overrule the demurrer but allow the demurrer to be filed.

Mr. Old: I wish to file the following answer to the petition: "Virginia: In the Hustings Court, Part II, of the City of Richmond.

David Dixon Russell *v.* Walter Russell Burton and Grace E. Burton.

The joint and separate answers of Walter Russell Burton and Grace E. Burton to a certain Petition for Writ of *Habeas Corpus* exhibited against them by David Dixon Russell in the Hustings Court, Part II, of the City of Richmond, Virginia.

For answer to the said Petition, or to so much thereof as they are advised that it is material that they should, these respondents answer and say:

They are husband and wife and reside in the Village of Chester, Chesterfield County, Virginia. The said David Dixon Russell, Jr., referred to in the said petition, was born on July 12, 1942, and after his birth he was cared for exclu-

sively by his mother Mildred Rachel Russell until the month of March, 1944, at which time the said mother, being unable to provide for herself and the said child, without gaining employment, provided that the child should be cared for by Mrs. Rogers, a sister of Grace E. Burton, in Chesterfield County. The mother paid to Mrs. Rogers the sum of \$9.00 per week for the care and support of said child. Mrs. Rogers continued to care for the said child at her home until July, 1945, at which time she and her husband went to Delaware to live. During that time the said mother continued to pay Mrs. Rogers the sum of \$9.00 per week. While the said child was at the home of Mrs. Rogers as aforesaid, these respondents visited Mrs.

Rogers regularly and often, and grew very fond
page 17 } and devoted to him, and when in July, 1945, Mrs.

Rogers removed to Delaware, they discussed with the mother the possibility of their taking the child. The mother, knowing that the child would be in good hands and being unable to work and care for the child properly, considered it to be for the best interests of the child that this be done. Accordingly, she placed the child under the care and custody of these respondents in the month of July, 1945. The mother continued to provide for the said child by paying these respondents the sum of \$9.00 per week until July, 1947.

These respondents aver that from July, 1945, until the present time, they have continuously cared for the said child in all respects as though he had been their own child. They, being without children of their own, in July, 1945, and knowing the little boy who is the subject of this suit with deep and abiding affection, were delighted to have him. The said Walter Russell Burton had been seriously wounded in the invasion of southern France, and in July, 1945, while living at home with his wife, was constantly or daily in attendance at McGuire's Hospital for treatment. Consequently, he was

not at that time able to regain his employment at
page 18 } DuPont, and had not then been technically discharged from the army. The mother recognized that she should help regularly with the support of the child under these circumstances. These respondents were not moved by any mercenary consideration in taking the child, but wanted to love him as their own child and be loved by him. This was the situation during the pendency of the suit of *Mildred Rachel Russell v. David Dixon Russell* in this Court. The petitioner was fully aware of the pendency of the said suit and talked to counsel for Mrs. Russell. About a week before Christmas, 1945, the petitioner, having been discharged from the army, came to the home of these respondents to see the child, and with their consent took the child to Baltimore

to see the mother of the petitioner. The petitioner was then and there advised of the arrangement between the mother and these respondents. Although having full knowledge of the pendency of the said suit, he made no appearance therein, and on January 24, 1946, this Court entered decree granting the mother divorce from the petitioner and awarding custody of the child to the mother, thus confirming and approving the existing arrangement and agreement between the mother and these respondents. Subsequent to the entering of page 19 } said decree, these respondents continued to care for the said child as though he were their own, and to love him and be loved by him.

The said Walter Russell Burton continued to recover somewhat from the wound mentioned above, and was able to regain employment at DuPont. In July, 1947,, these respondents notified the mother, who had remarried and was living in Lorraine, Ohio, that they no longer needed any assistance from her in the support of the said child whom they loved as their own, and that they wished to assume full and complete responsibility for the care, custody and support of the said child, looking forward to the legal adoption of him. The mother, feeling that the child would always be given a good home and cared for with love and affection, and knowing the tender ties which had grown up and developed between these respondents and the said child, considered that the best interest of the said child would be advanced by its remaining with and growing up under the affection and the parental care which had developed through the long and devoted association. All of these arrangements were made and effected by agreement between these respondents and the mother while the mother was vested with complete custody of the page 20 } child by decree of this Court.

These respondents are informed, they believe and therefore aver, that the petitioner has never given to the said child any of the affectionate regard which should characterize the natural father. They aver that since March of 1944 the said petitioner has not seen the child but three times, each if which being while the child was with these respondents. They were: December, 1945; June, 1946; and Christmas, 1946. During all of this time he contributed nothing to the support of the child, and with the exception of a few toys and some underclothes he gave nothing to the child. While the petitioner has not by express agreement voluntarily relinquished the child to the mother or to others, he has abandoned the child, and this Court on January 24, 1946, adjudicated that he had abandoned the mother and the child, which

decree constitutes a final judicial determination of that fact. These respondents, therefore, aver that the petitioner by his abandonment and neglect of the said child, has permitted the warmest and most natural ties of love and affection to grow around these respondents and the child, which ties can only be broken with accompanying pain and sorrow.

page 21 } The petitioner is a complete stranger to the said child, with no assurance that any bonds of affection may develop.

These respondents aver that the petitioner during his service in the army was such as to show him to be an unstable and reckless character. Since his discharge in December, 1945, he has demonstrated anew his unstable character, shifting from position to position. The only place he has held for any length of time has been with the Post Office in Coral Gables, Florida, which he retained for about a year, and relinquished about four months ago. He is now engaged in selling aluminum ware on commission. On the other hand the said Walter Russell Burton has a permanent position with DuPont and receives a pension from the government for the wound mentioned above. The petitioner's second wife, who is a stranger to the child, works regularly while the said Grace E. Burton gives her entire time and effort to making a home for her husband, the said child and another child which these respondents adopted in June of 1947, when it was nine days old. The said child regular attends school and Sunday school and is being brought up under kindly influences in a fine community. In view of all of the

page 22 } foregoing these respondents aver and allege that the best interests of the child will be advanced by continuing its life with these respondents.

And now having fully answered the said Petition for Writ of *Habeas Corpus*, these respondents pray that they may be hence dismissed with their proper costs in this behalf expended and that the said petition may be dismissed. And these respondents will ever pray, etc."

The Court: It is ordered that the answer be filed. Is there a statement in there that the respondents have this day produced the body of the infant in court?

Mr. Old: I did not put that in the answer but he is here.

The Court: That is all right, but will you then sometime during the morning prepare a short return to the writ and simply state—

Mr. Old: We can fix that. As a matter of fact he is here.

The Court: The answer to the petition is ordered filed.

Mr. Old: May it please the Court, there is one question

here I think is a question to be determined. Where-
 page 23 } in does the burden of proof lie? How are we go-
 ing to proceed? The only allegation in the peti-
 tion is the allegation of the entering of this decree—What I
 have in mind—

The Court: It seems to me you ought to raise that at the proper time.

Mr. Old: I have raised it by demurrer. That has been overruled.

Mr. Merhige: This matter comes before the Court on a petition for writ of *habeas corpus* directed to Walter Russell Burton and Grace E. Burton and it arose out of the refusal of the Burtons to turn over to the complainant or the petitioner on the writ of *habeas corpus* the child, David Dixon Russell, Jr., to whom the petitioner was awarded custody by decree of this Court under date of October 9, 1948, which decree was awarded as a result of petition filed in the case of *Mildred Rachel Russell v. David Dixon Russell*, and I have here a certified copy of the said decree which I would like to file and offer in evidence.

(Whereupon, by direction of the Court, decree was marked Petitioner's Exhibit 1 and received in evidence.)

Since as stated in *Buchanan v. Buchanan*, the
 page 24 } primary object of *habeas corpus* is to determine
 the legality of the restraint under which a person
 is held, we respectfully move the Court to direct the respondents to turn the said child over to the party in whose custody the Court decrees.

The Court: This is your case in chief?

Mr. Merhige: Yes, sir.

Mr. Old: I move that plaintiffs' evidence be stricken, as the issue to be brought in this proceeding, as in all other proceedings involving the custody of a child, is as to the best interest and welfare of the child and not as to technical, legal rights of certain parties to the child as though it were chattel.

The Court: The decree of the Court in *Russell v. Russell* having established that the father was a suitable and proper person to have custody of his child, the Court does rule that the plaintiff by his introduction of a certified copy of the decree in that case has carried the burden of proof at this stage of the trial that it is the best interest for the child to be with his parent. He would be a suitable and proper person unless other factors can be shown to the contrary. The burden is on

Mrs. Gladys E. Rogers.

the respondents to show the contrary. The Court page 25 } overrules the motion.

Mr. Old: Under our answer which has been filed we are permitted to develop our case with reference—The Court takes the position that the burden is not upon the father to determine that the best interest of the child shall be advanced by his having possession?

The Court: The Court has stated its ruling just a moment ago.

Mr. Merhige: If there is going to be testimony taken, I move the Court to exclude the witnesses.

The Court: Everybody that expects to testify stand up and raise your right hand.

(Whereupon, all witnesses were sworn and retired.)

MRS. GLADYS E. ROGERS,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. You are Mrs. Gladys E. Rogers?

A. That is right.

Q. Where do you live?

A. Route 10, Chesterfield County.

Q. Do you know the little boy, David Dixon Russell, Jr.?

A. Yes, sir.

page 26 } Q. Will you state to the Court how you happened to know this child and his mother?

A. Well, in March of 1944 I ran an ad in the paper to board children. I wanted several in my home to board, and Mrs. Russell answered the ad and she came out with David and we talked over the fact that I should board him and she left him. Paid me \$9 a week from March, 1944, until the latter part of June or the first part of July of 1945 when I moved away.

