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Though most of the family law decisions of the supreme court and appellate courts of Tennessee reported during 1964 were of the common garden variety, four cases presented issues of notable significance, and in three of them the supreme court seems to have decided questions of first impression in this jurisdiction.[1] As usual, the most common cause of controversy lay in matters of alimony, child support, and property settlements; but there were also decisions regarding grounds for divorce, child custody, the wife's right to damages for loss of the husband's consortium, and the parents' liability for a child's tort. Three other decisions are of interest mainly because of the conflict-of-laws problem presented,[2] and these will be dealt with in the Conflicts section of the *Survey*.[3]

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1. Morrissey v. Morrissey, 377 S.W.2d 944 (Tenn. 1964); Rush v. Great Am. Ins. Co., 376 S.W.2d 454 (Tenn. 1964); Bocock v. Rose, 373 S.W.2d 441 (Tenn. 1963).

2. Coury v. State *ex rel.* Webster, 374 S.W.2d 397 (Tenn. 1964), held that a Tennessee court has jurisdiction to decide the question of custody of the children after the wife was granted a divorce and custody by an Oklahoma court, which later authorized her to take the children to Tennessee, where she eventually became domiciled. The Oklahoma court's custody order was not entitled to full faith and credit and was not binding on the Tennessee courts after the children had become residents of Tennessee.

Burton v. Burton, 376 S.W.2d 504 (Tenn. App. W.S. 1963), held that the right of a wife, a Tennessee resident, to support by the husband was terminated by a decree of a Texas court awarding him an absolute divorce. Even though the wife had received only constructive service in the Texas divorce proceeding, the decree was entitled to full faith and credit because Texas was the only matrimonial domicile.

Strube v. Strube, 379 S.W.2d 44 (Tenn. App. W.S. 1963), held that a decree of a Georgia court granting the wife a divorce and custody of the children was entitled to full faith and credit as against the husband's claim for custody after he moved to Tennessee and obtained possession of the children. Since the wife had moved to Florida, if any change of custody is in order, it should be made by decree of the court at the wife's place of residence.

3. See Cheatham, *Conflict of Laws—1964 Tennessee Survey*, 17 Vand. L. Rev. 937 (1964).

I. GROUNDS FOR DIVORCE

In *Reitano v. Reitano*,[4] an appellate court applied with somewhat unusual liberality a generally recognized interpretation of what constitutes cruelty as a ground for divorce. The husband had sued for a divorce on the ground of cruelty, his complaint alleging, among other things that the wife had "carried on intimate and [sic] associations with another man . . . and that this co-respondent will be named at the hearing." The wife filed an answer denying the charges and a cross-bill for divorce on the ground of cruelty. In his answer to the cross-bill, the husband averred that the wife "was carrying on illicit associations with her employer as alleged in the original bill." At the trial, the husband produced no credible evidence to support these charges of illicit relations, and he admitted in his testimony that he had no basis for thinking that his wife had actually had sexual relations with the named co-respondent or any other man. The circuit court dismissed the original bill and granted the wife an absolute divorce on grounds of cruelty and abandonment. The court of appeals modified the decree to make it rest on cruelty alone. In support of its affirmance of the granting of the divorce, the appellate court referred only to the rule that "false charges of adultery constitute cruel and inhuman treatment as a ground for divorce."[5]

Though this proposition was announced in a dictum by the Tennessee court as early as 1855,[6] the decisions which are commonly cited as authority do not appear expressly to adopt it nor clearly to rest on it. Rather, in each of them the basis for divorce was proof that the defendant had been guilty of various types of misconduct toward the plaintiff, including physical violence or severe threats thereof, abusive language, and extreme quarrelsomeness, as well as false accusation of infidelity, the cumulative effect of which constituted cruelty.[7] In cases decided in other jurisdictions also, it appears frequently to be true that, while an unfounded charge of immorality or adultery may

4. 373 S.W.2d 213 (Tenn. App. W.S. 1963).

5. *Id.* at 219.

6. Shell v. Shell, 34 Tenn. 716 (1855). "We have recently held that deliberate and repeated accusations of adultery against the wife, by her husband, without grounds, is a sufficient cause [for divorce for cruelty]." *Id.* at 728. The recent holding is not cited, however. Watson v. Watson, 25 Tenn. App. 28, 33-34, 149 S.W.2d 953, 956 (M.S. 1940), reiterated this rule in dictum.

7. Parks v. Parks, 158 Tenn. 91, 11 S.W.2d 680 (1928); McClanahan v. McClanahan, 104 Tenn. 217, 56 S.W. 858 (1900); Lyle v. Lyle, 86 Tenn. 372, 6 S.W. 878 (1888); Sharp v. Sharp, 34 Tenn. 496 (1855). The latter case may be the decision referred to in Shell v. Shell, *supra* note 6, but the proof indicates that the defendant had committed acts of physical brutality, had defrauded the complainant in a pre-nuptial property settlement, had often flown into rages and threatened her, and had repeatedly accused her of being deranged, as well as charging her with having been intimate with another man.

be the most emphasized factor in the defendant's objectionable conduct, other wrongful acts are also cited as contributing to the ultimate finding of such cruelty as constitutes a ground for divorce.[8] In the *Reitano* case, the wife's cross-bill alleged other acts of the husband to support the charge of cruelty, but they were of such a relatively mild nature as not to add much weight to the complaint;[9] and the appellate court made no mention of them except in the statement of the facts, but rather referred only to the false charges of adultery as constituting cruelty.

