Vanderbilt Law Review

Volume 6
Issue 5 *Issue 5 - August 1953*

Article 3

8-1953

Domestic Relations

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DOMESTIC RELATIONS

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There have been several important appellate decisions by the Tennessee courts in the field of domestic relations during the past year, and several significant statutes on the subject were enacted by the 1953 General Assembly. These decisions and statutes are discussed briefly herein according to subject matter.

ANNULMENT OF MARRIAGES

One of the most important decisions to be rendered by the Tennessee courts recently in the entire field of domestic relations was that of the Supreme Court in *Estes v. Estes.*[1]

In that case, the parties were ceremonially married in Mississippi early in December, 1950. They apparently had lived in Memphis, Tennessee, prior to their marriage, and they returned to that city immediately thereafter. Some three weeks later, the wife learned that her husband was a party to a prior marriage which was still subsisting. She immediately withdrew from him and instituted annulment proceedings in the chancery court. Although the case was uncontested, the divorce proctor contended that the two-year residence period required in divorce cases when the ground of divorce arises outside of the State also applies to annulment actions. He also questioned whether the Tennessee courts had jurisdiction to entertain the action, since the marriage occurred in Mississippi.

The chancellor dismissed the action on the ground that the two-year residence requirement was applicable. The Court of Appeals reversed, and the Supreme Court affirmed the Court of Appeals, holding that in an outright annulment action the inherent jurisdiction of the equity court is invoked and that this jurisdiction exists apart from any statutory requirement.

Like many other states, Tennessee has no separate statutes dealing with the subject of annulment. One of the grounds for absolute divorce provided in the Code, however, is "that either party has knowingly entered into a second marriage, in violation of a previous marriage still subsisting."[2] Two other sections of the Code provide that in a given case the trial court may grant relief by annulment or absolute or limited divorce, as the circumstances require.[3] Still an-

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1. 250 S.W.2d 32 (Tenn. 1952), 22 TENN. L. REV. 1063 (1953).
2. TENN. CODE ANN. § 8426(2) (Williams 1934).
3. TENN. CODE ANN. §§ 8443, 8445 (Williams 1934).

other section imposes the residence requirement when the cause of action arose out of the State.[4]

In this important opinion, the Supreme Court pointed out the essential difference between an action for annulment and one for divorce. The Court stated that if the action were primarily one for divorce, with annulment asked only as a form of alternative relief, the two-year residence requirement would "no doubt" be applicable. In an outright annulment suit, however, the Court held that chancery courts have inherent power "to declare void that which is admittedly void, both in law and in fact." Consequently, they are not confined to the statutory restrictions governing divorce suits.

It is elementary, of course, that annulment and divorce are entirely different concepts. By an annulment, the marriage is entirely erased and generally is held never to have existed,[5] at least as between the parties.[6] A divorce decree, on the other hand, merely terminates an otherwise valid marriage. Marriages are annulled for reasons existing at the inception of the relationship which prevent a valid marriage from ever coming into being. Divorces are granted upon grounds which arise after the marriage takes place.[7] The subject of divorce is entirely statutory; but annulments were granted by the ecclesiastical courts of England long prior to the enactment of divorce statutes.[8]

Unfortunately the Tennessee statutes upon divorce are somewhat loosely drawn, and at least three of the grounds listed as entitling one to an absolute divorce have historically been recognized as grounds for annulment, entirely apart from the divorce statutes.[9] Thus, in the instant case, prior subsisting marriage was deemed to be ground for annulment, apart from the divorce statutes, although it is also a statutory ground of relief.

There is no doubt but that the Supreme Court was entirely correct in holding that annulment is not strictly a statutory subject in Tennessee. Our courts have never felt themselves confined to the grounds listed in the divorce statutes in granting annulments. Marriages have

4. TENN. CODE ANN. § 8428 (Williams 1934).

5. Southern Ry. v. Baskette, 175 Tenn. 253, 133 S.W.2d 498 (1939); Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L.R.A.1918B 415 (1917); CARUTHERS, HISTORY OF A LAWSUIT § 621 (7th ed., Gilreath, 1951).

6. Saving statutes, such as TENN. CODE ANN. § 8453 (Williams 1934), make children of such marriages legitimate. Even as to the parties, the marriage may not be held a nullity for all purposes. See Note, 2 A.L.R.2d 637 (1948). And as to innocent third parties, the marriage may be given some effect. Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929) (husband of first marriage relieved of alimony payments during period of second marriage of wife, later annulled). *But cf.* Southern Ry. v. Baskette, 175 Tenn. 253, 133 S.W.2d 498 (1939).

7. See note 5 *supra*; MADDEN, DOMESTIC RELATIONS 293 (1931).

8. MADDEN, DOMESTIC RELATIONS 44, 263 (1931); 35 AM. JUR., *Marriage* § 56 (1941).

9. These are impotency, prior subsisting marriage and antenuptial pregnancy by another man. TENN. CODE ANN. § 8426 (Williams 1934). See generally MADDEN, DOMESTIC RELATIONS 14, 36, 39 (1931).

been annulled, for example, upon grounds of fraud,[10] duress[11] and insanity,[12] none of which are listed as grounds of divorce, as well as for prior subsisting marriage, antenuptial pregnancy and impotency, all of which are listed in the divorce statutes.