Q. Do you know where Mrs. Russell was working at that time?

A. Yes, Peoples Drug Store, the latter part of the time. The first part of the time I'm not sure. I believe she was working at DuPont the first part of the time.

Q. In other words, in March, 1944, she was working at DuPont?

Mrs. Gladys E. Rogers.

A. She wasn't working when she brought the child out. She brought him out and left him so she could get a job. It was not very long until she went to work for Peoples. She had another job before that and then went to work at Peoples Drug Store at 4th and Broad.

Q. Mrs. Rogers, how long did you care for, take care of this child?

A. From March, 1944, until the latter part of page 27 } June, 1945. A little over a year.

Q. During that time did you see Mrs. Russell?

A. She visited us quite frequently, an average of once a week, and we would go to the store where she worked, after she got the job with Peoples, and take David with us; an average of once a week.

Q. Was she interested in the child?

A. Yes, sir, she was very much so.

Q. Now what changed your situation in July of 1945?

A. Well, my husband was transferred to Delaware and as soon as school was out, we made arrangements to leave and go up with him.

Q. Where was your husband working?

A. Wilmington, Delaware. The DuPont Company.

Q. In 1944 when you took the child where was he working then?

A. He was working at DuPont here.

Q. Now, Mrs. Rogers, are you a sister of Mrs. Burton here?

A. That is right.

Q. During the period of more than a year in which you kept this little boy, did Mrs. Burton and Mr. Burton have occasion to see him?

A. Yes, sir. They came up quite often and we were down there quite often.

page 28 } Q. And you would take him down to their house? And they would come up to your house?

A. Yes.

Q. They knew the little boy in July, 1945, when you left?

A. Yes, sir.

Q. Now what did you suggest to Mrs. Russell with reference to the boy when you left?

A. Well, I told her I was leaving and she wanted to know if I knew anybody that would keep him that would be good to him. I told her my sister had talked of it; she could talk with her.

Q. She talked with your sister?

Mrs. Bernice Spinner.

A. Yes, sir.

Q. Were you present when the arrangements were made?

A. No, sir, I was not.

Q. You were not there. Where did your sister live at that time?

A. Chester.

Q. She has continuously lived there?

A. That is right.

CROSS EXAMINATION.

By Mr. Merhige:

Q. You were boarding three other children at the same time?
page 29 } A. I think two or three; a little baby and I also had his little cousin.

RE-DIRECT EXAMINATION.

By Mr. Old:

Q. Did Mrs. Burton have any children at that time?

A. No, sir.

Q. Had she ever boarded any children?

A. No, sir.

Mr. Merhidge: I don't like to object but it seems to me these questions are definitely objectionable, based on hearsay.

The Court: You can go ahead if that is all you have to ask her. She has answered.

Witness stood aside.

MRS. BERNICE SPINNER,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. Where do you live, Mrs. Spinner?

A. Chester, Josephine Avenue.

Q. Where were you living in July, 1945?

A. With Mrs. Burton.

Q. You are no relation to Mrs. Burton?

Mrs. Bernice Spinner.

A. Just girl friends.

page 30 } Q. How long have you known Mrs. Burton?

A. Seven or eight years.

Q. Were you living at Mrs. Burton's at the time the little David Dixon Russell, Jr., was brought there?

A. Yes, sir.

Q. Do you know anything about the arrangements that were made when he was brought there, the arrangements between the mother and Mrs. Burton and Mr. Burton?

A. Nothing more than I know she agreed for him to come out there.

Q. What was the attitude of Mr. Burton and Mrs. Burton toward this boy?

A. They have always been crazy about him, ever since they laid eyes on him at Mrs. Rogers'. Used to talk about it and wish they could keep him, and when the time came they took him into their home as one of their own, treated him as one of their own.

Q. Did they give him every advantage?

A. They certainly did.

Q. Are you familiar with Mrs. Burton's life now? You don't live with Mrs. Burton now?

A. No, sir, but I'm up there four or five times a week.

Q. What is the situation under which this child now lives at Mrs. Burton's?

page 31 } A. What do you mean?

Q. I mean with reference to his having a good home, and so on. Just state your knowledge on that point.

A. He certainly has a good home. He is kept clean; nobody has ever seen him dirty. And he is treated in the home like a child of their own flesh and blood; not treated as a boarded child or nothing like that.

Q. Has he ever been treated as a boarded child?

A. No, sir.

Q. Does Mrs. Burton work? Does she have any employment outside the home?

A. No, sir. She stays at home and takes care of those children.

Q. Is this the only child Mrs. Burton has?

A. She has a little girl.

Q. How old is the little girl?

A. She is fifteen months old.

Q. Is the little girl her child?

A. By adoption.

Burton Haynes Long.

Q. How old was the little girl when the little girl was adopted?

A. Nine days old.

CROSS EXAMINATION.

By Mr. Merhige:

Q. Mrs. Spinner, how long had you been living page 32 } with Mrs. Burton prior to the time little David was brought there?

A. Three years.

Q. And you knew, did you not, that somebody was paying Mrs. Burton \$9 per week to take care of the child?

A. I knew she was being paid but I didn't have anything to do with how much.

Q. And you were there from June or July until December, is that correct?

A. Yes, sir.

Q. How many of you were there? You and Mr. Burton, Mrs. Burton and the child, is that correct?

A. Yes, sir.

Q. What kind of house were you all living in?

A. Two bedrooms, living room and kitchen.

Q. No bath?

A. No, sir.

Q. The bath, lavatory, was outside?

A. Yes, sir.

Q. Now, Mrs. Spinner, did you ever see Mr. Russell here?

A. I saw him one time but not while I was living there.

Q. But you saw him come to visit his son, did you not?

A. He was there in December of 1946.

Witness stood aside.

page 33 } BURTON HAYNES LONG,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. State your name, please?

A. Burton Haynes Long.

Q. Where do you live?

A. Chester.

Q. How long have you lived in Chester?

Burton Haynes Long.

A. Twelve years.

Q. Do you know Mr. and Mrs. Burton?

A. Yes, sir.

Q. What is your occupation?

A. Manager of the C. & P. Telephone Company, Chester Exchange.

Q. How long have you known Mr. and Mrs. Burton?

A. Since 1936.

Q. In July of 1947, what was your relationship with Mr. and Mrs. Burton?

A. I boarded there. I took my meals with Mr. and Mrs. Burton. In fact, I lived there.

Q. Do you recall when the little boy, David Dixon Russell, Jr., was brought to the home of Mr. and Mrs. Burton?

A. Yes, sir.

Q. You had opportunity to see what was going page 34 } on in that home day by day, did you not?

A. Yes, sir. Very few days I missed being there several times during the day.

Q. What was the attitude toward this little boy?

A. I'd say same as mother and father. They were everything they could be to a child.

Q. Was he—How was he dressed and cared for?

A. Better than the ordinary child; better than the average child.

Q. Do you still—are you still familiar with the situation at Mr. and Mrs. Burton's?

A. Yes, sir. I rent an apartment from Mr. and Mrs. Burton, their resident now.

Q. What is the condition under which this little boy is living now?

A. I should say one of the best communities that a child could live in, with the best parents that a child could have. Well clothed, fed, school, church, anything that any normal child could have.

Q. How far is this home in which they live from the schools and churches, etc.?

A. Well, not over a half mile from either. It is right near.

Q. Right in the community?

A. Yes.

page 35 }

CROSS EXAMINATION.

By Mr. Merhige:

Q. Were any other folks boarding there at the same time you were?

Floyd A. Duncan.

A. No, sir.

Q. You had your meals there, did you?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Old:

Q. Mr. Long, why was it necessary for you to board—

Mr. Merhige: I object. I don't see the relevancy.

The Court: It is immaterial.

Witness stood aside.

FLOYD A. DUNCAN,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. State your name, please, sir?

A. Floyd A. Duncan.

Q. Where do you live?

A. Chester, Virginia.

Q. What is your occupation?

A. Minister, Chester Methodist Church.

page 36 } Q. Also?

A. Temporary duty, District Chaplain, Virginia
Military District.

Q. Do you know Mr. and Mrs. Burton?

A. Yes, sir.

Q. State to the Court what you know of them.

A. I have known the Burtons for approximately two years. I've only been out there two years. And they are members of my church. Russell attends fairly regularly and Mrs. Burton comes only occasionally because of the other child they have. I also know other members of the family and they are very fine people, diligent, thrifty. I know nothing of a derogatory or questionable nature against any of them.

Q. Do you know the surroundings under which this little hol is living?

A. Yes, sir, I do.

Q. Will you state what those surroundings are?

A. They live in a large home which was purchased some time ago, about September, I think, which is divided up into

Mrs. Mildred Rachel Steris.

three apartments, two of which are rented out by Mr. Burton. It is a very nice home. I have been in their home, not this one but where they lived previously, enough to know it was a very congenial home, very affectionate toward each other and toward the child and he toward the foster parents.

No cross examination.

Witness stood aside.

page 37 } MRS. MILDRED RACHEL STERIS,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. State your name, please?

A. Mildred Rachel Steris.

Q. You were formerly Mildred Rachel Russell?

A. That is correct.

Q. Where do you live now, Mrs. Steris?

A. In Lorraine, Ohio.

Q. When were you and the petitioner, David Dixon Russell, married?

A. August 30, 1940.

Q. Where were you married?

A. Baltimore, Maryland.

Q. Now will you state to the Court where you lived during the period of your married life and various stages of it?

A. I lived in a number of different places. When we were first married we lived with my mother.

Q. In Baltimore?

A. Yes, sir. From there we had a two-room apartment. From there I lived in one room. From there I went in a three-room apartment. From there I went with David to Pennsylvania. We shared a home. We had one

page 38 } room but we shared the kitchen with another family. That was the last I lived with Mr. Russell.

