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Domestic Relations -- 1955 Tennessee Survey

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DOMESTIC RELATIONS—1955 TENNESSEE SURVEY

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There were several important decisions rendered by the Tennessee appellate courts upon this subject during the survey period, and some new statutes were enacted which are worthy of note.

ADOPTION OF CHILDREN

A case of some significance concerning rights of inheritance by adopted children was decided by the Supreme Court.[1] The adoptive parent died in 1950, survived by the adopted child. In 1953, the mother of the adoptive parent died, survived by blood relatives and the grandchild by adoption. The latter claimed a share in the grandparent's estate, claiming by representation through its adoptive parent.

The Supreme Court decided the case under the former adoption statutes,[2] which had been repealed in 1951.[3] The former statute provided that "unless restrained by the decree," an adoption conferred upon the person adopted "all of the privileges of a legitimate child" of the applicants.[4] The child was given capacity "to inherit and succeed to the real and personal estate of such applicant, as heir or next of kin."

The problem presented was whether the language of the statute conferring "all of the privileges of a legitimate child" should be literally interpreted, or whether inheritance should be restricted to direct inheritance from the estate of the adopting parent. The Supreme Court chose the more restricted interpretation and denied recovery, holding that the adopted child had no interest in estates of relatives of the adoptive parents. "In other words, one adopts a child for himself, not for anybody else."[5]

In view of an earlier holding that an adopted child does not inherit from collateral relatives of the adoptive parents,[6] the result reached in the present case was not surprising. The holding merely extends the former rule to include estates of lineal ancestors of the parent.[7]

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1. Fey v. Cato, 276 S.W.2d 734 (Tenn. 1955).
2. TENN. CODE ANN. § 9570 (Williams 1934).
3. Tenn. Pub. Acts 1951, c. 202, § 23.
4. TENN. CODE ANN. § 9570 (Williams 1934).
5. Craft v. Blass, 8 Tenn. App. 498, 507 (W.S. 1928).
6. Taylor v. Taylor, 162 Tenn. 482, 40 S.W.2d 393 (1930).
7. An earlier case had held that there is no right of inheritance from lineal descendants of the adoptive parent as well. Helms v. Elliott, 89 Tenn. 446, 14 S.W. 930, 10 L.R.A. 535 (1890). Under the present adoption statutes, however, the adoptee is expressly permitted to inherit from other children, natural and adopted, of the adoptive parents "in accordance with the statutes of descent and distribution." Such other children are given reciprocal rights in

The entire law of adoption being statutory,[8] the decisions from the other states reflect the diverse statutory views and, hence, are in conflict as to whether an adopted child may inherit from relatives of the adoptive parents. In the absence of language clearly authorizing such inheritance, the right is denied by the majority of the courts.[9]

The authorities likewise are sharply divided as to whether the law in effect at the date of adoption or the law in effect at the death of the decedent governs the right of inheritance by the adoptee.[10] The cases necessarily turn upon the interpretation of local statutes, but the majority of the courts hold that the statutes in effect at date of death are controlling.[11] By implication, the Supreme Court in the present case appears to have adopted the contrary view, since its opinion referred only to the earlier statutes.

The court might well have reached the same result, however, had it applied the statute in effect at date of death. The newer statute broadens rights of inheritance within the adoptive family to some extent,[12] but it is still silent as to whether the adoptee may inherit from collateral relatives or from ancestors of the adoptive parents. The statute provides that an adoption creates the relationship of parent and child between the petitioners and the child "as if such child had been born to them in lawful wedlock" and permits the child to inherit "real and personal property from the adoptive parents."[13] A literal interpretation would probably permit unlimited inheritance, but in most of the states with similar statutes, inheritance is limited to the estate of the adoptive parents.[14]

Perhaps more than anything else, the principal case illustrates the need for a more thorough and careful provision by the legislature for rights of inheritance by adopted children. The 1955 General Assembly undertook to broaden the existing statutes somewhat by conferring upon the adoptive parent the right to inherit from the child[15]—a right which previously had not existed in this state.[16] The new statute, however, is of doubtful validity because of a

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the estate of the adoptee as to after-acquired property. Tenn. Pub. Acts 1951, c. 202, § 23; TENN. CODE ANN. § 9572.37 (Williams Supp. 1953).

8. 1 AM. JUR., *Adoption of Children* § 3 (1936).

9. MADDEN, DOMESTIC RELATIONS 361-62 (1931); HARPER, PROBLEMS OF THE FAMILY 483-84 (1952); 1 AM. JUR., *Adoption of Children* § 63 (1936); Notes, 120 A.L.R. 837 (1939), 38 A.L.R. 8 (1925).

