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DOMESTIC RELATIONS—1960 TENNESSEE SURVEY

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I. ADOPTION OF CHILDREN

In the case of *McIntyre v. Doe*,[1] an attempt was made to revoke a surrender of a child after expiration of the statutory period for revocation.[2] Both the trial court and the supreme court held that the statutory provisions were mandatory and that there must be substantial compliance with them in order to effect a revocation. The surrender had been accomplished as prescribed by statute.[3] The natural mother of the child some two to four months later stated informally to the chancellor that she wished to revoke the surrender, but she did not return to accomplish the revocation within the prescribed time. On the last day of the statutory period her attorney filed a petition for revocation and held another informal discussion of the matter with the chancellor. The mother did not appear at this conference, and when a hearing was later held the chancellor ruled that the statutory requirements had not been met. In affirming, the supreme court noted that the statutes do not contemplate the filing of a petition for revocation and that the procedure followed was

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1. 332 S.W.2d 191 (Tenn. 1960).
2. TENN. CODE ANN. § 36-117 (1956).
3. TENN. CODE ANN. § 36-114 (1956). The surrender occurred before the effective date of the 1959 amendment, TENN. CODE ANN. §§ 36-112 through -14 (Supp. 1960), and accordingly both it and the revocation were governed by the earlier statutes.

ineffectual. The parent had ample opportunity to appear before the judge in chambers to revoke the surrender in the prescribed manner if she had desired to do so.

II. PERSONS IN LOCO PARENTIS

In a case of first impression, the supreme court held that prospective adoptive parents of a child have an insurable interest in the life of the child.[4] The foster parents had acquired the child from a licensed agency and had entered into a contract with the agency under which they were to have the care and custody of the child but were not to file adoption proceedings without consent of the agency. The agreement was subject to termination by either party. While in custody of the child, the foster parents procured a policy of insurance on its life. Later they returned the child to the agency and undertook to assign the policy to a bank under a trust agreement for the benefit of the child, the agency and a charity. They continued to pay the premiums on the policy until suit was filed by the insurer to cancel the policy for lack of insurable interest in the foster parents. The chancellor held that the policy was void, although he found that it had been procured in good faith.

Reversing, the supreme court held that a person standing *in loco parentis* to a child has sufficient relationship to him to have an insurable interest in his life. Under Tennessee law, an insurable interest need exist only at the time the policy is procured.[5] Therefore the later surrender of the child did not affect the validity of the policy.

III. DIVORCE, ALIMONY AND COUNSEL FEES

1. Venue.—The subject of venue in divorce actions was discussed in *Ensley v. Ensley*.[6] The parties had resided in Campbell County, Tennessee until the wife was adjudged incompetent. She was committed to a hospital in Knox County. The husband filed suit for divorce in Knox County, alleging that the parties were residents of Campbell County. The guardian ad litem for the wife filed a plea in abatement which was sustained by the trial court. The supreme court affirmed.

In divorce cases, venue, in the case of residents of the state, may be in the county "where the parties resided at the time of their

4. Volunteer State Life Ins. Co. v. Pioneer Bank, 327 S.W.2d 59 (Tenn. App. E.S. 1959). For further discussion of this case, see Andersen, *Insurance—1960 Tennessee Survey*, 13 VAND. L. REV. 1143 (1960).

5. Marquet v. Aetna Life Ins. Co., 128 Tenn. 213, 159 S.W. 733, 1915B L.R.A. 749 (1913).

6. 326 S.W.2d 481 (Tenn. 1958).

separation, or in which the defendant resides, or is found . . . ."[7] Divorce is a transitory action, and the defendant may properly be served in a county other than his residence.[8] There is, however, a general venue statute which localizes transitory actions when the parties are residents of the same county.[9]

In the present case, the wife was deemed unable to change her residence because of her incompetency.[10] Consequently both parties resided, legally, in the same county when the suit was filed, and the restrictive statute applied.

2. Jurisdiction.—The case of *Baber v. Baber*[11] dealt with the question of whether there had been sufficient acts of cruelty committed within the state to permit a divorce, and with the proof required to establish acts of cruelty. The only act alleged by the complainant was that his wife had admitted to him her adultery in another state. The admission occurred in a motel room in Tennessee.

In a somewhat cryptic opinion the supreme court affirmed the action of the trial court in dismissing the suit. The court stated that cruelty is usually considered to be a persistent course of conduct extending over a period of time.[12] It is possible, of course, for a single act to be so severe as to meet a statutory definition of cruelty.[13] In the present case the court simply held that a single unwitnessed admission of misconduct is, by itself, insufficient to meet the statutory requirement. The holding on this point seems satisfactory on the facts given in the opinion.