Q. During that period what was his employment? Did he work regularly?

A. Well, I don't know what you would call him. He never had any one special job, never did any one special thing. I don't think he was trained for any one thing. He did a number of different jobs.

Q. State some of the jobs.

Mrs. Mildred Rachel Steris.

A. When we first got married he was working at a skating rink. He worked there a month or six weeks and then he went to work for a friend of his in a florist shop. He worked until after Christmas, when he was inducted into the Army.

Q. How long did he stay in the Army at that time?

A. From February, 1941, to October, 1941, he was in the Army and he was discharged.

Q. Discharged in 1941?

A. I guess he was discharged. I don't know exactly how they did it. I know he was out of the Army.

Q. Did you live with him then after he was discharged from the Army? What happened then?

A. Yes, I was expecting the baby.

Q. Where were you living then?

A. We were living on Lafayette Street in Baltimore, Maryland, in a three-room apartment.

page 39 } Q. From the time he was discharged from the Army in 1941, what did he do then? What was his business?

A. Well, for a few weeks he went back to work for his friend in the florist's, and then for the Bethlehem Steel shipyards.

Q. How long did he work for the Bethlehem shipyards?

A. Right offhand I couldn't tell you.

Q. Now when was your son, David Dixon Russell, Jr., born?

A. July 12, 1942.

Q. Where was he born?

A. Baltimore.

Q. Was your husband employed at that time?

A. Yes, he was working in the shipyards when the baby was born.

Q. Now after the baby was born, did he continue to work in the shipyards?

A. Well, off and on. He would work a day and miss a day, work a day and miss a day. I left Mr. Russell when the baby was six weeks old.

Q. Where did you go then?

A. To Fredericksburg, Virginia, where my father--step-father and mother were living at the time.

Q. How long did you stay in Fredericksburg?

A. Oh, I stayed there until March of the following year.

page 40 } Q. That was March, 1943?

Mrs. Mildred Rachel Steris.

A. 1943.

Q. Now what were your husband's habits with reference to drinking, etc.?

A. Well, he drinks. I don't say he drinks now because I haven't been in contact with him for four years.

Q. At that time what was his—

A. He drank pretty heavily.

Q. Did he drink any after the baby was born?

A. A great deal.

Q. During that six weeks you were with him?

A. Yes, I was going to leave Mr. Russell when the baby was born. My mother was with me. He asked me in the hospital—my mother had all my clothes packed, and he asked me to give him six weeks, and it was only two weeks until he started up again.

Q. What do you mean, he started up again?

A. Drink, go out at night, stay out till 2:00 and 3:00 o'clock in the morning. Sometimes he didn't bother to come home at all.

Q. When did he go back into the Army, if you know?

A. I believe around October, 1942, right after the baby was born.

Q. Did you receive allotments from him during page 41 } that period.

A. From October until around March I never got anything at all for the support of the child, and the baby was taken sick and had pneumonia and I had to go to the Red Cross. I wasn't getting any money and they wouldn't take him in the hospital without being paid first, and I went to the Red Cross and they said they would stand good for the hospital because I wasn't getting allotment checks. Soon after I started getting allotment checks. Mr. Russell said he would—

Q. How long did you receive that allotment check?

A. Until—missed one month—until October, 1945, when I received a statement my husband was being discharged and that would be the last check I would receive.

Q. Was your allotment ever held up during that period?

A. Just the once, for about one month that I didn't get a check.

Q. What were the amounts of those checks?

A. I received \$80 a month.

Q. When did you come to Richmond?

A. I came to Richmond the last of July of 1943, right after the baby's first birthday.

Mrs. Mildred Rachel Steris.

Q. Where were you living? Who did you live with when you first came here?

A. My sister and I shared an apartment. Her husband was overseas and we shared an apartment together.
page 42 } She had two children.

Q. And you had one?

A. Yes.

Q. Were you seeking to have employment at that time?

A. Well, I went to work for Thalhimer's department store at that time, yes, but my sister cared for the child.

Q. When your sister was there you left your child with the sister?

A. Yes.

Q. How long did that arrangement continue?

A. Well, it wasn't too long. She was taken sick and she went back with my father and I moved in the apartment with my mother.

Q. How long did you live with your mother?

A. Just before Christmas, 1943.

Q. Then what did your mother do?

A. My mother joined the service.

Q. Then what did you do?

A. I kept the apartment and I had a girl friend of mine sharing it with me because I couldn't meet expenses any other way.

Q. You were still working for Thalhimer's at that time?

A. Yes, I was still working for Thalhimer's. I was only making \$18 a week and still couldn't make ends
page 43 } meet so I went to work for DuPont.

Q. When was that?

A. 1944, the first of 1944 I went to work for DuPont.

Q. Now, Mrs. Steris, how did you come in contact with Mrs. Rogers?

A. Mrs. Rogers was recommended to me from the employment office at DuPont because I was having trouble with the colored girl.

Q. How did you come in contact with Mrs. Rogers?

A. Mrs. Rogers was recommended to me from the employment office at the DuPont Company where I was employed.

Q. Were you told that her husband was employed at DuPont?

A. Yes, I was told her husband was employed at DuPont and that she was very reliable.

Q. What did you do then?

A. I went out to see Mrs. Rogers and I talked to her and

Mrs. Mildred Rachel Steris.

I made arrangements for her to take the baby. I would pay his room and board and buy his clothes or anything else that he might need. We agreed on \$9 a week and I was to buy his clothes when he was in need.

Q. How long did that arrangement last?

A. It lasted until Mrs. Rogers moved to Wilmington, Delaware, and in the meantime Mr. and Mrs. Burton had been seeing the child. As you know, they are sisters. They
page 44 } asked if they could take the child, and when she moved to Wilmington, Delaware, she asked if it would be all right if she took the child, and I let them have the child, Mr. and Mrs. Burton, under the same conditions that I—

Q. Did you know Mr. and Mrs. Burton during that period?

A. Yes, I had met them. They used to come down with David when I was at work. They used to come in with the Rogers.

Q. Before this child was turned over to Mr. and Mrs. Burton, you knew them, did you not?

A. Yes, I did.

Q. Did you visit your child while he was with Mrs. Rogers?

A. I was out there on an average of once a week; whenever I had a day off from work I was with my baby.

Q. Now following the taking of this baby by Mr. and Mrs. Burton, did you visit them and see the baby there?

A. After they took him, yes, I was out there quite often too. I don't know exactly how often I went out there but I went out when I had my days off from work.

Q. What were the surroundings there at the time that you saw, with reference to your baby, at Mr. and Mrs. Burton's?

A. I can truthfully say I never saw that boy dirty. He has a nice home. They love him and he loves them. I have been
page 45 } in their home. I have been respected and they respect me and they have been just like a mother and father to that child. In fact, I can say more of a mother and father than we have.

Q. Now, Mrs. Steris, this child, do you recall the time that this child was turned over to Mrs. Burton, Mr. and Mrs. Burton?

A. It was around July of 1945, I believe that he went to Russell and Alma Burton's home to live.

Q. Subsequent to that time, did you engage in divorce proceedings with Mr. Russell?

A. Yes, I did. I received a letter from Mr. Russell from

Mrs. Mildred Rachel Steris.

overseas, stating he wanted a divorce immediately; he was going with this girl and he hoped—

Mr. Merhige: I object.

The Court: This is not material.

Mr. Old: I want to show this arrangement was in existence with reference to this boy being with the Burtons at the time this divorce proceeding was instituted.

The Court: You have shown that. All this correspondence from Europe hasn't anything to do with it.

Mr. Old: To show the attitude of the father relative to—

The Court: The testimony she was about to page 46 } give—Go ahead and ask the questions.

Q. Mr. Steris, your husband, was he advised of the pendency of this divorce suit?

A. Was he advised of it? He asked for it.

Q. Now did he know at that time that your child was living with Mr. and Mrs. Burton?

Mr. Merhige: I don't see how the witness can answer that question.

By the Court:

Q. Do you know whether he knew or not?

A. I was not corresponding with him, no. I do not know unless he was told by his parents. I do not know.

By Mr. Old:

Q. Did you see him after he was discharged from the Army?

A. No.

CROSS EXAMINATION.

By Mr. Merhige:

Q. Do you have any children?

A. I have David and I have a little son three and a half months old, yes.

Q. You haven't seen Mr. Russell since what date;; when was the last time?

A. I haven't seen Mr. Russell since before he went overseas.

page 47 } Q. That was back in 1942, was it?

A. No, he went overseas in 1944, if I'm correct.

Q. You haven't seen him since then?

Mrs. Mildred Rachel Steris.

A. No, I have not.

Q. Have you corresponded with him?

A. No, I haven't.

Q. Did you write to him and tell him the child was with the Burtons?

A. No, I didn't.

Q. Who was the child staying with when you went to Fredericksburg?

A. Me. I had the child myself.

Q. You had left Mr. Russell at that time, had you not?

A. I had.

Q. Did the child become ill while living in Fredericksburg?

A. Yes, he did. He had pneumonia.

Q. Mr. Russell came, did he not?

A. Yes.

Q. Now when you—From October of, rather, from November, 1942, until October, 1945, you were receiving \$80 a month from Mr. Russell's allotment, were you not?

