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DOMESTIC RELATIONS—1957 TENNESSEE SURVEY

WILLIAM J. HARBISON*

A large number of significant cases were reported during the survey period dealing with various phases of domestic relations. The 1957 General Assembly enacted several statutes in the field which should also be noted.

ADOPTION OF CHILDREN

Because of domestic difficulty which developed in the home of the petitioning parents, petitions for adoption were denied in two reported cases involving the same parties.[1] In one of the cases[2] custody was granted to the Department of Public Welfare, which had intervened, because the adoption was not perfected within the two-year period prescribed by statute.[3] The court pointed out that the adoption proceedings are governed entirely by statute, and the statutory requirements must be explicitly followed.

A petition for adoption was likewise dismissed in the second of the cases[4] and custody given to the Department. In this proceeding the petitioning husband had withdrawn as a party because of the domestic discord. The wife contended that the trial court erred in permitting such withdrawal, alleging that the husband had contracted with her to adopt the child. The Supreme Court held that even if such a contract existed, it would not be enforced by the courts, and the adoption could be accomplished only by statutory proceedings, not by private contract. This holding is in accord with another recent case[5] in which it was held that the status of adoption can be achieved only through compliance with the statutes and not by estoppel or agreement. The court also stated that until a final decree of adoption has been entered, adjudging that it is for the best interest of the child that the adoption be granted, no legal rights arise in favor of any of the parties; the child remains a ward of the court until the entry of a final decree.[6]

The 1957 General Assembly reenacted two statutes which because of a defective caption had been ruled invalid in 1955 by the Attorney

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1. Clements v. Morgan, 296 S.W.2d 874 (Tenn. 1956); *In re* Clements Adoption, 296 S.W.2d 875 (Tenn. 1956).
2. Clements v. Morgan, *supra* note 1.
3. TENN. CODE ANN. § 36-124 (1956).
4. *In re* Clements Adoption, 296 S.W.2d 875 (Tenn. 1956).
5. Couch v. Couch, 35 Tenn. App. 464, 248 S.W.2d 327 (E.S. 1951), noted in Harbison, *Domestic Relations—1953 Tennessee Survey,* 6 VAND. L. REV. 977 (1953).
6. TENN. CODE ANN. § 36-120 (1956).

General.[7] These statutes contain detailed provisions concerning the consent of the natural parents of the child sought to be adopted or for making such parents parties to the adoption proceedings where their consent is not given.[8] They also prescribe the procedure for proper determination that a child has been abandoned,[9] and provide for out-of-state surrenders by natural parents before officials in their native states.[10]

Another provision of the 1955 Public Acts which had been of doubtful validity because of a technical defect[11] was reenacted.[12] This section permits the adoptive parents to inherit from the adopted child both real and personal property acquired from relatives of such parents. It also precludes natural heirs of the adopted child from inheriting any part of the estate of the adoptive parents or the estates of relatives of such parents. As pointed out in an earlier survey issue,[13] the enactment of this section eliminates a few of the many perplexing problems surrounding inheritance by and from adopted children; it by no means covers all possible situations, and the Tennessee adoption laws still leave many questions on the subject unanswered.

Support of Children

The wide discretion of the trial courts in administering funds for the support of children was illustrated in the case of *Pruett v. Pruett*.[14] The wife had been granted a divorce and custody of the child of the parties. The husband (her second) had been ordered to pay weekly sums for her support and that of the child. He filed the present petition seeking modification of the award upon grounds that the mother had remarried, and requested that his payments for the child be impounded for the future benefit of the child. It appeared that the mother of the child and her present husband were both working, and that the mother received funds for the support of her other children from her first husband. Accordingly the circuit judge reduced the weekly award and ordered the payments by the father of