If this decision indicates a more liberal point of view than most previous Tennessee cases,[10] it is yet supported by what has been termed the great weight of authority in other jurisdictions.[11] And the result is further sustained by the fact that the husband's accusations were made, not only orally to the wife's mother, but also as formal allegations in his complaint and his answer to the cross-bill.[12] In such circumstances, the charges are likely to receive considerable publicity, tend to be viewed by the public as having substance, and take on permanency as a part of the court's record. Once the accusations have been published in this manner, it seems highly improbable that the parties can ever be reconciled,[13] and quite likely that the falsely accused spouse will suffer the harmful consequences which most jurisdictions require as an element of cruelty justifying divorce. This element is variously stated as impairment or threat of impairment of health, or severe anguish, or extreme mental suffering, which renders further cohabitation with the wrongdoing spouse intolerable.[14]

8. See Annot., 143 A.L.R. 623, 643 (1943); Note, 28 MICH. L. REV. 937 (1930).

9. See Reitano v. Reitano, *supra* note 4, at 214: rude, callous and cold treatment of wife's parents; refusal to attend church with wife; neglect of wife when she was ill; showing preference toward their older child.

10. It is true that Beard v. Beard, 158 Tenn. 437, 439, 14 S.W.2d 745, 746 (1929), declares unequivocally that, "The publication of a false accusation of adultery by a husband against the wife constitutes cause for divorce." However, the supreme court only indicated that there was material evidence to support the findings of the chancellor and the court of appeals that plaintiff was entitled to a divorce, and ruled that the findings below were therefore not open to review in the supreme court. As authority for the rule set out above, only the Sharp, Lyle, and McClanahan cases, *supra* note 7, were cited, and as already noted, in each of those cases numerous acts of cruelty, in addition to the false accusations, were alleged.

11. See Annot., 143 A.L.R. 623-24 (1943), citing many cases from various states; Note, 24 KY. L.J. 98 (1935).

12. That a false charge of infidelity made in a divorce complaint or in an answer to such a complaint may constitute cruelty, see cases cited in Annot., 51 A.L.R. 1188 (1927). It may be significant that in Beard v. Beard, *supra* note 10, the false charges of adultery were made in a divorce complaint.

13. See Note, 24 KY. L.J. 98 (1935); Note 28 MICH. L. REV. 937 (1930).

14. Babcock v. Babcock, 117 Conn. 310, 167 Atl. 815 (1933); Massey v. Massey, 40 Ind. App. 407, 80 N.E. 977 (1907); Annot., 143 A.L.R. 623, 640 (1943). In the *Reitano* case the wife's cross-bill averred that the husband's misconduct was such as to render cohabitation unsafe and improper. 373 S.W.2d at 214. This phraseology is

A further requisite is that the false charges were made recklessly, wilfully, maliciously or without probable cause;[15] a good faith accusation made with some reasonable basis will not constitute cruelty even though it is groundless and the maligned party is completely innocent.

The trial judge in the *Reitano* case found that the husband had no reasonable cause to believe that the wife had engaged in sexual relations with other men. He then went on to express concern over the fact that such allegations had been included in the husband's complaint and answer when there was no evidence to support them, and decried the "reckless license" that was taken with the reputations of innocent persons. "I am thoroughly ashamed," he concluded, "that the facilities of this Court were taken for that purpose and used so recklessly."[16] It is to be hoped that such references to the nature of the professional responsibilities of lawyers engaged in divorce litigation may have a salutary effect.

II. WIFE'S RECOVERY FOR LOSS OF CONSORTIUM

Faced with another issue not previously settled in Tennessee, the supreme court in *Rush v. Great American Insurance Co.*[17] demonstrated a strong reluctance to deviate from a rule which it found to be the established common law in a large majority of the states. A married woman brought an action for damages for the loss of consortium of her husband resulting from serious personal injuries sustained by him in an automobile accident allegedly caused by defendant's negligence.[18] The trial court sustained defendant's demurrer and dismissed the case on the ground that a wife cannot maintain suit for loss of her husband's consortium. On appeal, the supreme court affirmed, concluding its opinion with the statement: "We do not think

standard in Tennessee cases charging cruelty as a ground for divorce. See Sharp v. Sharp, *supra* note 7, at 497; Parks v. Parks, *supra* note 7, at 94, 11 S.W.2d at 681.

15. Steele v. Steele, 237 Mich. 639, 213 N.W. 66 (1927); McArthur v. McArthur, 135 N.J. Eq. 215, 37 A.2d 76 (T. Err. & App. 1944); Annot., 143 A.L.R. 623, 634, 638 (1943); Annot., 51 A.L.R. 1188, 1191 (1927).

16. Reitano v. Reitano, *supra* note 4, at 219. The husband testified that he had not said that the wife had had sexual relations with anyone else but had only told his attoruey that the wife had carried on improperly with her employer, and that the attorney had chosen to insert the phrases "intimate associations," "co-rcspondent" and "illicit associations" in the complaint and the answer to the cross-bill. Though the attoruey argued that such terms as "intimate" and "illicit" do not necessarily imply sexual improprieties, the trial judge declined to believe that anyone is so naive as not to understand the clear intent of the language used.