This overlapping of the subject of divorce and annulment because of the loose wording of the divorce statutes creates real problems which are left unanswered by the present Supreme Court opinion. How is one to know whether he is proceeding under the statutes and is bound by the statutory requirements or whether he is addressing his bill to the "inherent" jurisdiction of chancery when he seeks relief upon grounds of prior subsisting marriage, antenuptial pregnancy or impotency? Does the wording of the prayer for relief control? In the present case, for example, if the complainant had simply prayed for an absolute divorce instead of an annulment, would the residence requirement have applied? Under the statutes permitting the courts to grant the type relief they deem fit, it has been held that the court is not bound by the prayer and may grant different relief.[13] An annulment would have been possible, therefore, in the supposed case, but would the case have nevertheless been governed by the divorce statutes, with their residence requirement? Or are such cases to be deemed always to fall under inherent equity jurisdiction? Such problems subgest that the divorce code needs serious revision with a view to separating and clarifying those grounds upon which divorce may be granted and those for which a marriage may be entirely annulled.[14]

The Supreme Court satisfied itself in the present case merely by holding that there is inherent jurisdiction in the chancery courts to annul a marriage apart from the divorce statutes.[15] Such jurisdiction was not exercised by the English courts of chancery,[16] and an early Tennessee case held that the Tennessee chancery courts have only that jurisdiction which was exercised by the English courts.[17] In holding, however, that equity has inherent power to annul marriages, the Supreme Court in the instant case is supported by the great weight of American authority;[18] and, as already stated, the Tennessee courts

10. See Southern Ry. v. Baskette, 175 Tenn. 253, 133 S.W.2d 498 (1939).
11. Cannon v. Cannon, 7 Tenn. App. 19 (W.S. 1928).
12. See Cole v. Cole, 37 Tenn. 57 (1857).
13. Lingner v. Lingner, 165 Tenn. 525, 56 S.W.2d 749 (1933).
14. This situation is not peculiar to Tennessee. In other states with similar statutory problems, courts frequently annul marriages on grounds which have historically been grounds for annulment, although the statutes make them grounds for divorce only. MADDEN, DOMESTIC RELATIONS 293 (1931). See also COMPTON, CASES ON DOMESTIC RELATIONS 149 (1951).
15. Only a few states have taken the contrary position. 35 AM. JUR., *Marriage* § 60 (1941).
16. See Ridgeley v. Ridgeley, 79 Md. 298, 29 Atl. 597 (1894); MADDEN, DOMESTIC RELATIONS 44 (1931).
17. Oakley v. Long, 29 Tenn. 254 (1849).
18. MADDEN, DOMESTIC RELATIONS 44 (1931); 35 AM. JUR., *Marriage* § 60 (1941).

have long exercised power to annul marriages for incapacity despite the fact that English chancery courts did not do so.[19] The present opinion is entirely sound, therefore, in recognizing an inherent jurisdiction. It is also in accord with the weight of authority in holding that the residence requirements of divorce actions do not necessarily apply to annulment suits.[20] It is to be hoped, however, that the Court will in future opinions clarify the distinction between this inherent jurisdiction and that granted by the divorce statutes, and will point out more definitely when the statutes apply and when they do not.

With respect to the issue raised by the divorce proctor as to whether Tennessee had jurisdiction to annul this marriage, the Supreme Court held that the Tennessee courts had jurisdiction of the marriage status of the parties and could correct that status, regardless of where the parties were domiciled at the time of their marriage. There is a wide divergence of authority upon the subject of jurisdiction to annul a marriage.[21] It is generally held that a marriage may be annulled only in a state which has some connection with that marriage, either by virtue of one of the parties' being domiciled in it or by virtue of having been the state of celebration of the marriage.[22] The reasoning of the Tennessee Court in the present case is not clear on this point. Apparently one or both of the parties was domiciled in Tennessee at the time of filing suit. If so, Tennessee would clearly have jurisdiction to annul the marriage under the great weight of authority. In dictum, however, the Court seemed to indicate that Tennessee could grant an annulment of this marriage because of its illegality and immorality, regardless of whether either party was domiciled here. Since the marriage was not performed in this State, such a position would seem to go beyond existing authorities.

Adoption of Children

In the recent case of *Couch v. Couch*,[23] the Court of Appeals was called upon to decide the effect of an informal contract of adoption. The natural father of an illegitimate son desired to adopt the child without incurring the publicity attendant upon normal court proceedings. Accordingly, in 1929, he went to Georgia and there had an attorney prepare a "Contract of Adoption" under the terms of which the father purported legally to adopt the child, to give him the family name and the right to inherit and to assure him of support and mainte-

19. See notes 10-12 *supra*.
20. Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L.R.A.1918B 415 (1917); see Note, 128 A.L.R. 61, 71 (1940); 35 Am. Jur., *Marriage* § 63 (1941).
21. For collection of cases, see Note, 128 A.L.R. 61 (1940); 35 Am. Jur., *Marriage* §§ 61-68 (1941).
22. Restatement, Conflict of Laws § 115 (1934); 35 Am. Jur., *Marriage* § 68 (1941).
23. 35 Tenn. App. 464, 248 S.W.2d 327 (E.S. 1951).