A. No. I didn't start getting any allotment check until 1943, March or April. I don't exactly remember the month.

page 48 } Mr. Merhige: I'd like to have the reporter go
back—

A. I told you I didn't get an allotment check when Mr. Russell was first inducted in 1942 until 1943. I don't know the exact date Mr. Russell was inducted into the Army, around October or November, and I did not. You must have misunderstood.

Q. You got allotment checks at the rate of \$80 a month for about two years?

A. That is correct.

Q. When you were living here in Richmond, when the child was turned over to Mrs. Rogers, with whom was the child living?

A. My mother.

Q. You were employed at that time?

A. Yes, I was, at the DuPont Company.

Q. But you did not institute suit against Mr. Russell for divorce until 1946, is that right?

A. I don't exactly remember when I did. Mr. Russell has possession of the letter that he wrote, asking for the divorce, or he should have possession. He forced his way into my apartment and demanded my trunk when I was with my father.

Mrs. Mildred Rachel Steris.

Mr. Merhige: The decree was entered January 24, 1946.

page 49 } A. That is when he was discharged from the Army, but the papers were sent to him by my lawyer twice before that and they were unable to locate him.

Q. Are you acquainted with a chap by the name of Louis Haahr?

A. No, I'm afraid I'm not.

Q. You do not know that man?

A. No, I do not.

Q. Did you go under the name of Miss Russel while living at 1140 West Grace?

A. I went under the name of Mrs. Russell.

Q. You lived at 1140 West Grace, did you not?

A. I did.

Q. You lived in Apartment 5?

A. I did. I lived with two other girls, to be exact.

Q. I ask you to look over this letter and tell the Court whether or not you received that from some Lieutenant and signed, "Your Bed Partner, Louie." Did you ever receive that letter?

A. Yes, I did.

Mr. Merhige: I offer that in evidence.

Mr. Old: What is the materiality?

Mr. Merhige: I think it goes to the character of the witness.

The Court: Character with respect to what?
page 50 } Mr. Merhige: Respect to her moral conduct during the time that Mr. Russell was overseas. She has stated Mr. Russell asked her for the divorce, leaving the implication that he desired to desert her and the child and I want to establish, if he did, that was the reason.

The Court: I don't see where any of this has anything to do with the issue this morning, who got the divorce or why.

Mr. Merhige: I withdraw the exhibit.

Q. Now, Mrs. Steris, you paid \$9 a week each and every week to the Rogers while they had the child?

A. I did.

Q. How often did you visit the child while with the Rogers?

A. Once a week.

Q. Did you pay \$9 a week to the Burtons?

A. Yes.

Mrs. Mildred Rachel Steris.

Q. When you gave the child to the Burtons did you tell them if they desired to keep the child forever?

A. No, I did not.

Q. They understood it was simply a temporary arrangement; they were going to board the child?

A. When they first took the child, yes.

Q. You paid them right up to a year ago, did you not?

A. I did.

page 51 } Q. Isn't it so that a year ago when you went to visit the child, you stated to Mr. and Mrs. Burton, "The child knows you better than it does me and if you want to adopt the child, you may." Isn't that the way it came about?

A. The way it came about, Mr. and Mrs. Burton told me they had become too fond of the child; I would either have to take the child or let them have him permanently. I called Mrs. Russell long distance in Baltimore and asked her if she would take the child because my husband at the time didn't have a home. We were living with my husband's people and expected to have a home soon, but at the time we did not, and she told me I would be breaking the baby's heart to take it. I asked her if she knew where Mr. Russell was. She didn't have his address; she knew he was in the state of Florida, but she told me she would talk to her other son Jerry and the minute she heard from David she would get in touch with me, but the way David had talked with her, he was satisfied with conditions at the Burtons and for the Burtons to have the child.

The Court: That is a lot of hearsay. Just tell what happened.

A. She told me she would talk to both of the Russell boys and let me know. That was a year ago and I haven't heard a word since..

page 52 } By the Court:

Q. What did you do?

A. I told Mr. and Mrs. Burton I was expecting my own baby then. I told them I couldn't pay the room and board. Mr. Russell didn't seem willing—his mother said he was not working—and I had no alternative but to let them have the child. I couldn't continue to work while carrying my son.

Mrs. Mildred Rachel Steris.

By Mr. Merhige:

Q. Were you successful in your efforts to contact Mr. Russell to tell him you were going to desert and abandon the child with the Burtons?

A. I was never successful because no one ever knew where he was.

Q. What other effort did you make other than contacting his mother?

A. I didn't know what to do besides getting in touch with his mother. If she didn't know, how did I know?

Q. Mrs. Russell, did you come over to see the Judge and tell the Judge you were going to leave the child with the Burtons?

A. No, I didn't.

Q. You had been custody of the child, had you not?

A. I had.

Q. At that time you left the child with the Bur-
page 53 } tons, in 1947?

A. Yes.

Q. You haven't seen the child until today?

A. Since last year, yes, that is correct.

Q. And you have not seen Mr. Russell since a few years ago?

A. That is correct.

Q. And you know nothing of him?

A. No, only hearsay.

RE-DIRECT EXAMINATION.

By Mr. Old:

Q. Did you say Mrs. Steris, that Mr. and Mrs. Burton stated to you that they were becoming too fond of the child; they either wanted to child permanently or that they wanted to terminate the arrangement?

A. They said they had become too fond of little David, that I would either have to take him or let them have him permanently, that it couldn't go on the way it was. The longer they kept him—

Mr. Merhige: It is all hearsay.

Mr. Old: That is all.

By the Court:

Q. Mrs. Steris, why were you not in this Court in the case of *Russell v. Russell* on Saturday, October 9th?

Mrs. Mildred Rachel Steris.

A. Your Honor, I really am not financially able
page 54 } to make this trip. Mr. Burton financed this trip
for me. He called me on Saturday night and asked
me to come. I told him I couldn't afford it and he said he
would pay my bills. That is why I'm here.

Q. Did you contact your previous attorney, in view of the
fact that you were not able to come to court on Saturday?
Did you contact your previous attorney in the divorce proceeding to represent you here on Saturday?

A. Yes, sir, I did.

Q. Did you authorize him to state to the Court that if the
Court found that Mr. Russell, your former husband, was a
proper person to have custody of the child, that you had no
objection to custody being transferred from you to your husband?

A. No, I don't remember exactly that I said that, no. I
don't think I authorized him to do that, no. I told him that
Mr. Russell evidently had changed a whole lot to want that
child. I remember saying that, because he is six years old and
all of a sudden he comes up like that and wants the child.

Q. What I'm getting at, you interposed no objection in that
proceeding to the transfer of custody from you to your former husband?

A. I wrote Mr. Rooke that I'd like for him to do everything that he could for Mr. and Mrs. Burton, in
page 55 } the letter.

Q. Did you authorize him to object in your behalf to transferring custody from you to your former husband?

A. No, I didn't know exactly what it was all about, myself.

By Mr. Old:

Q. Mrs. Steris, with your knowledge of both Mr. and Mrs. Burton, wherein do you think the best interest of your child rests?

Mr. Merhige: That is objected to.

The Court: Objection sustained.

Witness stood aside.

MRS. GRACE E. BURTON,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. You are Mrs. Burton, are you not?

A. Yes, sir.

Q. Where do you live?

A. Chester, Virginia.

Q. How long have you lived in Chester?

A. About ten years.

Q. You are the wife of Walter Russell Burton?

A. Yes.

Q. How long have you all been married?

page 56 } A. Nine years.

Q. You said ten years Saturday.

A. That is right. I made a mistake. It was nine instead of ten years.

Q. Do you and Mr. Burton have any children of your own?

A. Not of our own, no, sir.

Q. Will you state to the Court how you happened to have possession of this little boy?

A. My sister, Mrs. Rogers, had the little boy and we used to visit them frequently, and she and her husband had to go to Wilmington—he was transferred there—and I had seen him and had seen his mother and we talked to her about boarding the little boy, and it was satisfactory with her, so we did.

Q. Did you know the little boy when he was with your sister, Mrs. Rogers?

A. Yes, I did. We visited them once or twice a week.

Q. What was your attitude toward the little boy?

A. I have always loved the little boy.

Q. Since before you had him?

A. Yes, sir. I felt sorry for him.

Q. Now, Mrs. Burton, when did you get this little boy? When was he brought from Mrs. Rogers' home to your home?

A. In July, 1945.

page 57 } Q. Who brought him?

A. His mother.

Q. Did you see his mother frequently while she—

A. Yes, sir.

Q. Now, she paid you \$9 a week, I understand?

A. Yes, sir.

Mrs. Grace E. Burton.

Q. What was the situation with reference to your husband at that time, in July, 1947?

A. He was stationed in McGuire Hospital and he had to go up there every morning for treatment and he was back about noon.

Q. Was he able to resume his employment at DuPont then?

A. No, sir, he was not.

Q. Did you have any other children to board?

A. Not at that time, no, sir.

Q. Did you ever board any children?

A. No, sir.

Q. Why did you pick this child?

A. Because we both fell in love with the little boy the first time we saw him and we love children and just wanted him in the home.

Q. Where do you live now? What is your situation? With reference to your home?

A. Now we live in a—we bought a 13-room
page 58 } house with two baths. We have four rooms and
bath with side porch, front porch and backyard.

Q. Does the child go to school?

A. Yes, sir. I started him in school this year.

Q. That was the earliest you could have started him?

A. That is right.

Q. Does he go to Sunday school?

A. Yes, this Sunday he will be given a pin for going thirteen Sundays without missing.

Q. What is your attitude toward this little boy?

A. I love him just as I would one of my own. I couldn't have any more love for him if he was my own.

Q. Mrs. Burton, do you work outside of the house or in the home?

A. No, sir, I do not.

Q. What is your main purpose in life?

A. To give the two small children that I have in my home what they want and long for.

CROSS EXAMINATION.