17. 376 S.W.2d 454 (Tenn. 1964); 6 WILLIAM & MARY L. REV. 97 (1965).

18. Plaintiff's declaration alleged that the husband had been severely injured in the groin and pelvic regions and that his reproductive organs were so seriously damaged as to raise grave doubts regarding his virility.

it is within our province to create in this State a new action which was unknown at the common law and has not been provided for by statute."[19]

It is uncontroverted that, prior to 1950, no state recognized a cause of action in the wife for loss of her husband's consortium, resulting from a negligently inflicted injury.[20] Various reasons were advanced in support of this rule. Mainly, the courts pointed to the fact that the common law disabilities of coverture prevented the wife from having such a cause of action because she could not own property separately from her husband and so could have no property right in her husband's consortium, and consequently, no cause of action for loss thereof. The married women's acts were held not to change the situation, as they only removed procedural obstacles to her ability to sue, and did not create new causes of action. These courts also termed the wife's loss too indirect or remote to sustain recovery, and were concerned lest a recognition of such a right of action would result in awarding of highly speculative damages or in double recovery for the same loss,[21] since the husband had a personal cause of action for loss of earning capacity, and recovery for this item would serve indirectly to compensate the wife for loss of support, which was regarded as the main element of her rights to enjoy her husband's consortium.[22]

Legal writers generally found the rule logically unsupportable,[23] and in 1950 the Court of Appeals for the District of Columbia in *Hitaffer v. Argonne Co.*[24] re-examined the reasons for the denial of such an action by the wife, found them to be no longer persuasive under the present state of the law governing married womens' status, and allowed a wife to recover the damages sought. As a consequence of this breakthrough, the issue has been revived all across the nation; and while in twenty jurisdictions the courts declined to recede from the earlier common law position, in at least eleven jurisdictions the

19. Rush v. Great Am. Ins. Co., *supra* note 17, at 459.

20. McCORMICK, DAMAGES § 92 (1935); PROSSER, TORTS § 119 (3d ed. 1964). Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), had held such a cause of action existed, but that decision was overruled by Hinnant v. Tide Water Power Co., 189 N.C. 120, 120 S.E. 307 (1925). The right had also been reeognized in Ohio, but was abrogated in Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).

21. See Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918).

22. For a full review of these reasons, see Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 350 U.S. 852 (1950); Annot., 23 A.L.R.2d 1378, 1380-82 (1952); Note, 14 WASH. & LEE L. REV. 324 (1957).

23. See PROSSER, *op. cit. supra* note 20, at 916-17 nn.17, 18. Kinnard, *Right of Wife To Sue for Loss of Consortium Due to a Negligent Injury to Her Husband*, 35 KY. L.J. 220 (1947). See Rush v. Great Am. Ins. Co., *supra* note 17, at 456.

24. *Supra* note 22.

view of the *Hitaffer* case has been adopted.[25]

The growing minority view is based on the reasoning that the married women's acts have wrought a fundamental change in the common law concept of the marital relationship and indicate a legislative purpose to place married women in an equal position with men in respect to the ability to own property, to contract and to sue and be sued.[26] The effect of this legislation is that a wife is vested with the capacity both to own property in the form of a cause of action for loss of her husband's consortium and to bring suit to enforce this cause.[27] It is denied that the wife's loss is remote or consequential in the sense of a lack of proximate causation or that the damages are any more speculative than those which a husband recovers for loss of an injured wife's consortium or those which any injured person recovers for pain and suffering or mental anguish.[28] And recognizing a right of recovery in both the husband and wife is said not to involve double recovery, because the defendant's wrong results in two separate and distinct losses in two different persons.[29] Further demonstrating the illogic of the majority rule is the fact that the same courts which adhere to it will allow a wife to recover damages for loss of consortium from one who has *intentionally* injured the husband or interfered with the marital relation.[30]

Some of the courts which persist in denying recovery to the wife in cases of negligent injury to the husband have freely conceded that the basis for that rule is no longer sound in the light of the legal

25. The states now recognizing the wife's cause of action are Arkansas, Delaware, Georgia, Illinois, Iowa, Michigan, Mississippi, Missouri, Montana (by federal court decision), Nebraska (by federal court decision), and South Dakota. See cases cited in Note, *supra* note 17, at 98 (1965). Oregon has adopted the same view by statute. See Ellis v. Fallert, 209 Ore. 406, 307 P.2d 283 (1957).

26. As a means of eliminating the inequality of the rights of wife and husband in regard to recovery for loss of consortium, several states, instead of creating a new right in the favor of the wife, have abolished the traditional common law cause of action of the husband. Rogers v. Boynton, 315 Mass, 279, 52 N.E.2d 576 (1943); Carey v. Foster, 221 F. Supp. 185 (E.D. Va. 1963), applying VA. CODE ANN. § 55-36 (1950).

27. Hitaffer v. Argonne Co., *supra* note 17; Cooney v. Moomaw, 109 F. Supp. 448 (N.D. Neb. 1953); Acuff v. Schmit, 248 Iowa 272, 78 N.W. 480 (1956).