nance. The mother of the child consented to this arrangement. No further proceedings were contemplated or attempted. Three years earlier, in 1926, the father had executed his will in which this child was not mentioned. The will was never changed. Upon the father's death in 1947, the son claimed a share of the estate under the pretermitted child statute.[24] The Tennessee courts had previously held that a child adopted after the execution of a will may occupy the status of a pretermitted child.[25]

The Court of Appeals held the attempted adoption ineffective. It pointed out that there was no common law of adoption and that the right of adoption is strictly a statutory one.[26] Consequently, there must be at least a colorable compliance with the statutory procedure in order that the artificial status of adoptive parent and child may be created. No attempt was made or intended in the present case to comply with the statutes of either Tennessee or Georgia.

The Court also refused to permit a recovery upon the basis of estoppel. In earlier Tennessee cases, where there was an executory contract of adoption coupled with a promise to leave the child a share of the estate, recovery had been permitted in some instances.[27] In every such case, however, statutory adoption proceedings were intended. There was no such intention in the present case. Further, in the present case, the Court pointed out that recovery was allowed in the earlier cases on the basis of the contract, and not because the doctrine of estoppel created the status of parent and child. The Court held that the wording of the contract in the present case was not sufficiently strong to obligate the parent to leave the child a share or to prevent the parent from disinheriting him.[28]

The opinion is a very well reasoned one, and the result seems entirely sound. The detailed and elaborate safeguards in the adoption statutes for the protection of the child and of the natural and the adoptive parents would have little meaning if these statutes could be ignored. Regardless of the rule in other states, the Tennessee courts have consistently held that the only way in which the status of parent and child may be created by adoption is through a substantial compliance with the statutes.[29]

In refusing to permit the doctrine of estoppel to be used to create the status, the Court followed a tendency which has become well de-

24. TENN. CODE ANN. § 8131 (Williams 1934).
25. Marshall v. Marshall, 25 Tenn. App. 309, 156 S.W.2d 449 (M.S. 1941).
26. *In re* Knott, 138 Tenn. 349, 197 S.W. 1097 (1917); Rogers v. Baldridge, 18 Tenn. App. 300, 76 S.W.2d 655 (M.S. 1934); Note, *The Tennessee Law of Adoption,* 3 VAND. L. REV. 627, 628-30 (1950).
27. Starnes v. Hatcher, 121 Tenn. 330, 117 S.W. 219 (1908); Adcock v. Simon, 2 Tenn. App. 617 (M.S. 1926).
28. The clause in question stated: "That said child will inherit, from my estate or estates, in whole or in part, as any other son or child. . . ."
29. Note, *The Tennessee Law of Adoption,* 3 VAND. L. REV. 627, 630 (1950).

fined in the field of domestic relations within recent years. Formerly, the Tennessee courts had applied that doctrine to give at least partial validity to informal marriages,[30] but the present trend of the Tennessee decisions is to require at least some bona fide attempt to comply with the marriage statutes before permitting marital rights to be created.[31] A similar rule was applied in the instant case with reference to adoptions.

In *State,* ex rel. *"A" v. A Licensed or Chartered Child-Placing Agency,*[32] the unwed mother of a child surrendered the child before a chancellor as required by the adoption statutes.[33] She released the child to the agency to be placed for adoption. Subsequently, however, she married the father of the child, and they filed a petition for habeas corpus against the agency seeking custody of the child. Both the trial court and the Supreme Court held that the consent of the mother was irrevocable after thirty days under the statute[34] and that the petition was in effect nothing more than an effort to revoke that consent. The petition was accordingly dismissed.

The petitioners contended that the child should be placed in the custody of its natural parents. The Court held, however, that the primary consideration in awarding custody of children is the welfare of the child, not that of its parents. The adoption statutes preclude any question as to the right of the parents to revoke consent for adoption, once given. The natural parents thereby waive any and all of their rights to the child. By way of dictum, the Supreme Court suggested that the trial court might permit the petitioners to amend their petition and apply for the adoption of the child, but this was purely a discretionary matter with the trial court.

In its latest session, the General Assembly clarified the procedure for adopting persons over eighteen years of age.[35] The previous statutes had simply provided that the procedure for adoptions outlined therein should not apply to such persons.[36] The new provision repeals the former one and substitutes therefor a more clear and elaborate section. It provides that persons over eighteen years of age may be adopted simply upon their own consent, or if the person to be adopted is of unsound mind, then his natural or appointed guardian may consent. The usual prerequisites for adoption, including the order of reference, social investigation, report of the child-placing agency, waiting period and interlocutory decree, are all expressly waived.

30. Note, *Informal Marriages in Tennessee,* 3 VAND. L. REV. 610 (1950).
31. Pewitt v. Pewitt, 192 Tenn. 227, 240 S.W.2d 521 (1951); Rambeau v. Farris, 186 Tenn. 503, 212 S.W.2d 359 (1948), 20 TENN. L. REV. 621 (1949); Note, *Informal Marriages in Tennessee,* 3 VAND. L. REV. 610, 621-25 (1950).
32. 250 S.W.2d 776 (Tenn. 1952).
33. TENN. CODE ANN. §§ 9572.20 *et seq.* (Williams Supp. 1953).
34. TENN. CODE ANN. § 9572.25 (Williams Supp. 1953).
35. Tenn. Pub. Acts 1953, c. 171.
36. TENN. CODE ANN. § 9572.49 (Williams Supp. 1953).