The court stressed further the fact that the admission by the wife was uncorroborated. Corroboration of the confessions or admissions of a guilty party is frequently required,[14] but it is not clear from the present opinion whether the court was announcing a general rule that there must be corroboration in all cases or whether it was merely dissatisfied with the evidence in the instant case. It is, of course, well settled that the testimony of the complaining party in divorce cases must be supported by corroborating evidence where such can be obtained,[15] and it may be that the court felt that the complainant's own evidence was too meager to permit a divorce decree.

3. Cancellation of Decree.—In the case of *Hill v. Hill*[16] the wife had

7. TENN. CODE ANN. § 36-804 (1956).
8. Williams v. Williams, 193 Tenn. 133, 244 S.W.2d 995 (1951).
9. TENN. CODE ANN. § 20-401 (1956).
10. Hannon v. Hannon, 185 Tenn. 307, 206 S.W.2d 305 (1947).
11. 330 S.W.2d 307 (Tenn. 1959).
12. Schwalb v. Schwalb, 39 Tenn. App. 306, 282 S.W.2d 661 (W.S. 1955).
13. 17 AM. JUR. *Divorce and Separation* § 54 (1957).
14. 17 AM. JUR. *Divorce and Separation* § 420 (1957).
15. Greene v. Greene, 309 S.W.2d 403 (Tenn. App. W.S. 1957).
16. 326 S.W.2d 851 (Tenn. App. W.S. 1958).

been awarded a decree of divorce upon substituted service of process, alleging that her husband was a non-resident whose whereabouts was unknown. Approximately a year later the husband filed the present suit to set aside the divorce for fraud, claiming that his wife had sworn falsely with respect to the above allegations, and also alleging that his marriage to her was void because of his previously existing marriage. The chancellor found that the husband had had full knowledge of the divorce action, had made no effort to oppose it, and that he was guilty of laches in making a belated attack upon the divorce decree.

The court of appeals affirmed, pointing out that if the allegations of the present bill were true, then the wife would clearly have been entitled to a divorce in all events because of the previous marriage of the husband.[17] The findings of laches and of waiver were also affirmed since no excuse for the delayed attack was offered.

4. Alimony and Counsel Fees.—Four cases were reported during the survey period dealing with various aspects of alimony awards.

(a) Discretion To Deny Alimony.—In the case of *Mount v. Mount*[18] there had been a limited divorce awarded to the wife on grounds of cruelty. She had been granted monthly support and counsel fees, and leave had been given to either party to apply within one year to make the divorce absolute. Accordingly the present petition was filed by the wife within the one year period, seeking the absolute divorce. At the hearing the chancellor granted her the divorce but said that neither party was at fault and declined to award alimony to the wife.

The court of appeals reversed insofar as the trial court had declined to allow alimony. It pointed out that the chancellor had already adjudged the husband guilty of cruelty and that the ultimate divorce decree was entered pursuant to this finding. When the wife is the guilty party, alimony may not be awarded to her under Tennessee law,[19] but when she is the prevailing party in the divorce action, wide discretion is given the courts as to the type and amount of alimony which may be awarded.[20] In the present case, it was held to be an abuse of discretion to refuse any award at all.

(b) In Solido—In Futuro.—The parties in the foregoing case had entered into a stipulation regarding the assets of the husband, so that

17. TENN. CODE ANN. § 36-801(2) (1956).
18. 326 S.W.2d 493 (Tenn. App. W.S. 1959).
19. TENN. CODE ANN. § 36-826 (1956). An attempted award of alimony in such cases is beyond the jurisdiction of the court and is void. Brown v. Brown, 198 Tenn. 600, 281 S.W.2d 492 (1955).
20. TENN. CODE ANN. §§ 36-821 to -23 (1956).

it was possible for the appellate court to fix alimony without remanding the case to the trial court for proof. Since the husband had a substantial income and a moderate amount of accumulated assets, the court of appeals awarded the wife part of the assets and a specified periodic support, subject to modification in the event of altered circumstances of the parties.

The award finally made, therefore, was a combination of alimony *in solido* and alimony *in futuro*. There is, of course, no absolute formula for determining the amount or kind of alimony to be awarded in all cases. As allowed in Tennessee, alimony is deemed to be in lieu of the husband's obligation to support the wife during the marriage.[21] Alimony *in solido* is usually favored when the estate of the husband will permit, but some form of periodic support is necessary in the great majority of cases.