28. See discussion in Note, *supra* note 22, at 327-28 (1957).

29. Kinnard, *supra* note 23. See Pomd, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, at 193-94 (1916).

The assumption of the majority that the wife's claim for loss of consortium is essentially a claim for loss of support, is, of course, not justified by the generally accepted definitions of consortium. They include within that term, not only loss of support, but also loss of conjugal fellowship, love, companionship, affection, society, comfort, solace, services, and sexual relations. See Montgomery v. Stephan, 359 Mich. 33, 36, 101 N.W.2d 277, 228 (1960); Guevin v. Manchester St. Ry., 78 N.H. 289, 292, 99 Atl. 298, 301 (1916).

30. See PROSSER, *op. cit. supra* note 20, at 917; Annot., 23 A.L.R.2d, 1378, 1389.

status occupied by married women under modern law;[31] some, on the other hand, attempt to refute the legal arguments and discount the practical considerations on which the minority view rests.[32] Both groups concur finally that if a change in the law is to be made, it should be made by the legislature.[33]

In its opinion in the *Rush* case, the Tennessee court indicated that it had attempted to read every reported decision on the issue involved, but it dismissed the growing minority view with little more than one terse sentence.[34] The rest of the opinion is devoted to a review of the authority supporting the majority view[35]—which apparently was completely persuasive to the court—and finally to the declaration that any revision of the law in this field must come from the legislature.

In view of the fact that in the short space of fifteen years a dozen courts have recognized the wife's right to recover for loss of consortium, and a number of others have also acknowledged the force of the reasoning supporting such recovery, there are obviously some quite substantial legal and policy bases for departing from the rule denying this cause of action. In this situation, it is somewhat disappointing to have the highest court of a state resolve the issue by observing that such a remedy would be "a new action which was unknown at the common law,"[36] and that the matter must therefore

31. See, *e.g.*, Baird v. Cincinnati, N.O. & T.P. R.R. Co., 368 S.W.2d 172-74 (Ky. 1963): "The reasoning of the *Hitaffer* opinion basically rests on the epochal evolution in the status and position of a wife from conditions which existed in olden times under common law. . . .
"In the present age the distinction between the right of a wife and of a husband to maintain the action is at odds with reason." See also Ripley v. Ewell, 61 So.2d 420, 423 (Fla. 1952).

32. See, *e.g.*, Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963); Seagreaves v. Legg, 127 S.E.2d 605 (W. Va. 1962).

33. *E.g.*, Smith v. United Constr. Workers, 271 Ala. 42, 122 So.2d 153 (1960).

34. "A few jurisdictions have followed *Hitaffer*, but most of them continue to deny the wife's claim." Rush v. Great Am. Ins. Co., *supra* note 1, at 456. *Cf.* PROSSER, *op. cit. supra* note 20, at 918, for the statement that since 1958 "the trend has been definitely in the direction of approval" of the wife's cause of action.

35. The court observed that, while it had never before considered the exact issue of the case directly, it had done so "obliquely," citing two wrongful death cases in which a surviving widow was held not to be entitled to recovery of damages for "loss of comfort and enjoyment," or for grief, mental anguish or solatium resulting from the death of her husband. These decisions are hardly relevant to the matter of whether a wife may recover for loss of consortium of a husband who survives the personal injuries, because in the death cases, any claim must be based on a statutory cause of action, and wrongful death statutes are generally construed to allow recovery for only *pecuniary* losses sustained by the surviving kin. In the wife's suit for loss of consortium, she is attempting to enforce a common law cause of action based on the same considerations and allowing the same type of recovery as the common law action which a husband may prosecute for damages for loss of his wife's consortium.

36. Rush v. Great Am. Ins. Co., *supra* note 17, at 459.

be left to the legislature. The first observation seems to rest on the premise that the common law was crystallized at some remote time as an immutable body of rules which should forever prevail. On the contrary, the strength of the common law as a living institution in a changing world lies in the fact that it is continually being subjected to judicial reinterpretation and modification as the culture in which it operates produces new problems. Persistent reference to what the common law *"was"* creates a danger of overlooking a fundamental characteristic of the common law—that it not only "was" but that it also "is," and that like any other vital living organism, it must continue to develop or it will die. Though the legislatures, of course, have the power to alter the existing law by statute, legal history demonstrates that the work of the courts in modifying the common law has been at least of equal significance in keeping the legal system consistent with the needs of a changing social order. While sufficient justification may be found for either recognizing or denying a wife's right to recover for loss of consortium, the function of the court before which this problem is posed is well delineated by the Illinois Supreme Court: "We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities. Nor do we find judicial sagacity in continually looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal concepts of the past."[37]

III. LIABILITY OF PARENT FOR TORTS OF CHILD

The scope of a parent's liability for damages for personal injuries inflicted by the tortious conduct of a child was expanded in *Bocock v. Rose*[38] beyond the limits previously recognized in this state. Plaintiff sued the mother and father for damages resulting from an assault on him by their minor sons. The complaint alleged that defendants violated a duty to plaintiff by failing to restrain their sons from exercising known propensities to assault others, and that as a result of this failure, plaintiff was injured. Defendants' demurrer was sustained by the trial court, but the supreme court reversed and remanded, ruling that the complaint stated a cause of action. Acknowledging that it was deciding a case of first impression, the court carefully

37. Dini v. Narditch, 20 Ill. 2d 406, 429, 170 N.E.2d 881, 892 (1960). See Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 547 (Mo. 1963): "The all-prevading and overwhelming fact is that the concept of the inferior status of the wife has been totally repudiated and for this court to perpetuate the erroneous denial of a right of a wife based upon that repudiated early common-law concept on the ground that if the manifest wrong is to be righted, it must be done by the legislature, would be an improper avoidance of our judicial function."