10. Note, 18 A.L.R.2d 960 (1951).

11. MADDEN, DOMESTIC RELATIONS 361 (1931); Note, 18 A.L.R.2d 960, 962 (1951).

12. TENN. CODE ANN. § 9572.37 (Williams Supp. 1953). See note 7 *supra.*

13. *Ibid.*

14. 1 AM. JUR., *Adoption of Children* § 63 (1936).

15. Tenn. Pub. Acts 1955, c. 302. This statute further prohibits the natural relatives of an adoptee from inheriting from estates of relatives of the adoptive parents. The 1951 statute had prohibited such inheritance from the estates of the parents themselves. TENN. CODE ANN. § 9572.37 (Williams Supp. 1953).

16. The right was expressly denied under the former statutes. TENN. CODE ANN. § 9570 (Williams 1934). The 1951 statute was silent on the point.

defective caption.[17] Many other loopholes remain in the existing adoption statute, leaving unanswered a number of important questions, such as the right of the adopted child to inherit from its natural parents or blood relatives, and their reciprocal rights, if any.[18] There can be no doubt of the power of the legislature to regulate this entire subject, and litigation similar to the principal case could be held to a minimum by comprehensive and carefully considered statutory provisions.

The General Assembly amended the existing adoption laws by two other acts,[19] both pertaining to the method of effecting a surrender by natural parents. One of these acts has been ruled invalid by the Attorney General because of a defective caption.[20] Contained therein, however, is much needed legislation upon out-of-state surrender, as well as clarifying provisions for procedure in the event a contest arises as to whether a child has been abandoned.[21] The other provides that if the natural parent joins in a petition for adoption, no surrender proceedings are necessary.[22]

CUSTODY OF CHILDREN

A case dealing with the complexities of interstate custody was decided by the Court of Appeals.[23] By a decree based upon personal service, an Illinois court had awarded a divorce and child custody to a wife in 1946, when both the husband and wife were domiciled in Illinois. Both parties remarried, and in 1947 the husband established his residence in Tennessee. The divorce decree had allowed him to take the child to his home for one week during each summer, but neither parent was allowed to remove the child permanently from Illinois without permission from the court. In 1951, the wife moved to Texas temporarily and obtained the necessary permission from the divorce court to take the child, furnishing a bond to guarantee its return. In 1952, when the child was visiting his father in Tennessee, the father refused to permit the child to be returned to Texas, stating that the boy preferred to live with him and that the father's home furnished better surroundings and opportunities than the mother could afford. The mother brought the present habeas corpus action in Tennessee. After a full hearing, the circuit court concluded that circumstances had so changed that the Illinois decree should be modified.

17. Opinion of the Office of the Attorney General, April 29, 1955.
18. See generally HARPER, PROBLEMS OF THE FAMILY 483-84 (1952); MADDEN, DOMESTIC RELATIONS 361-66 (1931); 1 AM. JUR., *Adoption of Children* §§ 55-58 (1936).
19. Tenn. Pub. Acts 1955, cc. 320, 345.
20. Opinion of the Office of the Attorney General, April 26, 1955 (constitutionality of Tenn. Pub. Acts 1955, c. 320).
21. Tenn. Pub. Acts 1955, c. 320.
22. Tenn. Pub. Acts 1955, c. 345.
23. State *ex rel.* Sprauge v. Bucher, 270 S.W.2d 565 (Tenn. App. W.S. 1953).

The father was accordingly awarded custody during school months and the mother during summer vacations.

In the Court of Appeals the mother challenged the jurisdiction of the Tennessee court to modify the Illinois decree. Since there was personal jurisdiction over both parties, however, the Court of Appeals held that the trial court did have power to hear evidence of a change of circumstances and to modify the foreign decree in the interests of the child. That such jurisdiction does exist would now seem to be well settled when both parties are before the court.[24] In general, the courts of the forum will be reluctant to exercise this power,[25] but in the present case the Court of Appeals, after reviewing the evidence, concluded that the trial court was justified in its action.

A second insistence by the mother was that the lower court should not have divided the custody of the child between the parents. The court, however, held that there is no rule against divided custody and that the matter addressed itself largely to the discretion of the trial judge.[26]

Support of Children

Of considerable interest is the decision of the Court of Appeals in the case of *Cline v. Cline*.[27] In this case, the husband had obtained an uncontested divorce from his wife upon grounds of desertion for two years.[28] Personal service was had upon the wife. Subsequently she filed the present suit, seeking reimbursement from the husband for necessaries supplied by her to their three minor children for a six-year period, including the years which were involved in the divorce decree. The chancellor allowed recovery, and the Court of Appeals affirmed.

