respond in order to preserve his rights.

Service of an expired complaint does not give the Court jurisdiction over the person of the defendant. Had the defendant elected to respond by entering a general appearance, then we could consider the question whether he waived the improper service and voluntarily submitted to the jurisdiction of the Court. *Bentley v. Bentley*, 66 D&C 596 (1948). However, in the case at bar, defendant did not enter any appearance, and the failure to serve the complaint according to the Rules of Civil Procedure rendered the service of the complaint a nullity.

An attempt to correct the late service by filing a praecipe for reinstatement nunc pro tunc is a unique, but patently ineffective procedure. The Rules of Civil Procedure establish the procedure for reinstatement at Rule 1010. There is no provision for filing a praecipe to reinstate nunc pro tunc; such a procedure would permit the Court to take jurisdiction over the person of defendant without notice to that defendant. Having been served with a complaint rendered a nullity by improper service, the defendant could, with assurance that his rights were not in jeopardy, ignore the action. Reinstatement nunc pro tunc by praecipe gives the defendant no notice that those same rights are in jeopardy. Pa. R.C.P. 248 allows modification of all time limits by written agreement of the parties or by order of court. Actions which are attempted by a party "nunc pro tunc" are effected under Rule 248, which insures proper notice to the parties.

Review of the transcript of the Master's hearing in this case supports the Master's opinion that the plaintiff has failed to sustain her burden of proof; she has not made out a case for divorce by clear and satisfactory evidence creating a preponderance of evidence in her favor. *Taddigs v. Taddigs*, 200 Pa. Super. 29, 186 A. 2d 455 (1962); *Smith v. Smith*, 206 Pa. Super. 310, 213 A. 2d 94 (1965). A divorce decree must be founded upon compelling reasons and upon evidence that is clear and convincing. *Walper v. Walper*, 198 Pa. Super. 409, 182 A. 2d 209 (1962).

The only evidence of indignities offered was testimony about defendant's excessive drinking of intoxicants, and plaintiff's testimony of hearsay regarding her husband's association with "other women." None of the testimony is sufficient to establish indignities to the person of the plaintiff. The Superior Court has consistently held that drunkenness, no matter how excessive, is not an indignity. *Schrock v. Schrock*, 241 Pa. Super. 53, 359 A. 2d 435 (1976); *Shoemaker v. Shoemaker*, 199 Pa. Super. 61, 184 A. 2d 282 (1962). Plaintiff did not

testify to defendant having committed any improper acts, such as physical violence, vulgarity or unmerited reproach while intoxicated.

Further, the testimony regarding defendant's association with other women is vague and unconvincing. Plaintiff has no actual knowledge of such associations, so that the nature and extent of any friendships or relationships between defendant and another woman could not be considered. *Lapiska v. Lapiska*, 202 Pa. Super. 607, 198 A. 2d 386 (1964). Although evidence of defendant's conduct after separation is relevent to shed light on the parties behavior prior to the separation, *Kramer v. Kramer*, 194 Pa. Super. 538, 168 A. 2d 624 (1961); such evidence is not admissible for the purpose of proving indignities. *Scott v. Scott*, 21 Cumb. 24 (1971). Plaintiff, has, therefore, failed to sustain her burden of proof. Either this failure or the procedural defect in service alone would mandate a denial of the relief requested by plaintiff in the divorce complaint, and a dismissal of that complaint.

ORDER OF COURT

NOW, this 4th day of December, 1979, the plaintiff's exceptions to the report of the Master are dismissed. The plaintiff's action for divorce a.v.m. is denied.

Costs to be paid by the plaintiff.

Exceptions are granted the plaintiff.

HARRISON v. HARRISON, C.P. Franklin County Branch, F.R. 1979-975

Custody - Child's Preference - Age and Sex of Child

1. Some weight must be given to an 11 year old child's preference as to which parent she prefers to reside with, however, her expressions are not controlling on the court.

2. The stated preference of a four or five year old is not entitled to much weight by the court.

3. The age and sex of the child is a keystone factor in any custody determination.

4. A girl's psychological and social adjustment to her environment are more easily made through the confidence of a mother-daughter relationship.

David W. Rahauser, Esq., Attorney for Petitioner

Timothy S. Sponseller, Esq., Attorney for Respondent

OPINION AND ORDER

EPPINGER, P.J., November 27, 1979:

Jeffry and Wilma Harrison are husband and wife. They are the parents of Julie, who was born September 3, 1968, and Jason, who was born February 5, 1975. They separated in early July of 1979, and at that time Jeffry left their home and took the two children with him. The only time the children have not lived with both parents is since the separation.

This is an action by Wilma to obtain custody of the children. She states that it is in the best interests of the children to reside with her. The father resists her petition.