38. 373 S.W.2d 441 (Tenn. 1963).

limited the scope of its rule by spelling out four conditions which must be met in order to establish liability of a parent in such a case. (1) The parent must have had the "opportunity and ability to control the child"; (2) the parent must have known (or have had sufficient reason for knowing) of "the child's habit, propensity or tendency to commit specific wrongs"; (3) the specific acts must have been such as "would normally be expected to cause injury to others"; and (4) the parent must have failed "to exercise reasonable means of controlling or restraining the child."[39]

The question of a parent's liability for the torts of a child seems to have been raised on surprisingly few occasions before the higher Tennessee courts. Such decisions as have been reported demonstrate that the general rule of non-liability has been adopted in this state,[40] but that liability will be imposed under the family purpose doctrine,[41] and under the dangerous instrumentality rule.[42] It has also been indicated that a parent may be held liable for injuries inflicted by the child's use of an instrumentality which is not inherently dangerous but which becomes a menace in the hands of an unusually irresponsible, vicious or high-tempered child.[43] In both of the latter situations, liability is imposed, not on the basis of the parent-child relationship, or of imputation of the child's wrong to the parent, but on the ground that the parent is negligent in allowing the child to have possession and use of such a device under such circumstances.

The supreme court specifically pointed out that these dangerous or potentially dangerous instrumentality cases were not controlling in the *Bocock* case, but emphasized that liability could only be based on the parents' own negligence, which might be found in the failure to restrain, discipline or control the child. While this is by no means a novel theory,[44] the *Bocock* decision represents what seems to be an

39. Bocock v. Rose, *supra* note 38, at 445.

40. King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918). See MADDEN, PERSONS AND DOMESTIC RELATIONS § 117 (1931); PROSSER, *op. cit. supra* note 20, at 892; Gissen v. Goodwill, 80 So. 2d 701, 705 (Fla. 1955): "The deed of a child, the enactment of which results in harm to another . . . cannot be laid at the door of the parents simply because the child happened to be born theirs."

41. King v. Smythe, *supra* note 40; Messer v. Reed, 186 Tenn. 94, 208 S.W.2d 528 (1948); Driver v. Smith, 47 Tenn. App. 505, 339 S.W.2d 135 (W.S. 1959).

42. Smith v. Salvaggio, 4 Tenn. Civ. App. 727, 731 (1914): "[I]t is well settled law that a parent who permits his or her child to have possession of a deadly weapon when, on account of the child's youth and inexperience, he is incompetent to be entrusted with it, and the parent knows the danger that might happen to others from the use of such weapon, or in the exercise of reasonable care should know it, is liable for injuries inflicted upon the other by the child's reckless use of such weapon." (22-calibre rifle in the hands of a nine-year old boy.)

43. Highsaw v. Creech, 17 Tenn. App. 573, 69 S.W.2d 249 (W.S. 1933) (air rifle—no liability because of lack of proof that child was of abnormal nature or that parents had knowledge of any vicious propensities of child).

44. See Paul v. Hummel, 43 Mo. 119 (1868); Norton v. Payne, 154 Wash. 241, 281

increasing inclination in American courts to interpret the rule broadly so as to support liability.[45] This lengthening list of recent decisions holding parents responsible for personal injuries inflicted by children with known predispositions to harm others, and the impressive amount of recent legislation placing liability on parents for property damage intentionally caused by their minor children[46] appear to reflect a growing concern in our society over the frequency with which malicious acts of juvenile vandalism and terrorism are being committed. These statutes have been held to be constitutional when attacked on due process grounds,[47] though there may be some question as to their effectiveness in reducing misconduct by children.[48] It may be significant that though Tennessee has had such a statute in effect since 1957,[49] no cases in which its provisions were applied have yet been reported in the supreme or appellate courts of this state. The Tennessee act provides that no recovery shall be had from the parent if he "shows due care and diligence in his care and supervision" of the child. This reservation is consistent with conditions which the

Pac. 991 (1929); Harper & Kime, *The Duty To Control the Conduct of Another*, 43 YALE L.J. 886, 893 (1934); RESTATEMENT, TORTS § 316 (1934).

45. For recent cases recognizing the rule that a parent's liability may arise from failure to restrain a child from committing tortious wrongs injuring others, even though no dangerous or potentially dangerous instrumentality is involved, see Bieker v. Owens, 234 Ark. 97, 350 S.W.2d 552 (1961); Ellis v. D'Angelo, 116 Cal. App. 310, 253 P.2d 675 (1953); Gillespie v. Gallant, 24 Conn. Supp. 351, 190 A.2d 606 (1963); Gissen v. Goodwill, *supra* note 40 (recovery denied because no proof of habit or propensity of child to commit the wrongful act); Caldwell v. Zaher, 344 Mass. 590, 183 N.E.2d 706 (1962); Langford v. Shu, 258 N.C. 135, 128 S.E.2d 210 (1962); Landis v. Condon, 95 Ohio App. 28, 116 N.E.2d 602 (1952); Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944); Preston v. Duncan, 55 Wasb. 2d 678, 349 P.2d 605 (1960).