The Court of Appeals stated that the husband had moved to another county to work in 1944 and had lived apart from his family since that time. Since 1946, he had contributed "practically nothing" for the support of the children, although his earnings greatly exceeded those of his wife. In his suit for divorce, he had not asked for custody of the children and at no time had he sought to gain custody from their mother.

To the wife's suit in the present case, a plea of former adjudication was filed. The court held, however, that the divorce proceedings

24. Cecil v. State *ex rel.* Cecil, 192 Tenn. 74, 237 S.W.2d 558 (1950); State *ex rel.* French v. French, 182 Tenn. 606, 188 S.W.2d 603 (1944). Of course, real doubt exists as to the validity of such a decree based upon substituted service of process in ex parte proceedings as a result of the holding of the United States Supreme Court in May v. Anderson, 345 U.S. 528 (1953).

25. Cecil v. State *ex rel.* Cecil, 192 Tenn. 74, 77, 237 S.W.2d 558, 560 (1950).

26. The trial court was held to have erred in holding that the mother had lost her Illinois domicile and also in holding the Illinois bond invalid, but these errors were upon immaterial issues.

27. 270 S.W.2d 499 (Tenn. App. E.S. 1954), 23 Tenn. L. Rev. 1050 (1955).

28. Tenn. Code Ann. § 8426 (Williams 1934).

merely determined that the wife was guilty of desertion. Her right to reimbursement was not involved therein. The court emphasized the distinction between res adjudicata and collateral estoppel. Under the former doctrine, any issue which might have been raised in the prior proceedings may not be raised in a later case between the same parties.[29] This doctrine, however, applies only when there is a relitigation of the same cause of action which was tried in the first case.[30] Under the rule of collateral estoppel, only those issues actually decided in the earlier proceeding are binding in the latter, not all of those which might have been litigated.[31] This doctrine applies when the later suit involves a different cause of action from the first.[32]

The distinction between the two concepts is well settled in the Tennessee cases,[33] and seemingly was properly applied in the present case. Further, the courts are sometimes reluctant to give to a prior uncontested case the weight usually given to a fully litigated proceeding with sharply drawn issues.[34]

In the final analysis, from the facts stated in the opinion, the "equities" of the case clearly favored the wife. Frequently if a wife leaves her husband without justification, as the complainant in the present case was adjudged to have done, she cannot obtain reimbursement from him for funds which she expends in support of the children.[35] But in the present case the father's conduct in leaving the children with the mother without contributing to their support and without seeking to regain their custody proved to be an overriding consideration. He was held to have impliedly consented to her retention of custody. There is precedent in other states for the result.[36]

As has been pointed out in other comment on the case,[37] however, the decision could possibly lead to abuses in practice. A wife who has wrongfully left her husband and whose claim for reimbursement would find little sympathy from a divorce court, might find it possible to obtain reimbursement by the simple expedient of not contesting a divorce case and then filing a separate suit. In this manner she might circumvent a finding of fault upon her part in the divorce case.

29. Graybar Electric Co. v. New Amsterdam Cas. Co., 186 Tenn. 446, 211 S.W.2d 903 (1947); Jordan v. Johns, 168 Tenn. 525, 79 S.W.2d 798 (1935); Meacham v. Haley, 270 S.W.2d 503 (Tenn. App. E.S. 1954).

30. 30 AM. JUR., *Judgments* §§ 179, 180 (1940). See, *e.g.*, Moore v. Moore, 273 S.W.2d 148 (Tenn. 1954).

31. Pile v. Pile, 134 Tenn. 470, 183 S.W. 1004 (1915); Harris v. Mason, 120 Tenn. 668, 115 S.W. 1146 (1907).

32. 30 AM. JUR., *Judgments* §§ 180-85 (1940). *Cf.* Hills v. Rowles, 264 S.W.2d 638 (Ark. 1954), 8 VAND. L. REV. 134.

33. See notes 29 and 31 *supra.*

34. 31 AM. JUR., *Judgments* §§ 525 *et seq.* (1940).

35. 35 AM. JUR., *Husband and Wife* § 53 (1942); Note, 32 A.L.R. 1466 (1924).

36. Beigler v. Chamberlain, 138 Minn. 377, 165 N.W. 128, L.R.A. 1918B 215 (1917); Note, 32 A.L.R. 1466, 1469 (1924). *See* Poindexter v. State, 137 Tenn. 386, 395, 193 S.W. 126, 128-29 (1916).

