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Record No. 4970

In the Supreme Court of Appeals of Virginia at Richmond

ANTHONY F. DISTEFANO

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF WISE COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three 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 the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4970

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 26th day of November, 1958.

ANTHONY F. DISTEFANO, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Wise County

Upon the petition of Anthony F. Distefano a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Wise County on the 5th day of June, 1958, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; upon the petitioner, or some one for him, entering into bond with sufficient surety before the clerk of the said circuit court in the penalty of two thousand dollars, with condition as the law directs; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

page 2 } Commonwealth of Virginia,
County of Wise, to-wit:

To all or any of the Police Officers of the County of Wise:

WHEREAS, Lillian Distefano has on the 20th day Feb., 1958, filed a petition, verified by oath—affirmation—before me, H. M. Bandy Judge of the Juvenile and Domestic Relations Court, of said City, or County, alleging that on the ..... day of ....., 19 ...., at said City/County Anthony Distefano did unlawfully and without just cause, desert and wilfully neglect and refuse and fail to provide for the support and maintenance of his wife and his 1 male child ..... under the ages of seventeen years, his 1 female child ..... under the ages of seventeen years, and his ..... child ..... who ..... crippled and otherwise incapacitated for earning a living—such wife and child ..... being then and there in necessitous circumstances.

THESE ARE, THEREFORE, In the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me, the body of the said Anthonv Distefano to answer the complaint, and to be further dealt with according to law.

And, moreover, upon the arrest of the said Anthony Distefano by virtue of this warrant, I command you, in the name of the Commonwealth of Virginia, to summon Lillian Distefano, 1525 Valley Drive, Bristol, Tenn. to appear at the Juvenile and Domestic Relations Court, as witnesses to testify in behalf of the Commonwealth against the said Anthony Distefano on the 28 day of Feb., 1958, at 11:00 P. M. that is to say, on the next day following the day of arrest. And have then there this warrant, with your return thereon.

Given under my hand and seal, this 26 day of February, 1958.

H. M. BANDY (Seal)
Judge, Juvenile and Domestic
Relations Court.

(on back)

Commonwealth,

v.

Anthony Distefano.

WARRANT.

Executing by arresting the within-named .....
And summoning the within-named witnesses.....

This 3 day of March, 1958.

J. W. WILLIAMS, JR., D. S.

* * * * *

page 5 } INSTRUCTION A.

The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant is the father of the children in question, and if you further believe from the evidence beyond a reasonable doubt that he has voluntarily admitted paternity in writing under oath, then he is liable for the support, maintenance and education of said children as if the children were born in lawful wedlock.

The Court further instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant acknowledged paternity of the children on his income tax returns, then the Court tells the jury that an income tax return filed under the penalties of perjury is equivalent to an oath and meets the requirements set forth in the first paragraph of this instruction.

Given.

G. M., Judge.

page 6 } INSTRUCTION B.

The Court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that the defendant, without just cause, deserted or wilfully neglected, refused, or failed to provide for the support and main-

tenance of his children you shall find him guilty as charged in the warrant, and fix his punishment by a fine not exceeding Five Hundred Dollars and sentence the said defendant to the State Convict Road Force for a period of not less than ninety days nor more than twelve months, or both; or in lieu of the fine being imposed, you may require the said defendant to suffer a forfeiture of an amount not exceeding One Thousand Dollars.

Given.

G. M., Judge.

page 7 } INSTRUCTION C.

The Court instructs the jury that they are the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony, but that they have no right to arbitrarily disregard the testimony of any witness, but in determining the credibility of witnesses, and the weight to be given their testimony, the jury make take into consideration the interest of the witness in the thing about which he testifies, his means of knowledge, bias, and prejudice in regard to the thing about which he testifies and his demeanor while testifying. And, when the jury have considered the testimony of witnesses according to these witnesses, they should give the testimony of each witness all the weight to which his testimony is entitled, if any.

Given.

G. M., Judge.

page 8 } INSTRUCTION D-1.

The Court instructs the jury that as a matter of law in considering the case, the jury must not entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be a reasonable doubt, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such a doubt that were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence you can

say that you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

Given.

G. M., Judge.

page 9 } INSTRUCTION D-1.

The Court instructs the jury that the law presumes the accused to be innocent until he is proven guilty beyond a reasonable doubt, and if there is upon the minds of the jury any reasonable doubt of the guilt of the accused, the law makes it their duty to acquit him; and you are further instructed that mere suspicion or probability of his guilt, however strong, is not sufficient to convict, nor is it sufficient if the greater weight or preponderance of the evidence supports the charge in the indictment, but to warrant his conviction his guilt must be proved so clearly that there is no reasonable theory consistent with the evidence upon which he can be innocent.

Given.

G. M., Judge.

page 10 } INSTRUCTION D-2A.

The jury is further told that for a paper to be under oath it must be sworn to before a Notary Public or other officer authorized by law to administer oaths.

Given.

G. M., Judge.

INSTRUCTION D-3A.

The Court instructs the jury that this is a criminal proceeding in which Dr. Distefano might be subject to pay a fine or to be imprisoned as set forth in Instruction B, should the jury believe that the Commonwealth has proved beyond all reasonable doubt that Dr. Distefano acknowledged these children to be his by a paper voluntarily signed under oath. In the event the jury found the defendant guilty, then the jury could direct a forfeiture not exceeding $1,000.00 from

Dr. Distefano which would be for the benefit of the children, yet the benefit of the children is not at issue here; the question is whether the Commonwealth has proved its case against Dr. Distefano by a writing under oath.

Given.

G. M., Judge.

page 11 } INSTRUCTION D-4A.

The Court instructs the jury that in this case the law presumes that the two children involved are the children of Atler Stanley and his wife, Lillian Baber Stanley, but this presumption may be rebutted by clear and convincing proof.

Given.

G. M., Judge.

INSTRUCTION D-7.

The Court instructs the jury that although you may believe from the evidence in this case that Dr. Distefano is actually the father of the two children involved, yet you cannot find him guilty in this case unless you further believe that the Commonwealth has proved beyond all reasonable doubt that Dr. Distefano has heretofore by writing voluntarily signed by him under oath as defined in other instructions acknowledged these children to be his.

Given.

G. M., Judge.

page 12 } INSTRUCTION D-8.

The Court instructs the jury that the failure of the accused to testify creates no presumption against him; and in considering his guilt or innocence his failure to testify is not a circumstance which the jury is entitled to consider.

Given.

G. M., Judge.

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INSTRUCTION D-2.

The jury is further told that for a paper to be under oath it must be sworn to before a Notary Public or other officer authorized by law to administer oaths, Clerk of a court of record or Commissioner in Chancery.

Refused.

G. M., Judge.

INSTRUCTION D-3.

The Court instructs the jury that this is a criminal proceeding in which Dr. Distefano might be subject to pay a fine or to be imprisoned as set forth in other instructions, should the jury believe that the Commonwealth has proved beyond all reasonable doubt that Dr. Distefano acknowledged these children to be his by a paper voluntarily signed under oath. While the jury may, should they believe the Commonwealth has proved its case beyond all reasonable doubt as set forth above, direct a forfeiture not exceeding $1,000.00 from Dr. Distefano which would be for the benefit of the children, yet the benefit of the children is not at issue here but solely the question of whether the Commonwealth has proved its case against Dr. Distefano by the writing under oath as set forth above.

Refused.

G. M., Judge.

page 14 }

INSTRUCTION D-4.

The Court instructs the jury that in this case the law says that the two children involved are the children of Atler Stanley and his wife, Lillian Baber Stanley.

Refused.

G. M., Judge.

INSTRUCTION D-5.

The Court tells the jury that here there is only one way by which the Commonwealth can find Dr. Distefano guilty and

that is for the Commonwealth to prove beyond all reasonable doubt that Dr. Distefano by a writing voluntarily made under oath, acknowledged these children or either of them to be his. The jury is further told that in this connection the writing itself is always the best evidence.

Refused.

G. M., Judge.

page 15 } INSTRUCTION D-6.

The Court instructs the jury that an income tax return is not a writing under oath.

Refused.

G. M., Judge.

* * * * *

page 19 }

* * * * *

Received and filed May 27, 1958.

LEE A. NAULEY, Deputy Clerk.

MOTION.

The defendant, Anthony F. Distefano, by counsel, now moves the court to set aside the verdict of the jury returned on May 23, 1958 and dismiss the charge against him and assigns as his grounds the following:

I.

The verdict is contrary to the law.

II.

The verdict is contrary to the evidence.

III.

The verdict is contrary to the law and the evidence.

IV.

The court erred in not striking the evidence of the Commonwealth at the conclusion of the Commonwealth's evidence.

V.

The court erred in not striking the evidence at the conclusion of all the evidence in the case.

VI.

The court erred in admitting evidence by the Commonwealth's witness Lillian Stanley, alias Lillian Distefano that the defendant had claimed two children which was the subject matter of this suit on his income tax return for certain years when the income tax returns were the best evidence.

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VII.

The court erred in giving Instructions A, B and C for the Commonwealth over the objections of the defendant.

VIII.

The court erred in refusing Instructions D2, D3, D4. D4a, D5 and D6 for the defendant.

IX.

The court erred in admitting evidence for the Commonwealth and refusing to admit evidence for the defendant which is shown in the record.

ANTHONY F. DISTEFANO
By Counsel.

* * * * *

page 21 } COURT ORDER ENTERED, THURSDAY, JUNE 5TH 1958 CRIMINAL ORDER BOOK NO. 22 PAGE 339.

This day came again the Commonwealth by its attorney, and the defendant, Anthony Distefano appeared in person and was represented by his counsel, Leslie M. Mullins, The

court, at the conclusion of the trial in this case on May 23, 1958, (Criminal Order Book No. 22 page 315) took under consideration defendant's motion to set aside the verdict of the jury in this case, and allowed defendant until this date to prepare and file his written grounds of said motion and argue said motion. The defendant by counsel having filed his written grounds of said motion, and said motion being orally argue by Leslie M. Mullins, Counsel for Defendant and by Kenneth P. Asbury, Commonwealth's Attorney for plaintiff. After hearing arguments of counsel, and giving mature consideration, the court doth overrule said motion to set aside the verdict, the effect of which is to confirm the verdict of the jury, to which action of the court in overruling said motion, the defendant by counsel excepted.

It is therefore considered by the court that the Commonwealth at the relation of Lillian Distefano recover of the said Anthony Distefano, the defendant, for the benefit of his two (2) children, Anthony F. Distefano III, age six years, and Francis Distefano age Nine years, a Forfeiture in the amount of $1,000.00 (ONE THOUSAND DOLLARS), payable to Lillian Distefano mother of said children for their sole use and benefit to be used for the support, maintenance, care and education of said children aforesaid.

It is further considered by the court that if default be made in the payment of said forfeiture as aforesaid, that the said defendant, Anthony Distefino be, and he is hereby sentenced to confinement on the State Convict Road Force page 22 } of this State for the period of Twelve Months, there to be kept, treated and confined in the manner and form prescribed by law. It is further ordered that during such confinement on the State Convict Road Force the State Highway Commissioner shall pay the sum of $15.00 per week for each of said two children, viz; Anthony Distefino III, age six years, and Francis Distefino age nine years, or a total of $30.00 per week during such confinement, out of funds appropriated for construction and maintenance of Highways as provided by Sec. 20-63 of the Code of Virginia for 1950 as Amended; with the right of the defendant in lieu of the said sentence on the State Convict Road Force to execute a bond for payment of said Forfeiture to be approved by the Court, and upon such terms of payment as the court may direct.

It is further considered by the court that the Commonwealth recover of the said defendant, Anthony Distefano the sum of $500.00 for fine and its costs in this behalf expended.

If default be made in the payment of said fine and costs, and the same be not paid at or before the expiration of the said sentence on the State Convict Road Force, that he be, and is hereby sentenced to additional confinement on the State Convict Road Force for the time prescribed by law in such cases made and provided for Non payment of said fine and costs.

Thereupon, defendant by counsel asked for and is granted sixty days suspension of the execution of said sentence to give time to prepare the record and present to the Supreme Court of Appeals of Virginia with a petition in this case asking for a Writ of Error. And Defendant is allowed to remain at liberty on his bond in this case during said suspension or if a writ of error is granted until the case is determined in the Supreme Court.

/s/ GEORGE MORTON, Judge.

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* * * * *

Received and filed July 23, 1958.

LEE A. NAULEY, Deputy Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of Wise County, Virginia:

Counsel for Anthony Distefano, the defendant in the above styled case in the Circuit Court of Wise County, Virginia, hereby gives notice of appeal from the order entered in the case on June 5, 1958, and sets forth the following assignments of error.

I.

The court erred in not setting aside the verdict because it was contrary to the law.

II.

The court erred in not setting aside the verdict because it was contrary to the evidence.

III.

The court erred in not setting aside the verdict because it was contrary to the law and the evidence.

IV.

The court erred in not striking the evidence of the Commonwealth at the conclusion of the Commonwealth's evidence.

V.

The court erred in not striking the evidence at the conclusion of all the evidence in the case.

page 24 }

VI.

The court erred in admitting evidence by the Commonwealth's witness Lillian Stanley, alias Lillian Distefano that the defendant had claimed two children which was the subject matter of this suit on his income tax return for certain years when the income tax returns were the best evidence.

VII.

The court erred in giving Instructions A, B and C for the Commonwealth over the objection of the defendant.

VIII.

The court erred in refusing Instructions D2, D3, D4a, D5 and D6 for the defendant.

ANTHONY F. DISTEFANO
By Counsel.

GREEAR, BOWEN, MULLINS & WINSTON
Attorneys at Law
Norton, Virginia
By LESLIE M. MULLINS
Counsel for Defendant.

* * * * *

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* * * * *

LILLIAN DISTEFANO,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Asbury:
Q. What is your name?
A. Lillian Distefano.
Q. How long have you used the name Lillian Distefano?
A. For 9½ to 10 years.
Q. Prior to meeting Dr. Distefano were you married?
A. Before I met him?
Q. Yes.
A. Yes.
Q. To whom were you married?
A. Atler Stanley.
Q. When did you and Atler Stanley last live together?
A. I last saw him in 1947.
Q. That is the last time you lived together is 1947?
A. Yes, sir.
Q. Do you recall the month?
page 5 } A. No, sir, I don't.
Q. Was it the early part or the latter part of 1947?
A. I think it was in the early part of 1947.
Q. When did you first meet Dr. Anthony S. Distefano, the defendant?
A. It was in 1947, I think, I met him; he was my doctor.
Q. Where was he practicing medicine at that time?
A. Trammel, Virginia.
Q. One question, Mr. Greear made one mistake in his opening statement; were you born in Wise County?
A. No, I was born in Tennessee.
Q. Whereabouts?
A. Tennessee, Kingsport.
Q. Where do your parents live at the present time?
A. York, Pennsylvania.
Q. What is your father's name?
A. Silas Baber.
Q. Where was Dr. Distefano practicing when you first met him?
A. In Trammel, Virginia.
Q. Is he a medical doctor?
A. Yes, sir.
Q. What other line of medical work does he pursue, if any?
A. He is an oculist, eyeglass doctor; he makes eyeglasses.

Lillian Distefano.

Q. Where was he originally from?
page 6 } A. Boston, Massachusetts.
Q. Where do his people live?
A. Cambridge, Masachusetts.
Q. What did you go to see him for the first time you met him?
A. The first time I called him I had a miscarriage the first time I called him.
Q. Where were you at at that time?
A. McClure, Virginia.
Q. Did you start dating Dr. Distefano then?
A. No, not then.
Q. After that did you start?
A. After that I started dating him.
Q. How long after that did you start dating him?
A. I would say maybe three months, maybe two or three months. I don't remember exactly.
Q. Did you all start living together then as man and wife? If so, where?
A. No, sir, the first time we lived together was at Johnson City, 800 Fairview Avenue.
Q. When did you start living together over there?
A. 1949.
Q. Before the baby was born?
A. Yes, sir.
page 7 } Q. Before you had the apartment over there, had you and Dr. Distefano started having sexual relations?
A. Oh, yes.
Q. Where were you living at that time?
A. We didn't have an apartment or house at the time; I was staying with some girl friends of mine in Bristol.
Q. Now, were you living together at the time the baby was born?
A. Yes, sir.

Mr. Mullins: We object to the question as leading and suggestive.

A. Yes, sir, before.

Mr. Mullins: I think the last six questions have been leading and suggestive, but I am objecting.
Mr. Asbury: You would object even if they weren't.
Mr. Mullins: I object to improper statements or counsel.

Lillian Distefano.

The Court: You shouldn't ask leading questions.
Mr. Asbury: All right.

Q. Now will you tell the jury in whose name the apartment was listed in Johnson City.
A. Dr. and Mrs. Distefano.
Q. How often did he come to the apartment there?
A. He was practicing in St. Paul, Virginia at the time. He came home about three to four nights a week.
Q. That is 800 Fairview Drive?
A. Fairview Avenue.
page 8 } Q. When was the first child born?
A. February 14, 1949.
Q. Who is the father of that child?
A. Anthony Distefano.
Q. What is her name?
A. Frances Distefano. She has his middle name.
Q. Whose suggestion was that?
A. He did.
Q. During the period prior to the time she was born, who paid the expenses?
A. Well, I went to the hospital at Dante and spent the night there that night and he took me to Dr. Gordon's office that morning. Dr. Gordon told him to take me to the hospital so he did and I stayed in the hospital until after the baby was born, then came to his office in St. Paul later.
Q. Was it your suggestion that the baby be named Frances or his?
A. No, it was his suggestion.
Q. Was the birth certificate filled out?
A. He gave them the information; I didn't.
Q. Have you seen the birth certificate?
A. Yes, I had her birth certificate when I entered her in school, and later he took the birth certificate and he has them both.
Q. Who is listed as the father on the birth cer-
page 9 } tificates?
A. Anthony F. Distefano.
Q. Is that the defendant in this case?
A. Yes, sir.
Q. Did you tell anyone to put his name on there?
A. No, I didn't.
Q. Who paid the hospital bill?
A. Dr. Distefano.

Lillian Distefano.

Q. How long after the birth of Frances Distefano did you remain in Johnson City?

A. I guess about three months after that. Three or four months, something like that.

Q. Where did you move to then from there?

A. From there I went to my mother's house. She was living in Lebanon, Virginia at the time, so he took me from there over to my mother's house. I stayed there awhile and later we moved to an apartment in Bristol, Virginia.

Q. How was the apartment in Bristol, Virginia, listed?

A. He paid the bill there, but I didn't live under his name there.

Q. What name did you use then?

A. Baber.

Q. Did you later come to St. Paul to live?

A. Yes, sir.

Q. When did you come to St. Paul to live with him?

page 10 } A. In 1951. We got the apartment in 1950 or 1951 it was. We were living in Bristol at the time and when I was pregnant with my son, two weeks before my son was born I went to Mother's house because I was very sick and I stayed there and then we went to Asheville, North Carolina a week and while over there my son was born in the hospital over there in Asheville.

Q. Who made arrangements at the hospital in Asheville?

A. Dr. Distefano.

Q. What hospital was that?

A. St. Joseph's.

Q. What date was your son born?

A. March 3, 1951.

Q. Who paid the hospital bills there?

A. Dr. Distefano.

Q. Under what name were you entered?

A. Mrs. Distefano.

Q. At whose suggestion were you entered under that name?

A. I was very sick when they took me to the hospital. He entered me in the hospital. I didn't have nothing to do with that.

Q. The baby that was born March 3, 1951, what was his name?

A. Anthony Francis Distefano III.

Q. At whose suggestion was he named Anthony Francis Distefano III?

Lillian Distefano.

A. His by all means, his son.
page 11 } Q. Was he very proud of the birth of a son?
A. Yes, he was.
Q. Did he show that to any of the doctors? If so, how?
A. Oh, yes.

Mr. Greear: We object unless she saw it.

Q. Do you know of him passing out cigars?
A. He gave doctors cigars in the hospital.

Mr. Greear: Where was that?

A. Asheville, North Carolina.
Q. Were the children baptized?
A. Yes, they were, in the Catholic Church.
Q. Is that the faith of your husband or was at that time?
A. Yes, sir, it was.
Q. In what church were the children baptized?
A. St. Mary's, Cambridge, Massachusetts.
Q. Was Dr. Distefano present at the time?
A. No, he wasn't present; he was in St. Paul.
Q. Who suggested that?
A. He asked his mother by telephone to get the children baptized up there in the church before I brought them back home, so his mother made arrangements up there and his sister and his brother are my two children's godfather and godmother.
Q. What are the names of the godfather and godmother who stood up there?
A. The godfather was Joseph Distefano, Dr.
page 12 } Distefano's brother, and Rita Kempsity was the godmother.
Q. That was in his home church?
A. Yes.