The General Assembly also enacted legislation more strictly regulating child-placing agencies.[37] The new law repeals all former provisions pertaining to the licensing and regulation of such agencies.[38] It sets up minimum standards which all such agencies must meet and requires that all of them, public or private, must be chartered by the Secretary of State with the approval of the Department of Public Welfare. Provisions are made for regular inspections and for the revocation of licenses if suggested corrections are not made within a specified time. The Act authorizes duly accredited agencies to place children in private homes for adoption after thorough investigation and selection of such homes. Private individuals are expressly forbidden to place children in homes for temporary care or adoption. Administration of the Act is made the responsibility of the Department of Public Welfare, and penal provisions are provided for violations.

CUSTODY OF CHILDREN

In two cases, the appellate courts dealt with procedural points in awarding custody of children whose parents have separated. In *Branch v. Branch*,[39] the trial court dismissed a petition for divorce filed by the husband and also held that the wife was not entitled to a divorce under a cross-petition. Each of the parties had prayed for custody of their minor children. Despite the fact that it dismissed both prayers for divorce, the trial court entered a custody order in the case. Upon appeal, it was contended that the court had lost jurisdiction and control of the case by denying a divorce to either party. The Court of Appeals held, however, that the trial court is empowered under the Tennessee statutes to award custody and to retain the cause within its jurisdiction for further custody orders, even though no relief was granted to either party by way of divorce.[40]

In *State* ex rel. *Bolden v. Woodring*,[41] the wife sought by writ of habeas corpus to obtain custody of her minor children from her divorced husband. The divorce court had awarded the children to the husband. The Supreme Court held that such a collateral attack could not be sustained and that the only way in which the custody decree could be modified would be by a petition filed in the original divorce cause. The case remained under the control of the divorce court under Tennessee statutes,[42] and the Supreme Court simply reaffirmed the well-established rule that custody decrees must be modified in the

37. Tenn. Pub. Acts 1953, c. 228.
38. TENN. CODE ANN. §§ 4520, 4719, 4720, 4720.1-4720.3, 4721, 4722-31, 4734-37, 4739-46 (Williams 1934, Supp. 1953), TENN. CODE SUPP. §§ 4732-4732.2, 4765.93-4765.99 (1950).
39. 35 Tenn. App. 552, 249 S.W.2d 581 (E.S. 1952).
40. TENN. CODE ANN. § 8454 (Williams 1934) expressly so provides.
41. 254 S.W.2d 737 (Tenn. 1953).
42. TENN. CODE ANN. § 8454 (Williams 1934).

court rendering them and that no other court could properly take jurisdiction.[43]

In *Powell v. Powell*,[44] the Court of Appeals dealt with the factual issue of whether the natural father or the maternal grandmother of two young girls should be given custody. The mother of the children had obtained their custody when she was awarded a divorce from the father on grounds of desertion. The mother and children had lived in the home of the grandmother since the children were born, and since the death of the mother in 1951, the grandmother had had their sole custody and care. The Court of Appeals affirmed the trial court in holding that custody should remain with the grandmother. It appeared that both parties were proper persons to have the custody, but the courts declined to uproot the children from their familiar surroundings and permit them to be taken into another state by a father who had never supported them or paid them proper paternal attention. Although recognizing the general rule that a father is entitled to the custody of his children, the Court held that this rule must give way to the primary consideration of the welfare of the child.[45]

Support of Children

In the case of *Watkins v. Watkins*,[46] a wife sued her nonresident husband for divorce, service of process being had by publication only. After entry of an order *pro confesso* but before any hearing on the merits, she moved the court to adjudicate as to the future support of the children of the parties, so that if the husband ever returned to the State he could be compelled to support them. Both the trial court and the Supreme Court held that there was no authority for such procedure but that the matter should await the divorce hearing. Then the decree in the divorce case could be retained in the trial court for such future support orders as might be proper.

The wife in the present case could perhaps have proceeded under the Uniform Reciprocal Support Act hereinafter discussed to require the nonresident husband to be extradited or else support his children. Apart from such steps, however, the procedure suggested by the Supreme Court seems to be her only remedy in this State. Apart from divorce proceedings, the Tennessee decisions have made it very difficult for a child or mother to obtain a decree for future support from a father, even when the father is personally served with process. Once he is before the court in a divorce proceeding, support orders may be

43. Coleman v. Coleman, 190 Tenn. 286, 229 S.W.2d 341 (1950); Johnson v. Johnson, 185 Tenn. 400, 206 S.W.2d 400 (1947).

44. 255 S.W.2d 717 (Tenn. App. M.S. 1952).

45. For discussion of the right of the parent in modern law, see Stubblefield v. State *ex rel.* Fjelstad, 171 Tenn. 580, 106 S.W.2d 558 (1937); State *ex rel.* Daugherty v. Rose, 167 Tenn. 489, 71 S.W.2d 685 (1934).