37. 23 TENN. L. REV. 1050, 1055 (1955).

It would thus seem that the entire question of past and future child support should be decided by the divorce court, and generally such decision is made. In cases where the divorce decree leaves the matter open, however, and a separate suit is brought for reimbursement, the latter claim should receive close scrutiny from the courts. The right to reimbursement and the amount thereof depend upon equitable considerations,[38] and recovery should be confined to claims which are clearly meritorious.

Divorce and Alimony

Procedure: In the case of *Rutledge v. Rutledge*,[39] the Supreme Court dealt with the power of the trial court to award alimony and counsel fees pending an appeal in divorce cases. There is no statute in this state upon this situation, but the court held that the trial judge has inherent jurisdiction to make such a temporary award. Certainly, since that court is already familiar with the case, it would be in a better position to deal with the problem than would the appellate court. In many jurisdictions the appellate courts do have power to make such awards,[40] and in several Tennessee cases the appellate courts have done so.[41] In the present case, however, the Supreme Court stated that better practice would be for the trial court to handle such matters, and its holding that the trial court has the necessary power is in accord with the great weight of authority.[42]

In the case of *Hamilton v. Hamilton*,[43] the defendant husband had been found guilty of contempt of court for failure to pay alimony. He appealed to the Supreme Court, but that court held that his conviction involved a civil rather than a criminal offense and that the appeal should have been taken to the Court of Appeals in accordance with civil practice, rather than to the Supreme Court under criminal practice.[44] It is clear that contempt proceedings to enforce an alimony decree are civil in nature, designed to benefit private individuals rather than to punish,[45] but there is authority to the effect that proceedings therein should conform to criminal practice, since even a civil contempt has punitive and criminal aspects.[46] The Tennessee courts

38. Merrill v. Merrill, 188 Tenn. 10, 216 S.W.2d 705, 7 A.L.R.2d 488 (1948); Rose Funeral Home, Inc. v. Julian, 176 Tenn. 534, 144 S.W.2d 755, 131 A.L.R. 858 (1940); Brooks v. Brooks, 166 Tenn. 255, 61 S.W.2d 654 (1933).
39. 268 S.W.2d 343 (Tenn. 1954).
40. 17 Am. Jur., *Divorce and Separation* § 517 (1938).
41. *E.g.*, Taylor v. Taylor, 144 Tenn. 311, 318, 232 S.W. 445 (1921); Crabtree v. Crabtree, 28 Tenn. App. 371, 190 S.W.2d 319 (E.S. 1945). *See* Clardy v. Clardy, 23 Tenn. App. 608, 618, 136 S.W.2d 526, 532 (M.S. 1939).
42. 17 Am. Jur., *Divorce and Separation* § 516 (1938); Note, 19 A.L.R.2d 703, 705-06 (1951).
43. 268 S.W.2d 362 (Tenn. 1954).
44. Tenn. Code Ann. § 10618 (Williams 1934).
45. 12 Am. Jur., *Contempt* § 6 (1938).
46. *Id.* § 67. See Collier v. Memphis, 160 Tenn. 500, 26 S.W.2d 152 (1929).

have long been troubled by the question of appellate procedure in contempt cases. Where there has been no final decree in the trial court upon the merits of a case, it appears that the appellate court which would have jurisdiction over an appeal on the merits is the proper tribunal to hear appeals from contempt orders.[47] But where, as in the present case, a final decree on the merits has been entered and no appeal taken therefrom, and where the contempt citation is the only matter appealed from, earlier cases have indicated that the appeal properly lies to the Supreme Court.[48]

Collusion: The Supreme Court in the case of *Moore v. Moore*,[49] considered the question of whether there was collusion as a matter of law in a property settlement agreement. The document, after prescribing a child custody arrangement and division of property, recited that the parties thereto agreed and understood that the wife would "immediately institute action . . . seeking a final decree of divorce." This agreement had been submitted to an Arkansas court, which approved it and incorporated it into a divorce decree granted to the wife. The Supreme Court held that the agreement was not collusive as a matter of law, defining collusion as a corrupt bargain to procure a divorce not justified by the facts and intended as a fraud upon the court. If the document had contained an agreement that the husband would not contest the wife's action, clearly it would have been invalid.[50] In the absence of such a recitation, however, the question of whether collusion was practiced became an issue of fact. Since the case was before the Supreme Court purely upon the legal sufficiency of the agreement,[51] this factual issue did not arise.