7. Tenn. Pub. Acts 1955, cc. 320, 345; see Harbison, *Domestic Relations—1955 Tennessee Survey*, 8 VAND. L. REV. 1004, 1006 (1955).
8. Tenn. Pub. Acts 1957. c. 345, TENN. CODE ANN. § 36-108 (Supp. 1957).
9. Tenn. Pub. Acts 1957, c. 292, TENN. CODE ANN. § 36-110 (Supp. 1957). The former statutes had expressly provided that consent of a natural parent was not necessary for adoption if he had previously, in proper proceedings, been adjudged to have abandoned the child. The new statutes appear to have omitted this provision, although the plain implication of the new sections is that no such consent is necessary if there has been such adjudication.
10. Tenn. Pub. Acts 1957. c. 1, TENN. CODE ANN. § 36-114 (Supp. 1957).
11. Tenn. Pub. Acts 1955, c. 302; see Harbison, *Domestic Relations—1955 Tennessee Survey*, 8 VAND. L. REV. 1004, 1005 (1955); *Tennessee Bar Proceedings, Report of Adoption Laws Committee*, 24 TENN. L. REV. 73 (1955).
12. Tenn. Pub. Acts 1957, c. 345, TENN. CODE ANN. § 36-126 (Supp. 1957).
13. Harbison, *Domestic Relations—1955 Tennessee Survey*, 8 VAND. L. REV. 1004, 1006 (1955).
14. 291 S.W.2d 278 (Tenn. App. W.S. 1956).

the child in question to be made to the clerk of the court, there to be held and accumulated subject to further orders of the court, and not to be disbursed to the mother. This action was taken in order to insure that the child would actually receive the benefit of his father's contributions. The court of appeals affirmed, pointing out that the remarriage of the mother was proper ground for terminating any payments for her support, and that payments for the benefit of the child should be administered for the child's best interests. There is precedent for the decision,[15] and the result seems proper in view of the fact situation outlined in the opinion.[16]

In the case of *Roble v. Roble*,[17] the wife had been awarded a divorce and child custody. In the divorce proceedings, however, she had not asked for child support, allegedly because the father of the child was then unemployed. Subsequently, she filed the present suit seeking a support award, alleging and proving the father's ability to pay. The circuit judge, however, held that he lacked jurisdiction to make any award since the matter had not been dealt with in the original action. The court of appeals reversed, pointing out that the divorce decree did not sever the parent-child relation nor terminate the father's obligations. Further, the express statutory provisions retaining custody and support matters before the trial court would seem to leave no doubt as to the power of the court to enter a support order at any time.[18] There may be doubt in Tennessee that the court could order alimony if not granted in the original action,[19] but the same rule is not applicable to support decrees.[20]

The rights of children in the estate of their father, following a divorce between the parents, were treated in *Chapman v. Tipton*.[21]

15. Graham v. Graham, 140 Tenn. 328, 204 S.W. 987 (1918); Dews v. Dews, 6 Tenn. Civ. App. 154 (1915).

16. The courts have held that the burden of support must be equitably distributed between parents, according to their resources and abilities. Rose Funeral Home v. Julian, 176 Tenn. 534, 144 S.W.2d 755, 131 A.L.R. 858 (1940). Accordingly, here the mother's earning capacity was considered adequate to meet the child's current needs, and the father's contributions were impounded for the future.

17. 295 S.W.2d 817 (Tenn. App. M.S. 1956).

18. TENN. CODE ANN. §§ 36-820 to -828 (1956). See Davenport v. Davenport, 178 Tenn. 517, 160 S.W.2d 406 (1942), pointing out that prior to the enactment of these provisions in the 1932 Code, the court lost jurisdiction of such matters unless the original decree expressly or impliedly retained the cause before the court.

19. Darby v. Darby, 152 Tenn. 287, 277 S.W. 894 (1925). (decided before the 1932 Code was enacted), held that if a wife sues for divorce without personal service on her husband, she waives any right to alimony; whether this rule would apply in view of the provisions enacted in 1932 has never been decided. Those provisions retain questions of future support within control of the court, and conceivably would permit a subsequent petition for alimony, if, for good cause, none was sought in the original proceedings.

20. See note 18 *supra;* see also Watkins v. Watkins, 194 Tenn. 621, 254 S.W.2d 735 (1953), discussed in Harbison, *Domestic Relations—1953 Tennessee Survey*, 6 VAND. L. REV. 974, 981 (1953).

21. 292 S.W.2d 25 (Tenn. 1956).