It was possible for the court to award only alimony *in solido* in the case of *Raskind v. Raskind*.[22] The husband had a very substantial estate and a large annual income. The wife had contributed her earnings and part of her inheritance to the family assets before the husband's income had become substantial. In fixing alimony, the trial court awarded her an amount of real estate approximately equivalent to her contributions to the family funds. In addition she was allowed alimony and counsel fees in the amount of ninety-five thousand dollars.

In affirming the award, the court of appeals stated that alimony *in futuro* should not be allowed despite the earning power of the husband, since the estate was sufficient to permit substantial alimony *in solido*. The court did correct an error of the trial court in taxing the counsel fees as court costs, since such fees are generally considered to be part of the alimony decree.[23] It affirmed the action of the trial court in assessing only part of the total counsel fees of the wife against the husband. Since the wife's contribution to the family funds had been restored to her, it was deemed equitable that she bear part of the fees of her attorneys.

(c) Duty To Pay Counsel Fees.—In the case of *Thomas v. Thomas*,[24] the court of appeals held that the former husband may be required to pay counsel fees of his former wife in proceedings brought subsequent to divorce for the enforcement of alimony. Although such has long been the practice in Tennessee, there has been no previously reported case clearly so holding. Courts in other states are divided on

21. Rush v. Rush, 33 Tenn. App. 496, 503, 232 S.W.2d 333, 336 (W.S. 1949).
22. 325 S.W.2d 617 (Tenn. App. W.S. 1959).
23. Riley v. Riley, 9 Tenn. App. 643 (W.S. 1929).
24. 330 S.W.2d 583 (Tenn. App. E.S. 1959).

the question.[25] The husband contended that since the parties were no longer married, he had no obligation to provide legal services to his former wife. Under Tennessee statutes, however, decrees for periodic support are expressly retained within the jurisdiction of the divorce court.[26] Accordingly, the court of appeals held that proceedings to enforce a support order are merely continuations of the original divorce proceedings, and counsel fees are properly allowable to the former wife.

(d) Court Alteration of Support Agreement.—In this case the trial court had allowed the wife three hundred dollars per month as support despite the fact that at the time of the divorce, many years earlier, the parties had made a separation agreement allowing only one hundred dollars per month. This action was affirmed, since the courts are not bound by the terms of a private contract between the parties regarding periodic support, but may modify such contracts as circumstances require.[27] Besides making the additional award, however, the trial court had ordered the payments to continue beyond the date specified in the contract for termination of support payments. The court of appeals reversed this portion of the decree as being premature and directed that the question of continuance of the payments be reserved until the expiration date arrived.

(e) Attachment of Property—Non-Residents.—A non-resident wife attempted to attach Tennessee real estate owned by her husband in *Pierce v. Pierce*.[28] Both parties resided in Illinois, and the wife had been awarded separate maintenance there. She had not sought a specific amount of alimony, however, because the husband was not employed and owned no property in Illinois. She filed the present suit in Tennessee to attach the land and have it awarded to her as alimony.

Both the trial court and the supreme court held that the Tennessee courts had no jurisdiction to attach the property under the allegations of the bill. The suit had been filed under the attachment statutes.[29] Under these statutes, when both parties are non-residents and live in the same state, an attachment can be obtained in Tennessee only upon allegation that the defendant has removed his assets to this state to avoid the processes of the courts of his home state.[30] No such allegation was made in the present case, and there was no allegation

25. Annot., 15 A.L.R.2d 1252 (1951); 17 AM. JUR. *Divorce and Separation* § 640 (1957).
26. TENN CODE ANN. § 36-820 (1956).
27. Doty v. Doty, 37 Tenn. App. 120, 260 S.W.2d 411 (W.S. 1952); Osborne v. Osborne, 29 Tenn. App. 463, 197 S.W.2d 234 (E.S. 1946).
28. 325 S.W.2d 253 (Tenn. 1959).
29. TENN. CODE ANN. §§ 23-601, -608, -609, -646 (1956).
30. TENN. CODE ANN. § 23-609 (1956).

that he was about to dispose of his assets fraudulently so as to justify an equitable attachment apart from the statutes.[31] There was no apparent reason why judgment for alimony could not have been obtained in the Illinois courts. Suitable steps could then have been taken, either in Illinois or in Tennessee, to enforce such a decree.