By Mr. Merhige:

Q. Now, Mrs. Burton, you say that the mother left the child there with you in 1945, is that right?

A. That is right.

Q. And she paid you \$9 per week until sometime in 1947,

Mrs. Grace E. Burton.

is that right?

page 59 } A. That is right.

Q. When you first took the child, Mrs. Burton, I understood your testimony to be you took the child because you loved it. Were you not also motivated by the fact you were to receive \$9 a week.

A. To tell you the truth, I never gave the \$9 a week a thought.

Q. You never thought—

A. No, I didn't. I loved him.

Q. Mrs. Burton, you testified here on Saturday in the case of *Russell v. Russell*?

A. Yes, sir, I did.

Q. Do you recall testifying in response to His Honor's question that you needed the money and that was one of the reasons you took the child in 1945? I want you to think, now.

A. That I needed the money?

Q. That you could use the money, or words to that effect, and that was one of the reasons.

A. Naturally I could use the money, yes.

Q. Did you not testify that was one of the reasons you took the child in 1945?

A. I don't remember that. I remember saying I have always loved the child and that is the main reason I took him into my home.

page 60 } Q. You don't remember answering His Honor's question that one of the reasons was because you were getting \$9 a week, or words to that effect?

A. Yes, I did.

Q. Do you recall the conversation you had with the former Mrs. Russell in 1947 when she left the child with you and did not return? Do you recall that conversation?

A. Yes, sir, I do.

Q. Do you recall Saturday testifying that Mrs. Russell had not been by to see the child for some little time and when she did come in 1947, in July, 1947, she said that the child appeared to know you all better than it knew her and for that reason, if you wanted to adopt the child, she would let you keep him?

A. That is right.

Q. That is exactly the circumstances surrounding your deciding to keep the child?

A. He had been with us so long he didn't know anybody else.

Supreme Court of Appeals of Virginia

Walter Russell Burton.

Q. She suggested the child knew you all and loved you all better than her?

A. Naturally, he had been with us every day and every night, he would be.

Q. She suggested that?

A. Yes. We told her something would have to be done, straightened out; she would either have to take him or let us have him.

Q. You didn't say that Saturday, did you?

page 61 } A. No, I didn't say that Saturday. It wasn't asked on Saturday.

RE-DIRECT EXAMINATION.

By Mr. Old:

Q. Mrs. Burton, could you make a profit out of keeping a child at \$9 a week?

A. Not and buy his clothes, and I bought everyone, practically, that he has.

Q. Has Mr. Russell contributed anything to this child?

Mr. Merhige: This is rebuttal.

The Court: Confine your questions to rebuttal.

Witness stood aside.

WALTER RUSSELL BURTON,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Old:

Q. You are Mr. Walter Russell Burton, are you not?

A. I am.

Q. Where do you live, Mr. Burton?

A. Chester, Virginia.

Q. How long have you lived in Chester?

page 62 } A. Thirty-one years with the exception of nine months. I was up here at Stop 8½, Petersburg Pike, and Army time. My legal address then was Chester.

Q. How long were you in the Army?

A. Approximately three years.

Q. When did you come back from overseas?

A. August 22, 1944.

Walter Russell Burton.

Q. What was the reason why you came back from overseas?

A. Wounded in the invasion of Southern France, August 15, 1944.

Q. In July, 1945, where were you?

A. I was staying at home then, going back and forward to McGuire and taking treatments, and also working in the service station in Chester on advice from the doctor at McGuire Hospital, army doctor.

Q. Did you know this little boy prior to the time, prior to July, 1945?

A. Yes, I had occasion to visit Mrs. Rogers who was boarding him then, an average of once or twice a week. We saw each other, walk by maybe one night a week, and she would walk down. We saw each other quite frequently, and she was boarding him at that time I saw him.

Q. State what your attitude toward this little boy was?

A. Well, the first time I can remember seeing him, I went in there and he was in the front room and I got
page 63 } to playing hiding with him, got up a right good little acquaintance with him, sort of got knowing one another, and every time I'd go up there I'd play with him, take him little toys, some little toy to play with, stop by the five-and-ten and get a bag of candy or a little toy automobile, something for him to play with around there, and sort of got right fond of the little chap up there. And then when Mrs. Rogers was informed that her husband was being transferred from DuPont down here in Richmond to Wilmington, she said something about she would have to get a place to put the little boy. I don't know exactly how it came up, but I said, "If the mother don't object, I'll take him down and keep him," and she said, "I'll talk with the mother and see if we can work it out." And she went over and talked to her and worked out an agreement that I would keep the child down there, and I got him in July, 1945, and I've had him ever since.

Q. What arrangement did you work out with Mrs. Russell?

A. She was to pay \$9 a week board for him while I had him.

Q. State what has happened during that period. You have had the little boy ever since then?

A. Yes, I have had him.

Q. Does she still pay \$9 a week?

A. No, she quit that on or before June or July, 1947. I think July I received the last check from her.

Walter Russell Burton.

page 64 } Q. Why did she stop paying you?

A. Well, the wife wrote her a letter and I don't exactly recall what was in the letter but she wrote a letter out there and Mrs. Russell came here—Mrs. Steris she was then—came here to see him and we talked about adoption proceedings for the little boy—

Q. When was that?

A. That was in June, I believe, of 1947, and she said that she was expecting a child and couldn't impose on her husband to take care of this one and his father didn't seem to want to take care of him, and she said she had been away so long the little boy didn't know her and she felt the best interests of the child were with me. I believe that was the consensus of our talk there in the house.

Q. Did she stop paying you \$9 at that time?

A. Yes, sir. I got some papers drawn up and sent her the papers and told her when she signed the papers she could stop paying \$9, and I sent her—I think thirty days I gave her to either decide whether she was going to take him or let him stay there and sign the papers. I think it was thirty days I gave her.

Q. Mr. Burton, do you know Mr. Russell?

A. I have seen him two or three times, yes, sir. Three times, to be exact.

Q. Will you state when you have seen him?

page 65 } A. It was shortly before Christmas of 1945. He came out to see the boy, took the boy up to his mother's and brought him back, through agreement with us, and he came in, I think, June of 1946—it might have been May—somewhere along June of 1946, and he came back again Christmas of '46, and I have not seen him since then.

Q. Did you ever make any objection to his coming, or anything of that kind?

A. No, sir, I never did.

Q. Did you invite him to come?

A. Well, I just told him, I think I told him he could come and see the boy any time he wanted to, the last time he was down there.

Q. State what Mr. Russell has done with reference to this boy.

A. He bought him a few little toys, underclothes and little undershirts, and sent him a sort of sweatshirt like. And I believe he sent him a packet. I think he did.

Q. When was that? When were those things sent?

Walter Russell Burton.

A. Well, he brought him the toys Christmas of 1945 and he sent him the underclothes last Christmas, underclothes and jacket last Christmas. I think he sent him a box of candy one time. I don't remember right off. He sent him a box of candy. I can't recall right off.

Q. Has he ever contributed anything to the sup-
page 66 } port of this boy?

A. Not to my knowledge, he has not. He has never given me anything.

Q. Did he write to you or Mrs. Burton and ask, make any inquiries as to the boy?

A. No, sir.

Q. Has he ever written to you or Mrs. Burton since you have had the child?

A. No, sir, but he sent some Christmas cards and birthday cards to the boy and signed them "Dave, Senior."

Q. Did he leave his address with you or ask you to write to him as to the condition of the little boy?

A. No, sir. I sent the papers to Florida and I would send them down there—I think I sent them four or five different time down there. I got word from his mother, a certain address in Florida, and I would send them down there and they would come back.

Q. When was that?

A. 1947, around July and August. I think. It was July and August I sent them down there either three or four times.

Q. Have you been in touch with Mr. Russell's mother?

A. Yes, she wrote a letter down an average of once a week, maybe a little oftener.

Q. And did you or Mrs. Burton answer that?
page 67 } A. My wife answers then. I don't do much writing.

Q. Did she know Mr. Russell's address?

Mr. Merhige: That is objected to.

The Court: Objection sustained.

Q. Did you seek to get Mr. Russell's address from his mother?

A. Yes, we wrote up there and asked her for it when we got the papers, so we could send them to him.

Q. Mr. Russell's mother, did she give you his address?

A. The first time she sent an address University Place,

Walter Russell Burton.

Miami, Florida. We sent the letter down there registered mail and got it right back; less than four or five days it came back.

Q. You mean Mr. Russell did not receive it?

A. He did not live at that address.

Q. Were there any others?

A. I don't recall the other one right off. I can't recall the other one. There was another one I sent it to but I can't recall it right off.

CROSS EXAMINATION.

By Mr. Merhige:

Q. Mr. Burton, have you instituted a suit in any court in regard to the custody of this child?

A. I took the matter up with my lawyer, Mr. Old, and he suggested we wait and see if the father would answer page 68 { swer that or send it back. I also wrote him to send it back, either answered or unanswered.

The Court: The question was, have you instituted any suit?

A. No, sir.

Q. That is as far as you have gone with it? To write letters to Mr. Russell you don't know whether he received or not?

A. I know he received, because I have the receipt at home where he signed to receive it.

Q. Did you get an answer?

A. No, sir.

Q. Mr. Burton, you knew at the time you sent these papers you referred to there might be some question whether Mr. Russell would agree to give up his child?