When the divorce was obtained, the court did not assign homestead rights to the wife, as might have been done under the statutes.[22] She was given custody of the children. Their father never remarried and died intestate. The children claimed homestead in his realty and a year's support in his personalty. These statutory rights are granted to the widow of a decedent,[23] but the statutes governing the year's support expressly provide that "if there be no widow . . .. the same provision shall be made for the children of the intestate, or of the widow, or of both, under the age of fifteen (15)."[24] Likewise the statutes on homestead expressly state that homestead shall "inure to the benefit of the widow and children,"[25] and that homestead in a decedent's lands "inuring to the benefit of his widow or minor children" shall be laid out in a specified manner.[26]

In an earlier case the Supreme Court had held that when the mother obtains a divorce without having her homestead rights provided for in the decree, she waives such rights, and neither she nor the minor children thereafter may claim homestead in the husband's realty.[27] In that case, the court recognized that the father's duty of support continues after divorce but ordinarily does not survive his death. The court accordingly denied all claims of the children in that case.

In the *Chapman* case, the Supreme Court merely reaffirmed its former holding. The result seems clearly contrary to the language and intent of the statutory provisions. It is interesting to note also that in the earlier decision relied upon, the husband had remarried and left a surviving widow. No such facts existed in the present case. Accordingly the statutory provisions giving a year's support to the children "if there be no widow" would seem clearly applicable.

LEGITIMACY OF CHILDREN

In the interesting case of *Evans v. Young*[28] the effect of a Mississippi statute legitimating the issue of slave marriages was considered. The statute made the issue of such marriages "legitimate for all purposes."[29] Tennessee has a statute authorizing the children of Tennessee slave marriages to inherit from their parents,[30] but the statute had formerly been construed as not permitting collateral relatives of such children

22. TENN. CODE ANN. § 36-824 (1956). This section provides that when the wife is granted a divorce, title to the homestead shall be vested in her by the decree and upon her death it shall pass to the children.
23. TENN. CODE ANN. § 30-802 to -805 (1956) (year's support); TENN. CODE ANN. §§ 26-301 to -312, §§ 30-901 to -916 (1956) (homestead).
24. TENN. CODE ANN. § 30-805 (1956)
25. TENN. CODE ANN. § 26-301 (1956)
26. TENN. CODE ANN. § 30-901 (1956)
27. Carey v. Carey, 163 Tenn. 486, 43 S.W.2d 498 (1931)
28. 299 S.W.2d 218 (Tenn. 1957).
29. Miss. Pub. Acts 1865, c. 4 § 8.
30. TENN. CODE ANN. § 31-302 (1956).

to inherit from them.[31] Accordingly the Tennessee courts had held that statutes of other states, purporting to legitimate issue of slave marriages, would not be effective to confer a right of collateral inheritance in Tennessee, since the state had not conferred such right on its own citizens of like status.[32]

In 1919, however, the Tennessee statutes were amended to provide that collateral kindred of a deceased Negro should have full rights of inheritance.[33] The present Code so provides.[34]

The Supreme Court in the present case held that as Tennessee has now conferred a full right of collateral inheritance upon all legitimate colored persons, regardless of whether or not they are children of slave marriages, it should permit such inheritance from colored persons legitimated in other states. It had previously been held in Tennessee that this state will recognize the status of legitimacy conferred by the laws of another state and will permit inheritance thereunder to the same extent as under local legitimating provisions,[35] although it will not permit such foreign laws to create greater or different rights than the local laws confer. The present holding is consistent with this rule and carries out the apparent intention of the legislature in broadening the right of inheritance.[36]

Annulment, Divorce and Alimony

Collection and Abatement of Alimony: The use of a ne exeat bond to enforce alimony and child support provisions in a divorce decree was illustrated in *Orrick v. Orrick*.[37] The husband had failed on several occasions to make the payments as ordered; finally the wife, fearful that he would leave the jurisdiction, had him arrested under a writ of ne exeat.[38] He gave bond conditioned upon not leaving the state or the jurisdiction of the court. When he violated the conditions, the wife moved for and was granted judgment against the sureties. The judgment was affirmed on appeal, the court holding that the sureties were not discharged merely because the husband had been arrested