46. 254 S.W.2d 735 (Tenn. 1953).

entered by subsequent petitions in the same cause, even though no support was originally requested and even though the husband has since left the State.[47]

The Tennessee courts have, however, denied the right of a child or a mother to sue the father in an independent proceeding to obtain a decree for future support.[48] Creditors furnishing necessaries to the child may sue the father for reimbursement.[49] The mother may also sue to recover her past expenditures.[50] There is no logical reason for prohibiting the mother of child from suing for future support instead of compelling such support by the indirect means of procuring credit and having the creditors seek reimbursement. A great many states now permit such a direct action,[51] but Tennessee still holds to the opposite position. Apparently the Supreme Court felt in the instant case that a future support order could be obtained by a petition filed in the divorce case if the husband ever returned to Tennessee.[52] If so, it is to be hoped that the Court in the future will allow the same result in a direct and independent action against a derelict parent in cases where there are no divorce proceedings pending.

The 1953 General Assembly enacted a new and more elaborate reciprocal nonsupport statute,[53] repealing a similar one enacted in 1951.[54] Essentially the Act provides means of extraditing a nonresident

47. Darty v. Darty, 33 Tenn. App. 321, 232 S.W.2d 59 (W.S. 1949).

48. Such a suit was permitted without hesitation in Graham v. Graham, 140 Tenn. 328, 204 S.W. 987 (1918). But without referring to the *Graham* case the Court denied any action for future support in Fuller v. Fuller, 169 Tenn. 586, 89 S.W.2d 762 (1932), an action brought by the mother on behalf of the child. Similarly, in Baker v. Baker, 169 Tenn. 589, 89 S.W.2d 763 (1935), future support was denied in an action by the child through the mother as next friend, again without reference to the *Graham* case. And in Brooks v. Brooks, 166 Tenn. 255, 61 S.W.2d 654 (1933), and Davenport v. Davenport, 178 Tenn. 517, 160 S.W.2d 406 (1942), the above holdings were deemed to preclude further inquiry on the point.

49. Rose Funeral Home, Inc. v. Julian, 176 Tenn. 534, 144 S.W.2d 755, 131 A.L.R. 858 (1940).

50. Coleman v. Coleman, 190 Tenn. 286, 229 S.W.2d 341 (1950); Baker v. Baker, 169 Tenn. 589, 89 S.W.2d 763 (1935); Brooks v. Brooks, 166 Tenn. 255, 61 S.W.2d 654 (1933).

51. The contrary was formerly true. See MADDEN, DOMESTIC RELATIONS 392 (1931). But, permitting such direct action, see Simonds v. Simonds, 154 F.2d 326 (D.C. Cir. 1946); Addy v. Addy, 240 Iowa 255, 36 N.W.2d 352 (1949); Green v. Green, 210 N.C. 147, 185 S.E. 651 (1936), 15 N.C.L. REV. 67; Campbell v. Campbell, 200 S.C. 67, 20 S.E.2d 237 (1942); McClaugherty v. McClaugherty, 180 Va. 51, 21 S.E.2d 761 (1942).

52. TENN. CODE ANN. §§ 8446, 8454 (Williams 1934) authorize decrees for future support and retain such decrees within the court's control. It was held before the 1932 amendment to these sections that a wife who sued a nonresident for divorce by substituted service of process could not obtain alimony from him when he returned to the jurisdiction, even by petition filed in the divorce proceedings, since prior to the amendments such cases did not remain within control of the court. Darby v. Darby, 152 Tenn. 287, 277 S.W. 894 (1925).

53. Tenn. Pub. Acts 1953, c. 188.

54. Tenn. Pub. Acts 1951, c. 234, codified in TENN. CODE ANN. §§ 9720.11 *et seq.* (Williams Supp. 1953).

charged in this State with nonsupport of his dependents and for the return by this State of persons similarly charged in other states. It also provides that the person so charged may avoid extradition by agreeing to make support payments through the courts of the state of his residence, which will transmit them to the state in which the petition was filed. Provisions are made for the exchange of information and cooperation with states having similar statutes. Orders of support issued under the act do not supersede prior support or maintenance decrees, but amounts paid under either order shall be credited against amounts due under the other to prevent duplicating obligations. All communications between husband and wife are made competent as evidence in proceedings under the statute, and spouses may be compelled to testify against each other. Participation in proceedings under the Act does not confer jurisdiction of the parties upon any court for any other purpose.

LEGITIMACY OF CHILDREN

In a very significant decision, the Court of Appeals held that a child of a void marriage was legitimate. In the case of *Taliaferro v. Rogers*,[55] the question of the legitimacy of a child of a bigamous marriage was squarely raised. In holding that the child was legitimate, the Court went far in clarifying the Tennessee legitimacy statutes and in overturning previous conservative holdings.

There is no question but that bigamous marriages in Tennessee are absolutely void *ab initio*.[56] They are so entirely void that a decree of nullity would probably not be necessary,[57] and in all probability ratification of such marriages would not be recognized in this State even after removal of the disability of the previous subsisting marriage.[58]

55. 35 Tenn. App. 521, 248 S.W.2d 835 (W.S. 1951), 22 TENN. L. REV. 1066 (1953).