46. See Comment, 3 VILL. L. REV. 529, 536-37 (1958), listing 22 states with such statutes, nearly all of which have been adopted since 1951. The states listed (with citations) are: Arizona, California, Connecticut, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, West Virginia and Wisconsin. All except Louisiana limit liability to damages intentionally caused by the child. All of the statutes cover property damage, though a few are limited to damage to school and other public buildings; some extend also to personal injuries. Comment, *supra* at 536-37, lists Arizona, Connecticut, Georgia, Louisiana, Ohio and Rhode Island among the latter group.

47. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963); Kelly v. Williams, 346 S.W.2d 434 (Tex. Civ. App. 1961).

48. Such a statute was passed by the New York legislature but was vetoed by the Governor, who felt that the imposition of liability on parents was an unwise measure because the penalty would fall most frequently on the lower income families where it would cause the most hardship, and because the existence of such potential liability might increase tensions between parents and children. See Comment, 28 U. KAN. CITY L. REV. 183, 187 (1960); Note, 55 MICH. L. REV. 1205, 1207 (1957).

49. TENN. CODE ANN. §§ 37-1001 to -1003 (Supp. 1964). Since the act limits the parents' liability to $300 (a common limitation in this type of statute), it may be that suits have been brought to enforce the liability, and the defendant parents have not thought it worth while to appeal adverse judgments.

Bocock decision places on the imposition of liability on parents, indicating that both the legislature and the courts, while desirous of providing compensation to the injured persons or property owners, are taking a realistic view of the practical limitations which reduce the parents' theoretical ability to control the conduct of their minor children.[50]

IV. Enforcement of Property Settlement

Another apparent case of first impression, though the court did not designate it as such, is *Morrissey v. Morrissey*,[51] in which a woman sought specific enforcement of a property settlement agreement. The wife had been granted a divorce by the General Sessions Court of Springfield, Tennessee, which approved and incorporated into the final decree a property settlement previously made by the parties. Thereafter, both parties moved to Davidson County, and the wife brought suit in the chancery court of that county for specific performance of the settlement contract. The chancellor denied relief, and the supreme court affirmed the dismissal of the case. First, it was pointed out that, by statute,[52] every divorce decree which includes a support order remains in the court which entered the decree, and may be enforced or modified only by that court, even if both parties move to another county. When complainant argued that she was not attempting to enforce the divorce decree, but rather was seeking to enforce the settlement agreement as a separate contract, the supreme court responded by ruling that when the divorce court incorporated the agreement into its decree, the agreement became merged in the decree and lost its contractual nature.

This seems to be the first holding by the Tennessee Supreme Court that a property settlement which is incorporated into a divorce decree loses its separate identity so as to become unenforceable as a distinct cause of action. At one point the court stated that *Kizer v. Bellar*[53] "is identical with the case now before us" except as to the different courts involved;[54] however, the *Kizer* case did not involve a settlement agreement of the parties incorporated into the decree, but

50. "This is an era when strict, parental control of the children appears to be somewhat unfashionable. Children are faced with ever-inereasing opportunity to become involved in tortious acts. They have more instruments readily available to aid in their difficulties. They are more free to act than at any time in our history. The parent is thus faced with a problem that appears to defy solution." Comment, 28 U. Kan. City L. Rev., 183, 205 (1960).

51. *Supra* note 1.

52. Tenn. Code Ann. §§ 36-820, -828 (1956).

53. 192 Tenn. 540, 241 S.W.2d 561 (1951), holding that only the court which enters the divorce decree awarding alimony and child support to the wife had jurisdiction to enforce the alimony provision.

54. Morrissey v. Morrissey, *supra* note 1, at 945.

only an alimony and child support award of the divorce court, which the wife was attempting to enforce in another court. An appellate court's decision in *Doty v. Doty*[55] was cited in support of the rule that the property settlement merged into the decree and lost its separate identity thereby; however, in the *Doty* case, the issue was not whether such an agreement could be enforced as a separate cause of action, but whether its incorporation into the divorce decree deprived the court of the statutory power to modify the support provisions of the decree. The *Doty* case cited several other Tennessee decisions, but in none of them was the issue whether specific performance of the agreement could be obtained.[56] They concur in declaring that "the agreement of the parties merely supplied the evidence upon which the court fixed the award,"[57] so that the support provision stands as an order of the court, not the contract of the parties. This, of course, does not necessarily mean that the agreement was destroyed as a contractual obligation enforceable apart from the decree, and no prior Tennessee case so holding has been found. One appellate court decision has cited an Alabama case as ruling that an agreement of the parties becomes "merged into the decree and thereby loses its contractual nature . . ."; but that statement is concluded with the qualification: "at least to the extent that the court has the power to modify the decree when changed circumstances so justify."[58]

Further, it is to be noted that none of the Tennessee cases here discussed involved *property settlements* of the parties; rather, they dealt with alimony and child support agreements which the courts approved and made part of the decrees. In many jurisdictions, even though an agreement of the parties regarding alimony and child support which is incorporated into the decree remains within the power of the court to change, an agreement settling their property rights is not subject to such modification.[59] Under this view, the matter of whether the

55. 37 Tenn. App. 120, 260 S.W.2d 411 (W.S. 1952).