31. Sheperd v. Carlin, 99 Tenn. 64, 41 S.W. 340 (1897).
32. Cole v. Taylor, 132 Tenn. 92, 177 S.W. 61 (1915).
33. Tenn. Pub. Acts 1919, c. 14.
34. Tenn. Code Ann. § 31-303 (1956). In Wallace v. Berry, 6 Tenn. App. 248 (M.S. 1927) the Court of Appeals held that this provision conferred a right of collateral inheritance upon all legitimate colored persons, including the issue of Tennessee slave marriages.
35. Smith v. Mitchell, 185 Tenn. 57, 202 S.W.2d 979 (1947).
36. One of the justices, concurring, felt that the case should simply be disposed of upon the basis of the broadened legislation, since the right of collateral inheritance is conferred therein unconditionally and without reference to prior slave marriages. One justice dissented on the ground that the statutes should apply only to descendants of Tennessee slave marriages, and not to issue of non-residents.
37. 296 S.W.2d 825 (Tenn. 1956).
38. Tenn. Code Ann. § 23-108 (1956).

and later released from jail since the execution of the bond. The arrest had been for other violations of court orders and had not been related to the ne exeat proceedings; the court held that the ne exeat bond, unlike an ordinary bail bond, was not affected by the principal's being placed in custody on other charges.

In the case of *Daugherty v. Dixon*[39] the parties had been divorced in 1935, the decree requiring periodic alimony payments by the husband. Three years later the wife remarried; there was never any modification of the original decree and apparently no payments were made thereunder after December 1935. In 1956 the wife sued for the entire accumulated amount. In addition to pointing out that she was guilty of laches, the court held that it had authority under the Tennessee statutes to remit the entire amount of accumulated alimony and to terminate all future payments; accordingly the suit was dismissed. Tennessee has no code provisions automatically terminating alimony payments upon remarriage of the wife, nor did the court in the present case see fit to adopt such a rule by judicial decision. Unlike the rule obtaining in many jurisdictions, however, it is well settled in Tennessee that accrued alimony payments, as well as future payments, may be modified or remitted.[40] In the present case, the court exercised this power to relieve the husband from an obviously inequitable claim.

The General Assembly enacted specific legislation to authorize the recovery of attorneys' fees by the wife and the custodian of children in proceedings to enforce the provisions of alimony and support decrees.[41] While many of the courts in Tennessee had been making such allowances in practice, express authority therefor had not previously been made by statute. The practice varies widely in other states, depending often upon the construction of local statutes.[42] The new Tennessee statute leaves the trial court wide discretion in allowing such fees and in fixing the amount thereof.

Procedure and Jurisdiction: In addition to creating a new domestic relations court for Davidson County,[43] the General Assembly made several general changes in divorce procedure throughout the state. The cash deposit required in a divorce action filed by the wife under the pauper's oath was increased slightly.[44] Two statutes were enacted dealing with the form of pleadings in divorce cases. By one of these, the complainant is relieved from including "scurrilous or obscene"

39. 297 S.W.2d 944 (Tenn. App. E.S. 1956).
40. TENN. CODE ANN. § 36-820 (1956); Gossett v. Gossett, 34 Tenn. App. 654, 241 S.W.2d 934 (W.S. 1951).
41. Tenn. Pub. Acts 1957, c. 21, TENN. CODE ANN. § 36-822 (Supp. 1957).
42. See generally 17 AM. JUR., *Divorce and Separation* §§ 640-45 (1957).
43. Tenn. Pub. Acts 1957. c. 44.
44. Tenn. Pub. Acts 1957. c. 20, TENN. CODE ANN. § 20-1629 (Supp. 1957) (raising the deposit from $6.00 to $10.00). A husband may not proceed under the pauper's oath in divorce cases in Tennessee.

allegations in the complaint, although upon motion by the defendant the court may subsequently require complete details of the complaint to be specified.[45] The other statute requires that the complaint shall contain detailed data concerning the names, residences and ages of the parties and their children, and the previous marital status of the parties.[46] For failure to include the required information without good cause, the complaint may be dismissed.

An important provision dealing with annulment of marriages was enacted.[47] This statute expressly authorizes service of process in annulment cases by subpoena or by publication, as in divorce cases. Heretofore there had been doubt as to the propriety of proceeding in annulment suits by publication, especially since appellate decisions on the matter were lacking in this state. The authorities from other states are in conflict upon the point.[48] The new provision therefore removes an area of uncertainty heretofore existing in practice.