Mr. Greear: You said he lived in Boston?

A. Boston is just across the river from Cambridge. He was born in Boston, Massachusetts, but his mother lived in Cambridge later.
Q. Who suggested that particular church?
A. His mother, because he used to go to church there. The doctor used to go to church there.

Lillian Distefano.

Q. How long did you remain in the apartment in St. Paul?

A. I have been gone from St. Paul over a year now, since January 26th was a year this January that I have been gone.

Q. You lived there with him as man and wife from 1950 until January 1957?

A. Yes, sir.

Q. During that period of time I will ask you to state whether or not Anthony Distefano acknowledged these children as his own and tell some of the things to the jury how he acknowledged them as his own children.

Mr. Greear: We object to this. It would be immaterial. There are only two ways you could have acknowledgement that would amount to acknowledgment in this case.

Mr. Asbury: I know, but these things are used to corroborate other things.

Mr. Greear: You can't corroborate—

page 13 } Mr. Asbury: Yes, you can.

Mr. Greear: I object. You can't corroborate it. The statute fixes it.

The Court: I would like to see counsel in chambers to correct that.

IN CHAMBERS:

Mr. Greear: Court please, this is a proceeding in which the Commonwealth is attempting to make a man support what the Commonwealth claims are his illegitimate children. It is a matter that has always been very strict in this Commonwealth. And up until just a few years ago there was never any provision for the support of illegitimate children by a father, and in 1952 the Legislature passed this act which is Section 20-61.1: "Whenever proceeding hereafter under this chapter concerning children whose parents are not married a man admits before the court he is the father of the children or the Court finds that the man has voluntarily admitted paternity in writing under oath, the Court may enter judgment for the support, maintenance and education of such child as if such child were born in lawful wedlock." So he is confined to two things, that the man must admit it in open court before the court, but he denies and has always denied it, so he is out on that; and second, that it must be by writing under oath. Of course if he has got a writing under oath, that would be all right, but anything else is immaterial.

Lillian Distefano.

Mr. Asbury: It is always material what the page 14 } surrounding circumstances are. She says he is the father of the children, and all these circumstances to show he is the father leads up to all this other.

The Court: What is the nature of this suit, support for the children?

Mr. Greear: It is a criminal case.

Mr. Asbury: She is not entitled to it under the law, just the children.

Mr. Greear: Criminal prosecution for not supporting the bastard children.

Mr. Asbury: We haven't put on our evidence yet to sustain that law. It is a matter of evidence.

The Court: It just looks like there are two ways—"Whenever proceeding hereafter under this chapter concerning children of parents not married a man admits before the Court he is the father of the children or the Court finds that the man has voluntarily admitted paternity in writing under oath the Court may enter judgment for support, maintenance and education of such child as if such child were born in lawful wedlock." It looks like there are just two ways you can get support.

Mr. Asbury: I don't deny that. I haven't finished my evidence. I have a right to go into all that to show it in support of my contentions.

Mr. Greear: What is your contention?

Mr. Asbury: I will present my case; you pre- page 15 } sent yours.

Mr. Greear: I know, but what is your contention. If you are going on the proposition he admitted it in court, the writing itself is the best evidence.

Mr. Asbury: We have a right to present our evidence. You want to come in and just dismiss it.

Mr. Greear: You have to stay within that statute.

Mr. Asbury: No, I can go within the case law.

Mr. Greear: There is no case law.

Mr. Asbury: Just read the Roanoke case of McCarthy or some such Irish name.

The Court: This shows just two ways.

Mr. Asbury: Of course, but that would come up on the motion to strike.

Mr. Greear: I don't see any use going through a lot of rigmarole.

Mr. Asbury: We have a right to present our case.

Lillian Distefano.

Mr. Greear: I am objecting to going away from the statute.

The Court: Any question you ask of course might be, after you introduce certain other things, admissible but unless the other matters that are stated in this should warrant it, some of it would be inadmissible; I don't think you can go ahead and ask questions that would solicit an illegal answer.

Mr. Greear: His question, Judge, is to go ahead and tell any other way by which he acknowledged the children, but that does not make any difference how much he did to acknowledge the children, whether he told ten thousand people they were his. If he didn't do it by the statute, we don't have a case.

page 16 } Mr. Asbury: Mr. Greear wants to dismiss our case without us presenting our evidence.

The Court: I want you to present it under the statute.

Mr. Greear: You are not asking anything in that statute. You know you're not.

The Court: I am inclined to think you are not making yourself clear on it.

Mr. Asbury: I will phrase the question a different way.

Mr. Greear: If you have got a signed sworn statement, let us have it, then you will be in court; if you are going to say he acknowledged them in court, let's have it.

Mr. Asbury: I have a right to present my case in court; Mr. Greear can't come back here and set himself up as the Judge.

Mr. Greear: I am just going by the law.

The Court: The only question I see is "Whenever proceeding under this chapter concerning a child whose parents are not married, a man admits before the court he is the father of the child or the court finds the man has voluntarily admitted paternity in writing under oath, the court may then enter a judgment for the support, maintenance and education of the child." That just shows two ways; there may be other ways too; I don't know. But all this said is two ways.

Mr. Asbury: All this comes up on motion to strike.

The Court: The court has to see some object is sought to be gained. In other words, when asking an ordinarily immaterial question, there ought to be something in that question or in the preceding question that would show that

page 17 } the purpose for it was to have admitted evidence that would be material.

Mr. Asbury: Does the Court rule this immaterial to estab-

lish the paternity of the child and show he is the father of a child to ask if he recognized that child as his?

Mr. Greear: Certainly it is immaterial.

Mr. Asbury: We can not only sustain this under this statute, but under the decision of that case. I will have it up here when you make your motion to strike. We can proceed under a contract theory.

Mr. Greear: There is no contract theory in a criminal case.

Mr. Asbury: The courts held that non-support is not a criminal case, that it is a quasi-criminal case. The Commonwealth Attorney appears in these cases not as Commonwealth Attorney but as a friend of the court. The Attorney General so ruled. This is not a criminal case. It is a quasi-criminal case. You never kept up with the non-support law.

Mr. Greear: It says he can be sentenced to jail.

Mr. Asbury: That is only a means of support.

Mr. Mullins: If you look at Section 20-61 it makes it clearly a criminal case. "Any husband who without just cause deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his wife, and any parent who deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of seventeen years or child of whatever age who is crippled or otherwise incapacitated for earning a living, the wife, child or children being then and there in necessitous circumstances, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding $500 or confinement in jail not exceeding six months or in the case of a husband or father be sentenced to the state convict road force at hard labor for a period of not less than ninety days nor more than twelve months or both or in lieu of the fine or confinement being imposed, he or she may be required to suffer a forfeiture of an amount not exceeding the sume of $1,000.00 and the fine or forfeiture mav be directed by the court to be paid in whole or in part to the wife or to the guardian, curator and custodian or trustee of the minor child or children or to some discreet person or responsible organization designated by the Court to receive it."

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Mr. Asbury: This is an appeal from juvenile court.

Mr. Greear: The thing is that you have got to come under that statute and if you don't you are not in court.

Mr. Asbury: I am going to show you another way.

Lillian Distefano.

Court and Counsel returned to courtroom before the jury:

Direct examination of Lillian Distefano resumed:

By Mr. Asbury:

Q. Now, did Dr. Distefano buy the children any presents?

A. Yes, he bought the children watches and bought them bikes.

Mr. Greear: We object; it is immaterial what he bought them. I have bought children lots of things myself, but they weren't my children because I bought them presents.

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The Court: Overrule the objection; but I am not certain that is material, but there are instances where it might be material. For the present I am going to overrule the objection.

Mr. Greear: We save exceptions.

A. He bought many things like dolls and all kinds of toys for the little boy and girl.

Q. At Christmas time did he buy them presents?

A. Oh, yes.

Q. Now during that period that you lived in St. Paul, what name did you use?

A. Mrs. Distefano.

Q. Who paid the bills during all that period?

A. Dr. Distefano.

Q. Did you have a checking account?

A. We had a joint checking account in Clintwood, Virginia.

Q. Did he have a business at Clintwood?

A. He had an eye glass office there.

Q. Who did you have a joint checking account with?

A. Dr. Distefano.

Q. In what name was it?

A. In Doctor or Mrs. Distefano or Lillian Distefano is how I could sign checks.

Q. Where did you take your vacations at,

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A. In Myrtle Beach, South Carolina, and Boston, Massachusetts. There is a beach near his mother's house called Riviera Beach.

Q. When you would go places in St. Paul, in what manner did he introduce you?

A. As his wife, Mrs. Distefano.

Lillian Distefano.

Q. When your little girl became school age, where did she go to school at?

A. She first entered school in Hanover, Pennsylvania, in St. Joseph's School.

Q. Is that a public school or a Catholic school?

A. Catholic school.

Q. Do you know why she didn't go to St. Paul school?

A. Because he didn't want to put her in public school, and my mother at the time lived in Hanover and she could stay at her house.

Q. Who paid these?

A. The doctor.

Q. Dr. Distefano?

A. Yes, sir.

Q. Did they require you to file a birth certificate?

A. Yes, sir.

Q. Did you have an automobile of your own?

A. Yes, sir, I first had a 1952 Ford, then I had a 1954 Oldsmobile.

page 21 } Q. What kind of automobile was it?

A. 1954 Oldsmobile Star Fire Convertible.

Q. Did you have charge accounts?

A. Yes, at many places. I had charge accounts at J. Fred Johnson's—

Q. What kind of store is J. Fred Johnson's?

A. It is a big department store and has everything for ladies, men, boys and girls.

Q. Where else did you have charge accounts?

A. Nettie Lee Shop in Kingsport and Bristol, Joe Ann Shop, Vandervorts in Kingsport, Dobyns-Taylor, Deen's in St. Paul, Willis Department Store in St. Paul.

Q. Did Dr. Distefano, with whom you were living, did he file an income tax return?

A. He filed an income tax return on federal income. He put my two children, Frances Distefano, and Anthony Distefano on Federal and he had three other children he put on there; that was children by his first wife. He put his first wife's name on Federal and my name on state.

Mr. Greear: We object; the returns are the best evidence.

Q. Do you have a copy of those returns?

A. No, but I could get them very easily.

Lillian Distefano.

Mr. Greear: We object unless she produces them.
Mr. Asbury: If she saw the returns she can testify about them.

A. I saw them myself.

page 22 } Mr. Greear: We object because it is immaterial.
Mr. Asbury: You file your income tax return under oath.
Mr. Greear: They are not filed under oath. Bring it in and show it to me. Show me it is.
Mr. Asbury: I am going to introduce them.
Mr. Greear: Let's see it now.
Mr. Asbury: I will show you the oath in a minute.
Mr. Greear: All right, let's hurry and get it.
Mr. Asbury: We asked the question if she saw it and he claimed them. That is very material.
Mr. Greear: The Internal Revenue came along and took it all out because he had tried to claim the exemptions, but it was all taken out.
The Court: That can be shown.
Mr. Greear: He has to show the returns, show it is under oath.
Mr. Asbury: He has the returns. That is a matter of defense.
Mr. Greear: We don't have any returns at all.
Mr. Asbury: If she saw the returns, she can tell what was on them certainly.
The Court: Let her answer.
Mr. Greear: We except.

Q. Did you see the returns?
A. Yes, sir. I was in the office, I helped him get the figures together when he was fixing out his income tax return.
Q. Did he list Anthony, your son, and Frances,
page 23 } your daughter, on his income tax return?
A. Yes, sir.

Mr. Mullins: We object unless it specifies which return.
Mr. Asbury: I am asking about the state return.
Mr. Mullins: I would like to make an objection without being interrupted. I understood her to say awhile ago the doctor did not list any children or her on the Federal return but did on the state return.

Lillian Distefano.

A. You misunderstood me.

Mr. Mullins: The record will show.

Mr. Asbury: I asked about the Federal; she said he didn't list her on the Federal but listed the two children. We believe if Mr. Mullins will listen he will get this.

Mr. Mullins: I object to improper remarks of counsel.

The Court: I think you are making remarks instead of objecting to any questions and letting the Court rule. This thing of counsel quarreling with each other won't help me in deciding. Go ahead.

Mr. Mullins: We except.

Q. Go ahead.

A. On the state income tax my name and all five children are on the state; my son Anthony, and Frances Distefano and his three children by his first wife are on the state with my name.

The Court: Talk a little louder so we all can
page 24 } hear you.

Q. When he listed Anthony Distefano, Jr., there on the state return where it refers to relationship, what did he put?

A. "A son."

Q. Across from "Frances Distefano" what did he put across from her name?

A. His daughter.

Mr. Greear: We object unless she produces the returns.

Mr. Asbury: He has the returns.

Mr. Greear: Produce them; we can't proceed on something that might be ten years ago.

Mr. Asbury: We can't produce them if he has got them.

Mr. Greear: If you can't produce them I don't care who has got them, they are not evidence.

Mr. Asbury: If she helped prepare the returns and saw what was on them, that is the best evidence.

The Court: If she said she helped prepare them she can state then.

Mr. Greear: Those returns are the best evidence and filed in Richmond and available to the Commonwealth. If the Commonwealth hasn't got them, they are available.

Mr. Asbury: They are not available.

Lillian Distefano.

Mr. Greear: I did have them; they had them in the field auditing them; they were auditing his returns at the time is the reason I couldn't get them.

Mr. Asbury: Either he couldn't get them or they didn't want them.

page 25 } Mr. Asbury: You have a copy.

Mr. Greear: It is up to you; the burden of proof is on the Commonwealth in this case.

Mr. Asbury: This witness can answer as to these returns, as I understood the rule of the Court.

The Court: She can answer as to the returns if she saw them when he made them out and saw them at the time they were mailed or delivered.

A. I mailed them.

Mr. Mullins: We except to the Court's ruling in that respect.

Mr. Greear: We still contend—

A. I saw the returns and many times I mailed the returns myself.

Mr. Greear: Nobody said whether it was the return for 1947 or 1952 or what.

Mr. Asbury: We can't ask the question. We will find out if you will let us. You interrupt every time.

Mr. Greear: The return is bound to be the best evidence.

Mr. Asbury: If the returns are available they are the best evidence. They can bring the returns in if she is not telling the truth.

Mr. Greear: The Commonwealth has the returns and the Commonwealth is prosecuting.

The Court: Go ahead and let her answer. I can't tell whether it would be proper or not.

page 26 } Mr. Mullins: We except.

Q. Did you help prepare the returns?

A. Yes, sir, I helped with the figures.

Mr. Mullins: We want to object unless she tells what year, something more specific. I feel like the question is misleading; it is not proper and it is prejudicial to the defendant.

Lillian Distefano.

Mr. Asbury: I have never been able to get to the point where I can ask what year. They interrupt before I get to the next question. If they will give me time, I will bring it all out.

The Court: Go ahead.

Q. Did you help prepare the returns for the years you lived with him?

Mr. Mullins: I still don't know what he is talking about.

A. Yes, I did.

Mr. Mullins: What year?

Mr. Asbury: I am going to ask.

Mr. Greear: Why don't you ask did she help prepare the returns for 1949?

Mr. Asbury: Mr. Greear doesn't want facts to come out. We ask the Court to calm him down until we present our case.

The Court: Go ahead.

Mr. Greear: We except.

Q. What years did you help him in the preparation of his returns?

A. From 1949.

page 27 } Mr. Greear: He asked what years. Can you name them?

Mr. Asbury: This is my witness, I think, Mr Greear.

Mr. Greear: She was.

A. From 1949 to 1956 through those years from 1949 to 1956.

Mr. Greear: You mean to include every year, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956?

Mr. Asbury: Let me ask her.

The Court: I think, Mr. Greear, you ought to let him get through without asking everything about that in one question; when he gets through you can cross-examine. Go ahead and examine her.

Q. Tell what years you have helped prepare the Federal and State income taxes.

Lillian Distefano.

A. 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956.
Q. Will you tell what years you know of your own knowledge that he claimed Anthony Distefano, Jr. as a dependent?
A. 1951, 1952, 1953, 1954, 1955, 1956.
Q. What years did he claim Frances Distefano as a dependent?
A. 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956.
Q. Did he claim you as a dependent on his Federal income tax return during any of that period?

Mr. Mullins: We want the record to show that we are objecting to each and every one of these questions
page 28 } and the Court is overruling our objections and that we are excepting to the Court's ruling on the basis that testimony about these records is not admissible because the records themselves are the best evidence. I just wanted to get that in the record.

The Court: Have the record show that.

Q. What years did he claim you as an exemption on Federal and State income tax returns?
A. I was never claimed on Federal, only one time he claimed me on Federal income tax and the Internal Rvenue men came to see him about it. Anyway he told them he made a mistake by putting my name on there. I think that was in 1951 or 1952, and then from 1949 I think on the State between 1949 and 1950 is on the state income tax.
Q. Did you have a maid?
A. Yes, sir.
Q. What was her name?
A. Martha Burrell.
Q. How long did she work for you?
A. I don't remember exactly how many years she worked.
Q. Did the children stay at his mother's any?
A. Yes, my son was about a year old and they stayed with Dr. Distefano's mother and father for nine months.

The Court: How much longer will it take you to get through?
Mr. Asbury: Some little time.
The Court: I will adjourn for lunch. Ladies and
page 29 } Gentlemen of the jury, don't discuss this case with anyone or permit anyone to talk about it to you

or in your presence about it and return to Court at 1:00. Court is recessed until 1:00.

AT 1:00:

Q. Did you ever visit his people?
A. Yes, sir, many times.
Q. How often.
A. About three to four times a year.
Q. Did your husband or did Dr. Distefano order you to quit staying there in St. Paul with him?
A. Yes, sir.
Q. Tell the jury what words he used and why, if you know.
A. First we were separated. I was in Pennsylvania at my mother's house, and we were separated because I told him that I was going to leave because my daughter was getting older and I wanted to get married. She was asking me about a marriage certificate. So I left and told him if he ever decided to divorce his wife I would marry him. He got a divorce from his first wife. He had an attorney in Bristol and called me in Pennsylvania and told me that he had divorced his first wife and I told him I would have to see the divorce papers. He came to Pennsylvania and showed me the divorce papers. I came back home with him. He told me if I would come in February we would get married. In Feb-
page 30 } ruary his divorce was final then. I was home for two weeks. He asked me to write a letter to my attorney in Pennsylvania. We had a case in court up there over my 1954 Oldsmobile convertible and they said it was still going on in Pennsylvania then, so I was home two weeks. I wrote a letter to my attorney and told him to cancel the case up there, that I was home already. Instead of mailing the letter I tore it up and put it in the wastebasket at the post office. In a week, he said, "Your letter has had time to reach Pennsylvania, so the case has been canceled. You can get out. The only reason I wanted you to come back was to cancel the court case in Pennsylvania."
Q. Do you recall what date that was he told you to get out?
A. When I came home I was home three months, and for 2½ months he was telling me to leave. He would tell me to leave, but he would also padlock the door on the outside with two locks so I couldn't get out while he was gone. He said the only way I could leave was with the clothes I had on my back and the children. When he would leave, and he left al-

most every night, he would put a padlock on the door and lock it from the outside so I couldn't get out.

Q. When did you leave?

A. January 26th.

Q. What year?

A. I guess that was 1956 because I have been gone a year the 26th of this January past.

page 31 } Q. On April 16, 1956, did he give you a letter about supporting the children?

A. Yes, sir, he did.

Q. Under what circumstances did he give you that letter?

A. He wrote it out and called it a contract. We were arguing. He said, "Take this letter, my dear, and keep it because some day you are going to need it."

Q. I will ask you to examine this letter here and state if that is the letter which he wrote.

A. Yes, sir, that is the letter.

(Mr. Asbury shows letter to Mr. Greear).

Mr. Asbury: I desire that this letter be introduced as Commonwealth's Exhibit A and I will read it to the jury; it is on printed stationery. (Read Exhibit A to the jury) Is that the letter he gave to you?

A. Yes, sir.

Q. Has he ever paid you anything under that letter?

A. Not one penny.

Q. Since the previous trial has he ever contributed anything to the support of the children?

A. No, sir, he hasn't.

Q. Did you go back to your father's home in Pennsylvania after you left here?

A. Yes, sir.

Q. Did your father receive a letter from Dr. page 32 } Distefano?

A. Yes, sir.

Q. I will ask you to examine this letter and envelope it was mailed in and ask you if you recognize that as Dr. Distefano's handwriting?