A. No, sir, I didn't know.

Q. You had no idea?

A. If he hadn't been to see him since that Christmas, I left in my mind he would give him up. I really did.

Q. He hadn't said anything to you to indicate to you that he didn't desire to have his child, did he?

A. I don't ever recall him saying it, no, sir.

Q. When you got the child, the custody of the child rested with the child's mother, isn't that right?

A. Yes, she had the child when I got him, yes.

Walter Russell Burton.

page 69 } Q. When Mr. Russell came to see his child when he got out of the service Christmas of 1945, you objected to his taking his child away for a week, did you not?

A. Yes, I did.

Q. Did you not at that time tell him you had no right to let him take the child because the child had been left with you by the mother, and you finally agreed to let him take the child if he promised to return him in a week?

A. Also, it was snowing out that day and I was afraid the child would get sick there, and the mother had informed me not to let him have him.

Q. You so informed Mr. Russell?

A. Yes, I so informed Mr. Russell.

Q. He told you if you didn't he would get a policeman?

A. Might have been. I don't exactly recall.

Q. The essence, you did let him take the child and he returned as promised?

A. That is right, yes.

Q. He sent gifts to the child regularly, birthdays and Christmas, etc.?

A. Up until last Christmas, he did. I believe he got a box of candy from him Easter. I don't think anything since Easter. I don't just remember, but a package, something, coming to the house at Easter.

Q. As a matter of fact, he sent him a bicycle?

page 70 } A. No, sir. His grandmother and brother in Baltimore asked what the child wanted, and she sent it down from Baltimore, Maryland.

Q. It came from Mr. Russell's family?

A. Yes, that is correct.

Q. They have been keeping in touch with you since you got the child, have they not?

A. They have been writing to my wife.

Q. Now when Mrs. Steris left you in July, 1947, there was nothing definite between you and she about what was to happen to the child, was there?

A. I don't believe there was. I believe she wanted the time to talk it over with her husband and try to get in touch with Mr. Russell on the matter when she left, the best I can remember.

Q. Do you know what the Rogers were getting for keeping the child when you first took the child?

A. I believe she told me when she was getting ready to move she was getting \$9 a week.

David Dixon Russell.

Q. That is the same price you got?

A. Yes.

Q. This was your first experience in boarding children?

A. That is correct.

By the Court:

Q. I think you understand the Court's reasons
page 71 } for asking these questions. It hasn't come out and

I'd like for the record to be straight. You and
your wife have no children of your own?

A. No, sir.

Q. Is that because of medical reasons?

A. Yes, sir. We have lost four, Your Honor.

Mr. Old: That is the case, Your Honor.

Mr. Merhige: I have some rebuttal, sir.

DAVID DIXON RUSSELL,
having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Merhige:

Q. Mr. Russell, state your full name, residence and occupation.

A. David Dixon Russell, 6740 Southwest 20th Street, Coral Gables, Florida.

Mr. Merhige: Before examining this witness I ask leave of the Court to use exhibits that were introduced in the case of *Russell v. Russell*, with the understanding I will have photostatic copies made for both records.

The Court: It is so ordered.

Q. Where are you employed, Mr. Russell?
page 72 } A. Aluminum Company of America as distributor with one of their franchises. Wearever aluminum wear.

Q. How long have you been employed by them?

A. I have been employed by them almost, going on five months. I'm not employed with them. Under franchise contract. Under my own business.

Q. What has been your average weekly income for the past few months?

David Dixon Russell.

A. It varies, up and down. Minimum \$66.73. It varies. Sometimes up to \$75 or \$85.

Q. Mr. Russell, are you presently married?

A. Yes, sir, I am.

Q. How long have you been married?

A. A year and close to four months.

Q. And do you live in an apartment or house?

A. I own my own home.

Q. I hand you herewith what purports to be a plat of survey and ask you if that is a true plat of your home and grounds?

A. Yes, sir, it is.

Q. Will you please describe to His Honor your home, size of the lot, etc., how many rooms?

A. A huge back porch, inclosed, for my mother-in-law; a huge kitchen, large dining room, large front room, two bedrooms; only using one at present because we were
 page 73 } saving for the little son; a large bathroom, hallway in between the two bedrooms and bath, a huge lot which runs about 100 and so many feet by sixty and so many. I have three large orange trees in back, grapefruit tree, and everything the child would want.

Q. When did you move into that home?

A. Just as soon as my wife had saved enough, scraped up enough. Around approximately May or June of this year.

(Whereupon, the plat above referred to was marked Petitioner's Exhibit A.)

Q. This paper which I hand you, is this what purports to be a statement, guaranty of title and the abstract?

A. Yes.

Q. What was the purchase price?

A. \$9,389.10.

(Marked for identification Petitioner's Exhibit B.)

Mr. Merhige: I would ask that this be marked as an Exhibit.

(Whereupon, original of Army discharge was marked Petitioner's Exhibit C.)

Q. I hand you original Army discharge from the Army of the United States and ask you if that is your honorable discharge?

David Dixon Russell.

A. Yes, it is.

page 74 } Q. When were you discharged from the service?

A. Approximately December 15, 1945.

Q. How old were you when you married Mildred Rachel?

A. Approximately—about 23 years.

Q. How old are you now?

A. Thirty-one.

Q. Now, Mr. Russell, where were you when your wife gave your child to the Rogers, do you know?

A. I don't know when it was but I know I was overseas.

Q. Where were you in June, 1945?

A. Overseas.

Q. You have heard it testified here today that is the approximate date the child was given to the Burtons?

A. Yes.

Q. Did you know the Burtons had the child at that time?

A. No, I didn't.

Q. Did you know where your wife was at that time?

A. No, I didn't.

Q. Had you been or did you make arrangements for your wife to receive allotments during your term in the Army?

A. I certainly did, even after I got the letter from the lawyer saying she had applied for decree of divorce.

Q. When did you get discharged?

A. December 15, 1945.

page 75 } Q. When did you come to see your child after you were discharged?

A. Just as soon as I immediately found out the proper address to locate him.

Q. How did you set about finding the address?

A. It more or less went through the grapevine.

Q. You had no idea when you got out where the child was?

A. No, I didn't have the slightest idea.

Q. How did you find out that the child was with the Burtons?

A. I ran into certain friends down here in Richmond. I knew he was probably in this location, and they told me.

Q. Did you go out to see the child?

A. I did.

Q. Did you have conversation with Mr. Burton?

A. Yes, I wanted to bring my son home to his grandmother for Christmas.

Q. Was there any objection?

David Dixon Russell.

A. Definitely there was; almost came to being blows.

Q. What objection did Mr. Burton state?

A. That I had no authority to take him out of his home by, I think, by the opinion of my ex-wife, told him not to let me.

Q. You did take the child to your mother's did you?

A. Yes.

Q. How long did you keep him there?

page 76 } A. Just about a week to eight days.

Q. After you brought the child back, Mr. Russell, did you do anything or endeavor to do anything, after you had learned that the Burtons had the child? What if anything did you do in an effort to secure the child yourself?

A. When I had him up in Baltimore for Christmas holidays, when I went to see a friend in Baltimore, he told me I couldn't do anything at that time because I didn't have a home to bring him up as a child should be brought up.

Q. What did you do?

A. I previously had been married. My wife and I moved into a trailer, and scraped and moved into this home, to bring the child with us.

Q. Was that in Miami?

A. Yes.

Q. Where were you working when you first went down there?

A. The Twentieth Street Port Authorities, which was only paying so much. Then I put in for civil service and went to work for the United States Government Post Office.

Q. How long did you work there?

A. One year exactly.

Q. Where were you living in that period?

page 77 } A. Still living partly in the trailer and then as things were going along we moved into the new home.

Q. You just moved into the new home a few months ago, did you not?

A. Yes, sir.

Q. When did you, if you recall, take the steps and file a notice in order to secure the custody of your child?

A. Just as soon as the wife and I found we had a home capable of bringing up a son.

Q. Is your home furnished?

A. Completely furnished.

Q. Do you have any debts?

A. None.

David Dixon Russell.

Q. Do you have an automobile?

A. Yes.

Q. Is it paid for?

A. Yes, sir.

Q. Is your wife presently working?

A. Yes, she is, sir.

Q. Do you know what her weekly salary is?

A. Around \$36 a week.

Q. So combined, you have an income of approximately \$100 a week?

A. Approximately.

Q. You stated your mother-in-law is living with you. Is she financially independent?

page 78 } A. She has a nice bank account and also an income from the government.

Q. She is not dependent on you?

A. She is not dependent on me.

Q. Mr. Russell, did you see your child any more from December, 1945, until this litigation?

A. Up until this 1945 I saw him on Christmas and in June and in December, 1946, and then I was figuring on a way to get my son. I talked to another lawyer and he still told me it wouldn't be any use, so I previously had got married, saving everything possible to get along and bring up the son.

Q. Did you come by and see your child or make any effort to see your child in the last six or seven weeks, say?

A. I was going to see my child and the suit I instituted, they said it might be difficult and to wait.

Q. Told you to stay away?

A. Yes.

Q. That was when you instructed me to take whatever legal steps were necessary to secure your child, is that right?

A. Yes.

Q. Mr. Russell, of what religion are you?

A. Catholic.

Q. You go to mass every Sunday?

page 79 } A. Yes, sir, I do.

Q. Did you contact any spiritual advisor in regard to your son?

A. Father Franer, St. Theresa Church and School, and he advised me what to do, and I asked him, I wanted to bring him up in the Catholic school and he said, bring him down and enter him immediately.