Another important statutory change reduced the residence requirement from two years to one year before suit for divorce may be brought upon a cause of action arising in a foreign jurisdiction prior to the removal of the complainant to Tennessee.[49]

Cancellation of Decree: In the case of *Martin v. Martin*,[50] a husband while in military service in Tennessee had obtained an *ex parte* divorce from his wife, who resided in Pennsylvania and did not know of the proceedings. The husband was thereafter transferred overseas. Upon learning of the divorce decree, the wife promptly filed suit in Tennessee to have it cancelled for fraud. Service was obtained by publication, and the chancellor cancelled the decree of divorce. The Supreme Court affirmed, holding that Tennessee had jurisdiction over the marriage by virtue of the husband's having submitted the marriage to the courts of this state. There remained therefore "some sort of *res*" within the jurisdiction, even after the husband had departed. The court emphasized the obvious hardship and inequity upon the wife if jurisdiction were declined, since it would be impossible for her to obtain personal service upon her husband in any state to have the fraud corrected. The case is one of first impression in the state,[51] but the result seems to be sound.

45. Tenn. Pub. Acts 1957, c. 46, TENN. CODE ANN. § 36-805 (Supp. 1957).
46. Tenn. Pub. Acts 1957, c. 74, TENN. CODE ANN. § 36-805 (Supp. 1957).
47. Tenn. Pub. Acts 1957, c. 100, TENN. CODE ANN. § 36-834 (Supp. 1957).
48. See 35 AM. JUR., *Marriage* § 75 (1941); Annot., 43 A.L.R.2d 1086 (1955).
49. Tenn. Pub. Acts 1957, c. 274, TENN. CODE ANN. § 36-803 (Supp. 1957).
50. 292 S.W.2d 9 (Tenn. 1956).
51. A similar suit for relief was filed in Rose v. Rose, 176 Tenn. 680, 145 S.W.2d 773 (1940), but there the party committing the fraud had died. Since his death terminated the marriage and he had left no property to be disposed of, the court held that there was no *res* left for it to act upon. It indicated in dictum that relief would have been granted if the spouse committing the fraud were still alive, and that jurisdiction could be obtained by publication.

Right to Remarry: The effect of a prohibition against remarriage in a foreign divorce decree was treated in *Stephenson v. Stephenson.*[52] The husband had obtained a divorce from his wife in Alabama and the decree had permitted him to remarry but had denied such right to the wife. Thereafter, in violation of the decree, she married in Georgia. When her second husband later died in Tennessee, the legality of the marriage was raised in a contest over her right to administer the estate. There was no evidence that her remarriage was celebrated in Georgia for the mere purpose of evading the laws either of Alabama or of Tennessee. Accordingly the Tennessee court declined to give effect to the prohibition contained in the divorce decree, and held the subsequent marriage valid. The result is in accord with the majority rule that extraterritorial effect will not be given decrees or statutes limiting the right of remarriage.[53]

Res Adjudicata: In two protracted divorce proceedings, the principle of res adjudicata was applied by the courts. In the first of these,[54] the wife had been granted a decree of separate maintenance, and the husband's cross-bill for divorce had been dismissed in 1935. Thereafter there were numerous unsuccessful petitions and suits by the husband throughout the next twenty years, seeking a divorce on grounds of desertion, or in the alternative praying that the courts grant a divorce to the wife on grounds of "public policy" so as to terminate the unsuccessful marriage. The court of appeals under the present petition by the husband entered an absolute divorce in favor of the wife. The Supreme Court reversed, holding that the prior unappealed decrees had settled all issues insofar as the husband's claims were concerned, and holding that no doctrine of "public policy" demanded that the wife be forced to accept a divorce if she did not so desire, when she was living apart from her husband under a valid decree of separate maintenance.

In *Gracey v. Gracey*[55] a proposed property settlement between the parties had been submitted to the trial court in connection with divorce proceedings. The court had approved all of the settlement except one provision directing certain payments by the wife to the husband; this provision he had disapproved. The husband then filed the present suit seeking to collect those payments from the wife pursuant to their original agreement. Both the trial and appellate courts sustained a plea of res adjudicata, inasmuch as the property rights of the parties had clearly been considered and adjudicated in the earlier proceedings.

52. 298 S.W.2d 36 (Tenn. App. E.S. 1956).
53. 17 AM. JUR., *Divorce and Separation* § 461 (1957); see also Annot., 47 A.L.R.2d 1393, 1405 (1956).
54. Perrin v. Perrin, 299 S.W.2d 19 (Tenn. 1957).
55. 300 S.W.2d 606 (Tenn. 1957).