A. Yes, sir, it definitely is.

(Mr. Asbury shows letter to Mr. Greear).

Lillian Distefano.

Mr. Asbury: I desire to introduce this letter as Commonwealth's Exhibit B and will read it to the jury. First I will ask you, this is written to Silas L. Baber, that is your father?

A. My father, yes.

(Mr. Asbury read Exhibit B to the jury).

Q. Did your father receive that letter from him?
A. Yes, sir.
Q. That is in his handwriting?
A. Yes, sir.
Q. After he got a divorce from his wife, did he ever marry you?
Q. How much since you and your son and daughter left, how much has he contributed, if anything, to your support, to the children's support?
A. Not one penny.
Q. I will ask you to describe how the children have been living since you all have been gone.
A. In the past year that my two children have been in school, that I have been away, they have been in
page 33 } five different schools. Every place I go I can't even pay the rent, so we have to move from one place to another. I went to stay with my father for awhile and I stayed with my sister awhile. I was living in Bristol alone and couldn't pay the rent and buy food and clothes for the children to go to school. Right now we are living in Kingsport. We are two weeks behind in the rent and my children are out of school the 30th of May. I told the principal I couldn't afford to send the children to school, I don't have lunch money, my daughter has no clothes and my son has no clothes.
Q. When he ordered you to leave, did he let you take anything with you?
A. My daughter had two dresses when I left. She was in a private school in Asheville. He went over and picked up all her clothes. He wouldn't let me have any dresses or clothes or anything like that. He has them.
Q. Have you had sufficient funds to buy food for the children?

Mr. Greear: We object.
The Court: Overruled.

Lillian Distefano.

Mr. Greear: The question is whose children are they.
Mr. Asbury: There is a question whether or not he is supporting them.
Mr. Greear: No, the question is whose children they are.
The Court: I overrule the objection at this
page 34 } time.
Mr. Greear: We except.

Q. Have the children had sufficient food during the time since he ordered you to leave?
A. No, they haven't because I couldn't afford to buy sufficient food.
Q. Did you work awhile?
A. Yes, sir.
Q. Where did you work?
A. Bristol Memorial Hospital.
Q. Have you been out of work now for some time?
A. Yes, I have.
Q. Have you tried to get work?
A. I have tried every place.

Mr. Asbury: I believe you may ask.
Mr. Greear: Give us just a minute, please, sir.

CROSS EXAMINATION.

By Mr. Mullins:
Q. You were married to Atler Stanley you say?
A. Yes, sir.
Q. When were you divorced from Atler Stanley?
A. I never got divorce papers myself.
Q. I believe your husband sued you for divorce, is that right?
A. Yes, sir.
Q. Where did you and Atler Stanley last live together as husband and wife?
page 35 } A. McClure, Virginia.
Q. I believe that is over in Dickenson County?
A. Yes, sir.
Q. Who was your next door neighbor at McClure?
A. I don't know; I didn't live there that long.
Q. How long did you live there then?
A. About I would say nine months.
Q. That nine months you didn't know any of your neighbors?

Lillian Distefano.

A. I never visited next door.
Q. Do you know their names?
A. No, sir, I don't.
Q. How big a place is McClure?
A. It is very small.
Q. I believe that after that divorce you just assumed the name "Distefano," in other words, your real name is Stanley?
A. No, sir, it isn't.
Q. What is your real name?
A. For ten years I have gone by "Distefano" because Dr. Distefano asked me to.
Q. Has he ever asked you not to use his name?
A. No, he has not.
Q. If he should ask you not to use his name, would you still use it?

A. Yes, I would. I would have to because of my
page 36 } children.

Q. You never were Lillian Distefano, you don't pretend you were ever married to Dr. Distefano, do you?
A. No, sir, I was never married to him.
Q. Did you work in his office any?
A. I helped him in his office, yes. The house and office connects, so I would help him in the office when I wasn't busy in the house.
Q. When did you first go to St. Paul?
A. It was in 1950 or 1951.
Q. You don't recall when?
A. I was between that time, 1950 and 1951. I can't say for sure exactly.
Q. Well now, in other words, you went there to be Dr. Distefano's mistress, that's what it boils down to?
A. No, we were living other places before we went to St. Paul. We had an apartment in Johnson City and we lived at Bristol, I stayed with my mother awhile.
Q. Were you Dr. Distefano's mistress in St. Paul and those other places?
A. I don't know if you call it mistress or not, but I lived with him as his wife.
Q. Without benefit of clergy?
No Answer.

Q. I believe you are the subject matter of Dr.
page 37 } Distefano's real wife who divorced him because of your conduct there with him, didn't she?

Lillian Distefano.

A. No, sir.

Q. You moved in with the doctor, helped spend what money he made, that was your big motive?

A. No, sir.

Q. You were going with several other men at that time? Weren't you?

A. No, sir, I wasn't.

Q. Did you go with several other people while you were living as Mrs. Distefano as you call it?

A. No, sir, I didn't.

Q. Did you go with a fellow named Clarence Marshall?

A. Not when I was with him. I was separated. I went dancing with Charles Marshall three times.

Q. What year were you with Marshall?

A. I think it was 1956.

Q. What about a fellow named Slusser?

A. Sergeant Slusser, I did date him.

Q. When?

A. 1956.

Q. When did you first start out with him?

A. In 1956 when I was separated.

Q. There have been various periods when you left Dr. Distefano and took off with somebody else.

page 38 } A. No, I haven't because the first year I was gone, my daughter was in school in Pennsylvania and I would go up on week ends to see my daughter and maybe I would stay three or four weeks and be back home but it was because my daughter was in school up there.

Q. You left Dr. Distefano in January 1957 I believe, was that what you testified?

A. I have been gone a year this past January.

Q. That would be January 1957, wouldn't it, that you left over there?

A. Yes, sir.

Q. You don't deny and didn't deny—this is your handwriting, isn't it? (Showing letter to witness).

A. It could be my handwriting.

Q. It is your handwriting, isn't it? You finally reluctantly admitted it in the other court.

A. It could have been, yes.

Q. Is it or is it not?

A. I don't know, it could be.

Q. You know whether it is your handwriting, don't you?

A. I think that is my handwriting, yes.

Lillian Distefano.

Mr. Mullins: Your Honor, I would like to read this to the jury.

Q. I believe all these others are in your writing.
A. This is all one letter. It has been broken down.
Q. That is a letter you wrote Sergeant Slusser, is it not?

page 39 } Mr. Asbury: I object to it. I don't especially care. It is very interesting, but it is immaterial as far as that is concerned.

Mr. Mullins: It is just about as material as a lot of other things Mr. Asbury has put in here.

Mr. Greear: She says this was 1956.

Mr. Asbury: It was after the children were born.

Mr. Greear: It just hows where there is smoke there is fire.

Mr. Asbury: We still maintain it is immaterial as far as this case is concerned. We suggest that you let the Court read them before you read it and pass on the materiality. I went to read them before they are introduced.

Mr. Mullins: They were written while she was allegedly living with Dr. Distefano.

Mr. Asbury: But after the children were born. Mr. Greear said the only question is whether or not they were his children. These were written after the children were born.

Mr. Greear: She also testified, Mr. Asbury, that she didn't live with anybody else while she was with Dr. Distefano. The letters reveal what she was doing.

A. I was separated at the time I wrote the letter.

Mr. Greear: You got separated every week or so, didn't you?

The Court: I can't listen to her and read the letters at the same time. I believe one of them has been admitted.

Mr. Mullins: Yes, sir.

page 40 } The Court: I don't see much difference in them. I think they should go in.

Mr. Asbury: Is it the Court's ruling that these are material, which were written five or six years after the children were born?

Mr. Greear: It shows the pattern of conduct. It shows whose children they might be.

Mr. Mullins: This letter is dater July 3, 1956. She says

she left Dr. Distefano in January 1957 or some months after she wrote this letter.

The Court: Who is it written by?

Mr. Mullins: By the prosecuting witness to a sergeant in the Army. "July 3, 1956, Tuesday night. My only darling: As I'm sitting here very lonesome for you tonight I just had to write you a couple of lines to say how much I really love you. Honey, when I came back last night and you were gone did I every feel lonesome and lost. Darling I just wish you knew how much I really care for you. Darling I don't know how I can stand it until you get back. Honey I never want you to leave me again ever. Al darling I'm really in love with you. And I hope you understand that by now. Honev I want you to love me as much as I love you. Darling Joe is here now and I think he makes me miss you even more. Knowing he is here and you are so far away and you can't be. Darling I have so many things to tell you when you get back. I sure wish you were here tonight. Darling when I came back last night I needed you so very bad. So many things happened last night and yesterday I thought I had page 41 } to talk to you. Darling I hope you love me as much as I love you because you have my whole heart with you all time. Believe me darling.

Aug. 3, 1956, Friday night

My dearest & only Darling: I just got back from calling you. Its now 10:30 and you wasn't around. I called 433 and also the NCO Club. That dam old bitch locked the door when I went out and I had to ring her door bell to get back in. Honey she is a dam dirty, I can't think of a name nasty enough to call her. Darling I'm very lonely for you tonight and I love you more than you will ever know. Al, darling I hope you believe me because my life would not be complete without you. Darling I'm in love. Darling I hope some day we are together and no one can keep us apart. I love you honey more than you will ever know. Darling I just can't understand whats wrong, we just can't seem to have any luck. But I'll keep hopeing that some day we will have luck and we will to darling. Darling I am very very sorry for what has happened. I guess I'm all your trouble. But I'm in love with you and who can help loving some one. I'll love you until I die, no matter what happens. And darling if you are transferred I'll go with you some how. Darling you may be mak-

Lillian Distefano.

ing a fool out of me. But if you are some day I'll find it out. Al if you aren't in love with me I wish you would tell me now before we go on any more. Darling I don't want to get hurt by you because you can really hurt me more than you *relize.* You can really tear my heart out. Al I hope
page 42 } you write me a card or letter while you are gone then I'll know where you really went to. Al I hope some day you find what you are looking for and then maybe you will be ready to settle down and love just one person as I love you. Well, honey I'll finish your letter now. Last night I was tired and sleepy so I didn't finish it. Al, honey daddy was over this morning and he will be back tonight so I'm taking Frances and little Tony back, over to Hanover for awhile. I'll explain why when I see you. Al, so much has happened since you left. Honey I sure wish you had stayed here. So much to talk about when I see you. Honey I sure hope how soon all this mess is over so we can be happy together if that's what you want. Is it? Darling I don't even remember being so lonesome for any one as I am for you since you have been gone. I wonder if you feel the same way. Al honey I wonder if you will ever make me sorry I fell in love with you. Well I hope not. You could make me sorry you know by me finding out you have gone out on me since I've known you. Darling I hope you understand this letter because honey that's how I feel. Sweetheart do you love me or not. If you don't I wish you would tell me now when I love you more than words can say. Remember honey you are the only one I care for or ever will. Love and kisses always. Darling I looked at your bedroom shoes tonight and I just had to cry, so you see darling how much I love you. Darling I just wish you had my thoughts for only one minute then you would know I'm crazy about you. Darling you are the only man I have ever loved or ever will. If I can't
page 43 } have you then it will be no one. Darling when you are away from me, half of my self is gone to. Because honey you are part of me. Darling you are my whole life. Al darling no matter what happens just remember I'll always love you and I'll always be true to you. So honey you don't have to worry about me going out with some one. Because I love you to much, you are the only one I want. Darling about me being married honey I am not so please believe me. Honey you will find out soon I'm telling you the truth. Darling I am free, in fact, I've been free all my life and just didn't know it. Darling we will be married some day and I

Lillian Distefano.

just know we will the way we love each other. No two people can stay apart the way we are in love. Darling I didn't have any paper so I had to write it on your other letter so you have to letters in one now. Oh honey I could write all night but I have no more paper. So good night honey I love you. Lil. (on back, part of another letter). Just remember I love you always darling. Nothing or no one can ever stop me from loving you. Darling you are my whole heart. I love you and I miss you so much. Good night honey. Honey I've had so much trouble for the past few days. I hardly know what to do. Darling it seems like you have been gone for months. I wonder if you have had time to miss me any? Darling how many times have you gone out since you have been away? My self I have been no place. I came back Monday night and I haven't been out since. Al, I just wish I
page 44 } really knew your feelings for me. Honey I wish I knew if you are ready to settle down or if you are still playing the field. Well, darling I'll stop for now. I guess you will be tired reading this mess any way. But darling just remember I love you now and always. Love to my one and only darling. I miss you so much today honey. I love you with all my heart."

Mr. Asbury: We renew our objection. I think that is immaterial. The children were born long before these letters were ever written. She is not asking support for herself.

The Court: I didn't get the import of what you said.

Mr. Asbury: This witness is not asking for any support. She is asking for support for her two children. Anything she may have done three or four years after the children were born or five or six years, I believe closer to seven, would be immaterial in so far as that is concerned since she is not seeking support. It doesn't matter what she has done.

Mr. Greear: All the letters refer to it.

Mr. Asbury: These letters weren't written until five or six years after the children were born.

Mr. Mullins: It shows her pattern of conduct. We want to show the other people involved.

Mr. Asbury: Mr. Greear knows the rules of evidence, if Mr. Mullins can't take care of it.

The Court: I don't want you all to talk at once. I can't understand what he is trying to say.

page 45 } Mr. Asbury: Only one at a time can argue a point of law. If Mr. Mullins can't take care of it

himself he ought to sit down. These letters are immaterial. This witness is not asking for support for herself and she is only asking support for the two children of Dr. Distefano. These letters were written five or six years after the birth of the children and have no bearing on whether or not he is the father. We move to exclude them.

The Court: I overrule the motion. I think since they have been brought up, they might be material.

Mr. Asbury: We except.

Mr. Mullins: Your Honor, we desire to have all the letters introduced and marked by the reporter. (Letters marked Def. Ex. A).

Q. I believe when you came back the last time to live with Dr. Distefano after this trip to Pennsylvania, the reason he asked you to leave was because you gave him gonorrhea the last time you came back?

A. No, sir, I never did have anything in my life.

Q. You deny that?

A. Yes, I do.

Q. You indicated that you have a pretty hard time. I believe you came over to the trial last time in a cream colored Cadillac?

A. No, and I can prove how I came. No, sir, I didn't come in a car at all. I took the bus over.

Q. You didn't come over then driving a cream colored Cadillac?

page 46 } A. I do deny it.

Q. When you were here last week you had a black eye, didn't you?

Mr. Asbury: I object to that. That is immaterial. Whatever happened after the children were born is not material. She is not asking for support.

Mr. Mullins: She is telling about what a hard time she has.

The Court: I don't think you can go over everything that has happened and when it happened.

Mr. Mullins: She had a black eye last week.

The Court: Overrule the objection.

Mr. Asbury: We except. It has no pertinence to this case.

Q. I believe you ran up several thousand dollars worth of bills before you left?

Lillian Distefano.

A. I had charge accounts many places which he opened for me.

Q. How many thousand dollars did you spend before you left?

A. I don't know how much I spent. I bought things and he bought many things for me himself.

Q. How many dresses did you buy when you left the last time?

A. When I left last time? I am paying my bill at Sterling House in Bristol. He hasn't paid one dime to Sterling House.

page 47 } Q. How much was the bill?

A. $815.00.

Q. When you lived with Dr. Distefano you would go over and spend $1,000.00 at a clip?

A. No, sir.

Q. How long did it take you to spend up that $800.00?

A. I am paying for this bill myself.

Q. I asked you how long it took you to run that bill up. I didn't ask you if you were paying the bill. It didn't take you very long to run it up, did it?

No Answer.

Mr. Mullins: I believe that's all.

RE-DIRECT EXAMINATION.

By Mr. Asbury:

Q. How long had you lived with Dr. Distefano prior to the time his wife divorced him?

A. How long had I been living with him before she divorced him?

Q. Yes.

A. She divorced him in I think it was 1956 she divorced him.

Q. Do you know how Dr. Distefano got hold of these letters?

A. These letters (indicating exhibit)?

Q. Yes.

A. No.

page 48 } Q. When did you first meet Sergeant Slusser, the one you said you dated?

A. In 1956 when I was separated at the time.

H. L. Dailey.

Q. At the time you met him, how old were the children, approximately?
A. My daughter was seven and my son was five.
Q. Mr. Mullins said you came over here in a Cadillac. Have you got your bus tickets there?
A. Yes, sir, I have. (Gets ticket stubs from pocketbook). These are from the other trip. Yes, I have got those.
Q. This is from Three States Bus Company?
A. Yes.
Q. Do you need these any more?
A. No.

Mr. Asbury: I would like to introduce them.
Mr. Greear: We would like to see them. (Inspects tickets).

(Tickets marked Comm. Exh. C).

Q. He mentioned about you having charge accounts. You had those during the entire time you lived with him, didn't you?
A. Yes, sir.

Mr. Asbury: I believe that is all. Are you through?
Mr. Mullins: We might want to ask her about these bus tickets when we have an opportunity to examine them. No questions.

Witness stood aside.

page 49 } H. L. DAILEY,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Asbury:
Q. What is your name?
A. H. L. Dailey.
Q. Where do you work?
A. St. Paul.
Q. I believe you are employed by the Town of St. Paul?
A. Yes, sir.
Q. In what capacity?
A. Chief Police.

H. L. Dailey.

Q. How long have you been Chief over there?
A. I come there in September 1, 1951.
Q. When you came there to work was Anthony Distefano—did he have an office in St. Paul at that time?
A. Yes, sir.
Q. Did he have a wife or a person he held out to be his wife there with him?
A. Yes, sir.
Q. I will ask you to look at the lady sitting next to me, Mrs. Lillian Distefano. Is that the lady he lived there with as man and wife?
A. Yes, sir.
Q. What apartment did they have?
A. When I first come there they had an office, I believe it is over the drug store.

page 50 } Q. Where is the apartment at?
A. That is Turner's Apartment over the old Studebaker Garage where now the new hardware is.
Q. How long did she stay there, Chief Dailey, if you know?
A. Well, I don't know. It seems to me like it has been maybe the last part of 1956 or part of 1957 or somewhere along there, 1956 or 1957.
Q. Did they have any children at the apartment?
A. Yes, sir.
Q. Do you know whose children they were?

Mr. Greear: I object unless he knows.

A. Theirs, I thought.
Q. Did he hold them out to the public as his children?

Mr. Mullins: That question is objected to as leading and suggestive and immaterial.
Mr. Greear: We move to strike out his answer "Theirs, I thought." What the witness thinks is not evidence. That is not evidence. We move to strike it out and object to the other question because there is only two ways under the statute you can prove paternity and this question does not contribute to either one of those.
The Court: Sustain the objection.
Mr. Asbury: Whether or not he told them or not; I can show whether he recognized them as his.
The Court: If he told they were his, you can bring it out

or anybody else that is supposed to know any-
page 51 } thing about it; that is, if they know something.

Mr. Greear: We except to the Court's ruling.

Q. Did you ever go to his apartment?
A. Yes, sir.
Q. Did he introduce the children to you?
A. He introduced them as his children.
Q. Do you recall what he said on that occasion?
A. Well, not right offhand.
Q. Did he ever introduce Mrs. Lillian Distefano to you?
A. Yes, sir.
Q. How did he introduce her?
A. As his wife.
Q. Did you ever have any reason to believe they weren't married and these weren't his children?
A. No, sir.
Q. Did she have a car?
A. Yes, sir.
Q. What kind of car did she have, Mr. Dailey?
A. Oldmobile Convertible.
Q. 98 Olds?
A. I believe that's right, a 98.
Q. Did Doctor Distefano and Mrs. Distefano have colored help there?
A. Yes, sir.

Q. Did you ever see the doctor riding around
page 52 } with the children?

A. Yes, sir.
Q. Do the children favor him?

Mr. Greear: We object.
Mr. Asbury: That is always admissible.
Mr. Greear: That is his opinion. They might favor you in my opinion.
Mr. Asbury: Bring them in here and let's see. I will bring them in and let the jury see.

Q. Did he provide her a maid?

Mr. Greear: We object, immaterial.
The Court: Let him answer.
Mr. Greear: We except.

H. L. Dailey.

A. Gladys Dickenson worked there a right smart while and then I believe it got down to where they had a woman one day a week maybe.

Q. Did you ever see Dr. Distefano correct his children?

A. Yes, sir.

Mr. Mullins: We object to that as immaterial.

Mr. Greear: We object because it states it is his children and Mr. Asbury is testifying.

Mr. Asbury: I asked a minute ago if there were children at the apartment and they objected to that because I didn't show it was his children.

page 53 } Mr. Greear: God knows who they belong to.