Property Rights: In two cases during the survey period, the Court of Appeals dealt with a new question in Tennessee—the effect of a divorce, property settlement, or both upon a will of one spouse in favor of the other. The doctrine of implied revocation of a will by subsequent marriage and birth of a child to the testator has long been recognized in this state.[52] In the first of the recent cases,[53] however, testator and his wife were divorced subsequent to his execution of a will in her favor, and the parties entered into a property settlement

47. Stief Jewelry Co. v. Walker, 36 Tenn. App. 427, 256 S.W.2d 392 (M.S. 1952). See Metcalf v. Eastman, 190 Tenn. 206, 207, 228 S.W.2d 490 (1949).

48. Metcalf v. Eastman, 190 Tenn. 206, 228 S.W.2d 490 (1949); Collier v. Memphis, 160 Tenn. 500, 26 S.W.2d 152 (1929).

49. 273 S.W.2d 148 (Tenn. 1954).

50. Perry v. Perry, 183 Tenn. 362, 192 S.W.2d 830 (1946).

51. After executing the agreement the wife had obtained an Arkansas divorce. Later she brought the present suit in Tennessee for divorce, and the earlier proceedings were pleaded in bar. The wife had in effect demurred to the plea, thereby admitting the earlier proceedings but urged that the records therein showed collusion as a matter of law.

52. Hailey v. Hailey, 27 Tenn. App. 496, 182 S.W.2d 127 (W.S. 1943). *See* Frank v. Frank, 170 Tenn. 112, 92 S.W.2d 409 (1936).

53. Rankin v. McDearman, 270 S.W.2d 660 (Tenn. App. W.S. 1953), 23 TENN. L. REV. 1081 (1955).

at the time of the divorce. The Court of Appeals held that these events amounted to such a change of circumstances that the testator's will in favor of his wife was conclusively presumed to be revoked insofar as it provided for the wife.[54] Evidence that the testator had, after the divorce, stated that he wanted the will to stand was held inadmissible, and the court held that the will could be revived only by acts of sufficient solemnity to republish it. The result was reached as a matter of common law, there being no statute in this state upon the revocation of wills. The decisions in other states are in great conflict upon the point, many of them being affected by statutory provisions.[55] While the result reached would probably be that desired by the testator in most cases, it would appear that the presumption of revocation might well have been treated as being rebuttable, if competent evidence of testator's intentions to keep the will in effect were available.

In the second of the cases,[56] no divorce was obtained between the spouses, but about a month before testator's death he and his wife entered into a separation agreement. As a part of this settlement, the wife relinquished any interest which she might own or might ever have in certain real estate of her husband. After the death of the husband, his will, executed many years previously, was found to have devised this real estate to the wife. In will contest proceedings, the trial court held that the separation agreement effected an implied revocation of the will. The Court of Appeals reversed, holding that neither a divorce nor a property settlement alone would be sufficiently conclusive to revoke. Both would be necessary in order to effect a revocation as a matter of law. And since the testator had not mutilated the will, destroyed it or done any other act of sufficient solemnity to revoke it in fact, the will was entitled to probate.[57] As in the previous case, the result was reached as a matter of common law. While in some states by statute a divorce itself is sufficient to revoke a will in favor of a spouse,[58] usually a property settlement alone does not do so and in the absence of statutes most of the decisions are in agreement that both are necessary to effect a revocation.[59]

Another case dealing with property settlements was decided by a federal district court.[60] In this case in a separation agreement, the husband had converted certain insurance policies on his life into paid-

54. Although the point is not discussed in the opinion, presumably such revocation would extend only to these provisions, not to the entire will. See 23 TENN. L. REV. 1081, 1084 (1955).
55. 57 AM. JUR., *Wills* § 536 (1948); Note, 18 A.L.R.2d 697 (1951).
56. Price v. Price, 269 S.W.2d 920 (Tenn. App. W.S. 1954).
57. The court pretermitted the question of estoppel of the wife by reason of her contract since the present case was a will contest only.
58. PAGE, WILLS c. 96 (Supp. 1941-1954).
59. 57 AM. JUR., *Wills* § 535 (1948); Note, 18 A.L.R.2d 697, 702 (1951).
60. Waltz v. Travelers Ins. Co., 124 F. Supp. 465 (M.D. Tenn. 1954).