56. Perry v. Perry, 183 Tenn. 362, 192 S.W.2d 830 (1946); Brown v. Brown, 156 Tenn. 619, 4 S.W.2d 345 (1928); Osborne v. Osborne, 29 Tenn. App. 463, 197 S.W.2d 234 (E.S. 1946). In the *Perry* case, the support agreement which the divorce court had incorporated into its decree was held to be void because the divorce was found to have been obtained by collusion. In the *Brown* case, the issue was whether a decree incorporating a property agreement of the parties was enforceable by contempt proceedings. In the *Osborne* case, and in Thomas v. Thomas, 46 Tenn. App. 572, 330 S.W.2d 583 (E.S. 1959), the question was the same as in the *Doty* case—the court's power to modify the support decree which had incorporated a settlement agreement of the parties.

57. Doty v. Doty, *supra* note 55, at 125, 260 S.W.2d at 413.

58. Worthington v. Worthington, 224 Ala. 237, 240, 139 So. 334, 335 (1932), quoted in Osborne v. Osborne, *supra* note 56, at 468, 197 S.W.2d at 236.

59. "As distinct from provisions dealing with alimony, a divorce agreement's property settlement provisions, once adopted in the decree, are inviolable." Note, 20 U. CHI. L. REV. 138, 153 (1932). See also Erwin v. Erwin, 179 Ark. 192, 14 S.W.2d 1100 (1929);

contract merged into the decree is irrelevant when, as in the *Morrissey* case, property settlements are involved, and becomes significant only when alimony or child support agreements are being dealt with. However, the Tennessee courts seem not to have given effect to this distinction;[60] and the *Morrissey* decision gives further indication that, for purposes of determining whether an agreement of the parties loses its identity by incorporation into the decree and therefore can be modified, property settlements and support agreements are treated alike.

If no distinction is to be made between the different types of agreements, the question of whether incorporation into a divorce decree destroys the separate contractual effect of either should be decided on the basis of the intention of the parties in having the court give recognition to the agreement. If their purpose was to have the court pass on the fairness of the terms, the reasonableness of the benefits conferred and burdens imposed, and the voluntariness of its adoption by the parties, so as to establish its validity, then the fact that the agreement was "incorporated into the decree" so as to become the basis for the support or property division provisions of the decree should not extinguish the agreement as a source of independent contractual liability. If, on the other hand, the purpose was to have the agreement become part of the decree and to have the court order its performance, the parties would seem to have intended the agreement to merge into the decree and lose its identity as a separate contract.[61]

If, on the basis of this test, it appears that the parties did not intend to have a merger take place, the agreement should be specifically enforceable in a suit in any court with jurisdiction over the parties and the subject matter, quite apart from any proceedings which might be brought in the divorce court to enforce the provisions of the decree. Several courts, including one Tennessee appellate court, have, in fact, provided substantially that remedy.[62]

Hall v. Hall, 105 Colo. 227, 97 P.2d 415 (1939); Kohl v. Kohl, 330 Ill. App. 284, 71 N.E.2d 358 (1947); Kistler v. Kistler, 141 Wis. 491, 124 N.W. 1028 (1910); Annot., 166 A.L.R. 675-76, 693 (1947); Note, 19 So. CAL. L. REV. 70 (1945).

60. Doty v. Doty, *supra* note 55, at 125, 260 S.W.2d at 413, recognized the distinction as being observed in other states, but did not apply it. However, compare Johnson v. Johnson, 51 Tenn. App. 205, 366 S.W.2d 141 (W.S. 1962) (court's property division decree is not subject to subsequent modification; statute authorizes modification only of allowances of periodic monthly payments).

61. Flynn v. Flynn, 42 Cal. 2d 55, 265 P.2d 865-66 (1954): "[I]t is first necessary to determine whether the parties and the court intended a merger. If the agreement is expressly set out in the decree, and the court orders that it be performed, it is clear that a merger is intended. . . . On the other hand, the parties may intend only to have the validity of the agreement established, and not to have it become part of the decree enforceable as such." Note, 20 U. CHI. L. REV. 138, 146 (1952).

62. Newburger v. Newburger, 14 Tenn. App. 229 (W.S. 1932) (child support agree-

If the parties to a divorce proceeding wish to make their own final arrangements for support and property settlement, rather than to have the court determine these matters in granting the divorce, it seems that such a process of amicable negotiation and agreement is generally preferable to adversary maneuvering during the trial and court imposition of terms at the conclusion. The divorce court's role is then only to determine whether the agreement was voluntary, fair and reasonable; and the decision on these points merely declares the validity of the subsisting separate contract. In accordance with the parties' request, the divorce decree would contain no provisions regarding property division or support matters,[63] except that it would refer to and approve the agreement of the parties. And that agreement remains enforceable in the same manner as any other valid contract. However, if the parties attempt to make their own separate agreement, and then have it incorporated into the decree as the court's support and property division determinations, difficulties may well arise unless the original contract is held to have lost its separate identity by merger into the decree. Otherwise, the divorce court, by statute or by term of the decree, would have the power to modify its own provisions in case of a change of circumstances, but the original terms of an unmerged contract would remain enforceable. Thus, if a change of conditions justified an increase in the wife's support allowances, she could obtain a modification of the decree and enforce the modified provision. However, if the husband should persuade the court that a change had occurred which entitled him to a decrease in the support allowances, the wife would still be able to obtain the original amount by enforcing the terms of the parties' agreement as a subsisting contract right. It would seem unwise and unfair to put the husband in a position in which he could only be at a disadvantage by having the divorce court adopt an agreement of the parties as the basis for its support or property division award. And so, whenever the parties request the court to make support and property settlement matters a part of its decree, they should be held to have intended that their agreement as to these matters is destroyed as a separate contract.[64] The result of the *Morrissey* decision is consistent with this line

ment); Coxe v. Coxe, 20 Del. Ch. 384, 178 Atl. 104 (Ch. 1935) (property settlement); Hudson v. Hudson, 36 N.J. 549, 178 A.2d 202 (1962) (judgment in N.J. court for arrearages in payments of alimony and child support agreement which had been incorporated into Alabama divorce decree).