With very little else to dwell upon, much of the testimony was on the work schedules of the parties. Wilma is employed as a Registered Nurse and her hours generally are from 6:50 in the morning until 3:00 in the afternoon. Occasionally she works overtime and rotates working every other Saturday and Sunday. If the Court grants her request for residential custody, her arrangements for caring for the children while she is working are entirely satisfactory. When the parties lived together, she bore the principal responsibility for disciplining the children and thought discipline consisted of teaching good behavior as well as punishing misbehavior. She maintained a fairly regular schedule for the children and participated in recreational and other activities with them.

Wilma complains that while the children are with their father, they spend a great deal of time in a restaurant which is owned by Jeffry's parents. This assertion was borne out by the evidence in the cast. It is their custom to eat many meals in the restaurant, and Jason frequently stays with his baby-

sitter, if he likes what she is having for supper. It is established that the children and their father do not often share mealtimes.

Since the parties have separated, Wilma remains in the house; however, it is listed for sale. The house is an attractive one, located near a golf course in a fine residential area. Mrs. Harrison is regarded by those who know her as a caring, loving mother who finds herself in a difficult situation, but whose main concern is for the children.

Jeffry is employed as a sales representative. He and the children are now living in a mobile home behind the restaurant. He gets up at 5:00 in the morning and awakens Julie. The two of them go to the restaurant for breakfast, leaving Jason in the home. Jeffry then takes her to the bus stop, which is necessary because when the parties separated he moved into another school district but wanted Julie to continue in the school she had been attending.

Jeffry returns from work between 5:00 and 6:30 p.m. He has made satisfactory arrangements for looking after the children when he is at work. His family, a sister and both parents, are interested in the children and help where they can. Jason is attending nursery school, as he did before the parties separated.

The mobile home is a two bedroom model; Jeffry and Jason sleep in one room, Julie in the other. There is no cooking done in the home, and the children bathe at their grandparents'. In addition to his sales work, Jeffry works on the weekends at the restaurant. He acknowledges that eating arrangements are a little catch-as-catch-can.

Jeffry enjoys outdoor activities with the children. They go on camping outings and had a vacation together last summer. Since he has had custody of the children he has never denied Wilma visitation rights, but if Julie doesn't want to go with her mother he doesn't require her to do so. Those who know Jeffry say he has a good relationship with the children.

Julie is 11 and in the 6th grade at the Middle School in Chambersburg. She said her father decided to move to her grandmother's and asked her whether she wanted to go with

him. She responded affirmatively and stated that she is happier with her father because he spends more time and does more things with her., If she gets to stay with him, she says she can see her mother whenever she wants. Her preference is to remain with her father. Jason said that things are going all right where he is now.

This brief summary of the evidence indicates that neither the father nor the mother is disqualified from having residential custody of the children. So the sole issue remains what is in the children's best interest. This is the test and while the legal principles are easily stated, their application is much more difficult. *Commonwealth ex rel. Holschuh v. Holland-Morritz*, 448 Pa. 437, 292 A.2d 380 (1972).

We have Julie's statement that she would like to remain with her father, and some weight must be given to that, but her expressions to this effect are not controlling upon the court. *Humphreys v. Hess*, 11 Cumb. 33 (1960).

Since the demise of the tender years doctrine, *Spriggs v. Carson*, 470 Pa. 290, 368 A.2d 635 (1977), it is no longer possible to conclude this case by simply saying that young children are best served by being with their mother. For in fact there are circumstances where that is not so.

But here we have a girl of eleven, entering or approaching puberty with all its ramifications. As Judge Hoffman wisely stated in a dissenting opinion in *Commonwealth ex rel. Zeedick v. Zeedick*, 213 Pa. Super 114, 245 A.2d 663 (1968), the age and sex of the child is a keystone factor in any custody determination. He then went on to explain that a mother can explain the process of maturation and sexual knowledge to growing daughters better than a father, and that experience has taught us that a girl's psychological and social adjustment to her environment are more easily made through the confidence of a mother-daughter relationship. While Judge Hoffman went on to tie these proven principles with the tender years doctrine, we think that standing alone they are largely determinitive of the issue in this case. For as we said, both parents are otherwise qualified for residential custody. But as to Julie, considering her age and sex, we conclude that it is in her best interest to have immediate access to her mother during the next important and formative years and that can best be achieved by her living with her mother with

substantial visitation custody for her father. See *Leedy v. Shaffer*, 3 Franklin Co. L.J. 14 (C.P. Franklin County, 1979). Wilma, because of her training as a nurse, is admirably suited to guide her daughter during this period.

Jason, who is four years old, was agreeable to his present situation. That did not mean, we conclude, that he expressed a preference for living with his father. But even if he did make such an expression, our courts have indicated that the stated preference of four and five year olds is not entitled to much weight. *Commonwealth ex rel. Johnson v. Johnson*, 195 Pa. Super 262, 171 A.2d 627 (1961); *Commonwealth ex rel. Maines v. McCandless*, 175 Pa. Super 157, 103 A.2d 480 (1954).