up insurance and agreed that his wife should be named as primary beneficiary, with his daughter and grandson as contingent beneficiaries. The agreement provided that such designations should be "irrevocable" insofar as the husband was concerned. An Ohio divorce decree entered in favor of the wife incorporated this agreement by reference. Subsequently the husband remarried, and some years later his former wife died. He thereupon undertook to designate his second wife as primary beneficiary under the policies. The district court denied relief, holding that the agreement and divorce decree were binding, and that upon the death of the first wife the contingent beneficiaries became owners of vested interests in the policy proceeds. The case is quite similar to a recent case from the state courts in which the same result was reached, the court holding that the right to change beneficiaries is one which may be irrevocably surrendered in a property settlement.[61]

ACTION FOR LOSS OF CONSORTIUM

In the case of *Butler v. Molinski*,[62] a wife brought suit against a physician for negligence in treating a fracture and for assault and battery in operating upon her without her consent. Her husband brought a companion suit for loss of consortium. The trial court held that there was no evidence of negligence by the doctor and that the only issue for the jury to decide in the wife's case was whether she should recover nominal damages for a technical assault and battery. He thereupon dismissed the husband's suit upon the ground that the husband may not recover for loss of consortium for tort to his wife when the wife is entitled only to nominal or punitive damages. The Supreme Court affirmed, stating that a mere technical tort to the wife cannot be made the basis of a substantial award to the husband "when no right of his had been violated." The wife had sustained serious injury when she fractured her wrist, but none of her injuries and disabilities were found to have resulted in any way from the defendant's conduct, so that her recovery if any could be only nominal. In view of this finding of fact, the holding seems to be correct, since, in order for the husband to have a cause of action, he must show that he sustained actual damages, such as medical expenses and loss of consortium of his wife, and that these were caused by actions of the defendant under circumstances imposing liability upon him.[63]

61. Goodrich v. Massachusetts Mut. Life Ins. Co., 34 Tenn. App. 516, 240 S.W.2d 263 (W.S. 1951).

62. 277 S.W.2d 448 (Tenn. 1955).

63. PROSSER, TORTS § 104 (2d ed. 1955); MADDEN, DOMESTIC RELATIONS 161 (1931); 27 AM. JUR., *Husband and Wife* §§ 503-06 (1940). *Cf.* Butler v. Stites, 7 Tenn. App. 482 (M.S. 1928).

ALIENATION OF AFFECTIONS

In two cases, the Supreme Court dealt with the difficult problem of the statute of limitations in actions for alienation of affections. Until the enactment of the 1950 Supplement to the Tennessee Code, there had been no express statute of limitation upon this cause of action, and in one of the recent decisions, *Rheudasil v. Clower*,[64] the court held that such suits should be governed by the one year statute prescribed for cases of criminal conversation.[65] Both of these actions are based upon interference with the right of consortium,[66] but generally are treated as separate torts.[67] In the *Rheudasil* case, the Supreme Court held that criminal conversation must, by its nature, include alienation of affections, although the converse is not necessarily true. Consequently the statute of limitations for criminal conversation was deemed to control actions for alienation of affections also.

The opinion did not refer to the express provision of the 1950 Supplement that "actions for alienation of affections, shall be commenced within three years from the accruing of the cause of action."[68] The cause of action in the *Rheudasil* case apparently accrued in 1951. Possibly the court deemed the above statute inapplicable, since the Code Supplement did not take effect until the beginning of 1952.[69] The suit was not filed until after the effective date of the statute, but the applicability thereof was not mentioned by the court. In any event, the statute would seem to prescribe the period of limitation as being three years instead of one year for cases arising after January 1, 1952.

Of more difficulty and constantly recurring in alienation of affections cases is the problem of determining when the statute begins to run.[70] This problem was presented both in the *Rheudasil* case and in *Scates v. Nailling*.[71] In both cases the plaintiff had been separated from his spouse but had effected a temporary reconciliation, after learning of the misconduct of the defendant. Later the plaintiff in each case had permanently separated from his spouse. In both cases, the Supreme Court held that the statute of limitations began to run from the date of the first separation, or the date on which the plaintiff first became aware of the loss of affections. It was not tolled by the reconciliation so as to run from the date of the final separation. These cases appear

64. 270 S.W.2d 345 (Tenn. 1954).
65. TENN. CODE ANN. § 8595 (Williams 1934).
66. Darnell v. McNichols, 22 Tenn. App. 287, 122 S.W.2d 808 (M.S. 1938).
67. PROSSER, TORTS 684 *et seq.* (2d ed. 1955); MADDEN, DOMESTIC RELATIONS 165, 175 (1931); 27 AM. JUR., *Husband and Wife* § 536 (1940).
68. TENN. CODE § 8598 (Official Supp. 1950).
69. TENN. CODE § 26.1 (Official Supp. 1950).
70. For the many and varied tests proposed by the courts to establish this critical date, see Note, 173 A.L.R. 750, 772 *et seq.* (1948).
71. 268 S.W.2d 561 (Tenn. 1954). This case also involved allegations of criminal conversation, and the one year statute of limitations for such cases was applied. TENN. CODE ANN. § 8595 (Williams 1934).