Q. The two children that were there with Mrs. Lillian Distefano, did you ever see him correct them?

A. Yes, sir.

Mr. Asbury: I believe you may ask.

Mr. Mullins: Your Honor, we move to strike the evidence of this witness as being immaterial.

Mr. Asbury: The Court already ruled on the questions as asked. You objected to each and every question and the Court has already ruled on part of it.

The Court: What is your motion?

Mr. Mullins: We move to strike the evidence of Mr. Dailey as being immaterial.

The Court: Motion overruled.

Mr. Mullins: We except.

CROSS EXAMINATION.

By Mr. Greear:

Q. I believe you said you were employed there as Chief Police?

A. Yes, sir.

Q. If this woman was not married to Dr. Distefano and just living there with him, you wouldn't expect him to tell about it, would you?

A. No, sir.

Q. I believe she was away from St. Paul a good deal, she would be gone a week or two weeks or a month at

page 54 } a time and then be back?

A. Yes, sir, about I don't know just what year,

but it has been some time, she was away quite a bit that year, maybe three or four months, next year maybe more.

Q. You didn't know where she was or what she was doing?

A. No, sir.

Q. They had a 98 Olds she would drive around the country in that, drive to Bristol away from St. Paul and you wouldn't know where she had been?

A. Yes, she had a convertible.

Q. She was free and roamed wherever she wanted to go?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Asbury:

Q. Did you ever see her running around with other men hauling them?

A. No.

Q. Did you ever see her with any other men other than Dr. Distefano?

A. No, sir.

* * * * *

page 55 } MARTHA BURRELL,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Asbury:

Q. What is your name?

A. Martha Burrell.

Q. Where do you live, Mrs. Burrell?

A. Dante, Virginia.

Q. Do you know the man sitting over there in the middle?

A. Certainly, I work for him now.

Q. How long have you worked for him?

A. I started working in 1955.

Q. Did you work for him when Mrs. Distefano was at the house?

A. Yes, sir.

Q. Were you in the home there any when he would come and see the children?

A. Every time I went there he was already there because his office was at the house.

Martha Burrell.

Q. What did the children call him?
A. They called him "Father" or "Daddy."
Q. Is that the two little children that were in here awhile ago?
A. Yes, sir.
Q. I will ask you to state whether or not he seemed to be fond of them.
page 56 } A. He did to me.
Q. Did he ever buy them things?
A. They had all kind of toys and things and they were bought and brought in. I didn't see him pay for them but they were brought in, all kinds of toys.
Q. You work for him now?
A. Yes, sir, I work for him now.
Q. Who is this lady here (indicating Lillian Distefano)
A. She is supposed to have been Mrs. Distefano is all I know.
Q. Did you think that was Mrs. Distefano at the time you worked there?
A. As far as I know, she was, yes, sir.
Q. What did he call her?
A. He called her "Lois."

CROSS EXAMINATION.

By Mr. Greear:
Q. As far as you observed, Mrs. Burrell, Dr. Distefano was a kind and considerate man to the people that were there in his house?
A. Yes, sir.
Q. That is all you could say about him?
A. Yes, sir.
Q. You don't know what relations they had or whether they were married or whose children they were?
A. No, I don't know about the children. All I
page 57 } know is what I found out since this trial has been going on.

RE-DIRECT EXAMINATION.

By Mr. Asbury:
Q. They always called him "Daddy?"
A. Yes, sir.

J. W. Williams.

Mr. Greear: We object.
The Court: Overruled.
Mr. Greear: We except.

Q. When they called him that, did he deny it?

Mr. Greear: We object to that, immaterial, leading and suggestive.
Mr. Asbury: If they called him "Daddy" and he didn't deny it—
Mr. Greear: The statute fixes the way to prove it.

RE-CROSS EXAMINATION.

By Mr. Greear:
Q. Did this woman stay there all the time?
A. No, sir.
Q. Did you know where she was gone when she was gone?
A. As far as I knowed she was supposed to be going to Pennsylvania as far as I knowed.
Q. How long did she stay away at a time, Martha?
A. I worked there all the time and Mrs. Distefano didn't stay at home too much of the time the whole time I was working there right straight. She would go out and come in.

RE-DIRECT EXAMINATION.

By Mr. Asbury:
Q. She would help him in the office some?
A. Yes, certainly, the office was right there in the home.
Q. He didn't have a nurse and she was helping
page 68 } him out?
A. She would be in the office. I reckon you would call that helping him out.

Witness stood aside.

J. W. WILLIAMS,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Asbury:
Q. What is your name?

J. W. Williams.

A. J. W. Williams.
Q. Are you a deputy sheriff for Wise County?
A. Yes.
Q. Stationed at St. Paul?
A. Yes, sir.
Q. Mr. Williams, do you know Dr. Distefano, the defendant in this case?
A. I do.
Q. How long have you known him?
A. I have known him, the Doc, about when he was practicing medicine in Trammel in 1947 or 1946.
Q. When did he come to St. Paul?
A. I don't remember, exactly, when Doc did come to St. Paul.
Q. Do you remember him living there with Mrs. Lillian Distefano, the lady sitting beside me?
A. Yes, sir.
page 69 } Q. How long did they live there together?
A. I don't know; it must have been several years. I don't know the exact number; it was several years.
Q. Has it been since about 1950?

Mr. Mullins: We object; that is leading and suggestive.
Mr. Asbury: I have a right to refresh his memory.
Mr. Mullins: Mr. Asbury ought to be sworn if he is going to testify.

A. I don't know what year, but several years.
Q. Did he hold her out as his wife to the general public?

Mr. Mullins: We object; that is immaterial.
The Court: Let him answer.
Mr. Mullins: We except.

A. Yes, sir.
Q. The two children that were here with her this morning, did you see them?
A. I did.
Q. Do you know whose children—did you ever see those children with Dr. Distefano?
A. I have.
Q. Did he ever tell you whose children they were?
A. No, he never did come out and tell me they were his children.

Q. Was it generally considered in and around St. Paul that they were his children?

page 70 } Mr. Mullins: We object; that would be purely hearsay.

The Court: Sustain the objection.

Q. Did the children stay at the apartment there with him?
A. Yes, sir.
Q. Do you ever know of him introducing them as his children?
A. I don't know of any specific time that he ever did introduce them as his children in front of me.
Q. Do you remember an occasion there when Dr. Distefano —did you play Santa Claus for the kids one year or was it Mr. Dailey?
A. I did.
Q. Where were they at *at* that time?
A. They were at Chief Dailey's home.
Q. Who made arrangements for you to play Santa Claus?

Mr. Mullins: We object; that is immaterial.
The Court: Let him answer.
Mr. Mullins: We except.

A. I believe if I remember correctly Mrs. Distefano and Chief Dailey did.
Q. Did he introduce Mrs. Distefano on that occasion?
A. No, I don't think he introduced anybody.

* * * * *

page 71 } MARGIE KANIA,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Asbury:
Q. What is your name?
A. Margie Kania.
Q. Are you any relation to Lillian Distefano, if so, what?
A. She is my sister.
Q. Did you stay with her any prior to the birth of either one of the children?

Margie Kania.

A. Yes, sir, I did. I lived with her in Bristol when she had Frances Distefano, the daughter. She was pregnant at the time with his son when I lived with her. I lived with her almost a year.

Q. Prior to the birth of the child, how often did Anthony Distefano, the defendant, come to the apartment?

A. Practically every night.

Q. Did you know at that time they were not married?

A. No, sir.

Q. When did you find out they were not married?

A. Only recently, because he always referred to her as his wife.

Q. He always referred to her as his wife?

A. Yes, sir.

Q. Did you see the birth certificate of the children?

A. I saw the birth certificates of both of them.

page 72 } Q. Who is listed as the father?

A. Dr. Distefano.

CROSS EXAMINATION.

By Mr. Greear:

Q. Your name is Margie Kania? Will you spell that?

A. K A N I A.

Q. Where do you live?

A. Philadelphia.

Q. How long have you been living in Philadelphia?

A. Almost a year.

Q. Almost a year?

A. That's right.

Q. When did you come down here?

A. I have been here now, well, I have been here off and on during the year but I have been down here for three weeks.

Q. Were you formerly Mrs. Paul M. Marker?

A. That's right.

Q. Have you had any other husbands?

A. No, sir, only the husband I am married to now.

Q. When were you divorced from Marker?

Mr. Asbury: Your Honor please, I can't see it is material, whether she has been divorced or not.

The Court: Let her answer.

A. February 1957.

Margie Kania.

Q. Now you say you lived in Bristol with your sister before her child was born?

page 73 } A. Before the son was born.

Q. I thought you said before Frances.

A. I was living with her when Frances was born already.

Q. That was in Bristol?

A. Yes, sir.

Q. Was that on McNeil Street?

A. James Street.

Q. Did you know when she and Atler Stanley, her husband, lived on McNeil Street in Bristol?

A. I didn't know whether they lived on McNeil Street.

Q. Did you know when they lived in Bristol?

A. I knew she lived in Bristol.

Q. Did you know she lived with Atler Stanley in Bristol?

A. I knew she lived with Atler Stanley.

Q. They separated in Bristol in May 1949, didn't they?

A. In 1949, that's when Frances was born.

Q. Frances was born at the time they separated, she was born in February and they separated in May, that is correct, isn't it?

A. I think she was separated from Stanley before that.

Q. You think they separated, you said they separated in 1949.

A. I said in 1949 is when Frances was born. I

page 74 } didn't say they separated in 1949.

Q. When did they separate?

A. I don't know but I think it was in 1947 or something like that.

Q. You think they were living in Bristol in 1947?

A. I don't know.

Q. She didn't live in Bristol in 1947, you know that, don't you?

Mr. Asbury: She said she didn't know.

Q. You know your sister didn't live in Bristol in 1947?

A. I don't know.

Q. She went in 1948 and lived with a bunch of women?

A. I said I didn't know.

Q. Do you know whether she lived there with Stanley or whether she lived in a rooming house?

A. I think it was 1947 when she separated from Stanley. I lived with her shortly after Frances was born.

Frances Distefano.

Q. You don't know that it was 1947 when they separated, do you?
A. I believe it was, yes.
Q. You do know that she lived in Bristol with Atler Stanley?
A. I don't know what year.
Q. You do know they lived in Bristol?
A. I am not sure.
page 75 } Q. You are not sure they ever lived in Bristol?
A. No.
Q. You are not sure they lived in Bristol. You are telling us that now?
A. I didn't live with her when she lived with Atler Stanley in Bristol so I don't know.

Mr. Greear: You can stand aside.

RE-DIRECT EXAMINATION.

By Mr. Asbury:
Q. Did you ever see Atler Stanley?
A. Yes, sir, I have seen him.
Q. Is he fair complexioned or dark?
A. I would say he is about medium.
Q. Tall or a small person?
A. Very tall.
Q. What color hair does he have?
A. I think his hair was light.

Witness stood aside.

FRANCES DISTEFANO,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Asbury:
Q. Frances, come up here a minute. How old are you?
A. Nine.
Q. Do you know the difference between right and wrong?
A. Yes, sir.
Q. Do you know the difference between telling a story and telling the truth?
page 76 } A. Yes, sir.
Q. Do you know that man over there, the one in

the middle in the blue suit? (Indicating defendant).

A. Yes, sir.

Q. Who is that?

A. My father.

Q. Did you ever live at his home with him?

A. Yes, sir.

Q. How long did you live with him?

A. Ever since I was six or seven.

Q. Did he ever buy you any presents or anything?

A. Yes, sir.

Q. Did you love your Daddy?

A. Yes, sir.

Q. How long has it been since you have been living with your Daddy?

A. About a year.

Q. Has he ever been to see you since then?

A. No, sir.

Q. Has he ever brought you any presents in the past year or anything?

A. No, sir.

Q. When you lived there at home did your Daddy seem to love you too?

A. I guess he did.

Q. Did you ever hug his neck and tell him goodnight?

A. Yes, sir.

page 77 } Q. Did you go to school awhile?

A. Yes, sir.

Q. Where did you go to school at?

A. Asheville, North Carolina.

Q. What kind of school, church school or public school?

A. I believe it was church school because you slept there and went to church.

Q. Did you ever go to church with your Daddy and Mother?

A. Yes, sir.

Q. What church did you all go to?

A. When I was in the first grade I went to the church that was beside the school.

Q. Have you ever been to church with Daddy and Mother?

A. Yes, sir.

Q. What church did you go to then?

A. I can't remember the name.

Q. Has your Daddy ever helped you or sent you anything in the past year?

A. No, sir.

Frances Distefano.

Q. Before him and your mother separated, did your Daddy take you out in the car?

Mr. Greear: Objected to as leading and suggestive.

A. Yes, sir.

page 78 } Mr. Asbury: This is just a child.
Mr. Greear: I don't care whether it is just a child or not. If you want her to testify, let her testify.
The Court: Don't ask leading questions. I sustain the objection.
Mr. Asbury: All right, sir. That's all I have.

CROSS EXAMINATION.

By Mr. Greear:
Q. Frances, I believe you all lived over in Bristol until recently?
A. Yes, sir.
Q. You had a real nice home there, kindly of a ranch type house, one story house?
A. Yes, sir.
Q. And men came there pretty often, didn't they?
A. No, sir.
Q. You didn't have men coming there?
A. No.
Q. Did any men come there?
A. No, sir.
Q. No man at all?
A. No.
Q. Do you know why cars are parked there at night?
A. Well, some people live there.
Q. Did you all have a car parked under your carport every night?
A. No, sir.
Q. What time did they put you to bed?
page 79 } A. On school nights at 8:00.
8:00; I see. How much do you weigh?
A. Last time I weighed 65.
Q. You are a pretty good sized girl. That's all.

Frances Distefano.

RE-DIRECT EXAMINATION.

By Mr. Asbury:

Q. Your father has been sending people over there to scare your mother, do you know anything about that?

A. Bobby came up one night.

Q. Do you know of him sending some people there to scare her?

A. Well, that Bobby, and I can't remember any others.

* * * * *

Mr. Asbury: Bring Tony in. (Anthony Distefano, Jr. was brought in) Tony, you come around and sit in that chair. What is your name?

A. Tony.

Q. Do you know the difference between right and wrong, Tony?

A. No.

Q. Do you know where your Daddy is?

page 80 } A. Right over there (indicating defendant).

* * * * *

Mr. Asbury: The Commonwealth rests.

Mr. Greear: We desire to see the Court in chambers.

IN CHAMBERS:

Mr. Greear: The defendant moves to strike the evidence of the Commonwealth. There are only two ways a man can be made to support illegitimate children and that is when he admits in court that they are his or where they prove it by a voluntary statement signed by him under oath. The Commonwealth hasn't complied with either one of those provisions, therefore, has no case.

Mr. Asbury: Your Honor, please, in reply, the Code says if a man voluntarily admits paternity in writing and under oath. The evidence in this case is that he filed state and federal income tax returns for years and as you know and we all know, those are filed under the penalties of perjury, which is the same as an oath. It imports a verity and we believe that alone, those income tax returns alone, when she

testified she helped him fill out the returns and put them in the post office, are filed under penalty of perjury. He listed his son, Anthony S. Distefano, Jr. The purpose of making that oath is so that there wouldn't be any misunderstanding. He went further in addition to the income tax returns to corroborate and support that, which he signed under penalties of perjury—he wrote her a letter and said,

page 81 } "You will need this some day." He said in the letter, "I will pay you $200.00 a month for the support of these children." That corroborates that. The birth certificates corroborate that. The fact that she lived there corroborates that. We think all these things together make a compliance of the law to make that a verity and we believe that this is just simply a question for the jury on how much money this man should pay for support of the children if they consider him the father.

Mr. Greear: In answer to Mr. Asbury, he says that they had the income tax returns made under penalties of perjury. There are no income tax returns here, either state or federal, and hasn't been during the period of testimony in this case made under oath. The statute says there must be acknowledgment voluntarily made under oath, and there is no such. The state returns of Virginia are not made under any penalty of perjury, and the federal returns by statute cannot be made under oath. The federal statute says they cannot be. The Director of Internal Revenue can change as to other things but he can't change as to income tax returns and make it be made under oath.

The Court: I don't think he can, as far as the State.

Mr. Asbury: I will read what you sign: "I declare under the penalties of perjury that this return has been examined by me and to the best of my knowledge and belief is a true, correct and complete return." And the State reads:

"I declare under penalties provided by law that

page 82 } this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return."

Mr. Greear: It isn't made under oath or under any penalty.

Mr. Asbury: They are under penalties of perjury.

Mr. Greear: No, they're not. The penalty of perjury—but they are not under oath. The statute says he must acknowledge them under oath, and in addition to that, there is no income tax return here filed. We have no evidence of that kind.

Mr. Asbury: You have them, but we can't get them.

Mr. Greear: No, we don't have them.

Mr. Asbury: There is no difference between filing something under oath and filing it under penalties of perjury.

The Court: There certainly is. Why does the Federal Statute make a difference? It is filed under penalties of perjury. The penalty for perjury is three years, the penalty for filing an improper return is three years in the penitentiary. That's all. You have to prove this by a voluntary signed statement.

Mr. Greear: He hasn't done that and he has no case. He has to prove it according to that statute. That's all there is to it. You have to prove it by a voluntary statement under oath or the man has to admit it in court.

The Court: (Reading Section 61.1) Whenever proceeding hereafter under this chapter concerning children of parents not married, a man admits before the Court he is the father of the children or the Court finds that the
page 83 } man has voluntarily admitted paternity in writing under oath, the Court may enter judgment for support, maintenance and education of such child as if such child were born in lawful wedlock."

Mr. Greear: It just gives him two ways to stay in court. He hasn't proved anything to come within either one of them.

Mr. Asbury: We think we have, Your Honor. We have proved that for a period of five years or more he filed his income tax returns and listed Anthony S. Distefano III as a son, exemption $1,000.00, and Frances Distefano, a daughter, exemption $1,000.00 and he signed that "I declare under penalties of perjury that this return has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return." That is a acknowledging them.

Mr. Greear: That isn't under oath.

Mr. Asbury: We have showed he acknowledged these children in the tax returns, which is just the same as a Notary acknowledgment. The purpose of the statute is to get something that can't be false. Then he comes along and gives her a letter and that letter says that they are his children in effect and he agrees to pay $200.00 a month.

Mr. Greear: No, it says "her children."

Mr. Asbury: Then the officers testified they lived together.

The Court: There is lots of evidence along that line. I am not absolutely certain, and the trial is taking
page 84 } a good deal of time. If we can get through it and get an end to it, of course, I can consider that in a motion to set aside the verdict.

Mr. Greear: They just have two ways to prove it and the Commonwealth hasn't proved it either way, by voluntary acknowledgment in writing under oath or admission in court. And if they haven't done either one, that is the end of it.

Mr. Mullins: The Federal Statute 6065 says it shall not apply to returns and declarations with respect to income taxes made by individuals. In other words, they put it specifically it cannot apply. You can't make an individual income tax return under oath.

Mr. Asbury: These returns state "I declare under the penalties of perjury, etc."

Mr. Greear: It isn't under oath, Kenneth.

The Court: I am not certain about it. I want to know more about it.

Mr. Greear: Our motion is, and you can pass on it one way or the other, we move to strike the evidence because the statute gives two ways to prove a case that he can go to the jury on and he hasn't proved it by either one of them.

Mr. Asbury: We feel we have, Your Honor.

The Court: I would rather adjourn and come back in the morning.

Mr. Greear: We have a witness we have had a lot of trouble getting.

The Court: Put her on.

Mr. Greear: I can't do that if you adjourn.

page 85 } The Court: It is too important a question for me to pass on either way, to not look at it thoroughly and at least convince myself that I am right. I believe I will let you proceed with it and if you have got your instructions drawn you can give me a copy of them and I will take them home with me.

Mr. Greear: You overrule the motion then?

The Court: Yes, I overrule the motion.

Mr. Greear: We except to the ruling of the Court.

BEFORE THE JURY:

The Court: Gentlemen, you may proceed if you have any further evidence.

MRS. JESSALINE SCOTT,

after being duly sworn, testified as follows:

Mrs. Jessaline Scott.

DIRECT EXAMINATION.

By Mr. Greear:

Q. What is your name?

A. Mrs. Jessaline Scott.

Q. Where do you live?

A. North Carolina, Asheville.

Q. Where did you live before you moved down there?

A. I lived at Bristol.

Q. How long did you live in Bristol?

A. I lived there practically all my life up until three years ago.

Q. Do you know the prosecuting witness here, Lillian Baber Stanley?

page 86 } A. Yes, sir.