SEPARATE MAINTENANCE

In three cases reported during the survey period, decrees of separate maintenance were involved. In two of them a trial court had granted separate maintenance to the wife and had denied divorce to the husband.[56] In each case the husband thereafter moved the court to make the "divorce" absolute. In both cases the Supreme Court held that a decree of separate maintenance is unlike a divorce *a mensa et thoro,* which can be made into an absolute divorce upon a showing of cause. In each of the cases under consideration, the wife had not sought any kind of divorce but only an equity decree for separate maintenance. Such a proceeding is not brought pursuant to the divorce code and relief therein is granted under inherent chancery power, being available often when the requirements of the divorce code cannot be met by the petitioner.[57] Accordingly in each case the Supreme Court held that it would not be proper for the trial court to undertake to grant an absolute divorce in a separate maintenance suit, even though it appeared that the parties were irreconcilable.[58]

In the case of *Elrod v. Elrod*[59] the husband sued for divorce, and the wife filed a cross-action for separate maintenance. The court of appeals held that the evidence entitled the husband to a divorce on grounds of cruelty, but his bill was dismissed for noncompliance with the state residence requirements. Because of the inequitable conduct of the wife, however, she was denied separate maintenance. The court held that because of her conduct, the husband was entitled to live separate from her, and therefore owed her no duty of support.

PRESUMPTION IN FAVOR OF SECOND MARRIAGE

In the case of *Rutledge v. Rutledge*[60] the primary defense raised by the husband in an action by his wife for divorce was that he had previously been married and that the prior marriage had not been dissolved. His testimony, however, showed that both he and his former wife had lived in various places in other states and that his former

56. Perrin v Perrin, 299 S.W.2d 19 (Tenn. 1957); Stephenson v. Stephenson, 298 S.W.2d 717 (Tenn. 1957).

57. *E.g.,* Cureton v. Cureton, 117 Tenn. 103, 96 S.W. 608 (1906) (separate maintenance allowed although residence requirement for limited divorce not fulfilled); Bevil v. Bevil, 8 Tenn. App. 490 (W.S. 1928) (wife unable to establish grounds for divorce may be granted separate maintenance in later proceeding, the two remedies being "entirely distinct").

58. In each case the husband invoked the rule of Lingner v. Lingner, 165 Tenn. 525, 56 S.W.2d 749 (1933). In that case it was held that in an action for limited divorce, the court could, in its discretion, grant an absolute divorce if the parties were irreconcilable, pointing out the hardship and undesirability of long continued separations. In each of the present cases, however, the Supreme Court declined to extend this "public policy" rule to separate maintenance actions.

59. 296 S.W.2d 849 (Tenn. App. W.S. 1956), *cert. denied, reh. denied,* 296 S.W.2d 856 (Tenn. 1956).

60. 293 S.W.2d 21 (Tenn. App. W.S. 1953).

wife had herself remarried prior to defendant's entering into his present marriage. He produced certificates from the chancery court clerks of two counties in Mississippi that there were no records of dissolution of defendant's prior marriage in their courts. Both the trial court and the court of appeals, however, held that there is a very strong presumption that before a second marriage is entered into, the former marriage has been lawfully terminated.[61] The evidence in the present case was held insufficient to rebut the presumption, particularly in view of the trial court's statement that the husband was not a credible witness.[62]

ACTIONS FOR LOSS OF CONSORTIUM

The husband's action for loss of consortium caused by tort to the wife was dealt with briefly in two cases reported during the survey period. In *Spence v. Carne*,[63] a jury verdict in favor of the wife for personal injuries in an automobile accident was affirmed. The husband had sued for property damage to his automobile and for his wife's medical expenses. He had stayed at home and cared for his wife personally instead of hiring outside help. In his suit, however, he made no allegations concerning his loss of time or loss of consortium. His property damages and medical expenses totalled $2,462.71. The jury awarded him $3,000. The court of appeals held that the verdict must be reduced to the actual expenses proved, and that nothing should be allowed for the husband's loss of time or loss of consortium.