Q. You have made arrangements for your child to enter school if the Court decrees you shall take him?

David Dixon Russell.

A. Yes, sir.

Q. Mr. Russell, did you ever *made* any statement to the effect you were leaving your child, didn't desire your child?

A. No, sir, I never did.

Q. Has that thought ever been in your mind?

A. No, sir, it never has.

Q. Have you been working toward today since you got out of the service?

A. Working day and night to have my son with me.

Q. When was the last time you contacted the Burtons or sent gifts to your child?

A. The last one was July 12th of this year, his birthday. My wife and I bought some presents in the store she works in. I mailed them and had them insured.

Q. Have you ever been by the Burtons to see your child and couldn't find him?

page 80 } A. On the way up last year, nobody was home, and on the way back nobody was home.

Q. How long have you been living in Florida?

A. Since January 9, 1947, right after the last time I saw my boy.

Q. Mr. Russell, have you ever been arrested?

A. No, sir, I have not.

Q. Are you a drinking man, sir?

A. No, sir, I am not.

Q. I hand you herewith what purports to be a marriage license and ask you if that is the marriage license under which you and your present wife are married?

A. Yes, sir, it is.

(Whereupon, the marriage license was marked Exhibit "D".)

Q. How long have you been married to your present wife?

A. August 14, 1947.

Q. Have you discussed with the present Mrs. Russell, prior to your marriage, your child?

A. Even discussed it before we were married.

Q. She knew what your intentions were?

A. Definitely.

Q. Does she have any objections still?

A. She said she wanted him very much. To bring him up as my son.

David Dixon Russell.

Q. Mr. Burton, after your wife left you and page 81 } went to Fredericksburg, did you ever make any effort between that time and the time when you went overseas to see your child? Did you see the child?

A. I did. He had pneumonia, double pneumonia. I got a telegram from the Red Cross to come immediately, they were expecting him to die. I stayed there eight or nine days, morning to night.

Q. Your wife had not been living with you?

A. No, sir. When it got double pneumonia it was living with a colored lady.

CROSS EXAMINATION.

By Mr. Old:

Q. Mr. *Old*, you say you came by in the summer of 1947?

A. Yes, sir.

Q. What did you do; just drive by the house?

A. Yes, sir, I did. There was nobody home. I went up to the porch.

Q. What time of day?

A. It was 1:00 or 2:00 o'clock.

Q. The middle of the day?

A. Yes.

Q. How long did you stay?

A. I didn't have much time. I wanted to go up and see my mother and I only had a few days off, and came back on Monday.

Q. Did you make any inquiries where they might page 82 } be or when they might come back?

A. I didn't know anybody around there that might know anything. I was a total stranger.

Q. When you came back, what time was it?

A. Between 10:30 and 11:30, or a quarter of 12:00.

Q. You didn't find anybody then?

A. Nobody home.

Q. Did you stop?

A. I stopped.

Q. Did you ask anybody where they might be?

A. I don't know anybody there to ask.

Q. You had driven up from Florida, I imagine?

A. Yes, sir.

Q. And you were not interested enough to see your child that you would ask around out there and try to find out when they would be back, when you could see him?

David Dixon Russell.

A. I stopped to see if he was there but when I didn't—

Q. When you didn't find the child you went on, is that right?

A. That is right.

Q. You didn't put yourself to any trouble whatsoever to get to see him?

A. I put myself to enough trouble to come up to see him when I did. Nobody was there. I don't know page 83 } where they were.

Q. You knew they would be back?

A. Yes, that is why I came back around almost the following day.

Q. Why didn't you leave a note and say you would be back a certain time?

A. I thought I would be back; thought they would be back when I returned.

Q. Why should you have thought they might not be away for a short while?

A. I don't know.

Q. You have known ever since December, 1945, that your child was living with Mr. and Mrs. Burton, isn't that true?

A. Yes, sir.

Q. Have you ever talked to Mr. and Mrs. Burton about your child about anything?

A. About his health, yes. How was he making out?

Q. When?

A. When I was there, paid my visits.

Q. When was the last time you were there?

A. I just told you, 1946, in December, sir.

Q. Christmas, 1946; nearly two years ago was the last time you were there?

A. Yes, sir. I have been working toward the page 84 } goal to bring up my son in my own home.

Q. You were discharged in December, 1945, is that true?

A. Yes, sir.

Q. What did you do from that time until you left for Florida?

A. I worked, sir.

Q. Where did you work?

A. I was an airplane mechanic.

Q. What company did you work for?

A. Royal Flying Service, in Baltimore.

Q. Did you work almost a year at that?

David Dixon Russell.

A. Almost a whole year.

Q. What was your salary?

A. Approximately between \$35 and \$38 a week.

Q. During that period did you contribute anything to your son's support?

A. Sent him gifts, clothing.

Q. How much clothing?

A. I think Christmas I got him—I even went over to one of the stores, Thalhimers, and picked him out a corduroy suit and some clothing, and I gave my mother part of the money for the tricycle that was sent. It was split three ways, my mother and brother and myself. Some clothing, gifts, and candy, and my brother and mother sent him gifts regularly.

page 85 } Q. Did you ever send any money to either Mrs. Burton or your wife?

A. No, sir. I was trying to approach a goal to bring him up in my own home.

Q. While you were approaching that goal, you were perfectly willing for somebody else to take care of your child, whatever their goal they were trying to approach, isn't that true? Sacrificing themselves for your child, regardless.

A. I said, said I was working for the custody of him and I didn't have the custody of him then, sir.

Q. You were entirely unmindful of the fact that these people might become affectionate toward your child and he might become affectionate toward them; that didn't make any difference to you, did it?

A. It certainly did.

Q. Now, Mr. Russell, did you ever write to Mr. or Mrs. Burton and inquire as to the health of your child?

A. No, I didn't, because I sent him presents and I thought they would send back that they received them. I didn't get no answer so I didn't know if they were living there or not.

Q. When was the last presents you sent?

A. July of this year.

Q. Did you ever write them and tell them where you were?

A. I thought my mother—my address was on
page 86 } every package that went to him.

Q. How many packages?

A. I just told you, just the previous July and Easter and Christmas.

Q. Did you ever write to your mother and inquire as to your boy?

David Dixon Russell.

A. Yes, sir, and my mother always wrote me.

Q. How did you know your mother knew about the boy?

A. Because the Burtons were writing her.

Q. How did you know?

A. Because my mother wrote me and told me and I wrote my mother back.

Q. Did you receive notice from the Burtons that you sign adoption papers?

A. I received some sort of letter but it seemed more or less not the very kind of letter you would write for the adoption of somebody else's son.

Q. Did you have the courtesy to write them after you received that?

A. I don't think, if you wrote that letter, there shouldn't be any courtesy to answer that, sir.

Q. What kind of letter was it? What type of letter was it?

A. It is right there. I couldn't express the feeling as a father of the son they were asking for.

Q. What did they ask you to do?

A. More or less still threatening in there; if I don't do this, don't do that—

Q. What kind of threat?

A. I don't have to answer that. It is right there in front of you.

Q. When did you receive the letter?

A. I think February of this year.

Q. What did you do?

A. Oh, I took it to two or three lawyers down in Miami. I was working, saving money so I could come up here and see a lawyer in Baltimore that I knew personally in Baltimore that was very good, so he said he couldn't do anything with it and sent me down here to see Mr. Merhige.

Q. When you received this you knew that Mr. and Mrs. Burton had become very, very devoted to this child?

A. No, sir, I did not.

Q. And you had no more regard for the persons who thought as much of your child that they wanted to adopt it that you ignored the letter entirely?

A. Yes, I did ignore the letter.

Q. You said you worked while you were in Baltimore. How long in Baltimore?

A. For about one year.

page 88 } Q. When did you go to Florida?

A. January 9, 1947, sir.

David Dixon Russell.

Q. Now from the time that you were discharged, during that year 1946, you worked regularly all year?

A. As any soldier gets out of the Army, usually have about two months off and then they go to work. That is what I did.

Q. With the exception of two months, after your discharge, you worked every day? Where were you living?

A. 224 East 22nd Street.

Q. Living with your mother?

A. Yes, every day.

Q. You paid her board?

A. Yes, sir, I paid her board.

Q. With the earnings you made during that time, you never thought to contribute one cent to the support of your child, did you?

A. Yes, I did, but I talked to my lawyer in Baltimore.

Q. You talked to a lawyer and the lawyer advised you not to support your child?

A. No.

Q. What do you mean?

A. Told me to save my money to get a home and bring him up as my own little boy.

Q. He advised you to save your money and let page 89 { somebody else support your child?

A. I said, I didn't have the custody.

Q. Do you mean to say you would not do anything for your child unless you had the custody?

A. I'd do anything for my son, yes.

Q. You would leave it?

Mr. Merhige: I object to the arguing with the witness.

The Court: Ask questions of fact.

Q. When you went to Florida, where did you go?

A. Coral Gables, Florida.

Q. You are still there now?

A. Yes, still there.

Q. You have been there ever since you lived in Baltimore?

A. Yes.

Q. I understand you left Baltimore for Florida in January of 1947, is that true?

A. Yes, sir.

Q. Where did you go after you got to Florida? What did you do?

David Dixon Russell.

A. I went to work, sir.

Q. What did you work at?

A. Twentieth Street Port Authorities.

Q. How long did you work there?

page 90 } A. Four months, because the pay wasn't very much. Then I took a civil service exam.

Q. What did you receive from the Port Authority?

A. \$35 to \$38 a week.

Q. What were your duties there?

A. Assistant foreman.

Q. Mechanic or what?

A. No, carpenter, more or less.

Q. When did you take civil service?

A. I took civil service while I was working at the Port Authority and they called me to work around either May 3rd or July 1st.