Q. When did you first meet her?

A. I met her in 1948.

Q. 1948?

A. Yes.

Q. Where were you living at that time?

A. I was living at 414 Moore Street, Bristol, Virginia.

Q. Was that a rooming house?

A. Yes, sir, it was.

Q. Did Lillian Baber Stanley come there to room?

A. Yes, she did.

Q. How long did you and she live there in the same house?

A. Well, I lived there a good while after she left.

Q. Were you married or single at that time?

A. I was single.

Q. What were you doing then?

A. I was working.

Q. Where were you working?

A. General Shelby Hotel in the dining room.

Q. You were a waitress in General Shelby Hotel dining room?

A. Yes.

Q. Was Lillian Stanley working at anything at

page 87 } that time?

A. She said she was taking a beauty course.

Q. What was her conduct there at that time with reference to late hours?

A. Well, she come in, it wasn't early hours, too early.

Q. Was that a pretty regular thing?

Mrs. Jessaline Scott.

A. Of course, I didn't hear her come in all the time but I did hear her come in some.

Q. Was that after you had gone to bed that you would hear her?

A. Yes.

Q. When did you move away from that house?

A. I moved away in the spring, I believe it was in March.

Q. March of 1948 or 1949?

A. 1949.

Q. Did you stay there for a year?

A. Around a year.

Q. Was she there at that time when you left?

A. No, she was already gone.

Q. She left before you did?

A. Yes.

Q. Where did she live the next time you knew of her?

A. The next time I knew of her she was living on McNiel Street.

page 88 } Q. Is that on the Tennessee or Virginia side?

A. That is Virginia.

Q. Was her husband, Atler Stanley, there?

A. I visited her home and he wasn't there the day I was there.

Q. Did she have his picture there?

A. Yes.

Q. Did she show it to you?

A. On the way out I seen an enlarged picture setting on a table. I picked it up and looked at it and asked if it was her husband, Atler, and she said, "Yes."

Q. At that time when you were there, did she have a child?

A. Yes.

Q. Is that this little girl, Frances?

A. Yes, it is.

Q. How did you happen to go there on that occasion?

A. She called me and asked me if I could come over for a little while, that her and her husband had had a fight.

Q. What condition was she in when you got there?

A. Well, she was of course walking around, but she had some scars.

Q. What about her eyes?

A. Well, they were black.

Q. Her eyes were black?

A. Yes.

page 89 } Q. She called you to come over, she and her husband had had a fight?

Mrs. Jessaline Scott.

A. Yes.
Q. Since that time have you seen her from time to time?
A. I would see her off and on. She would be gone and stay six months, then she would come back.
Q. You would just see her now and then?
A. Yes.
Q. Did you know of her starting to live with Dr. Distefano?
A. No, not up until around three years ago.
Q. Three years ago is the first you knew she was living with him?
A. Yes.
Q. While you were living in Bristol did you ever know of Dr. Distefano coming around her any at all?
A. No, I didn't.
Q. Where were they when you found out they were living together?
A. St. Paul.
Q. Were you at their house?
A. We were there a couple of times while she was there.
Q. Since you moved to Asheville, has she been to your house there?
page 90 } A. Yes.
Q. I will ask you if she made telephone calls from your house at Asheville.

Mr. Asbury: When was this?

Q. What did you say?
A. Yes, she made a couple, to Pennsylvania.

Mr. Asbury: We would like to know if that was since they separated, it would be immaterial.
Mr. Greear: We think it shows the pattern of conduct of this woman.
The Court: I don't think anything that happened since the permanent separation has any bearing.
Mr. Greear: This is before the separation; she was there with Dr. Distefano.

Q. Dr. Distefano, was he also at your house in Asheville?
A. Yes, sir.

The Court: Go ahead.

Mrs. Jessaline Scott.

Q. Who was she calling in Pennsylvania from your house in Asheville?

A. I don't know.

Q. Did she talk to them very long?

A. Yes, she talked a good while.

Q. What was the bill?

A. I don't exactly remember, but I believe one of them was around $11.00 or $12.00.

page 91 } Q. One telephone call was $11.00 or $12.00?

A. Yes.

Q. Did Dr. Distefano know anything about her making that call and having that long conversation?

A. No, he didn't.

Q. He wasn't there in the house when that was done?

A. No.

Q. Did you hear any of the conversation?

A. I just didn't pay any attention to the conversation.

Q. You didn't pay any attention?

A. No, I had television on, so I didn't pay any attention.

Q. You didn't try to listen in on her?

A. No.

Q. While she was there in Bristol back in 1949 I believe, did she call you at any time about her husband had stolen her baby?

A. Yes, she did. One night around 1:00 she asked could we borrow my brother's car, her and her husband were having trouble and he had stolen the little girl through the window and she said she knew where the little girl was, that he had taken her to his mother's, so I told her my brother was in Winchester, I would call to where he worked and see if the car was there. I called Winchester and asked my brother if it would be all right if we used the car and he

page 92 } said, "Yes." I went with her. We came in Virginia some place to Atler Stanley's mother's house and got the little girl.

Q. She went to Atler Stanley's mother's house and got this baby girl?

A. Yes.

Q. What time of night was it she called you?

A. Around 1:00.

Q. What time was it you came to Atler Stanley's mother's home and got the baby?

A. I think he was supposed to have left around 5:00 coming back to Bristol with a load of lumber and we were going

to give him time to get gone before we went in to get the baby.

Q. Do you know whether that was in Dickenson County you went to?

A. I don't know what county it was; it was in Virginia.

Q. You just didn't know where it was, you just went where she told you?

A. Yes, it was a house sitting on the left hand side in Virginia somewhere. It was in Virginia.

Q. Did you find the baby there?

A. Yes.

Q. Did you take it back with you?

A. Yes, sir.

Q. To refresh your memory, was that in Nora, page 93 } Virginia, where you came?

A. That sounds like the place.

Q. Nora, Virginia. Now, what was the little girl's name at that time?

A. Well, I knew her as Patricia Ann.

Q. Patricia Ann Stanley?

A. That's right.

Q. Later when you found she was living with Dr. Distefano, had she changed the child's name?

A. Yes, she told me she had changed her name and decided to call her Frances.

Q. Did this woman, Lillian Baber Stanley, ever tell you who the father of this child was?

Mr. Asbury: We object to what somebody told her. It would be hearsay.

Mr. Greear: I am asking about—

The Court: Let her answer.

Mr. Asbury: Are you asking what this girl told or what the family told?

Mr. Greear: This girl.

Q. Has she told you who the father was?

A. She told me the child was Atler Stanley's baby.

page 94 } Mr. Greear: You may cross examine.

CROSS EXAMINATION.

By Mr. Asbury:

Q. You say she told you it was Atler Stanley's baby?

Mrs. Jessaline Scott.

A. That's right.

Q. Do you know why she had Dr. Distefano's name put on the birth certificate?

A. I wouldn't dare to answer that because I wouldn't know.

Q. According to you, she hadn't met Dr. Distefano at the time the baby was born, had she ?

A. Well, at the time the baby was born I never heard his name mentioned.

Q. Do you know why with her being married she would go to the hospital and put "Anthony Distefano" on the birth certificate?

A. I don't know anything about that.

Q. You were not summoned to appear here, were you?

A. Yes, I was summoned.

Q. Who summoned you?

A. Mr. Greear.

Q. Did the Sheriff ever come down to North Carolina and summon you?

A. They summoned me in the parking lot when I was leaving the other day.

Q. You volunteered to come up last term of Court?

A. Yes, I come because Dr. Distefano asked me
page 95 } to.

Q. You are right fond of him too, aren't you?

A. Right fond of him?

Q. Yes.

A. I think he is a wonderful, nice person.

Q. You come up here yourself, this is the third trip you have made, isn't it?

A. This makes the second trip.

Q. You have spent two or three days each time, haven't you?

A. You mean in this court room?

Q. You stayed two days last time?

A. No, I didn't.

Q. How many days?

A. I come one night and went back next day.

Q. Then you volunteered and spent your own money to come on two occasions just to appear for him?

A. I can't say I spent any money to get here.

Q. How did you get here?

A. Well, I got here but I didn't—

Mrs. Jessaline Scott.

Mr. Greear: Tell him how you came.

A. Dr. Distefano and his wife come after me.

Q. She was living there in 1948 at Bristol at 414 Moore Street, and that is a rooming house for girls?

A. Yes.

Q. It's a nice place, isn't it?

page 96 } A. Well, I always thought it was a nice place.

Q. She wasn't living with her husband at that time?

A. No, she wasn't.

Q. Do you know whether she was dating Dr. Distefano or not?

A. No, I don't.

Q. She was not working and didn't have any means of income, did she?

A. She said to me that she was taking a beauty course.

Q. Do you know whether she was or not?

A. No, I don't know. She said she was.

Q. She moved in March 1949 you said.

A. I left in 1949 but she was gone before I left.

Q. As a matter of fact she moved to Johnson City before you left and started living over there in Dr. Distefano's apartment?

A. I don't know about that.

Q. You don't know then whether or not she went on over to live with him the early part of 1949, do you?

A. In 1949 I visited her home on McNiel Street and she had the little girl.

Q. She had already been to Johnson City and had an apartment and moved back to Bristol and had the baby in the meantime?

A. I don't know about that; I didn't know about that.

Q. You said she had the little girl?

page 97 } A. She had the little girl. I visited her own home on McNiel Street.

Q. What month did you visit McNiel Street?

A. I don't know, the little girl looked to me like she was around four months old.

Q. Now when you visited her on McNiel Street, did she have a home of her own?

A. They had a house.

Q. She was just living in a room there, wasn't she?

Mrs. Jessaline Scott.

A. No, she had a whole house with all the furniture you could possibly get in it.

Q. Do you know whether Dr. Distefano paid for that or not?

A. I never heard Dr. Distefano—all I knew she was married to Atler Stanley and had the little girl.

Q. They came to see you in North Carolina a number of times when you moved down there?

A. I think they were there about two or three times.

Q. He put the little girl in a private Catholic school?

A. Yes.

Q. Didn't want her to go in these bad public schools?

A. He put her in a Catholic school.

Q. Did they stay at your home when they visited?

A. Yes, I believe they spent one night and come
page 98 } during the day and *live* at night.

Q. Did you think they were married when they came to your house?

A. Lillian said they weren't married.

Q. That was all right with you though?

A. I knew her a lot longer than I knew Dr. Distefano.

Q. Were they pretending to be husband and wife? Did he pretend that was his wife?

A. She wasn't introduced to me as Mrs. Distefano.

Q. I know, but they were pretending to be husband and wife?

A. Yes.

Q. He was extremely proud of his kids, very fond of his children, isn't that true?

A. He seemed to be.

Q. And he called them his kids, didn't he? Isn't that right now?

A. He called them Frances and Tony. I never did hear him say they was his kids.

Q. He made everybody believe they were his children, didn't he?

A. I don't know about everybody.

Q. That is what he pretended to you all, didn't he?

A. Well, he didn't talk much about it.

Q. What did the little children call him?

A. They called him Daddy.

page 99 } Q. Both of them called him Daddy?

A. Yes.

Q. He pretended all that time they were his children, didn't he, isn't that correct?

Mrs. Jessaline Scott.

A. They called him Daddy. He didn't say anything when they called him Daddy.

Q. He was real proud of those children, very affectionate towards them?

A. When they were around he seemed to.

Q. Didn't you know he enrolled her as his daughter at Catholic school?

A. I imagine he did. I wasn't at the school. I didn't visit the school.

Q. Don't you remember talking about having to have a birth certificate in his name to get her enrolled?

A. I don't know anything about the birth certificates.

Q. You don't want to recall anything except what is in his favor, do you?

A. I am only telling the truth and that is all.

Q. When you all come over here looking for the baby you claim was Atler Stanley's, when was that?

A. It was in 1949.

Q. What month is 1949?

A. I don't know what month it was; it was shortly after I visited her home.

Q. Was that January or February?

page 100 } A. I don't remember the month.

Q. Was it the early part of the year or latter?

A. It was in the early part.

Q. You don't remember which month?

A. No, I don't.

Q. Why is it you can't remember the month you come over here, yet you remember the exact month she lived on McNiel Street?

A. All I know—

Mr. Greear: We object; that is contradictory, she never said what month she lived on McNiel Street.

Mr. Asbury: I wrote it down in my notes.

Mr. Greear: She never mentioned it.

A. I don't know how long they was living there; she told me when I seen her on the street they had been gone and had moved back to Bristol. They were living on McNiel Street in Bristol, the Virginia side.

Q. What month was that?

A. 1949.

Q. What month?

Mrs. Jessaline Scott.

A. I don't know what month. I didn't—
Q. What month did she move out of the rooming house?
A. I don't know.
Q. You said awhile ago March 1949.

Mr. Greear: She said she did.

A. I moved out in 1949.
page 101 } Q. You don't remember what month you come looking for the baby?
A. No, but the baby was much bigger than it was before that.
Q. Was it the first of the year?
A. I would think it was in the fall when we came over to get the baby from his mother's home in 1949.
Q. What time did you leave over at Bristol?
A. She called, it was around 1:00, and we left shortly after that.
Q. Was it night or day?
A. It was at night.
Q. You left Bristol at 1:00 A. M.?
A. Yes.
Q. What time did you get over to his mother's then?
A. We stopped and had a cup of coffee. She was going to wait until after he was gone before she went in to get the baby.
Q. Where did you stop to get a cup of coffe?
A. Stopped at some restaurant.
Q. How long did it take you to drive from Bristol to where you stopped at the restaurant?
A. I don't know; she was driving.
Q. Do you know whether it was one hour or two hours it took you to drive or three or four?
A. I think we left I would say, she called at
page 102 } one, and by the time we got in the car and everything it was 2:00, and we got over there about a quarter to six and fooled around until it was six, and I believe it was nine or ten o'clock before we got back to Bristol.
Q. You swear under oath that she told you that was Atler Stanley's baby? Did you know he filed divorce proceedings and swore in that divorce proceeding they had not had any children?
A. No, she never did discuss her divorce. She told me they had a divorce but never did mention that.

Mrs. Jessaline Scott.

Q. That was prior to the time the baby was born she told you they were divorced?

A. No, they were living on McNiel Street.

Q. Did you ever see him?

A. I was only there one time and I saw his picture.

Q. Because you saw his picture you say they were living there?

A. The reason why I went, she called me and told me her and her husband had a fight.

Q. You never did see her husband there?

A. I was only there one time. She said he was working but when I went through the living room an enlarged picture was setting on the table. I picked the picture up. I said, "Is this your husband, Atler Stanley?" She said, "Yes."

Q. He is a great big tall blond headed fellow?

page 103 } A. In the picture of course he was sitting down. I wouldn't say if he is tall or not.

Q. He is blond headed, light complected fellow, isn't that right? Just describe the man you saw.

A. He had a big long nose.

Q. Was he blond or dark?

A. He wasn't black headed.

Q. Brown or medium?

A. I would say in the picture he looked about medium.

Q. How big was the picture?

A. Something about that big (indicating).

Q. He was standing up or sitting down?

A. Sitting down.

Q. Was anybody with him?

A. No, just him.

Q. You visited them at the apartment in St. Paul too?

A. Yes.

Q. Under what name or guise were they living at that time?

A. I didn't ask them if they were living under what name.

Q. Did you go out with them any?

A. Yes, occasionally.

Q. Do you remember an occasion when you went on a Christmas party together at Radford with Mr.

page 104 } and Mrs. Distefano?

A. Beg your pardon, it wasn't Christmas, it was a New Year's Party.

Q. You were visiting friends of yours then?

A. Yes.

Mrs. Jessaline Scott.

Q. When you took them to your friends' home, you all introduced them as Dr. and Mrs. Anthony Distefano?

A. Yes, we did, but we knew better.

Q. After he had a couple of drinks, do you remember him talking about the two little children down in St. Paul, Anthony Distefano III and Frances?

A. No, he wasn't talking about them in St. Paul because they were with us.

Q. How did he introduce them?

A. Frances and Tony.

Q. Did he say, "These are my children?"

A. I didn't hear him say, "These are my children."

Q. What did he say when he introduced them?

A. "This is Frances and Tony."

Q. He never did say they were his children, you never did hear him say that?

A. He said, "This is Frances and Tony."

Q. One of them is named after him?

A. I understand one of them is.

Q. It was born while they were living in St. Paul together?

A. I didn't know she was over there up until about three years ago.

page 105

Q. You say the doctor want to Asheville and brought you up here?

A. Yes.

Q. What is your interest in this case? Why are you so interested in Dr. Distefano?

A. Well—

Q. You said you were her friend to start with.

A. The thing is he knows I knew Lillian when she was married to Atler Stanley.

Q. Did anybody pay your expenses for coming up here?

A. No, I wouldn't accept any.

Q. You are interested in the outcome to see that Dr. Distefano wins?

A. Since I am on the case I just want to get it over with. It doesn't make any—

Q. He married another one of your friends after he quit living with Lillian, didn't he?

A. Yes.

Q. What is her name now?

A. Patricia Ann Distefano.

Q. Do you know whether they are married or not or is he just having another fling?

Mrs. Jessaline Scott.

A. They said they was married.
page 106 } Q. You don't know though, do you?
A. I didn't check back and all that.
Q. It means a lot to you to see your best girl friend's husband win his case, doesn't it?
A. Well—

RE-DIRECT EXAMINATION:

By Mr. Greear:
Q. Do you have any interest in this other than just the facts and the truth?

Mr. Asbury: I object to that as leading. She showed by her own demeanor she was interested.

Q. I asked her if she had any interest in this other than just the facts and truth.
A. That is all I want to tell is the truth.
Q. Is that all you have told?
A. That's it.
Q. Have you told all you know of this woman's conduct?
A. I have told some of it.
Q. I believe the doctor's wife came down and got you and brought you up here?
A. Yes.
Q. Did she take you back the other time to Asheville?
A. Yes.
Q. Brought you up last night?
A. Yes.
Q. Do you expect them to take you back home?
page 107 } A. Yes.
Q. Do you have a husband?
A. Yes, I do.
Q. What does your husband do?
A. Purchasing Agent for American Thread Company.

RE-CROSS EXAMINATION.

By Mr. Asbury:
Q. Does he have any children by your girl friend?
A. Yes.
Q. How many?
A. A little boy.

Q. What is his name?
A. Joseph Anthony Distefano IV.
Q. Is it named after him?
A. The Anthony part is.

* * * * *

MRS. BARBARA BARTEE,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. You are Mrs. Barbara Bartee?
A. Yes, sir.
Q. Where do you live?
A. Dante: between St. Paul and Dante.
page 108 } Q. Near the village of Hamlin?
A. Yes.
Q. How long have you lived there?
A. We have just lived there about almost a year. Before that we lived in St. Paul.
Q. Who is your husband?
A. John Bartee.
Q. What does he do?
A. He is brakeman on the Clinchfield Railroad.
Q. Do you know Dr. Distefano here?
A. Yes, sir.
Q. Do you know Mildred Steffey?
A. Yes, sir, that is my sister-in-law, my husband's sister.
Q. Where does she live?
A. She lives farther on up the road, I guess you would still call it Hamlin or Dante.
Q. A few years ago was your sister-in-law expecting a child?
A. Yes, sir.
Q. Do you remember what year that child was born?
A. 1952.

Mr. Asbury: I object to whether or not her sister-in-law was expecting a baby; it has nothing to do with this case.
Mr. Greear: Just wait a minute.

page 109 } Q. What doctor was called?
A. Dr. Distefano.

Barbara Bartee.

Q. Were you at the house the night when your sister-in-law's pains started and called Dr. Distefano?
A. Yes, sir.
Q. Did he come?
A. Yes, sir.
Q. Did anyone come with him?
A. Lois.
Q. This woman (indicating prosecuting witness)?
A. Yes.
Q. You call her Lois?
A. Yes.
Q. Is that the name you knew her by?
A. Yes, sir.
Q. What time of night did they come there?
A. It was late. I guess it must have been maybe I don't know for sure, maybe 11:00 or 12:00.
Q. 11:00 or 12:00?
A. I think so.
Q. Was the baby born that night?
A. No, sir, it was false labor.
Q. What did Dr. Distefano do after he got there at the house?
A. He examined Mildred and then he sat in the
page 110 } living room and I think he fell asleep. He stayed all night, I do know that.
Q. What did he sleep in, in a chair or couch?
A. I think it was in a chair.
Q. Slept in a chair in the living room?
A. Yes.
Q. What was Lois doing?
A. She was sitting with me in the kitchen.
Q. Did your sister-in-law get up during the night and come in there too?
A. Yes, after her pains quit, she did.
Q. What were you doing in the kitchen?
A. Just talking.
Q. During that conversation did Lois make a statement to you with reference to the parentage of her little girl?
A. No, we were talking about our children and Lois said Pat was hard to fit. I just thought she had a little girl named Pat.
Q. Did she say anything about having been married before?
A. No, sir, not that night.