The holding seems unduly restrictive, although it might be justified by a strict reading of the pleadings. As pointed out in the other reported case during the period,[64] in which the wife alleged personal injury because of malicious prosecution, the action for loss of consortium is well recognized in Tennessee and was not abolished by the emancipation of married women. And the same court which ordered the remittitur in the *Spence* case had only recently held that a jury award to the husband for "mental anguish" might well be interpreted as being an allowance for loss of consortium and thereby sustained.[65] It would seem that unless the pleadings absolutely precluded the husband's claims in the *Spence* case, therefore, the modest award made to him should have been sustained.

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61. See generally Payne v. Payne, 142 Tenn. 320, 219 S.W. 4 (1919); Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911); Annot., 14 A.L.R.2d 7 (1950).
62. Little stress was given to the fact that the former wife of defendant had herself remarried. The proof of this marriage would seem to add strength to the presumption that defendant's former marriage had been dissolved.
63. 292 S.W.2d 438 (Tenn. App. W.S. 1954).
64. Dunn v. Alabama Oil & Gas Co., 299 S.W.2d 25 (Tenn. App. M.S. 1956).
65. Scott v. St. Louis—San Francisco Ry., 286 S.W.2d 347 (Tenn. App. W.S. 1954), 24 TENN. L. REV. 602 (1956).

TENANCY BY THE ENTIRETY

The case of *Moore v. Cole*[66] was another of the many cases involving unsettled titles in Tennessee during the so-called "Bejach" period from 1913 to 1919. As discussed in an earlier survey issue,[67] a deed to husband and wife during these years, because of an unfortunate misinterpretation of the Married Women's Emancipation Act of 1913,[68] had the effect of creating a tenancy in common rather than a tenancy by the entirety.[69] The deed in the present case was executed in 1914. Adhering to its former rulings on the subject, the Supreme Court held that only a tenancy in common was created, and upon the death of the wife her one-half interest passed to her heirs. The rights of these heirs were held unaffected by later conveyances in which the husband sought to create a tenancy by the entirety in the whole tract in himself and his second wife. Both the husband and his second wife were found to be acting in good faith and in the belief that he owned fee simple title to the entire property by survivorship.

The unfortunate effects of the holding by the Supreme Court in 1918[70] that the General Assembly had abolished tenancy by the entirety in enacting the emancipatory legislation, are coming more and more to be felt. A generation has passed since the decision; and it is to be expected that an increasing number of cases will arise during the next few years growing out of titles created during the 1913-1919 interval. At this late date, however, it would probably only add to the complexities of the situation if the court were to overrule its 1918 decision, and retroactive legislation at this time might encounter insurmountable constitutional problems.

In *Waddy v. Waddy*[71] rights of an individual creditor of a tenant by the entirety were considered. The creditor held judgment against the husband alone, and a *nulla bona* return had been made on execution. The present suit was filed to subject to the judgment the interest of the husband in realty owned by the entirety with his wife. The chancellor ordered a sale of the husband's interest, subject to his homestead right. The Supreme Court affirmed, pointing out that if the wife survived, the purchaser of the husband's interest would take nothing; if the husband survived, the purchaser would take the fee, subject to certain prior mortgage indebtedness on the land.

Perhaps the most important case dealing with tenancy by the

66. 289 S.W.2d 695 (Tenn. 1956).
67. Harbison, *Domestic Relations—1956 Tennessee Survey*, 9 VAND. L. REV. 990 (1956).
68. Tenn. Pub. Acts 1913, c. 26; Gill v. McKinney, 140 Tenn. 549, 205 S.W. 416 (1918).
69. The estate was expressly restored by legislation in 1919 and has existed since that time. Tenn. Pub. Acts 1919, c. 126, TENN. CODE ANN. § 36-602 (1956).
70. Gill v. McKinney, 140 Tenn. 549, 205 S.W. 416 (1918).
71. 291 S.W.2d 581 (Tenn. 1956).

entirety during the survey period was *Preston v. Smith*.[72] In this decision the court of appeals held that an estate of tenancy by the entirety cannot arise by mere joint adverse possession of real estate by a husband and wife, unaccompanied by any sort of deed or muniment of title. Such possession, continued for over twenty-one years, was held to create only a tenancy in common between the parties. The court refused to enlarge the usual presumption of lost grant arising out of twenty years' adverse possession to the point of presuming that such grant would have been of an estate by the entirety. The case was one of first impression in the state. It has been criticized,[73] and the result seems somewhat contrary to the extremely liberal attitude of the Tennessee courts generally toward the creation of tenancy by the entirety.[74]

HUSBAND AND WIFE

In the case of *In re Estate of Templeton*,[75] a wife had signed a note of her husband as accommodation maker. Upon his death she was compelled to pay the entire note. The court held that she was entitled to reimbursement out of her husband's estate for her expenditures. There is no rule in Tennessee prohibiting a wife from becoming surety upon her husband's debts. In many states such a prohibition obtains as an incident to the emancipation legislation.[76] Since, therefore, the wife may become a surety in Tennessee, she should be entitled to all of the remedies of a surety, among which reimbursement is of primary importance.