Q. That you were called to work at the Post Office?

A. Yes, sir, I passed.

Q. How long did you work at the Post Office?

A. One whole year.

Q. Then what did you do?

A. Well, I had another contract that was offered me under the Aluminum Company of America, franchise contract which was putting me into my own business, whereas I went ahead and bettered myself by leaving the Post Office.

Q. So you are now engaged in salesmanship with reference to some aluminum products?

A. Yes, sir, my own business.

Q. Your own business?

page 91 } A. Yes, sir.

Q. How long have you been engaged in that?

A. Going on four months. I'm due for a promotion pretty soon.

Q. Now prior to the time you went into the Army, what was your employment record then? What did you do before you went into the Army?

A. I worked down in the shipyard, electric welder on acetylene torch, carbon arc welder.

Q. Mrs. Steris has testified you went from place to place, right many places.

A. That was her opinion.

Q. Is it true or not?

A. No, it isn't.

Q. Did you have permanent employment?

Mrs. Berneta Esther Russell.

A. I did.

Q. Where?

A. Fairfield Western Maryland Shipyard, Bethlehem Steel, Sparrows Point.

Q. Since you have been in Florida, nearly two years, you have been employed at the Port Authority, in the Post Office, and what you are doing now?

A. I'm in my own business, sir.

Q. You own your own business now?

A. Yes, sir.

page 92 } Q. So since you have retired from the Army, the last steady position that you have held is with the Post Office?

A. Well, that is to better myself, yes, sir. I quit one job to better myself, from each job. Steps go up; I crawled up to the top, got off the bottom.

Witness stood aside.

MRS. BERNETA ESTHER RUSSELL,
having been duly sworn, testified as follows.

DIRECT EXAMINATION.

By Mr. Merhige:

Q. Mrs. Russell, you are the wife of David Dixon Russell, the petitioner in this matter?

A. Yes, sir.

Q. How long have you been married?

A. Since August 14th, last year.

Q. Where are you and Mr. Russell living?

A. In Coral Gables, Florida.

Q. And whereabouts in Coral Gables do you live? Do you have an apartment, house, or what?

A. We have a home. 6740 Southwest 29th Street.

Q. How long have you all had that home?

A. Since May 12th or 13th this year.

page 93 } Q. Mrs. Russell, did Mr. Russell acquaint you with his marital status prior to the time you all got married?

A. Yes, sir.

Q. Did he tell you about his son?

A. Yes, sir.

Mrs. Berneta Esther Russell.

Q. What is anything did he tell you he intended to do about the boy?

A. As soon as we could, we wanted him, to bring him to Florida.

Q. And does Mr. Russell work every day?

A. Yes, sir.

Q. What is his position?

A. He is a distributor for Wearever.

Q. And you are employed, are you, Mrs. Russell?

A. Yes, sir.

Q. And do you intend to continue in your employment?

A. Only until he can take care of everything without my help.

Q. Do you all have any debts that you know of?

A. We owe some on our furniture.

Q. Very much?

A. No, not so terribly much.

Q. Do you own a car?

A. Yes, sir.

Q. Do you owe anything on the car?

A. No, sir.

page 94 } Q. How much money, if any, was put down on the purchase of this house?

A. \$800.

Q. Now, Mrs. Russell, do you know whether or not Mr. Russell has sent any gifts to his child recently?

A. Yes, he did.

Q. Do you know of your own knowledge when the last time was he sent a gift to the child?

A. On his birthday this year.

Q. Do you recall what month that was?

A. July.

Q. Now, Mrs. Russell, do you and Mr. Russell have any children of your own?

A. No, sir.

Q. What is your attitude in respect to having this child come to live with you?

A. I want him.

Q. What church do you attend, Mrs. Russell?

A. I was born and raised a Methodist.

Q. Have you and Mr. Russell discussed the child's religious upbringing in the event the Court sees fit for you to take the child?

Mrs. Berneta Esther Russell.

A. He would be brought up the way my husband wished him to be brought up.

Q. You have discussed it?

page 95 } A. Yes, sir.

CROSS EXAMINATION.

By Mr. Old:

Q. Mrs. Russell, when did you, about what time in the year did you meet Mr. Russell?

A. It was in March, last year.

Q. Of 1947?

A. Yes, sir.

Q. You were married in August?

A. August 14th.

Q. What was his occupation at the time you met him?

A. He worked in the Port Authority.

Q. Then when did he take his position with the Post Office?

A. In September, the same year.

Q. To earn the money and save the money to make that down payment?

A. We both saved money.

Q. The down payment of \$800 on the house?

A. He saved the money, yes.

Q. What kind of car do you have?

A. '37 Terraplane.

Q. Was that your car or his?

A. It is his car. He paid for it.

Q. When did he get it?

page 96 } A. My father died in January. Mother came back in March. We paid for—paid her for it then.

It was his car. We bought it from mother.

Q. Your mother lives with you?

A. Yes, sir.

Q. So if Mr. Russell should have—This was a 1937 Terraplane which belonged to your father?

A. Yes.

Q. How much did you pay your mother for it?

A. \$200.

Mrs. Berneta Esther Russell.

RE-DIRECT EXAMINATION.

By Mr. Merhige:

Q. As I understand your testimony, in the past year you and Mr. Russell have saved at least a thousand dollars, have you not?

A. With what we put in the home and furniture, yes.

RE-CROSS EXAMINATION.

By Mr. Old:

Q. Did you think it strange that your husband was permitting his boy to stay with other persons and had not contributed anything to his support?

A. I don't know whether I thought it was strange or not, but the way I understood, he didn't have custody of his child.

Q. You mean he was not legally bound to support—page 97 } port—bound by court order to take care of his child?

A. Yes, sir.

Q. You knew he was not doing anything with reference to the support of his child?

A. He was working hard to make a home for him, as soon as he could get him.

Q. You knew he was saving money and letting somebody else spend money on his child; you knew that?

A. I'm sorry. I didn't know anything about it.

Q. You did know he was not using any part of his income to do anything with reference to the support of his child? You knew that, didn't you?

A. Yes, sir.

By Mr. Merhige:

Q. And the reason you know that is he was saving every cent he had?

A. Yes, sir.

Mr. Merhige: That is our case.

The Court: Is that the case for both sides?

Mr. Old: I should like to put Mr. Burton back on the stand for a few minutes. Mr. Russell has put in evidence the amount of money he is making.

Mr. Merhige: I'll stipulate that on the record.

WALTER RUSSELL BURTON,
recalled:

page 98 } By Mr. Old:

Q. Mr. Burton, where are you employed now?

A. E. I. DuPont.

Q. What is your salary?

A. \$214 per month.

Q. Have you any other income?

A. Assistance from the government for wounds.

Q. How much is that?

A. \$82.80 per month.

Q. Then your income is approximately around \$300 per month?

A. Yes, sir.

By Mr. Merhige:

Q. Now this money you get from the government is subject to change any time? You have to take periodic physical examinations to see that you are entitled to that?

A. I have had one since I was out. I went back to the hospital. I think there is a clause in there, subject to change.

The Court: The Court will take the case under advisement, and I would like to see counsel in chambers.

(Whereupon, the hearing was concluded at 11:40 a. m., Wednesday, October 13, 1948.)

page 99 } I, M. Ray Doubles, Judge of the Hustings Court of the City of Richmond, Part II, who presided over the trial of the case of David Dixon Russell, petitioner, and Walter Russell Burton and Grace E. Burton, respondents, do certify that the foregoing is a true transcript of the evidence and other incidents of the trial, all of which was heard on the 13th day of October, 1948.

The exhibits referred to in the foregoing transcript of the testimony and offered in evidence marked "Ex. #1, A, B, C and D have been duly authenticated by me, and upon the request of any party, by counsel, such original exhibits so authenticated shall be forwarded to the Clerk of the Supreme Court of Appeals.

I further certify that this certificate has been tendered to, and signed by me, within the time prescribed by Code Section 6252 for tendering and signing Bills of Exceptions, and

that reasonable notice in writing has been given to opposing counsel of the time and place at which said certificate would be tendered.

Given under my hand this 9th day of December, 1948.

M. RAY DOUBLES,
Judge of the Hustings Court of the City
of Richmond, Part II.

page 100 } I, Chas. R. Purdy, Clerk of the Hustings Court
of the City of Richmond, Part II, do certify the
foregoing transcript of the evidence and other incidents of
the trial in the case of David Dixon Russell, petitioner,
against Walter Russell Burton and Grace E. Burton, respond-
ents, was delivered and filed with me on the 10th day of De-
cember, 1948.

CHAS. R. PURDY,
Clerk, Hustings Court of the City of
Richmond, Part II.

page 101 } I, Chas. R. Purdy, Clerk of the Hustings Court
of the City of Richmond, Part II, do certify that
the foregoing is a true transcript of the record, with the ex-
ception of the original exhibits which have been certified by
the Court under the provisions of Section 6357 of the Code
of Virginia, in the case of David Dixon Russell, petitioner,
against Walter Russell Burton and Grace E. Burton, respond-
ents, and that the petitioner had due notice of the intention
of the respondents to apply for such transcript.

I further certify that the respondents have executed a sus-
pending bond in the penalty of \$1,000.00.

Witness my hand this 18th day of December, 1948.

CHAS. R. PURDY,
Clerk, Hustings Court of the City of
Richmond, Part II.

Fee for record—\$24.86.

A Copy—Teste:

M. B. WATTS, C. C.

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