The advisibility of raising children together was discussed in *Sykora v. Sykora*, Pa. Super , 393 A.2d 888(1978). There it was pointed out that any benefit derived from forcing one child to reside with one parent solely for the purpose of keeping the children together can be outweighed by the detrimental effects on the child who prefers not to live with that particular parent. We find that there is a manifest benefit to these two children in bringing them up together. Therefore we find that Jason should likewise live with his mother with substantial visitation custody in the father.

As to the visitation custody, in the past the parties have been able to develop their own visitation schedule. We therefore refrain at this time from making an order fixing the times when the children shall be with the father. If, however, the parties cannot agree, on application of either party, without further hearing, the court will make a further order fixing the father's visitation periods.

ORDER OF COURT

November 27, 1979, custody of Julie and Jason Harrison is awarded jointly to their parents, Wilma R. Harrison and Jeffry C. Harrison. For the purposes of exercising such custody, Wilma R. Harrison shall have residential custody of the children and the children shall live with her. Jeffry C. Harrison shall have visitation custody of the children at times to be agreed upon by the parties. If the parties cannot agree, on application of either, without further hearing, the court will make an order fixing the father's visitation periods.

The court retains jurisdiction for making such further orders as may be required. The parties shall each pay their own costs.

MENTZER v. APPLEBY, C.P. Franklin County Branch, Equity Vol. 7, Page 168

Equity - Pending Prior Action - Appointment of Board of View - Res Judicata - Establishment of Private Road

1. Where an equity action involves the question of the ownership of a road and a petition is later filed to appoint a board of view to layout a private road across defendant's land, a disposition of the prior action would act as a bar to the present action on the grounds of res judicata.

2. The rule of res judicata does not require that the subsequent suit be identical in all respects to the prior suit and may bar a subsequent action even though it is based on a different right of action.

John McCrea, III, Esq., Counsel for Plaintiffs

Jerry A. Weigle, Esq., Counsel for Defendants

OPINION AND ORDER

KELLER, J., November 16, 1979:

Defendants have raised, by Preliminary Objection to the Petition for Appointment of a Board of View, the issue of whether the above captioned action is pending prior action which requires that the petition for the Board of View be dismissed. At present, the proceedings of the Board of View have been suspended by Order of Court dated February 14, 1979, pending a decision on the Preliminary Objections.

The Pennsylvania Supreme Court in *Hessenbruch v. Markle*, 194 Pa. 581, 593 (1900) stated the general principle of law on prior pending actions:

> "A plea of former suit pending must allege that the case is the same, the parties are the same, and the rights asserted and the relief prayed for the same; and where the proof of the plea can be ascertained by an inspection of the record the court will determine the question without a reference."

This does not precisely describe the present actions in question. The parties to the Petition for Board of View include Terry Rosenberry, who is not a party to the suit in equity. Nevertheless, because of the issues raised in the equity action, "it appears a disposition of the prior action would act as a bar to the present action on the grounds of res judicata." *Petrasko v. Fellin*, 60 Luz. L. R. 186 (1969). The nature of the ownership of the road in question and the question of whether it is a public or a private road, is factually and legally essential to a determination by the Board of View as to the necessity and propriety of laying out a private road across the land owned by defendants. Therefore, it is proper to stay the proceedings of the Board of View pending the outcome of the prior action. *Petraska*, supra.

Petitioners urge that the provision for a Board of View is a "separate, and distinct statutory remedy which although bearing upon the original lawsuit, produce a different result and affect additional party rights." It remains a fact, however, that the plaintiffs wish to establish a right of way to their land over land owned by defendants. Their suit in equity and the Petition for a Board of View seek, by different legal methods and conflicting factual allegations, to achieve this end. A resolution of the suit in equity has the potential of barring action by the Board of View based upon a legal determination of the status of the land, the road, in controversy. The rule of *res judicata* does not require that the subsequent suit be identical in all respects to the prior suit. The court in *Bowers Estate*, 240 Pa. 388, 87 A. 711 (1913), clearly states that the rule of *res judicata* applies with the same strictness where the cause of action, although not technically the same, is so related to the cause of action in the prior litigation that the same matter essential to recovery in the second was determined in the first. *Bowers* is cited in *Loughran v. Matylewicz*, 367 Pa. 593, 81 A. 2d 546 (1951), where the court held that the appellee had established his ownership in a certain pond against appellant's predecessor in title, so that the issue of ownership determined in *Wm. Baylor v. W. S. Decker* was *res judicata* in *Loughran v. Matylewicz*. See also *Ottinger v. Walling*, 335 Pa. 77, 5 A. 2d 801 (1939); *Wallace Estate*, 316 Pa. 148, 174 A. 397 (1934).

In *Ottinger*, the issue was whether damages could be recovered for "maintenance" by a seaman in a second action for the same injury. The court held that "the prior judgment operates as an estoppel when the subject matter controverted