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The volume of litigation in domestic relations cases, as shown by the reported decisions on appeal, has continued to be heavy during the past five years. Since few of the decisions are significant from the standpoint of establishing new legal principles, this article will be limited to comment on those decisions which involve interesting application of familiar principles and notation of the more significant problems which have been discussed in notes in the *Kentucky Law Journal* over the past five years.

MARRIAGE

Validity—Although the Kentucky statute purports to make "void" as many as seven different types of purported marriages, not all of these are completely inoperative for all purposes in the absence of a decree of annulment during the lifetime of the parties. Among the purported marriages which are "void" upon collateral attack without any annulment proceedings are miscegenous marriages, marriages between persons of closer relationship than second cousins, common law marriages, purported marriages when there is a prior subsisting marriage, marriages procured by fraud or duress or while one of the parties is under mental disability.[1] In a recent case a purported marriage between first cousins, celebrated only a few months after the statute voiding such marriages had been passed in 1946, was held completely void on collateral attack in a proceeding by the first cousin as the widow claiming her share in the estate of the deceased service man to whom she thought she was married and with whom she lived as his wife.[2]

The Kentucky policy which has outlawed "common law" marriages since 1852 does not prevent the Kentucky courts from

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[1] KY. REV. STAT. secs. 402.010, 402.020.

[2] Bowen v. Bowen, 247 S.W. 2d 379 (Ky., 1952).

recognizing as valid, under general principles of conflict of laws, a marriage without any ceremony entered into by the parties while resident in a state recognizing common law marriages, but the Kentucky courts insist that the residence of the parties in the other state as well as their intention to become man and wife must be clearly proved in order to be recognized in Kentucky and will not presume this where the relationship began by the parties living in Kentucky and was therefore meretricious in its inception.[3]

The applicable statute on capacity to enter into a valid marriage provides that a marriage "with an idiot or a lunatic" is "prohibited and void".[4] It is the condition of the parties' minds at the time of the marriage that is controlling, however, and it is quite possible sometimes to find sufficient capacity despite a previous adjudication of incompetence or even insanity, provided that the contracting spouse has the ability to understand the nature of the marriage relationship at the time of the celebration.[5] In *Littreal* v. *Littreal*[6] the evidence of capacity was held to overcome the previous adjudication of incompetency of the husband and appointment of a committee for his affairs. Following this case a recent note in the *Kentucky Law Journal* discussed the types of adjudication bearing upon capacity to marry in Kentucky.[7] Although the capacity of a party to marry is governed by the law of the state where the marriage takes place and a marriage valid where contracted will be recognized in Kentucky, it is possible that a marriage in a sister state by a person previously adjudicated insane by the Kentucky court may not be recognized in Kentucky on the ground of violation of a fundamental public policy of Kentucky.[8]

The statute prohibiting officials authorized to solemnize the marriage ceremony from soliciting marriages will be enforced.[9]

Presumptions—There is a presumption that a valid marriage exists from the fact that a man and woman live together and

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[3] Kennedy v. Damron, 268 S.W. 2d 22 (Ky., 1954), commented upon in an article, Lacy, *Family Law*, 30 N.Y.U.L. REV. 30 (1955); Carroll v. Carroll, 251 S.W. 2d 989 (Ky., 1952).
[4] KY. REV. STAT. sec. 402.020.
[5] Cook v. Cook, 243 S.W. 2d 900 (Ky., 1951).
[6] 253 S.W. 2d 247 (Ky., 1952).
[7] Youngblood, *Domestic Relations—Capacity to Marry*, 43 KY. L.J. 415 (1955).
[8] Beddow v. Beddow, 257 S.W. 2d 45 (Ky., 1952).
[9] Ladd v. Commonwealth, 233 S.W. 2d 517 (Ky., 1950).

establish a reputation that they are husband and wife. This presumption, however, may not be applied in the face of contrary evidence. Thus, in one case the court refused to indulge in the presumption where there was some evidence of a mere illicit relationship and the woman claiming to be decedent's widow had taken an inconsistent position, first asserting but failing to prove a ceremonial marriage in Ohio, and later in the same proceedings offering evidence of a common law marriage in Florida. Although the parties had lived together with an appearance of matrimonial ties in both Kentucky and Florida, the court was unable to find from the evidence a valid common law marriage in Florida.[10] A question of conflicting presumptions as to continuing validity of two marriages was resolved in *Trimble* v. *Wells*,[11] when it was shown that a divorce action involving the first marriage had not been carried to completion, thus causing to disappear any presumption of validity of the second marriage.