to be the only decisions on the subject in Tennessee.[72] There is undoubtedly much to be said for requiring suits of this nature to be brought promptly if at all, and clearly this is the effect of these decisions. On the other hand, a reconciliation is also highly desirable, and a reconciliation would hardly be promoted by the bringing of a suit of this character, with all of the acrimony and publicity normally attendant thereon. It would seem that a new cause of action might well be deemed to have arisen after the reconciliation, so that the statute would run only from the date of the final separation. There is at least some indication in authorities from other states that the statute will run only after the realienation has been effected.[73]

TORT ACTIONS BETWEEN SPOUSES

The Tennessee courts have consistently held that the Married Women's Emancipation Act[74] in this state did not enable either spouse to sue the other in tort.[75] In a recent federal case,[76] however, the question arose as to whether a tort action might be maintained between spouses in Tennessee when the tort occurred in a state where the common-law immunity has been abolished. In this instance, a wife was negligently injured by her husband in an automobile accident which occurred in North Carolina. Tennessee follows the general rule of conflicts that the law of the place of the tort governs the rights and liabilities of the parties,[77] and in North Carolina spouses may sue each other in tort.[78] In a well-reasoned opinion, the district court permitted the action, and the Court of Appeals for the Sixth Circuit affirmed.[79] The district court held that there was no public policy in Tennessee against such suits, the immunity simply being based upon an interpretation of the local emancipation act. The Tennessee courts have permitted many other kinds of actions between spouses, including actions based upon fraud or bad faith.[80] Consequently it was held that the North Carolina law would be applied. The holding probably cannot be said to foreshadow a change in the Tennessee rule of immunity,

72. While the problem may have been present in Broidioi v. Hall, 188 Tenn. 236, 218 S.W.2d 737 (1949), it was not discussed by the court.
73. 27 AM. JUR., *Husband and Wife* § 541 (Supp. 1955); Note, 173 A.L.R. 750, 785 (1948).
74. Tenn. Pub. Acts 1913, c. 26; Tenn. Pub. Acts 1919, c. 126; TENN. CODE ANN. § 8460 (Williams 1934).
75. Tobin v. Gelrich, 162 Tenn. 96, 34 S.W.2d 1058 (1931); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628, L.R.A. 1916B 881 (1915).
76. Wills v. Franklin, 131 F. Supp. 668 (E.D. Tenn. 1953), *aff'd*, 217 F.2d 899 (6th Cir. 1954), 23 TENN. L. REV. 1056 (1955).
77. Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1934).
78. Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931).
79. Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954).
80. Hall v. Hall, 193 Tenn. 74, 241 S.W.2d 919 (1951); Hull v. Hull Bros. Lumber Co., 186 Tenn. 53, 208 S.W.2d 338 (1948); Justice v. Henley, 27 Tenn. App. 405, 181 S.W.2d 632 (M.S. 1944).

although there is a strong trend away from the doctrine of immunity in other states.[81] It should be persuasive in the state courts, however, in permitting such actions which arise in other states, and may also be influential if the Supreme Court does have occasion to reconsider its position on the question of immunity.

Common-Law Marriages

The subject of informal marriage in Tennessee was reviewed in a recent opinion by Chief Justice Neil.[82] In the past the Tennessee courts have generally refused to sanction informal or common-law marriages, although occasionally the doctrine of equitable estoppel has been applied to give at least some effect to such arrangements.[83] The tendency in recent cases, however, has been to require that parties make at least some effort to comply with the statutory formalities before the relationship will be regarded as anything but meretricious.[84] In the present case, despite the fact that the parties had for many years cohabited as husband and wife and had the reputation of being married, the woman was denied the rights of a widow upon the death of the man. There was no showing that the parties had made any agreement to marry upon which an estoppel might have been rested, and no indication that they ever attempted to comply with the statutory requirements for marriage. Apparently they had knowingly entered into an illicit relationship. In denying recognition to their status, the Supreme Court expressed its unwillingness to follow the broad language of an earlier case,[85] in which reputation and cohabitation had been held sufficient to permit application of the doctrine of estoppel.[86]