Barbara Bartee.

Q. Did she at any time tell you that?
A. The first time I ever met her.
Q. Where did she tell you that?
A. In Dr. Distefano's office.
page 111 } Q. What did she say there?
A. She said she was a divorcee.
Q. Did she say anything about her child?
A. She said she had a little girl.
Q. By who?
A. She didn't say by who.
Q. She just said she was a divorcee and had a little girl?
A. Yes.
Q. Do you remember her mentioning that night the same thing?
A. No, she just said her little girl, Pat, was hard to fit in clothes, and that is all I can remember, all I can remember her saying.
Q. To refresh your memory, do you remember she stated—

Mr. Asbury: We object to that, it would be leading the witness.
Mr. Greear: I asked to refresh her memory.
The Court: Don't ask leading questions.
Mr. Greear: All right. Go ahead, you may cross-examine.

CROSS EXAMINATION.

By Mr. Asbury:
Q. You knew her as Mrs. Anthony Distefano?
A. I just knew her as Lois.
Q. When she came there did you think she was the doctor's wife?
page 112 } A. Yes.
Q. That is what she was known as is Mrs. Distefano around town?
A. Yes, I thought she was.
Q. Everybody thought they were married and these were their two children?
A. Yes.
Q. She told you she had been married before and that she was a divorcee?
A. Yes, sir.
Q. Haven't they been trying to get you to tell she has been running around with men? Hasn't the doctor been trying to get you to tell that?

A. Oh, no.
Q. She told you the little girl was hard to fit with clothes, and there wasn't anything wrong with that?
A. No.
Q. Just normal conversation?
A. Yes.

Witness stood aside.

ALEC BARROWMAN,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. You are Alec Barrowman?
A. Yes, sir.
page 113 } Q. Where do you live?
A. Banner.
Q. How long have you lived at Banner?
A. All my life, fifty-three years.
Q. Do you know Lillian Baber?
A. Yes, sir.
Q. Did you know her father?
A. Yes.
Q. What is his name?
A. Lee Baber.
Q. Did he have the name Silas too?
A. Silas Lee.
Q. What is her mother's name?
A. Liza Baber; she was a Compton.
Q. Is she any relation to you?
A. Yes, about second cousin. Her father and me are first cousins.
Q. You are a first cousin to Silas Lee Baber?
A. That's right.
Q. Where was this woman born?
A. Born there at Banner.
Q. Who waited on her mother at the time of birth?
A. Her grandmother, Nettie Baber.
Q. How long did she live at Banner?
A. They lived there off and on and moved away.
page 114 } I don't remember what year they moved away from there.

Q. She was a pretty good sized girl when they left?
A. She was small when they left.
Q. Have they come back and lived there any time since then?
A. Yes.
Q. Did they come back and live awhile and move away again?
A. Yes.
Q. What does Silas Lee Baber do?
A. At that time he was mostly farming, the best I remember.

CROSS EXAMINATION.

By Mr. Asbury:
Q. When did you first meet Dr. Distefano?
A. That was in 1956 I believe, somewhere along there.
Q. You hadn't seen his wife, Lillian, for a long time prior to that?
A. No, it had been a right smart bit.
Q. Didn't he start asking who you were and he called her in and said, "You didn't know I married your niece?" How did he word that?
A. His uncle or something like that. Uncle is what I believe it was.
Q. Anyway, he brought her in and told you he was married to her, isn't that right?
page 115 } A. Yes.
Q. Did he tell you he had two children by her?
A. No.

Witness stood aside.

HIAWATHA SILCOX,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. Your name is Hiawatha Silcox?
A. Yes, sir.
Q. Where do you live?
A. St. Paul.
Q. Do you know Dr. Distefano?

Hiawatha Silcox.

A. Yes, I do.
Q. Do you know Lillian Baber Stanley over there?
A. Yes, I know her.
Q. Sometime ago, a few years ago did you make a trip with Dr. Distefano up in Pennsylvania when he went up there trying to get Lillian to come back and live with him?
A. Yes.
Q. Did you know where she was supposed to be?
A. No, I didn't know. She was supposed to be at her people's.
Q. What town do her people live in?
A. I believe Carlyle or Hanover one.
Q. Did you find her in the town where her people were?
A. Found her in Carlyle.
page 116 } Q. Living with her people?
A. No, she was in an apartment house.
Q. Was she there when you got there?
A. No.
Q. What time did you arrive?
A. 11:30 or 12:00.
Q. She wasn't there?
A. No.
Q. What did you do then?
A. Waited there until she come.
Q. What time did she get in?
A. She got in around 2:00, I say 2:00.
Q. Who brought her in?
A. She got out of a car. I couldn't say who brought her in.
Q. Did the car pull off?
A. Yes.
Q. Did she come back with you?
A. No, she never.
Q. Did you all go in the apartment?
A. No, she wouldn't let us in.
Q. What was the condition of her face at that time?

Mr. Asbury: We object to that unless he shows the time. unless he shows they were living together at the time; it would be immaterial after they separated.

page 117 } Q. What year was that in?
A. 1956.
Q. What was the condition of her face?

Hiawatha Silcox.

Mr. Asbury: Ask what month so we will know.

Q. Do you know what month?
A. I didn't keep no monthly records. It wasn't nothing to me to keep records.
Q. Was it hot weather, cold weather or medium?
A. It was kindly warm. It wasn't winter time.
Q. At that time what was the condition of her face?

Mr. Asbury: We object; that would be immaterial. What has that got to do with whether or not he is supposed to support his children?
Mr. Greear: It shows the pattern of her conduct and shows whether or not anybody could tell whose children they are.
The Court: Let him answer.

A. She had bruises on her face.
Q. Did she make a statement about where the bruises came from?

Mr. Asbury: We object to that; that certainly would be immaterial.
Mr. Greear: I am asking what she said about it.
Mr. Asbury: That would have nothing to do with the case after they separated. It would have nothing to do with whether or not he was under a duty to support his children.
The Court: Sustain the objection; I don't see page 118 } it would have any bearing.
Mr. Greear: We except.

CROSS EXAMINATION.

By Mr. Asbury:
Q. You were the doctor's chauffeur?
A. No.
Q. Didn't you work for him a long time as chauffeur?
A. No.
Q. Never employed by him?
A. No.
Q. Did you drive the car for him long?
A. No, one time I drove it just going to Pennsysvania and back, just helped drive.
Q. Didn't he have you as a chauffeur awhile?
A. No, sir.

Q. They were separated and had been for a month or so at the time you went up there?
A. I couldn't say whether they were or not.
Q. Was the doctor worried about his children when he went up there?
A. He didn't mention it.
Q. Did Mr. Mullins come around the steps just before you testified and talk to you?
A. No.
Q. Did he talk to other witnesses out there?
A. I didn't see him if he did.

* * * * *

page 124 }

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MRS. MILDRED STEFFEY,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. You are Mrs. Mildred Steffey?
A. Yes, sir.
Q. Where do you live?
A. Dante, Virginia.
Q. Are you related to Mrs. Barbara Bartee?
A. She is my sister-in-law.

Mr. Asbury: We would like to ask a preliminary question. Did you sit in the courtroom yesterday?

A. No, sir.

Mr. Greear Resuming Direct Examination:

Q. Do you know Dr. Distefano?
A. Yes, sir.
Q. Did you know Lillian Baber Stanley?
A. I knew her as Lois.
Q. Where did you meet her?

Mildred Steffey.

A. First time I saw her was in Dr. Distefano's office.
Q. What was she doing there at that time?
A. Well, she acted more like the office nurse.
page 125 } Q. You were a patient of Dr. Distefano's?
A. Yes, sir.
Q. Did you have a child born in 1952?
A. Yes, sir.
Q. What month was your child born?
A. October 9th.
Q. October 9, 1952?
A. Yes, sir.
Q. Prior to the time of the birth of your child, I will ask you whether you called Dr. Distefano to your home.
A. Yes, sir, I called him in September, the first, along about the first of September.
Q. Were you expecting the child then?
A. Yes, sir.
Q. Did he come?
A. Yes, sir.
Q. Did anyone come with him?
A. Yes, sir, Lois.
Q. This woman that has been here in the courtroom?
A. Yes.
Q. What time was it when they came to your home?
A. Around 11:00, maybe a little after 11:00, or 12:00, I couldn't say for sure.
Q. Did your pains continue that night or wear off?
A. No, sir, they stopped.
page 126 } Q. Where was the doctor at the time the pains stopped?
A. He was in the living room asleep.
Q. What did you do after that?
A. I went in the kitchen.
Q. Who was in the kitchen?
A. Barbara, my sister-in-law, and Lois.
Q. What did you do then?
A. Sat down, talked and drank coffee and gossipped.
Q. At that time did Lois make a statement to you with reference to her daughter?
A. Yes, sir.
Q. What statement did she make to you about her daughter?
A. She was talking about the little girl Pat; I didn't know she had one. I said, "I didn't know you had a little girl." She said, "I have a little girl by my first husband."

Mildred Steffey.

Q. She said she had a little girl by her first husband?
A. Yes, sir.

Mr. Greear: I believe you may cross-examine.

CROSS EXAMINATION.

By Mr. Asbury:
Q. You say Barbara Bartee was present at that time?
A. She was in the kitchen, yes.
Q. She was sitting right there too?
A. She sat there part of the time.
page 127 } Q. All she heard was that Mrs. Distefano said she had a little girl.
A. I can't help it what she heard. I know what she told me.
Q. Were you summoned or volunteered?
A. Summoned.
Q. Who summoned you?
A. Mr. Breeding.
Q. How did Dr. Distefano find out about the information you all knew she had said that?
A. When Lois left Dr. Distefano that is all he talked about, he was so crazy about her, that's all he ever talked about. When he talked about it I asked where the little girl was she had by her first husband.
Q. Did he tell you that was his? What about the little boy?
A. I don't know anything about the little boy.
Q. Do you know her first husband?
A. No.
Q. Is he a big, tall, sorta blond, sandy haired man?
A. I never did see him.
Q. You knew her as Lois?
A. Yes.
Q. You also knew her as Mrs. Distefano?
A. No.
page 128 } Q. You never did know her as Mrs. Distefano?
A. No.
Q. Wasn't that what everybody thought?
A. No.
Q. What did they think?
A. They thought she was his mistress; that's what I thought.
Q. All the officers and everybody thought that.

Mildred Steffey.

A. I don't know what they all thought, but that's what I thought.

Q. Are you still under Dr. Distefano's care?

A. Yes.

Q. What is he treating you for at the present time?

A. Well, I had a pelvic examination the last time I was down there.

Q. Do you have prescriptions filled by him regularly?

A. I have had. It has been a right smart while since I had a prescription filled.

Q. What kind of medicine does he give you?

A. I don't know.

Mr. Greear: We object to that; in other words, I feel like if a patient is being treated by a doctor, Mr. Asbury has no right to go in and ask what he is treating the patient for. In other words, a number of things, you have the relationship of doctor and patient, and I feel that is not Mr. Asbury's affair and he is highly improper in asking about it. It page 129 } is immaterial in this case.

Mr. Asbury: I asked it for the purpose of determining the prejudice and bias of the witness. I think that is proper.

Mr. Greear: I think that is a poor way of showing it.

The Court: It would be impossible for the Court to pass on that unless he knows what the question and answer would be. Ordinarily what a physician tells a person regarding their health and so on and treatment, would not be permitted and is objectionable and you can't subject a doctor or even a patient to inform you about things like that.

Mr. Greear: I feel like it should not be in this trial.

The Court: We can go in chambers.

Mr. Asbury: I will just withdraw it then.

Q. Your sister testified, Mrs. Bartee, that—

A. She is not my sister.

Q. Your sister-in-law testified she knew her as Mrs. Distefano. Why would she know something different?

A. You said what did I think. I didn't think she was Mrs. Distefano. I thought she was his mistress. He didn't introduce her to me as Mrs. Distefano.

Q. Everybody referred to her as Mrs. Distefano, didn't they?

Mildred Steffey.

A. No, sir.

Q. Nobody ever referred to her as Mrs. Distefano?

A. I guess some people did, but most people I
page 130 } knew called her Lois. I didn't know whether her
name was Stanley or Baber, didn't know what her name was.

Q. She lived in the apartment with him?

A. She was there off and on; I would see her.

Q. How many years did she live there?

A. I don't know.

Q. After your sister-in-law testified yesterday, Mr. Mullins went all the way around the stairs and talked to you, didn't he?

Mr. Mullins: I object to that. I want the Court to instruct the jury and Mr. Asbury that it is not only the right of lawyers to consult with witnesses, but the duty to do so.

Mr. Asbury: You had no right to go around and talk to her.

Mr. Mullins: I want to make my motion. Mr. Asbury consults every witness he has. It is not only my right, but my duty to consult with the witnesses.

The Court: That is true, but he can ask.

Mr. Mullins: I don't care what he asks.

Mr. Asbury: He has no right to tell what somebody else testified.

Mr. Mullins: I object unless he can back his statements up.

Mr. Asbury: Do you deny you slipped around the courtroom and told her?

Mr. Mullins: I do deny it; it isn't true, and I don't like the insinuations, and I deny I "slipped." I walked out of here. I weigh 200 pounds; there was nothing sneaking. That
is highly improper and prejudicial to the de-
page 131 } fendant and I move for a mistrial.

Mr. Asbury: I withdraw it. All right, that's all.

Witness: Are you finished with me?

Mr. Asbury: Yes, ma'am.

Witness stood aside.

LEE STANLEY,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. Your name is Lee Stanley?
A. I am.
Q. You are Deputy Clerk for the Circuit Court of Wise County, Virginia?
A. I am.
Q. As such do you have charge of the records of this Court?
A. I do.
Q. I show you a file marked *Atler Stanley, complainant,* v. *Lillian Baber Stanley,* defendant, and ask you if that is one of the official records of this court.
A. It is.

Mr. Greear: We desire to introduce this record, the official record.
Mr. Asbury: Let's see if it is all in there. I don't care if it's all there. (Inspects record). We have no objections, sir. We want the entire record to go in.
Mr. Greear: We introduce the entire record As Defendant's Ex. B.

page 132 } Q. Will you introduce that as an exhibit with your testimony?
A. I do.

Mr. Greear: That is all; you can cross-examine.
The Court: What is the purpose of this?
Mr. Greear: This is the divorce case between Atler Stanley and Lillian Baber Stanley. Mr. Asbury will probably want to read some parts of it. I am not going to read all of it, except call the Court's attention to one or two things in it. The bill alleges they married the 15th of December, 1944, and that continually from the date of said marriage, and in May 1949 your complainant and the said Lillian Baber Stanley lived together as husband and wife in Dickenson County, Virginia, and in Bristol, Virginia. This was served on her December 10, 1951, Wise County, by delivering a true copy to her, Lillian Baber Stanley, alias Lillian Barker in person by Harold Fleming, Deputy Sheriff. The depositions, several witnesses testified and there was no defense made to the case. This suit was served in December 1951, that is when the suit

was instituted, and the divorce decree granted on February 25, 1952. Bobby Stanley testified in the case as follows:

"Q. Please state your name, age, residence and occupation.
"A. Bobby Stanley, age 20, Nora, Virginia, in the United States Air Force.
"Q. Are you the son of Oakley Stanley, Sheriff
page 133 } of Dickenson County?
"A. Yes.
"Q. Where were you living at the time Atler Stanley and his wife separated?
"A. Nora, Virginia.
"Q. Do you know about when they separated the last time?
"A. The spring of 1949.
"Q. Is Atler Stanley, the complainant in this suit, an actual bona fide resident of Dickenson County, and has he resided and been domiciled in the State of Virginia for more than one year preceding the commencement of this suit?
"A. Yes, sir."

Mr. Greear: And he was recalled:

"Q. Did you stay with your uncle, Atler Stanley, quite often?
"A. Yes, sir.
"Q. Were you ever present with them when she left home?
"A. Yes, sir.
"Q. On more than one occasion?
"A. Yes, sir.
"Q. When she would leave did she give any reason why she was leaving?
"A. No, sir.
page 134 } "Q. How long would she be gone on her trips?
"A. Sometimes just overnight. Sometimes two or three days, sometimes a month and sometimes more.
"Q. Where did she usually say she was going when she would leave?"

Mr. Asbury: That part of it would be immaterial.
Mr. Greear: You had no objections.
Mr. Asbury: That is immaterial as far as this case is concerned.
Mr. Greear: It is part of the official record.

Lee Stanley.

Mr. Asbury: It has to be material to the issues in this case. I will let it go in only as to material issues of the case.

The Court: You can question its materiality, but that will be a question for the jury.

Mr. Greear: "Q. Where did she usually say she was going when she would leave?

"A. She didn't say. Sometimes she would say she was going to her mother's. Sometimes to a friend's house or just out.

"Q. Did Atler Stanley do anything wrong that you saw that would give her a reason or excuse to leave on these trips?

"A. No, sir.

"Q. How many times could you say from your own knowledge that you have known of Lillian Baber Stanley leaving home on these trips?

"A. I could safely say five or six times." And further this deponent saith not. Signed Bobby Stanley.

page 135 } CROSS EXAMINATION.

By Mr. Asbury:

Q. Mr. Stanley, I believe the bill is signed by Atler Stanley?

A. Signed by Atler Stanley by his attorney.

Q. And in his bill in Paragraph 4 I believe it states there were no children born of this marriage, is that correct?

A. That is correct.

Q. Then on Page 3 *three* Rena Stanley Kestner was asked on the first page of her deposition "Do you remember about when Atler Stanley and his wife separated" and her answer was "I wouldn't know exactly. I would say in the neighborhood of two years." And these were taken in December 1951. Now on Page 3 of her deposition, that is Mrs. Rena Stanley Kestner, she was asked if any children had been born of this marriage and she said, "No, sir, not that I know of."

A. That is correct.

Q. And "Is he a resident of Dickenson County and resided and been domiciled in Dickenson County for more than one year preceding the commencement of this suit" and it said "Yes, sir?"

A. That's right.

Mr. Asbury: I haven't had a chance to read these depositions carefully, Your Honor.

Mr. Greear: We stipulate he had no children and no child was mentioned.

page 136 } Mr. Asbury: All right, you stipulate he says he has no children then.

Mr. Greear: That's all, thank you, Mr. Stanley.

Witness stood aside.

Mr. Greear: In connection with that divorce suit, Mr. Asbury, we would like to stipulate Atler Stanley now lives in Alexandria, Virginia, and Bobby Stanley in Oklahoma.

GLADYS DICKENSON,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. Your name is Gladys Dickenson?

A. Yes, sir.

Q. Where do you live?

A. St. Paul.

Q. How old are you?

A. Forty-six.

Q. How long have you lived in St. Paul?

A. Eight years.

Q. Do you know Dr. Distefano?

A. Yes, I do.

Q. Do you know Lillian Stanley, alias Lillian Barker over there at the other table?

A. I have known her practically ever since she has been up there. I haven't known much about her the last couple of years or so.

Q. Did you formerly work for Dr. Distefano?

page 137 } A. Yes, I did. I was working there when she just came there and took up.

Q. What did you do?

A. I was cleaning his office and straightening up and mopping floors.

Q. Where was his office?

A. Over the drug store in St. Paul.

Q. Where did he sleep?

A. I suppose he was sleeping out about Norton at that time. I never asked him. I wasn't interested.

Gladys Dickenson.

Q. He didn't have a bedroom there at that time?
A. No.
Q. How many rooms did he have in his office?
A. He just had his office and waiting room and a little hallway.
Q. Were you there every day?
A. I was there three or four days a week.
Q. You say you were there when this woman came and took up?
A. Yes, I was.
Q. Tell the circumstances, what happened there.
A. I went to work that morning in his office. I always give him time to have the office opened up. There wasn't anyone there but him when I went. Shortly after I went, this woman came in (indicating Lillian Distefano) and walked
page 138 } on into the office. I supposed she was a patient. She stayed and stayed, so I kept waiting for her to come out so I could get in there, and other patients kept coming in and wait. Some would ask who he had in there and how long they had been in there. I stayed until in the evening. She was still there. I discovered they were having harsh words between each other. I heard him order the woman to get out, how she was hurting business and the patients leaving him. When she didn't come out I waited until a quarter to 5:00. She was still there; they was still having words. He was ordering her to get out of the place of business. I opened the door and said, "I am going home, Dr. Distefano." I just closed the door and said, "I'll see you tomorrow." I don't remember whether I went back next day or waited another day. When I went back she wasn't there the first day I went back. In a few days I went back and she was there. She skipped a few days. She come back again and stayed from then on; she was there every day he was in town.
Q. Were any children with her at that time?
A. No, she had been there probably three or four months and a man and woman come one day, she said was her father and mother; they had two little kids with them, Frances and Tony. That is the first I seen of the children at that time was when the man and woman came.
Q. How big was the boy at the time they brought them there?
page 139 } A. He was walking, toddling around the floor, maybe a year or more; the girl was some bigger.
Q. Did Mrs. Stanley say whose children they were?