5. Jointly-owned Property.—In *Hill v. Hill*[32] the husband was awarded a divorce from his wife. The parties owned their home as tenants by the entirety. The husband sought to have his wife's interest in the property vested in himself. A statute enacted shortly after the deed to the parties authorizes a divorce court to vest jointly-owned property in the husband when the husband is awarded a divorce, under proper circumstances.[33] The trial court, however, declined to divest the wife of her interest, and the court of appeals affirmed. As in several previous cases,[34] the court held that the trial court has wide discretion as to the use of this statutory power. It also expressed doubt as to whether the statute could affect a deed executed before its effective date.[35]

IV. Family Immunity in Tort

Two cases decided during the survey period dealt with the question of family immunity in tort.

In *Prince v. Prince*[36] the supreme court adhered to a number of previous decisions to the effect that spouses may not maintain tort actions against each other under Tennessee law.[37] The court has permitted such actions to be maintained in the state courts where the tort occurred in another state and was governed by the law of such state,[38] but it refused to depart from its earlier rule in the instant case insofar as Tennessee substantive law is concerned. The existence of liability insurance was held not to affect the result.

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31. See 2 Gibson, Suits in Chancery § 928 & n. 107 (5th ed., 1956).
32. 329 S.W.2d 840 (Tenn. App. W.S. 1959).
33. Tenn. Pub. Acts 1953, ch. 90, § 1. The statute was re-written and broadened in 1959. See Tenn. Code Ann. § 36-825 (Supp. 1960); Harbison, *Domestic Relations—1959 Tennessee Survey*, 12 Vand. L. Rev. 1183, 1189 (1959).
34. Schwalb v. Schwalb, 39 Tenn. App. 306, 282 S.W.2d 661 (W.S. 1955); Humphreys v. Humphreys, 39 Tenn. App. 99, 281 S.W.2d 270 (W.S. 1954); Grant v. Grant, 39 Tenn. App. 539, 286 S.W.2d 349 (W.S. 1954); Harbison, *Domestic Relations—1956 Tennessee Survey*, 9 Vand. L. Rev. 990, 997 (1956).
35. Humphreys v. Humphreys, *supra* note 33.
36. 326 S.W.2d 908 (Tenn. 1959), 27 Tenn. L. Rev. 422 (1960).
37. Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932); Tobin v. Gelrich, 162 Tenn. 96, 34 S.W.2d 1058 (1931); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628, 1916B L.R.A. 881 (1915). See generally, Sanford, *Personal Torts Within the Family*, 9 Vand. L. Rev. 823 (1956).
38. Lucas v. Phillips, 326 S.W.2d 905 (Tenn. 1957) (applying Arkansas statutes); *cf.* Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954) (federal courts in Tennessee applying North Carolina law).

In *Brown v. Selby*,[39] however, the administrator of a divorced wife was allowed to maintain a tort action against the former husband despite the fact that the beneficiaries would be children of the marriage. The husband had murdered his former wife, and her administrator filed a wrongful death action. The trial court sustained a demurrer on the ground that a minor child may not sue its father in tort.[40] Since the children were the sole beneficiaries of the action, he felt that the suit was an indirect action by them against their father. In reversing, the supreme court pointed out that the right of action would have been in the mother had she lived, and that with her divorce, all immunity between her and the former husband had ceased. The mere fact that the recovery for her death would go to her children, therefore, was held not to prevent assertion of the cause of action.

V. TENANCY BY THE ENTIRETIES

The effect of a partition deed to husband and wife was considered in *Johnson v. Beard*.[41] The wife, her brother and her sister inherited property from their father as tenants in common. Thereafter by voluntary deeds they partitioned the land in kind. The conveyance of the wife's portion of the property was made to her and her husband. In proceedings to construe the deed many years later, it was insisted that the effect of the deed was to create an estate by the entireties. Both the chancellor and the supreme court held, however, that the husband acquired no interest under the deed. Following an earlier decision,[42] the court held that a voluntary partition deed "passes no title and creates no new estate but merely effects a severance of possession, whereby an estate theretofore owned jointly, is thereafter owned in severalty."[43] Under modern law, it would have been possible for the wife, after receiving the partition deed, to have made a new conveyance to her husband so as to create an estate by the entireties,[44] but the partition deed itself was ineffectual to do so.

39. 332 S.W.2d 166 (Tenn. 1960), 27 TENN. L. REV. 614 (1960).
40. Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991 (1903).
41. 332 S.W.2d 208 (Tenn. 1960).
42. Holt v. Holt, 185 Tenn. 1, 202 S.W.2d 650, 173 A.L.R. 1210 (1947).
43. 332 S.W.2d at 209.
44. TENN. CODE ANN. § 64-110 (Supp. 1960).