DIVORCE

Jurisdiction—Some interesting developments have taken place in regard to the jurisdictional prerequisites for a divorce action in Kentucky. *Weintraub* v. *Murphy*[12] was an exercise by the Court of Appeals of an original writ of prohibition to the Circuit Court to compel determination of the husband's required one year residence within the state. The non-resident defendant challenging plaintiff's residence was held entitled to a special appearance for the sole purpose of challenging the jurisdictional fact of residence without being compelled to litigate all of the issues. The statute[13] denying an appeal from a judgment *granting* a divorce was cited by the court. It construed this statute to preclude an appeal from a merely erroneous judgment by the lower court as to the existence of jurisdiction, adopting as its premise that such a judgment would not necessarily be void but may be merely erroneous. And since appeal would therefore be unavailable should the decree grant the divorce, the writ of prohibition was the only remedy whereby the non-resident defendant could re-

[10] Carroll v. Carroll, 251 S.W. 2d (Ky., 1952).
[11] 234 S.W. 2d 683 (Ky., 1950).
[12] 240 S.W. 2d 594 (Ky., 1951).
[13] KY. REV. STAT. sec. 21.060.

quire the determination of the jurisdictional fact of plaintiff's residence. In answer to the presumption that every public officer will perform his duty the Court of Appeals stated . . . "we will not presume that public officers (including courts and their officers) will not sometimes act erroneously while performing that duty". Though the writ of prohibition enabled the non-resident defendant in the divorce action to obtain in effect a limited appeal on the jurisdictional fact of residence, this the court considered the very thing she was entitled to by her special appearance.

On another original writ of prohibition based upon lack of residence by the plaintiff, the appellate court affirmed the finding that a serviceman originally from Kentucky had maintained his Kentucky residence (in the sense of domicile) despite his previous application for the Ohio Veteran's Bonus and letters to his wife in Brooklyn that he considered his permanent residence to be the home of his wife's parents.[14]

Jurisdiction of the Kentucky court, based upon residence of only one of the parties who has the non-resident party served by publication, was sustained in *Kenmont Coal Co.* v. *Fisher*.[15] The procedure upon which the case reached the court was unusual. The non-resident wife, claiming to have had no notice of the divorce proceedings in 1947, filed a petition in equity after the death of plaintiff-husband against his administrator to vacate the divorce decree for want of one year's residence and won an award annulling the divorce because of "jurisdictional fraud" on the court in that the matrimonial domicile was in Maryland. Thereupon the present plaintiff, a former employer of the deceased husband who had not been made a party to the action to annul, brought the instant action to set aside the judgment vacating the divorce, basing its interest in the subject matter of the litigation upon its financial responsibility which it first discovered when the non-resident wife filed her claim under the Workmen's Compensation Law as widow of deceased. The deceased husband's employer was held to have standing to set aside the decree vacating the divorce, to which action it was a necessary party, since its property rights were involved. The rule limiting such actions to the divorced parties themselves applies to suits affecting the divorce

[14] Russell v. Hill, 256 S.W. 2d 508 (Ky., 1953).
[15] 259 S.W. 2d 480 (Ky., 1953).

directly but not when property rights of third parties are affected. On the merits, the court went on to hold that the decree vacating the divorce should be set aside, thus reinstating the divorce. The divorce decree should not have been set aside "without clear and convincing proof of an utter lack of jurisdiction".[16] The evidence of lack of residence in the action to vacate was insufficient to overcome the finding of the fact of residence by the Circuit Court when it first granted the divorce. The court, therefore, had jurisdiction to grant the divorce and the judgment vacating it was a nullity. The power of the Court of Appeals to vacate the decree vacating the divorce was thus held to rest upon the lack of power of the lower court to vacate its own divorce decree when based upon proper jurisdiction.

Recognition of out-of-state divorces—While a divorce decree in any state having jurisdiction is entitled to full faith and credit in every state, the home state of the parties to the marriage has generally reserved the right to deny effect to a divorce decree rendered by a sister state without jurisdiction. Thus the Kentucky court will not give effect to a Nevada decree when that court lacks jurisdiction because of the failure of the party who goes there to get the divorce to acquire more than a temporary presence in that state. And on proper petition the Kentucky court will re-litigate the issue of bona fide residence in Nevada even though the Nevada court has already specifically determined such residence as a fact in connection with its decree.[17] This is in line with recent United States Supreme Court pronouncements permitting the re-determination of the existence of jurisdictional prerequisites for divorce under the full faith and credit clause.[18]

Venue—The statute governing venue between counties requires that the action for divorce be brought in the county where the wife usually resides.[19] Cases challenging the propriety of venue have recently arisen, both on appeal[20] and on original writ

[16] *Id.* at 482. Of course annulling a divorce decree based upon proper jurisdiction is another matter and may be done upon joint application of the parties.

[17] 242 S.W. 2d 747 (Ky., 1951).