PARENT AND CHILD

In *Lakins v. Isley*[77] a husband and wife had been divorced, with custody of their child given to the wife. The wife thereafter was killed in an accident, and the child went to live with her maternal grandmother. The father of the child qualified as administrator

72. 293 S.W.2d 51 (Tenn. App. M.S. 1955), 24 TENN. L. REV. 892 (1957), 10 VAND. L. REV. 460 (1957).

73. 24 TENN. L. REV. 892, 899 (1957).

74. See., *e.g.*, Oliphant v. McAmis, 197 Tenn. 367, 273 S.W.2d 151 (1954) (personalty registered in husband's name but acquired through joint efforts held to be owned by the entirety); Sloan v. Jones, 192 Tenn. 400, 241 S.W.2d 506 (1951) (bank account in name of husband or wife). See Harbison, *Domestic Relations—1956 Tennessee Survey*, 9 VAND. L. REV. 990, 998 (1956). Even the Tennessee General Assembly once recognized a rather unconventional and unorthodox method of creating a tenancy by the entirety by providing for such an estate to arise upon a deed from one spouse to the other of "a one-half undivided interest" in realty. Tenn. Pub. Acts 1949, c. 255. This provision has now been modified to require a direct conveyance to the other spouse expressing the intention to create the tenancy. TENN. CODE ANN. § 64-109 (1956).

75. 300 S.W.2d 613 (Tenn. 1957).

76. See generally 26 AM. JUR., *Husband and Wife* §§ 211-20 (1940).

77. 292 S.W.2d 389 (Tenn. 1956).

of his former wife's estate and filed suit for wrongful death. The grandmother sought to have him removed as administrator, since she was closely related to the deceased while the divorced husband had no relationship whatever to her. The Supreme Court pointed out, however, that neither the grandmother nor the divorced husband would share in the wrongful death proceeds. These would belong solely to the child. Accordingly the father of the child was granted the right to administer the estate and prosecute the suit.

The 1957 General Assembly modified the general rule of non-liability on the part of a parent for tort of his child by providing that a parent or guardian should be liable for property damage inflicted by his child under eighteen years of age, provided that the damage is done "maliciously or willfully" and provided that the child is living with the parent or guardian.[78] The statute restricts recovery to actual damages, however, and limits liability to three hundred dollars and court costs. A complete defense is provided "if the parent or guardian of the person show due care and diligence in his care and supervision of such minor child."

The General Assembly provided that in proceedings involving the issue of paternity of a child, the court may, upon motion of the alleged father, require the alleged father, the mother and the child to submit to blood grouping tests to determine whether the defendant can be excluded as being the father.[79] The results of the tests are admissible in evidence only where exclusion is established.

The General Assembly also created the Division of Juvenile Probation to operate within the Department of Correction.[80] This Division is designed to handle problems of probation of juvenile offenders and to place such problems in the hands of specially qualified and trained personnel.

The General Assembly also clarified the procedure of appeal from the juvenile court to the circuit court.[81] The new statute allows five days for appeal and expressly authorizes trial de novo in the circuit court. The circuit court is directed to remand the case after decision to the juvenile court for enforcement of the judgment.

78. Tenn. Pub. Acts 1957, c. 76, TENN. CODE ANN. §§ 37-1001 to -1003 (Supp. 1957).
79. Tenn. Pub. Acts 1957. c. 30. TENN. CODE ANN. § 24-716 (Supp. 1957).
80. Tenn. Pub. Acts 1957, c. 278, TENN. CODE ANN. §§ 37-901 to -909 (Supp. 1957).
81. Tenn. Pub. Acts 1957, c. 315, TENN. CODE ANN. §§ 37-273 (Supp. 1957).