56. Pewitt v. Pewitt, 192 Tenn. 227, 240 S.W.2d 521 (1951); Moore v. Moore, 102 Tenn. 148, 52 S.W. 778 (1899).

57. See note 56 *supra*. Such a decree will be granted, however, because of the practical importance of a judicial declaration of nullity. *Ibid.*

58. In states recognizing informal or "common law" marriages, removal of an impediment and subsequent cohabitation will give rise to a valid marriage from the date of the removal, when the parties entered into the relationship with matrimonial intent and in good faith. Chamberlain v. Chamberlain, 68 N.J. Eq. 414, 59 Atl. 813 (1905); MADDEN, DOMESTIC RELATIONS 73 (1931); see Note, 104 A.L.R. 6 (1936). In states like Tennessee which refuse to recognize informal marriages, the doctrine of "ratification" is frequently not sanctioned. COMPTON, CASES ON DOMESTIC RELATIONS 69 n.17 (1951). Tennessee has applied it in the case of mental incapicity followed by a lucid interval. Cole v. Cole, 37 Tenn. 57, 70 Am. Dec. 269 (1857), but never in a case involving prior subsisting marriage, although there has been speculation that Tennessee might join the minority of states and apply it to a bigamous marriage made in good faith followed by removal of the disability. See Madewell v. United States, 84 F. Supp. 329, 334 (E.D. Tenn. 1949); Jones v. General Motors Corp., 310 Mich. 605, 17 N.W.2d 770, 773 (1945) (interpreting the Tennessee cases); Note, 3 VAND. L. REV. 610, 616-17 (1950).

It has long been felt, however, that there is nothing to be gained by bastardizing children whose parents have undertaken to marry. As early as 1836, the legislature provided that dissolution of a marriage should not affect the legitimacy of children.[59] In 1932, the Code was amended to save the legitimacy of children of annulled marriages.[60] In the present case, the Court construed this amendment to mean that actual annulment proceedings are not necessary and that children of any void or "null" marriage are legitimate. Actually the interpretation given the Code in the present case is a broad and liberal one. Under this interpretation, children of any ceremonial marriage would appear to be legitimate. For example, in earlier cases the Court had held illegitimate those children who were born of marriages where one of the parents had been divorced for adultery and had married his co-adulterer during the lifetime of the innocent spouse.[61] These holdings were repudiated in the present case upon the ground that they were not based upon the 1932 amendment or because, in one of the cases,[62] there was really no proof that the parents of the children had actually attempted to marry.

The holding in the present case is clearly in line with the spirit of the recent Tennessee legislation legitimizing illegitimate children whose parents later marry, even though the subsequent marriage is "illegal, void or voidable."[63] It places Tennessee in accord with the most liberal states and would appear to be in line with modern thinking upon the social problems raised by illegal marriages. The holding in no way condones the wrongdoing of the parents, but protects the innocent children of those parents. Whether the Tennessee courts would go so far as to hold legitimate children of a marriage between a white person and a Negro still remains undecided,[64] but there would seem to be no reason for distinguishing such a marriage from any other type of void or illegal union.

DIVORCE AND ALIMONY

In the case of *Troutt v. Troutt*,[65] the Court of Appeals held that circumstantial evidence produced on the trial was sufficiently strong to prove adultery on the part of a husband, entitling the wife to a divorce.

59. Tenn. Pub. Acts 1836, c. 26, § 7.
60. TENN. CODE ANN. § 8453 (Williams 1934).
61. Jennings v. Jennings, 165 Tenn. 295, 54 S.W.2d 961 (1932); Bennett v. Anderson, 20 Tenn. App. 523, 101 S.W.2d 148 (M.S. 1936). Such marriages are prohibited by TENN. CODE ANN. § 8452 (Williams 1934).
62. Bennett v. Anderson, 20 Tenn. App. 523, 101 S.W.2d 148 (M.S. 1936).
63. Tenn. Pub. Acts 1949, c. 70, codified in TENN. CODE ANN. § 9567 (Williams Supp. 1953); Legis., 21 TENN. L. REV. 453 (1950). The statute was held constitutional in Southern Ry. v. Sanders, 193 Tenn. 409, 246 S.W.2d 65 (1952), 5 VAND. L. REV. 838 (1952).
64. Such marriages are prohibited and made criminal by TENN. CODE ANN. §§ 8409, 8410 (Williams 1934).
65. 35 Tenn. App. 617, 250 S.W.2d 372 (W.S. 1952).

Adultery as a ground for divorce must be proved by a preponderance of the evidence, of course, but it need not be proved beyond reasonable doubt and may be, and generally must be, proved by circumstantial evidence.[66] In the present case, private investigators and other witnesses testified as to the opportunity and inclination of the defendant to commit adultery. Defendant sought to establish an alibi, but the Court of Appeals refused to disturb the findings of the trial court, which had had an opportunity personally to examine the witnesses.