Gladys Dickenson.

A. Nothing only she said they were hers.

Q. How long did you continue to work there, Gladys?

A. I went to work there in September 1950. I worked on; I either quit in the early part of 1954 or 1955, I don't remember which.

Q. What were the circumstances under which you quit?

A. I had a sister working in town at the same time, and she come in one night and said, "You know what I heard in St. Paul today?" I said, "No, you are liable to hear anything up there" something like that. She said, "A woman told me in St. Paul that this woman Dr. Distefano has up here had another man over in Bristol."

Mr. Asbury: We object to that; it wouldn't be admissible.
The Court: You can't tell what you heard.

A. I just got afraid to go back any more, afraid if she was doing that, there might be men come in there.

Mr. Asbury: We object.
The Court: Sustain the objection.

A. That's why I quit.

Mr. Asbury: You heard what the Judge told you.

A. That is the reason I quit; I just quit on that account.

Mr. Asbury: Listen to the Judge; Mr. Greear is not the Judge.
page 140 } Witness: I hear the Judge.
Mr. Greear: You may cross-examine.

CROSS EXAMINATION.

By Mr. Asbury:

Q. When was this when the woman first come in?

A. It must have been in the latter part of 1951, the best of my remembrance.

Q. When she first come she didn't have the children with her?

A. No, she didn't have the children with her.

Q. Do you know why the doctor stayed in Johnson City or Bristol prior to that?

Gladys Dickenson.

A. No, he was staying in Norton somewhere along that time. We had shortly left Bull Run and he used to come through there, if we met him he would stop coming through going to St. Paul.

Q. Are you still employed by Dr. Distefano?

A. No, I am not.

Q. Is he still your doctor?

A. Yes, he is still our family doctor.

Q. And what year did you say she come there?

A. I think it was the latter part of 1951. I wouldn't make a definite statement, but the best of my remembrance it was.

Q. Could you pin that down a little more? Was it around August or September?

A. I think it could have been later in the year
page 141 } than that but I wouldn't swear definitely because
I didn't know I would have to swear to it later.
I didn't keep a record.

Q. If the boy was born in March 1951 it wouldn't have been any eighteen months old the latter part of the year.

A. I said I wouldn't swear definitely it was 1951.

Q. How long were you supposed to stay there of a day in 1951? How long were you supposed to work?

A. Just until I got my work done.

Q. How long did it usually take you to get your work done?

A. Some days if he didn't have too many patients in and out so I could go in the office and have free access, I would finish around 12:00. I didn't barge in on any patient he had in there.

Q. He kept her in there all day?

A. I can't say he kept her. It didn't look like he was keeping her when he was trying to get her out.

Q. Did they argue?

A. They were having harsh words.

Q. Did she accuse him of being the father of her children?

A. No, I never heard her say he was the father of her children.

Q Didn't they call him Daddy?

A. I don't know as I ever particularly paid any
page 142 } attention to them calling him Daddy.

Q. You never heard the children refer to that man (indicating defendant) as Daddy?

A. No, we each one had our places and tended to it.

Q. Did you ever see him with the children?

A. Yes, they were in the quarters.

Lillian Distefano.

Q. The quarters was next to the office?

A. Yes, but they were screened off. When I come in the waiting room to clean I went on and did it. He didn't allow these kids to chat too much.

Q. She came and worked for him and to all appearances was Mrs. Distefano?

A. I couldn't say. She never did tell me she was Mrs. Distefano.

Q. They all referred to her as Mrs. Distefano?

A. Some few did, some Baber, some Barker.

Q. What did you call her?

A. Lois.

Q. After the first day you never did hear the doctor try to put her out any more?

A. Yes, I did various times, I heard him order her to get out and stay out. I made remarks at home that if anybody talked to me like that I would get out and stay out. He did order her out.

Q. These times he would order her out, was that
page 143 } before or after he bought her a 98 convertible Oldsmobile?

A. I don't know he bought her a 98 Oldsmobile.

Q. Did you ever see her driving that convertible?

A. Yes, they "drive" cars around.

Q. Did he buy her fancy clothes?

A. I couldn't say.

Q. And all the time ordering her out?

A. I couldn't say about that. I didn't go look in her grips.

Q. She always wore pretty clothes? The kids had pretty clothes and he bought them the best of everything?

A. Yes, they had a comfortable living there.

Q. And all the time he was ordering her to get out?

A. Yes. sure.

Q. She stayed with him, didn't she?

A. Yes, she stayed.

Q. She had a pretty good thing?

A. Yes, it looked like she had it made if things had went right.

Witness stood aside.

Mr. Greear: The defense rests.

LILLIAN DISTEFANO,

recalled.

Lillian Distefano.

By Mr. Asbury:

Q. It has been stated here by Mrs. Scott that you got her up one day at one o'clock in the morning and went to Nora or somewhere to get your baby. Is that right?

page 144 } A. No, sir, that isn't true.

Q. Did you ever make a trip over here with her?

A. I never made a trip over here with her.

Q. Did you ever live with Atler Stanley in Bristol?

A. No, I lived with two girls on McNiel Street; we had a house.

Q. Who were those two girls you lived with?

A. June Arnold and Nell Arnold.

Q. Where are they now?

A. I think one is in New Orleans and I don't know where the other girl is at now. She is away but I don't know where.

Q. Mrs. Mildred Steffey testified you said the little girl was by your first husband, and Barbara Bartee said that you had been married before and was a divorcee. What did you tell them on that occasion?

A. I never told anyone my child belonged to anyone except Dr. Distefano.

Q. Have you ever claimed it was Atler Stanley's child?

A. No, sir, I haven't.

Q. Did you intervene in this divorce suit and ask him to support the children?

A. No.

Q. Have you ever sued him for support?

A. No.

Q. Why haven't you?

page 145 } A. Because I had no children by him.

Q. This little girl is Dr. Distefano's daughter?

A. Yes, sir, she is his daughter.

Mr. Asbury: I believe you may ask.

CROSS EXAMINATION.

By Mr. Mullins:

Q. Now I believe that you did talk to Atler Stanley on one occasion or two, I believe Atler's mother lived on Open Fork.

A. I wouldn't know where she lives.

Q. What is her name?

A. I think her first name is Ollie; Ollie Stanley.

Lillian Distefano.

Q. To refresh your memory, on one or two occasions you told Atler that child was his, the first one, and you were going to make him support her.

A. No, I never did tell him that.

Q. Do you recall the night that you left, and Atler went up and got Oakley, his brother, to spend the night and you came and crawled in the window at 3:00 in the morning?

A. No, I don't remember that, that isn't true.

Q. You kept the oldest child over at Mrs. Stanley's, your mother-in-law, for a considerable period of time?

A. I never had my child in Stanley's house.

Q. You never did, the oldest girl?

A. No, sir, I didn't.

Q. The time you came to get that child, don't
page 146 } you recall you got boiling mad and was crying
and your mother-in-law told you, "Lillian, let me have the child back" and soothed it and said, "I don't want it to leave here crying?"

A. The child was never in her house.

Q. You are telling us under oath that your oldest child was never in that house and never kept by Mrs. Stanley any length of time?

A. Yes, sir, I am.

Q. Do you deny under oath that you came with this woman from Bristol over to your mother-in-law?

A. I never came to her house.

Q. And got your baby?

A. My baby was never in her house.

Q. You never did go there and get it?

A. No, sir.

Q. You are telling under oath that never happened?

A. Yes, sir.

Q. And that the situation where she was trying to keep you there for a little while and soothed the crying baby before you took it, you say that never occurred?

A. I tell you, Mr. Mullins, my child was never in Stanley's house.

Witness stood aside.

Mr. Asbury: The Commonwealth rests.

Mr. Greear: We want to see the Court in
page 147 } chambers.

IN CHAMBERS:

Mr. Mullins: May it please the Court, the defendant by counsel again moves the Court to strike the evidence in this case. It is a settled law in certain southern states, including Virginia, that the common law principles apply and those principles very clearly set forth in the case of *Brown* v. *Brown,* 183 Va. 353, where the Court in considering a case similar to the case at bar held that at common law a bastard was considered as kin to no one and was considered as kin to no one and was therefore incapable of being the heir of any person; and the Court went on further to say at common law the father is under no obligation to support or contribute to the support of his illegitimate child even though paternity is admitted. And in that case the Court discussed the doctrine of the common law and the doctrine of common law as applicable to the State of Virginia, and I can't quote from that case at length, but I desire to quote briefly—in other words, in this case we feel we have shown that this child was born while the mother was in lawful wedlock with one Atler Stanley. In fact, the divorce decree between Atler Stanley and Lillian Baber Stanley, the prosecuting witness in this case, shows that the divorce was entered in 1952. All these children were conceived and born prior to that time. There is a presumption that these children are the children of Atler Stanley. Even assuming that Dr. Distefano has held these children out as his own, which we deny, but even assume it to be true, that still is not sufficient under the page 148 } laws of Virginia to make him liable under the non-support statute. At common law the paternative father is under no obligation to support or contribute to the support of illegitimate children, and the Court further says there is no obligation made between a reputed father and an admitted father. Accordingly the courts of the states which have adopted the common law have held in almost every case in which the question has been raised that without legislation the father of illegitimate children cannot be required to provide for their support. And further quoting the case, "by statute the common law continues to full force in Virginia except when altered by the General Assembly of Virginia." Any statute, and particularly a criminal statute that alters or modifies the common law is to be strictly construed. Therefore, in this case we do not know under what basis the Commonwealth is proceeding, but we do call Your Honor's attention that the only modification made by the General Assembly of Virginia to the common law is a statutory section,

namely 20-61.1, and it is the only modification of the common law that modified it slightly in 1952. "Concerning a child of parents not married, if a man admits before the Court he is the father of the child or the Court finds that the man has voluntarily admitted paternity in writing under oath, the Court may then enter and enforce judgment for the support, maintenance and education of said child as if such child were born in lawful wedlock." This proceeding is brought under Chapter 5, Title 20, and the evidence is devoid of the requirements to modify the common law, namely, there

page 149 } is no evidence that the defendant, Anthony Distefano, has admitted before the Court he is the father of the child. Secondly, there is no evidence that the defendant has voluntarily admitted paternity in writing under oath. And it would be and should be the duty of this Court to strike the evidence, considering the common law as set forth in *Brown* v. *Brown* as modified by the section of the Code. The Commonwealth introduced a paper wherein the defendant stated he would pay $200.00 per month for the support of "her" children addressed to whom it may concern. It also is not under oath, so it doesn't come within the statutory requirements. We understand from the statement of the attorney for the Commonwealth when we made a prior motion to strike in this case, that he was relying upon certain statements made by the prosecuting witness that she had seen the income tax returns and she further stated she knew the government had disallowed certain things in those returns.

Mr. Asbury: No, don't misquote me.

Mr. Mullins: That is her evidence; we can find it. Assuming that is true, which we deny, we say the income tax returns are available to the attorney for the Commonwealth if he relied on that, but it was not introduced, and the tax return itself is the best evidence, but even assuming for the point of argument that he did list these parties on his income tax returns, the Code of Virginia specifically says that income tax returns are not to be under oath, and we cite to Your Honor Section 58-26 or 27 of the Code of

page 150 } Virginia; and no income tax returns or forms have been introduced by the Commonwealth to show they are under oath for the years involved, and they are just made and if they are not accurate it is a misdemeanor and the statute says it shall not be under oath. We then go to the Federal law and the Internal Revenue Code provides in Section 6065 as follows under the heading "Verification of Returns. (a) Penalties of perjury—Except as otherwise

provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provisions of the Internal Revenue laws or regulations shall contain or be verified by a written declaration that is made under the penalties of perjury. (b) Oath—The Secretary or his delegate may by regulations require that any return, statement, or other document required to be made under any provision of the Internal Revenue laws or regulations shall be verified by an oath. This subsection shall not apply to returns and declarations with respect to income tax returns made by individuals." Therefore, the law of subsection (b) clearly indicates that an income tax return is not made under oath and the law specifically provides that the Secretary of the Treasury cannot require income tax declarations and returns to be made under oath. Therefore, considering that this statute is a criminal statute it is in degradation and contrary to the common law, the provision of the Virginia Code, namely 20-61.1. Section 20.61.1 must be strictly construed and under such strict construction and under the law it would be the Court's solemn duty page 151 } at this time to strike the evidence.

Mr. Asbury: Your Honor, please, to begin with Mr. Mullins stated that there is a presumption the first child belonged to Atler Stanley. But in the record which has been introduced here, he filed in his bill "no children born of this marriage" and he presented evidence in that proceeding that there were no children born of that marriage. This court previously adjudicated that case and entered an order stating that there were no children born of this marriage, so that presumption has been rejected and it has been adjudicated by this court that no children were born of her marriage to Atler Stanley. It is true at common law you couldn't, and it is true at the time the Brown case was decided you couldn't make a father support his illegitimate children, but the Legislature in 1952 entered an amendment to the non-support statute that provided that when a man admits before the Court he is the father of a child and admitted his paternity in writing under oath the Court may enforce judgment as if the child were born in lawful wedlock. Now Mr. Mullins said we have to have strict construction of that, but the note says the procedure is the same for this as a divorce proceeding and the Commonwealth Attorney is not even required to appear in desertion and non-support cases. The Attorney General suggests they appear as a duty to the public, but as far as being obligated to appear, I am not because it is a quasi-criminal case, and this is an appeal from the Juvenile

Domestic Court of Wise County, Virginia. It has been repeatedly held that the Juvenile and Domestic Court sits as a court of equity. Certainly in this case these chil-
page 152 } dren are entitled to support under the law and in equity. I call your Honor's attention to the McClaugherty case. In effect the Court held in that case that the father of illegitimate children was estopped to deny the parentage. The purpose of requiring the oath was so there would be no mistake, in other words, by a verity. I believe the Legislature intended to provide support for bastard children where there was no question about it, and certainly there is no question in this case. First, all the evidence we have offered is equivalent to an oath, including the admission in writing that he would support these children. And she helped prepare the tax returns and put them in the post office and he listed them on his tax returns. This evidence is uncontradicted. He put "name of child, Frances Distefano, daughter, $1,000.00 exemption; Anthony Distefano, son, $1,000.00 exemption." For the state return, it was filed under the penalties of perjury, which penalty is imprisonment not exceeding one year and a fine not exceeding $1,000.00. That is equivalent to an oath. The Federal returns listed each child for six or seven years. He took $600.00 exemption for each one of those, and the certificate he puts on that is "I declare under the penalties of perjury that this return, including any accompanying schedules and statements, has been examined by me to the best of my knowledge and belief is a true, correct and complete return." When you make a statement under the penalties of perjury, that is equivalent to an oath.

Mr. Mullins: That is not the law.

Mr. Asbury: This is an appeal from Juvenile
page 153 } and Domestic Relations Court of Wise County, and under such an appeal this Court sits as the law of equity. Equity demands this man support these children.

Mr. Greear: One other word, the Congress of the United States specifically provides that they cannot make an individual tax return under oath, and none of them are made under oath. And the statutes of Virginia say he must acknowledge the children by writing under oath voluntarily made, so there is no such, and we think certainly the evidence should be stricken. The Commonwealth is not able to prove its case.

The Court: The way I feel about this, this is entirely new to me and I don't know whether it has ever been raised before,

that is brought up here. And there is a good deal of law that might be apparently, just looking at it offhand, contrary, but it is an important case. There is a good deal of conflict in the evidence. In other words, it seems to me there is a good deal of feeling in the case on different angles and I am inclind to believe that you should proceed, that the Court should pass on it. Then of course either side would be allowed an appeal; that is, they can apply for appeal. Of course if that is turned down, that would be the end of it, but I believe it is too important a case and means so much to the small fry, as the saying goes, the little children, who have no way to protect themselves. I think it is the kind of a case that ought to be thrashed out by the parties. No matter which way it goes it will certainly be decisive, at least it seems like it would. Of course, it might not be either. I overrule the motion to strike the evidence.

page 154 } Mr. Greear: To the action of the Court in overruling the motion to strike the evidence, the defendant by counsel duly and properly excepts.

INSTRUCTION A WAS OFFERED TO THE COURT BY THE COMMONWEALTH.

Mr. Mullins: Defendant by counsel objects to the giving of Instruction A for the following reasons: first, the instruction has two paragraphs and we will discuss those two paragraphs separately. The first paragraph of the instruction is contrary to the law and contrary to the evidence, and there is no evidence in this case to support the giving of Instruction A. With reference to the second paragraph, the second paragraph of the instruction is not a correct statement of the law and is contrary to the evidence in this case. Specifically the second paragraph is contrary to the law as set forth in Section 58-27 of the Code of Virginia insofar as it applies to state income tax returns.

(At this point the jury was excused for lunch, to return at 1:00).

Moreover, the instruction is contrary to the law as set forth in the Internal Revenue Code of 1954, Section 6065 and the similar section of law applicable to Federal income tax returns prior to the enactment of the 1954 Internal Revenue Code. Furthermore, the income tax returns themselves are the best evidence. No copies or any specimens have been filed in this cause or introduced by the Commonwealth. The

income tax returns if relied upon by the Commonwealth as its criteria in this case could only be the best evidence, and those returns could be subpoenaed from the State
page 155 } Department of Taxation by the attorney for the Commonwealth, which was not done. Those returns were the best evidence particularly in this case, and there is no evidence that any of those returns were made under oath, inasmuch as the returns themselves were not filed, exhibited or testified about in completeness. And the giving of the instruction with reference to that would only let the jury speculate as to what was in the returns and the language of the returns and would be prejudicial to the defendant. We say the instruction offered is contrary to the law, contrary to the facts and contrary to the evidence and is an improper statement of the law.

Mr. Asbury: This is the same question that was involved a minute ago and Your Honor overruled the motion to strike the evidence, and this is the law. Of course, the best evidence is the evidence available to the Commonwealth, and in this case the only evidence available was the fact that she had helped him fill out the returns and worked them up for him and took them to the post office and the Court overruled the motion, and in overruling their motion this is what the Court held in effect the law was. It doesn't say that has to be signed; it says the man has to voluntarily admit paternity under oath. This is just a statement of the law as the Court decided it a minute ago in overruling the motion to strike. The tax returns are filed under penalties of perjury, and the Court in overruling their motion to strike said in effect
page 156 } that this is the law.

Mr. Mullins: In reply thereto we challenge the Commonwealth to produce any authority to support their contention. We have produced the authority, namely, the best authority you can have, the statute of the Federal and State Government.

Mr. Greear: The Commonwealth has been unable to show any statement in any law book that because an act is done under penalties of perjury that it is under oath.

Mr. Asbury: I will read from the tax returns: "I declare under the penalties of perjury that this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct and complete return."

Mr. Mullins: He is reading from the 1957 returns.

Mr. Asbury: I can get the 1956.

The Court: I tell you gentlemen, I am not certain that

that instruction will stand up, but if it is submitted to the jury I want to get enough in the instructions so that if the Supreme Court should reverse it or if they should overrule it, they will give some indication as to what the law is, and the law could be the way it has been mapped out here. A man could decide either way without having much effect so far as his conscience is concerned, but what I want to do—we have got the evidence in and it is an important case. It is important to each one of the people that are involved. It is important to the man and the woman and it is important to those children and important to the neighborhood. I think it ought to go to the jury, and if it were just an
page 157 } ordinary matter I might have sustained the motion to strike the evidence, but I believe this is the kind of a case where these kids are interested; he is a prominent doctor; it interests this woman and a whole bunch of others, that it ought to be decided. Therefore I am going to give this first one. I may give the others as we go along and then of course I will give appropriate instructions for the defendant, except I want one written stating the way the verdict should be for the defendant.

Mr. Greear: To which action of the Court in giving Instruction A, the defendant by counsel duly and properly excepts.

INSTRUCTION B WAS OFFERED TO THE COURT BY THE COMMONWEALTH.