63. This procedure involves no violation of §§ 36-820 and 36-828 of the Tennessee Code, as they merely state that the divorce court *"may"* make orders for support of the wife and children, but do not require it to do so. And the parts of these sections which provide that the orders shall remain in the control of the court for subsequent modification surely apply only to the terms of support orders issued by the court and not to the terms of agreements of the parties unincorporated into the decree.

64. See discussions in Note, 19 So. CAL. L. REV. 70 (1945); Note, 31 So. CAL. L. REV. 287 (1958).

of reasoning, though the language of the opinion leaves some doubt as to when the court would be willing to recognize the continued existence of a support agreement as a separate contract.[65]

V. Miscellaneous: Support Awards, Property Settlements, Contempt, Custody

Several other decisions dealt with family law questions of a more routine nature, most of them relating to support matters. In *Plumb v. Plumb*,[66] the husband had obtained a divorce by a decree which placed custody of one child in the husband and one in the wife who was to receive 200 dollars a month for support of that child. Within thirty days after the decree was entered, the husband petitioned the court for reduction of the support award. The trial court granted a reduction to 165 dollars per month, and the court of appeals affirmed, holding that the court below had jurisdiction to modify the award on either of two bases: (1) that the petition be treated as one for a rehearing before the divorce decree became final, in which case reduction of the award could be made to correct an error in the original findings regarding the husband's ability to pay; or (2) that the petition be treated as one for modification of a final decree because of a change of the husband's financial circumstances.

The validity of the Reciprocal Enforcement of Support Act was upheld by the Tennessee Supreme Court in *Martin v. Martin*,[67] against the contention that it violates the state constitutional provision against suspension of the general law for the benefit of any particular individual[68] because it permits a petition in a Tennessee court by a non-resident on a pauper's oath whereas the general law allows residents to file suit on a pauper's oath only in certain other designated types of cases.[69]

65. *E.g.*, the court quotes 17 Am. Jur. *Divorce & Separation* § 773 (1957): "It would appear to be the almost universal rule that where a court has the general power to modify a decree for alimony, such power is not affected by the fact that such a decree for alimony *refers to*, or even incorporates or adopts, *an agreement entered into by the parties to the action.*" 377 S.W.2d at 946 (Emphasis added).

Also, the court asserted: "If such agreement stood alone it would probably be met in the first instance by a proper plea or answer showing it was contrary to public policy in that it is made on consideration that the parties get a divorce." *Ibid.* There is no explanation of the import of the last clause of this statement, bnt certainly it is not true that separation agreements made in contemplation of divorce to deal with support aud property settlement matters are inevitably "contrary to public policy." See Smedley, *Domestic Relations—1963 Tennessee Survey*, 17 Vand. L. Rev. 1039, 1046 (1964).

66. 372 S.W.2d 771 (Tenn. App. W.S. 1962).

67. 373 S.W.2d 609 (Tenn. 1963).

68. Tenn. Const. art. XI, § 8.

69. Tenn. Code Ann. § 20-1629 (Supp. 1964).

In *Mayhew v. Mayhew*,[70] it was held that the court which grants a divorce and orders support payments retains exclusive jurisdiction to enforce the decree, and that contempt proceedings for alleged failure to comply with the support provisions cannot, therefore, be brought in any other court.

Two cases dealt with the propriety of decrees by divorce courts divesting wives of their interest in property owned jointly with their husbands. In one instance the divestiture was held to be improper, the property having been owned by the husband and wife as tenants by the entireties, and having been purchased with the proceeds of the sale of other property owned by them in the same capacity.[71] In the other case, the court was held to have acted properly under its statutory authority to adjust the rights of the parties in jointly owned property "so as to preserve for [the] husband that portion of such property as for which he contributed and paid."[72]

Finally, a decree awarding custody of daughters aged four and seven to the husband because of the wife's illness was held to be in error, in view of the general rule that "a mother, except in extraordinary circumstances, should be with her child of tender years," especially since the evidence indicated that the mother could care for the children in her parents' home, in spite of her poor health.[73]

70. 376 S.W.2d 324 (Tenn. App. M.S. 1963).

71. Lansing v. Lansing, 378 S.W.2d 786 (Tenn. App. W.S. 1963).

72. Wilson v. Andrew, 375 S.W.2d 650 (Tenn. 1963). The statute in question is TENN. CODE ANN. § 36-825 (1956). The section now in effect empowers the court to act "so as to preserve for each or either party, that portion of such jointly owned property as may be just and reasonable under the facts and circumstances of the case . . . ." TENN. CODE ANN. § 36-825 (Supp. 1964). It was ruled that the court had power to divest the wife of her property interest even though she was served by publication only.

73. Bevins v. Bevins, 383 S.W.2d 780 (Tenn. App. E.S. 1964).