One point of first impression dealt with in the case was the type of appeal bond required in divorce cases. The trial court awarded the wife $7,500.00 in alimony plus counsel fees. The husband appealed and executed a cost bond in the amount of $250.00. The wife contended that he should be required to give bond in the amount of the alimony plus fees and cost. In an appeal from a chancery decree for a specified sum of money, bond must be given for the amount of the decree plus costs.[67] Divorce proceedings are equitable in their nature,[68] and it was contended that a full bond should be required. Earlier Tennessee cases had so held when there was an appeal upon the question of the amount of alimony.[69]

In the present case, however, the defendant appealed not only from the alimony awarded but also upon the ground that the complainant was not entitled to a divorce. The Court of Appeals held that under these circumstances only a cost bond would be required, since if there was no ground for divorce, there could be no basis for alimony. Earlier cases had stated that alimony and divorce are separate subjects,[70] but the Court of Appeals pointed out that they are not entirely independent and that there cannot be alimony unless there is sufficient ground for the granting of a divorce. The two questions being inextricably interwoven in this case, the Court reviewed both without requiring a full bond.

In *State* ex rel. *Wright v. Upchurch*,[71] a husband had been held in deliberate contempt of an alimony decree and committed to jail. By habeas corpus, he attacked the commitment order upon the ground that it did not show on its face that he was able to pay alimony. While recognizing that inability to pay is a defense to a contempt proceeding in alimony cases, the Supreme Court dismissed the petition in the present case on the ground that the writ of habeas corpus may not be used as a substitute for appeal. The petitioner merely sought to make a col-

66. Sutton v. Sutton, 3 Tenn. App. 333 (W.S. 1926).
67. TENN. CODE ANN. § 9045 (Williams 1934).
68. Broch v. Broch, 164 Tenn. 219, 47 S.W.2d 84 (1932); CARUTHERS, HISTORY OF A LAWSUIT § 622 (7th ed., Gilreath, 1951).
69. Going v. Going, 144 Tenn. 303, 232 S.W. 443 (1921); Chenault v. Chenault, 37 Tenn. 247 (1856).
70. Williams v. Williams, 146 Tenn. 38, 236 S.W. 938 (1922); Toncray v. Toncray, 123 Tenn. 476, 131 S.W. 977 (1910).
71. 254 S.W.2d 748 (Tenn. 1953).

lateral attack on the commitment order from which he should have appealed. The Court pointed out, however, that alimony decrees remain within the control of the divorce court and that the husband could subsequently petition for a modification of the alimony order if circumstances warranted.

The 1953 General Assembly amended the alimony statutes to provide that a court granting a divorce to a husband may divest out of the wife and into the husband any interest which she has in jointly owned property for which the husband has paid.[72] The statute applies to both real and personal property and expressly applies to property owned as tenants by the entirety. Of course, all property, both real and personal, which is jointly owned by a husband and wife is owned as tenants by the entirety unless otherwise specifically provided,[73] but upon the severance of the marriage, property owned by the entireties becomes owned as tenants in common.[74] The present statute does not authorize alimony to be paid to a husband from the wife's estate, but it does authorize the restoration to the husband of property for which he has paid, an equitable result heretofore not attainable.[75]

The General Assembly also amended the divorce statutes by permitting members of the armed forces to make affidavits to divorce bills before certain commissioned officers, even beyond the continental limits of the United States.[76]

ACTIONS FOR LOSS OF CONSORTIUM

The Supreme Court, in *Napier v. Martin*,[77] indicated in dictum that it would not recognize in Tennessee the right of a wife to sue for loss of consortium. The husband had been injured while at work and had collected workmen's compensation from his employer. The wife, however, brought this action at common law against the employer for loss of services and consortium. The primary holding of the case was that the compensation laws provided the exclusive remedy for the workman and his family and that the employer was therefore not subject to any further suit. In dictum, however, the Court said that such an action by the wife does not exist in Tennessee "under the common law or by statute." The plaintiff insisted that the Married Women's Emancipation

72. Tenn. Pub. Acts 1953, c. 90, amending TENN. CODE ANN. § 8446 (Williams 1934).

73. Sloan v. Jones, 192 Tenn. 400, 241 S.W.2d 506 (1951); see note 88 *infra*.

74. Brown v. Brown, 160 Tenn. 685, 28 S.W.2d 350 (1930).

75. *Ibid.*

76. Tenn. Pub. Acts 1953, c. 174, amending TENN. CODE ANN. § 8431 (Williams 1934).

77. 250 S.W.2d 35 (Tenn. 1952), 22 TENN. L. REV. 976 (1953). See the comment on this case in the Exclusiveness of Remedy section of the Workmen's Compensation article.

Act[78] conferred upon a wife the right to bring such an action, but the Court declined to rule upon this point.

The majority of states still do not permit the wife to bring suit for loss of consortium for tortious injury to the husband, even under the emancipation statutes,[79] but there is authority to the contrary.[80] Logically, there would seem to be little reason to deny the right to her. The wife is not obligated to furnish medical expenses or necessaries to the husband. Nevertheless, as hereinafter discussed, the concept of consortium includes society, services, sexual relationships, and so forth. It would seem that the wife should be afforded a remedy for a negligent interference with these matters just as readily as is a husband. Where there is an intentional interference with the marriage relationship, as in an action for alienation of affections, the Tennessee courts have construed the Emancipation Act to permit the wife to sue as well as the husband.[81] It is unfortunate that the Supreme Court commented adversely upon her right to sue for negligently inflicted injuries to her husband, particularly since a decision upon the point was not required in the case.