Mr. Mullins: Please the Court, the defendant by counsel objects to Instruction "B" because the instruction is not a correct statement of the law applicable to this case and the instruction is contrary to the law and contrary to the evidence. There is uncontradicted evidence in this case that the prosecuting witness is a woman of loose morals; and the uncontradicted evidence is that these children were born during the time she was lawfully married to one Atler Stanley and the children are presumed to be his children; and the presumption can be overcome only by very strong and convincing evidence, and if that presumption is overcome then it would show these children were born under the most favorable theory to the Commonwealth under the circumstances to make them illegitimate. The Court in the case of *Brown* v. *Brown* which I previously cited to Your Honor
page 158 } stated the common law says that the father is under no duty to support his bastard children. And under the evidence in this case, the evidence in this case most

favorable to the Commonwealth, these children at most could be only illegitimate or bastard children and there is no duty on the father to support them. And the statute says that if the father admits in open court that he is the father of the bastard children or illegitimate children or that he voluntarily enters into a writing under oath that he is the father of the children, then in that case only could he be held liable for their support. This Instruction "B" excludes all those elements and we feel it is not for those reasons a correct statement of the law applicable to this case and should be refused, and to give it would be prejudicial to the defendant.

Mr. Asbury: Your Honor, please, this instruction came from Section 20-61 of the Code of Virginia. Of course it is true they had to find under Instruction "A"—all these instructions go together, and "A" defines under Section 20-61 when he could be made to support them. Then under 20-61 his penalty if they believe he did or think it, under Instruction "A," it says he shall be punished by a fine not exceeding $500.00 and sentence the said defendant to the State Convict Road Force for a period of not less than ninety days nor more than twelve months, or both; or in lieu of the fine being imposed, you may require the said defendant to suffer a forfeiture of an amount not exceeding One Thou-
page 159 } sand Dollars. That is exactly right out of the Code of Virginia.

Dr. Mullins: In reply to that, that section clearly states that applies only when there is no question as to who the father of the children is and born in lawful wedlock and has no application to this case, which is a different situation.

Mr. Asbury: I would like to take the last sentence off that. (Last sentence marked off the original instruction as given).

Mr. Greear: We have the same objection to the instruction with the last sentence taken off as we had with it before.

The Court: I am not certain about it by any means, but I want to give it so it will come to an end, and I want to put enough in here that they could find for the plaintiff, with the idea that if that is done, of course, the motion could be made to set aside the verdict, and if I don't do it you can appeal. I want to get all the elements in so every point can be covered on both sides. It is a new thing to me and I see what the statute is, and my mind isn't as clear on it as I would like it to be, but I think I have heard about all the law applicable; it has been quoted, and I think I understand what it is, but just what the law in Virginia would be afterwards I don't know. I will give Instruction "B."

Mr. Greear: To which action of the Court in giving In-

struction "B," the defendant by counsel duly and properly excepted.

page 160 } INSTRUCTION "C" WAS OFFERED TO THE COURT BY THE COMMONWEALTH.

Mr. Mullins: The defendant by counsel while admitting that ordinarily this would be a correct statement of the law, it is not applicable to this case. We feel the question to be decided in this case is entirely a legal question and nothing for the jury to decide, and under the law and evidence in this case it would be the duty of the Court to strike the evidence.

Mr. Greear: And further it is not a proper statement of the law with reference to the credibility of witnesses.

The Court: I am going to give Instruction "C."

Mr. Greear: To which action of the Court in giving Instruction "C" the defendant by counsel duly and properly excepted.

INSTRUCTION "D" WAS OFFERED TO THE COURT BY THE COMMONWEALTH.

Mr. Greear: Defendant by counsel objects to Instruction "D." It is not a proper statement of the law. It is an instruction taken from a West Virginia case and not approved in Virginia and is argumentative.

Mr. Asbury: I will withdraw it and offer Instruction "D-1."

Mr. Greear: The defendant by counsel objects to Instruction D-1 in that it is improper in those words. We believe it is a correct statement of the law with reference to reasonable doubt, but we object on the ground that the Commonwealth is not entitled to any instructions in this case because it has failed to prove a case under the statute in Virginia and hasn't introduced any writing under oath by which this

page 161 } defendant acknowledged these children were his.

The Court: I will give Instruction "D-1."

Mr. Greear: To which action of the Court in giving Instruction "D-1" the defendant by counsel duly and properly excepts.

INSTRUCTIONS D-1, D-2 and D-3 WERE OFFERED TO THE COURT BY COUNSEL FOR THE DEFENDANT.

Mr. Asbury: I have no objection to Instruction D-1.

The Court: Instruction D-1 is given.

Mr. Asbury: The Commonwealth objects to Instructions D-2 and D-3 on the grounds they are contrary to Instruction "A" which has already been given and tries to place on the jury the duty of determining the law in the case. Instruction "A" tells them that income tax returns are filed under penalties of perjury and are equivalent to an oath. The Court already ruled on this particular point in the motion to strike and arguments on Instruction "A." I believe Instructions D-2 and D-3 should be refused. That is certainly not the law.

Mr. Greear: There is no question about D-2 being the law, is there?

Mr. Asbury: If you would amend it to show that a paper filed under penalty of perjury is an oath.

Mr. Greear: This is the law and ought to be given—"notary public or other officer such as a Clerk of a court of record," they are some of the officers.

Mr. Asbury: That instructs a verdict for the
page 162 } defendant; both of those are erroneous.

Mr. Mullins: We argued that on Instruction "A."

Mr. Greear: This is the definition of "oath." That is what "oath" means in law.

Mr. Asbury: It might be all right if you got the last line and a half off.

Mr. Greear: I have no objection to doing that. I thought it would be clear to the jury if we put that in.

Mr. Mullins: In other words, if you didn't tell the jury who some of the officers authorized to administer oaths were, the jury wouldn't know.

The Court: It looks to me like all that "such as" ought to be out.

Mr. Greear: I have no objection to taking it off. All I was trying to do was to make it clear to the jury and I was trying to point out some of the officers. It doesn't say that is all of them, but "such as."

Mr. Asbury: That would entirely do away with Instruction "A." It would have to be qualified to show that the latter part of "A"—

Mr. Mullins: That is all the more reason why "A" should be refused. We feel the Court should reconsider Instruction "A" and refuse it.

Mr. Asbury: We have been through all that before.

The Court: I believe if you are going to men-
page 163 } tion it if there are any other officers they should be included.

Mr. Greear: I will offer it by striking off "such as a Clerk, etc."

Mr. Asbury: He has written D-2 and D-3 together; both have to be passed on together. You referred to D-3 "as set forth above" and "No. 2." D-3 might be correct if you added "as set forth in Instruction A." That eliminates our theory of the case. It eliminates the theory that these income tax returns are given under the penalties of perjury, which is equivalent to an oath, which the Court passed on two or three times. If you will amend that at the end and put "or as a writing under oath or as set forth in Instruction A."

Mr. Greear: No, we would be amending the statute of the state. We are following the statute laws.

Mr. Asbury: The Court passed on this once, in the motion and on argument of Instruction A. Now you are trying to get him to pass on the argument.

Mr. Greear: We are following the statute and our instructions follow the statute.

Mr. Asbury: You argued that law on the motion to strike and the Court overruled you and you argued it again, and now you want to give an instruction against the rules of the court.

Mr. Greear: I want the instruction in line with the statute of the state.

Mr. Mullins: It is the duty of the Court to give instructions according to the statute. That is all we are relying on.

page 164 } Mr. Asbury: We think it is clearly erroneous and should be refused.

The Court: I refuse Instruction D-2.

Mr. Greear: Defendant by counsel excepts to the action of the Court in refusing to give Instruction D-2 and we will offer Instruction D2A.

INSTRUCTION D-2A WAS GIVEN BY THE COURT WITHOUT OBJECTION.

(Referring to Instruction D-3): Mr. Asbury: The Court already ruled twice that that is not a correct instruction. We think that ought to be refused.

Mr. Mullins: Does the Court want to see the statute again?

Mr. Greear: This is not a question for the benefit of the children. This is a criminal case, and that is what this instruction tells them. You have got an instruction that can cause him to make forfeiture up to $1,000.00. The benefit of

the children is not the issue. The question is, is he guilty of the criminal charge?

Mr. Mullins: Section 20-61.1; here is the statute that is based on. That can be the only basis of any verdict in this case against the defendant.

Mr. Asbury: If you amend it "as set forth in Instruction A" as the Court construed the statute. It is up to the Court to construe the statute, not the jury. The Court has decided on two occasions, when he overruled your motion and when he passed on the other instructions. I think it should
page 165 } be amended at the end by adding "as set forth in Instruction A."

Mr. Mullins: We say Instruction "A" is erroneous and should have been refused.

Mr. Asbury: We argued that all morning.

Mr. Greear: Kenneth won't bring in any law on it. Bring me the law; that's all I ask, any kind, from any book. There is no such. He is trying to get you to change the statute. You can't change the statute; you know you are wrong and you think you can run a "sandy."

Mr. Asbury: You are the ones trying to do it. He ruled on it twice.

Mr. Mullins: We want to stay with the statute, that's all. We feel Mr. Asbury is unfair to the Court trying to get him—

Mr. Asbury: That's not fair.

Mr. Greear: You know what you're doing.

The Court: (Reading D-3) It doesn't make it clear to me.

Mr. Asbury: The instruction is argumentative too.

Mr. Greear: That's the law.

Mr. Asbury: That is argument; that's not the law.

Mr. Greear: The question is, did he acknowledge these children to be his by a paper under oath.

The Court: You put stuff in here that doesn't register exactly with me.

Mr. Asbury: We think it ought to be refused.

Mr. Greear: We think it ought to be given. It is up to the Judge.

page 166 } The Court: I am going to refuse it. See if you can't get it down where it will be a little more clearly understood.

Mr. Greear: To which action of the Court in refusing to give instruction D-3, the defendant by counsel duly and properly excepts.

INSTRUCTION D-4 WAS OFFERED TO THE COURT BY THE DEFENDANT.

Mr. Asbury: That is the issue for the jury. They are trying to get the Court to tell—that is a question for the jury to decide whether or whose children they are. The Court already adjudicated that in the divorce case. They are trying to get the Court to reverse itself in the divorce case. That is a question for the jury whose children they are. That is certainly an erroneous instruction.

Mr. Greear: There was no issue in the divorce case with reference to the children. This wasn't raised, and the law says when a man and woman are married and living together and she has children, they are his children. They are not always his actually, but the law says they are. They are legitimate and they are his children. Both of these children were born during wedlock.

Mr. Asbury: For the Court to instruct that they are another man's children would have the Court passing on the evidence and directing a verdict.

Mr. Greear: We are telling what the law is, and that is the law.

Mr. Asbury: That is not the law.

Mr. Greear: Show us where the law is.

Mr. Asbury: The Court adjudicated this in the divorce case.

page 167 } Mr. Greear: The child was born before they separated according to the divorce decree.

Mr. Asbury: The divorce decree said "no children."

Mr. Greear: The divorce decree said they lived together in Bristol until 1949.

Mr. Asbury: That is a question for the jury as to whose children they are.

Mr. Mullins: We have a right to tell the jury what the law is.

Mr. Greear: If the jury doesn't know what the law is, they can't decide the case correctly.

Mr. Mullins: The law says that; they were born in wedlock; they belong to their father and mother.

The Court: The only way D-4 could be given as I see it is:

"The Court instructs the jury that the law says that the two children involved are *prima facie* the children of Atler Stanley and his wife, Lillian Baber Stanley, but may be changed by proper evidence" or something along that line or "this presumption may be rebutted by evidence" or some-

thing to that effect. There is a natural presumption there since Atler Stanley and Lillian Baber Stanley were married, actually married and not divorced, the natural presumption would be that these children are his, but that is a rebuttable presumption.

Mr. Greear: I was under the impression it was a conclusive presumption. Mr. Mullins thinks it is a strong presumption that can be rebutted by clear and convincing proof.

page 168 } The Court: Of course the jury would have to believe it, whatever it is. I will refuse D-4.

Mr. Greear: To which action of the Court in refusing Instruction D-4, the defendant by counsel duly and properly excepts.

INSTRUCTION D-5 WAS OFFERED TO THE COURT BY THE DEFENDANT.

Mr. Asbury: That would be the same objection, the same thing in a different language, the same as 3, which was refused, but in different language, and the Court ruled if we don't have the tax returns, if she acknowledged them her own self she could testify about them, and certainly the last sentence of it is not good.

The Court: I don't think so either, but—

Mr. Asbury: I think if you take the last sentence off and put at the end of that "or as set forth in Instruction A" then I think it would be right.

Mr. Mullins: In reply, the defendant takes the position that the common law is set forth in the case of *Brown* v. *Brown* previously presented to Your Honor, which makes it no duty upon a father to support his illegitimate children. Even if he admits that child is his, unless he goes further than that, he has got to comply with the requisites of the statute, namely, Section 20-61.1 by acknowledging in open court, whih is not involved in this case. There has been no acknowledgment, in fact, the man denies it. Secondly, if he admitted voluntarily in writing under oath that he is the parent. Now the statute was designed to be strictly construed, the reason being that where you have a

page 169 } woman of loose morals and expensive tastes—

The Court: I get all that.

Mr. Asbury: He is just trying to confuse the issues.

Mr. Mullins: There is a great danger that a woman of such loose morals would claim this man was the father of her chil-

dren and pick out a man she felt she would get the most money out of.

The Court: You have a right to argue that.

Mr. Mullins: I just wanted to put this in the record. The General Assembly felt that in order to place the burden of support of an illegitimate child which is born to a woman of questionable character, that is a matter that should not be lightly taken, and generally the testimony of persons of that type is very closely scanned, and in order to avoid such cases as that one, the General Assembly provided it had to be in writing and under oath, which would be a very solemn act, and the writing itself is the best evidence. To permit a woman to come in and say, "Well, he done this, but I don't have it in writing" is exactly what the statute enacted by the General Assembly was designed to prevent. We feel as we previously stated, there isn't any proof at all of any writing under oath.

The Court: (Reviewing Instruction A for the Commonwealth). There isn't any question but what that instruction is opposed to the way the defendant gave his instruction.

Mr. Greear: We are following the statute and he is not following anything.

page 170 } Mr. Asbury: Your Honor already ruled on that and it is the law in this case. There is a lot involved here for these little children.

The Court: I tell you what you do. Take those we have already worked on down there to your office and also take those we have given for the defendant and look at the rest of them. I don't think you need to make any changes in those, but draw these others so they will not be diametrically opposed to each other.

Mr. Greear: Do you refuse Instruction D-5?

The Court: I think the main part of D-5 is all right.

Mr. Asbury: If they add "as set forth in Instruction A," then it would be correct.

Mr. Greear: That is not the statute though. It is contrary to the statute.

The Court: (Reviewing Instruction A for the Commonwealth and Instruction D-4 for the defendant). I don't recall any evidence other than the fact that she was married to Stanley.

Mr. Greear: What do you think about D-5? We think it should be given; it is the law; it is in line with the statute.

Mr. Asbury: It is up to the Court to decide what the statute is. He can't give an instruction one way on one hand and another way on the other.

Mr. Greear: He already has.

Mr. Asbury: No, he hasn't.

Mr. Greear: Let's either refuse it or give it.

page 171 } All we want to do is get rid of this case.

Mr. Asbury: I think it should be refused.

Mr. Greear: I think it should be given and we have given the Court the statute right there. What do you want to do with D-5?

Mr. Asbury: I think 5 should be refused.

The Court: I think D-5 should be changed a little.

Mr. Greear: What change should be made, sir.

The Court: Does that have to be in writing?

Mr. Greear: That's what the statute says.

The Court: I was under the impression that there was some evidence that he acknowledged them to be his, but not under oath.

Mr. Asbury: Yes, sir. there is a paper here; it isn't under oath; and the income tax returns are equivalent to an oath. D-5 in our opinion is wrong.

Mr. Greear: I want you to mark it "given" or "refused."

The Court: I am going to.

Mr. Greear: Let's do it, whichever you want to do.

The Court: I am going to mark it "refused" but I may change it a little bit and give it.

Mr. Greear: To which action of the Court in refusing Instruction D-5, the defendant by counsel duly and properly excepted.

Instruction D-6 was offered to the Court by the Defendant.

Mr. Asbury: D-6 is objected to; that will be telling them to disregard this other one.

The Court: I refuse Instruction D-6.

page 172 } Mr. Greear: To which action of the Court in refusing D-6, the defendant by counsel duly and properly excepted.

Instruction D-4A was offered to the court and was given with no objection by the commonwealth.

Instruction D-7 was offered to the court by the defendant.

Mr. Asbury: This instruction should have "as defined in Instruction "A." I will let that go in, Judge.

Mr. Greear: Thank you.

The Court: I will give D-7.

Instruction D-2A was offered to the court and given with no objection by the commonwealth.

Instruction D-3A was offered to the court by the defendant.

Mr. Asbury: That is the instruction just refused, all he did was add a few words to it, but he still left the defective part in it. If he would put "as set forth in Instruction A" then it would be a correct instruction. The Court refused this and he added one or two words at the top but it didn't correct the part that was defective.

Mr. Greear read the instruction to the court.

Mr. Asbury: It argues the points of the case. He has a right to argue, but not in the instruction. It's the same instruction.

Mr. Greear: There is no argument there, sir.

Mr. Asbury: Yes, sir, there is. It is opposed diametrically to Instruction "A."

page 173 } Mr. Asbury: It comments on Instruction "B." He will argue and say if we didn't have a paper under oath, you ought to dismiss it.

Mr. Greear: Certainly. You will argue, "I have got income tax returns and the Court says that is equivalent to a paper under oath."

Mr. Mullins: We have showed the Court the law and we challenge the Commonwealth to show their authority.

Mr. Greear: We have challenged them since this morning to produce any statement of law to back up Instruction "A," and you can't produce anything to back it up. We think our instruction should be given and he thinks it shouldn't; we want you to mark it one way or the other.

Mr. Asbury: He offered three instructions like that, and the Court told him to amend them.

Mr. Greear: This doesn't mention income tax returns.

Mr. Asbury: If you want to put it on the end there.

Mr. Greear: I am not going to put anything on it.

Mr. Mullins: The Court is to pass on the instructions. We have got the law here to back ours up.

Mr. Greear: It's just a plain statement of the law.

The Court: This is putting it squarely up whether he signed a paper under oath.

Mr. Asbury: Yes, sir, it leaves out if he signed one under penalties of perjury, that that is equivalent to that. You can't have one instruction telling one thing and another tell-

ing another. That instruction leaves it incom-
page 174 } plete.

Mr. Greear: It doesn't say anything against the income tax argument at all. This tells the jury we are not trying the case as to what is good for the children; we are trying a criminal case.

The Court: It might be misleading if that is the purpose.

Mr. Mullins: That is the law. The criminal statute, that is the only way you could instruct the jury. Does Your Honor want us to read the statute again or do you want to read it?

Mr. Asbury: We have been through it ten thousand times.

Mr. Mullins: I don't think you understand.

Mr. Asbury: You don't understand it.

Mr. Greear: We are not a bit uneasy about this client.

The Court: I will give Instruction D-3A.

Instruction D-8 was offered to the court by the defendant and was given without objection.

The Court: Do you want to give it to the jury without argument?

Mr. Asbury: Yes, sir.

Mr. Greear: Yes, sir.

In Courtroom before the Jury:

The Court: Gentlemen of the jury, the case is being submitted to you without argument by counsel. The Court will give you the following instructions which together constitute the law applicable to this case and by which you shall be governed in arriving at your verdict from the evidence. (The Court read the instructions) You may retire to your room and decide the case.

page 175 } (The jury retired to consider the case at 3:27, taking the instructions and exhibits). At 4:00 the jury reached a decision.

The Court: Gentlemen, have you reached a verdict?

Juror: Do we have a right to sentence him to the road force and if he pays the forfeiture bond for the children to withdraw the sentence and fine?

The Court: I better take that up with the attorneys.

Mr. Asbury: They can sentence him so many months on the convict road force and say "or in lieu thereof he shall suffer forfeiture of $1,000.00."

(The jury retired and returned with the following verdict:

"We the jury believe the defendant to be the father of the two children in question and find him guilty of non-support of said children and order him to forfeit $1,000.00 bond for the sole support of children in lieu of jail sentence of twelve months or State Convict Road Force and fine of $500.00. W. I. Holding, Foreman."

Mr. Asbury: We would like to amend that "We find him guilty" and there at the bottom that "said jail sentence of twelve months or state convict road force and fine of $500.00 in lieu of forfeit."

The Court: If you want to take it up on appeal, of course you can.

Mr. Greear: We will want to make a motion to set aside the verdict and take it up on motion day.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official 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 printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§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 references 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 opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, 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. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three 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 the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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