Tenancy by the Entirety

Real Property: In a case of first impression,[87] the Supreme Court upheld a conveyance from one tenant by the entirety to the other—in this instance from the wife to her husband. The decision is in accord with the weight of authority elsewhere,[88] and marks a progressive step in Tennessee real property law. There is no real objection to the recognition of such conveyances between the spouses, giving effect to their intention as stated in the deed. The decision was shortly followed by legislation in the 1955 General Assembly, expressly authorizing such conveyances.[89]

81. Prosser, Torts 674-75 (2d ed. 1955); 7 Vand. L. Rev. 717 (1954).
82. Crawford v. Crawford, 277 S.W.2d 389 (Tenn. 1955).
83. Note, 3 Vand. L. Rev. 610 (1950).
84. Rambeau v. Farris, 186 Tenn. 503, 212 S.W.2d 359 (1948).
85. Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S.W. 392 (1905).
86. Similar unwillingness to apply the language of the *Smith* case was expressed in the *Rambeau* case, *supra* note 84.
87. Howell v. Davis, 268 S.W.2d 85 (1954), 23 Tenn. L. Rev. 911 (1955).
88. Note, 8 A.L.R.2d 634 (1949).
89. Tenn. Pub. Acts 1955, c. 78.

In another case,[90] the Supreme Court held that a lease executed by one tenant by the entirety was not binding upon the other. Since the enactment of the Emancipation Act,[91] neither the husband nor the wife is the dominating personality, and neither can sell, convey or encumber the interest of the other without authority from the other to do so.[92] There was no proof of any agency in the present case and no basis for estoppel was found.

In a third case,[93] a tenancy by the entirety in real estate had been severed by divorce. The wife had been awarded a life estate in her husband's interest as alimony, and the remainder interest was vested in the child of the parties by the divorce decree. Prior to the divorce the husband and wife had encumbered the property by deed of trust, and after the divorce was granted, the wife defaulted and permitted a foreclosure. She and her second husband purchased the property for the amount of the debt at the foreclosure sale. In the present case, the Supreme Court held that such purchase by them could not affect the remainder interest of the child, since there is a relationship of trust between life tenant and remainderman.[94] The fact that neither the trustee under the deed of trust nor the child had been a party to the divorce decree was held not to affect the validity of the decree. The trustee was not a necessary party, and previous cases have established that a father's interest in a tenancy by the entirety may, upon divorce, be vested in a child.[95]

Personal Property: It has long been established in Tennessee that tenancy by the entirety may exist in personal property as well as in realty.[96] In its latest decision upon the point,[97] however, the Supreme Court held that such tenancy existed in a bank account, in cattle and in automobiles registered in the name of the husband alone. The husband and wife had for many years worked and saved, and by their joint efforts and enterprise had developed a successful cattle business. Their joint funds went into the purchase of the cattle, farm equipment, and automobiles, and they had accumulated considerable cash which they kept at home. Upon the death of the husband, his daughter by a former marriage claimed a share of the personal property. Probably because of the very appealing equities in favor of the wife, the Supreme Court, reversing the Court of Appeals, held that the wife

90. Irwin v. Dawson, 273 S.W.2d 6 (Tenn. 1954).
91. TENN. CODE ANN. § 8460 (Williams 1934).
92. Alfred v. Bankers' & Shippers' Ins. Co., 167 Tenn. 278, 68 S.W.2d 941 (1934).
93. Edwards v. Puckett, 268 S.W.2d 582 (Tenn. 1954).
94. McGee v. Carter, 31 Tenn. App. 141, 212 S.W.2d 902 (E.S. 1948), 2 VAND. L. REV. 470 (1949).
95. Cline v. Cline, 186 Tenn. 509, 212 S.W.2d 361 (1948).
96. Sloan v. Jones, 192 Tenn. 400, 241 S.W.2d 506 (1951), 5 VAND. L. REV. 253 (1952).
97. Oliphant v. McAmis, 273 S.W.2d 151 (Tenn. 1954), 23 TENN. L. REV. 1068 (1955).

was entitled to all of the personalty as surviving tenant by the entirety. As to the cash and miscellaneous personalty, the decision cannot be questioned. The holding that there was joint ownership of the property registered in the husband's name, however, certainly leaves considerable doubt. The court held that such ownership could be established only by "convincing evidence" but held that all of the circumstances might be considered in determining whether the parties intended to create a joint ownership. Statements by the husband and the fact that the parties owned some real estate as tenants by the entirety were given consideration. The holding has been criticized,[98] and it is probable that it will be confined to the particular facts. For example, it is hardly likely that the widow's claim would have been sustained against claims by creditors of her husband or bona fide purchasers from him.

98. 23 TENN. L. REV. 1068 (1955).