In the case of *All v. John Gerber Company*,[82] the Court of Appeals discussed fully the elements that enter into the concept of consortium. In that case, the wife sued a beauty parlor for injuries sustained while she was being given a permanent wave. The husband sued for loss of consortium and for medical expenses. In the trial, the court charged the jury that the measure of his damages was the amount of medical expenses which he had incurred on behalf of his wife. The Court of Appeals held that this charge was erroneous, inasmuch as a husband, in an action for loss of consortium, is entitled to recover for actual services of his wife which he has lost and also for the loss of her companionship, society, sexual relationship and the normal contribution which she renders to the home life. The Court said that, in recovering for loss of services, the husband must prove in detail the actual services lost. However, there are other elements in the consortium, and proof of lost services is not essential to recovery for these. The value of consortium depends upon the jury's estimate of the loss sustained in the home life in its normal conditions and surroundings.[83] The husband

78. Tenn. Pub. Acts 1919, c. 126, codified in TENN. CODE ANN. §§ 8460 *et seq.* (Williams 1934).

79. COMPTON, CASES ON DOMESTIC RELATIONS 372 n.14 (1951); RESTATEMENT, TORTS § 695 (1938).

80. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), 4 VAND. L. REV. 358 (1951); Passalacqua v. Draper, 199 Misc. 827, 104 N.Y.S.2d 973 (Sup. Ct. 1951); COMPTON, CASES ON DOMESTIC RELATIONS 372 n.14 (1951).

81. Wilson v. Bryant, 167 Tenn. 107, 67 S.W.2d 133 (1934); Archer v. Archer, 31 Tenn. App. 657, 219 S.W.2d 919 (E.S. 1947).

82. 252 S.W.2d 138 (Tenn. App. W.S. 1952).

83. See Notes, 133 A.L.R. 1156 (1941), 21 A.L.R. 1517 (1922).

was held not entitled to recover for his own mental anguish in the action for loss of consortium, however.

Although the charge of the trial court was held erroneous, the Court of Appeals did not reverse, inasmuch as the jury allowed the husband a sum substantially in excess of any and all damages proved. The Court felt that under the circumstances the error was not prejudicial.

PARENT AND CHILD

The Supreme Court refused in *Ownby v. Kleyhammer*[84] to modify the position which it has consistently taken on the right of a minor to sue its parent for tort. In this case, the minor was a guest in a car driven by his father but owned by a third party. There was no allegation that the father was employed in any way by the owner. As a result of the father's negligence in driving the car, the child was injured. His suit against the owner of the car was dismissed on the ground that, if recovery were allowed, the owner would have an action over against the father, thus indirectly permitting the child to sue his parent.

Although the Tennessee position is very conservative on this point, the case is in accordance with previous holdings which, for similar reasons, denied the right of a child to sue the employer of his negligent parent[85] or the wife to sue the employer of her negligent spouse.[86]

TENANCY BY THE ENTIRETY

In *Hardin v. Chapman*,[87] the Court of Appeals held that a deed conveying property to "H. H. Brown and wife, Mary Brown, equally and jointly" was sufficient to create the estate of tenancy by the entirety. It was contended that such a conveyance was effective only to make the parties tenants in common. In the habendum clause of the deed, however, the property was conveyed to "H. H. Brown and Mary Brown, their heirs and assigns forever," and in the covenants the same language was used. There was no extrinsic proof as to the intention of the grantor or grantees with respect to the title. The Court followed the general rule that, when property is conveyed to a husband and wife jointly, it is presumed that a tenancy by the entirety is created in the absence of contrary wording or proof of contrary intention.[88]

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84. 250 S.W.2d 37 (Tenn. 1952), 22 TENN. L. REV. 1050 (1953).

85. Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622, 162 A.L.R. 571 (1945); Mahaffey v. Mahaffey, 15 Tenn. App. 570 (W.S. 1932).

86. Fagg v. Benton Motor Co., 193 Tenn. 562, 246 S.W.2d 978 (1952); *cf.* Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263 (1932).

87. 255 S.W.2d 707 (Tenn. App. E.S. 1952).

88. Bost v. Johnson, 175 Tenn. 232, 133 S.W.2d 491 (1939).

Conservators of Estates

The 1953 General Assembly provided a means whereby conservators may be appointed in county or probate courts for the estates of persons who are incapable of managing their own estates because of age or disability.[89] Such appointment may be made upon petition of the friends of such persons. Provisions are made for notice, hearing and the appointment of a guardian *ad litem*. The conservator is given all of the powers and duties of a guardian of a minor except as to custody. Bond equivalent to a guardian's bond is required, and the person whose property is placed in the conservator's hands has only the capacity of a minor to enter into contracts. There is no requirement of a jury trial or inquest of insanity. The appointment and the removal of the conservator are left to the discretion of the county or probate judge.

89. Tenn. Pub. Acts 1953, c. 158.