[18] Coe v. Coe, 334 U.S. 378, 68 S. Ct. 1094 (1948); Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207 (1942), 325 U.S. 226, 65 S. Ct. 1092 (1945). It is everywhere the law, however, that the domicile of just one of the parties gives a state jurisdiction for divorce. See Pollitt, *Quick Divorce*, 39 KY. L.J. 289 (1951).

[19] KY. REV. STAT. sec. 452.470.

[20] Carter v. Carter, 273 S.W. 2d 823 (Ky. 1954).

of prohibition.[21] No period of time of the wife's residence is required to confer venue, but her actual residence within the county at the time suit is brought is the test.[22]

Dismissal—The public policy involved in the dismissal of divorced proceedings was touched upon in *Huls* v. *Smith*,[23] a case arising on original petition for mandamus to compel the lower court to dismiss. Conceding the usual liberality in allowing a divorce action to be dismissed on petition of both parties where reconciliation may be achieved, the chancellor's exercise of discretion in refusing dismissal was upheld in view of the particular circumstances of the case. These circumstances included unlikelihood of any reconciliation or settlement and the fact that the dismissal did not take care of the children, orders for whose support the defendant-husband had disregarded. Further, the dismissal had been consented to by the wife without the advice of her attorney and ignored an award to her attorney of a fee payable by the defendant.

The dependence of the client upon his attorney, in this as in other types of adversary proceedings, was brought to light in a case where the wife had instructed her attorney to dismiss and thought he had done so. Meanwhile, the action not having been dismissed, her husband procured a divorce on his counterclaim and it could not be set aside.[24]

Grounds—The statutory provision in Kentucky recognizes as a ground for divorce by either husband or wife physical and mental cruelty under certain circumstances. The physical cruelty is cast in terms of ". . . such cruel beating or injury, or attempt at injury . . . as indicates an outrageous temper . . . or probable danger . . . to life, or of great bodily injury. . . ." The form of mental cruelty provided is "Habitually behaving . . ., for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion . . . or to destroy permanently . . . peace or happiness."[25] However, to be a sufficient ground in favor of the wife, unlike the husband, there is the additional proviso, "if she is not in like

[21] Stewart v. Yager, 272 S.W. 2d 674 (Ky., 1954) (Suit held properly brought in county of wife's old residence where move to new residence not completed).
[22] Brumfield v. Baxter, 307 Ky. 316, 210 S.W. 2d 972 (1949); Carter v. Carter, *supra* note 21.
[23] 252 S.W. 2d 917 (Ky., 1952).
[24] McKay v. McKay, 260 S.W. 2d 945 (Ky., 1953).
[25] KY. REV. STAT. sec. 403.020.

fault". Like language affecting the right of the husband had been omitted in an amendment to the earlier statute, and the court noticed the omission in at least one case.[26] It was recently held, however, that the omission would not have the effect of giving a husband "in like fault" a right to divorce on the ground of cruelty because the doctrine of recrimination would operate to bar him.[27]

The greatest volume of reported divorce cases deal with some form of cruelty. There are numerous recent cases reversing the lower court's denial of a divorce[28] and others affirming that the divorce was properly granted incidental to appellate review of the appropriateness of the alimony or property settlement awarded.[29] There have also been cases affirming the denial of a divorce because of insufficient evidence or because of recriminatory conduct by the plaintiff.[30]

In providing for adultery as a ground for divorce, the Kentucky statute is seemingly more liberal in granting a divorce to the husband than to the wife, in that the husband can be granted a divorce for the wife's adultery *or* such lewd and lascivious conduct as to prove her unchaste whereas a divorce against the husband can be had only for "living in adultery".[31] There have been cases dealing with what type of conduct is sufficient to create the inference of unchastity. Two days in Evansville, Indiana, with another man was held sufficient.[32] Occasionally the evidence falls

[26] Muth v. Muth, 314 Ky. 531, 236 S.W. 2d 469 (1951).

[27] Fenner v. Fenner, 273 S.W. 2d 803 (Ky., 1954).

[28] York v. York, 280 S.W. 2d 553 (Ky., 1955); Coleman v. Coleman, 269 S.W. 2d 730 (Ky., 1954), noted 43 KY. L.J. 322 (1955); Carlton v. Carlton, 265 S.W. 2d 477 (Ky., 1954) (husband abusive, threatening, once vicious); Eckhoff v. Eckhoff, 247 S.W. 2d 374 (Ky., 1951) (Wife entitled to absolute divorce, mental cruelty); Jones v. Jones, 246 S.W. 2d 583 (Ky., 1952) (error to refuse divorce solely because testimony of plaintiff was uncorroborated); Moore v. Moore, 238 S.W. 2d 999 (Ky., 1951) (Instructions to wife to return to her parents and decide whether she wanted to live with him held refusal to permit her to return and justified divorce to wife on ground of cruelty.)

[29] Shick v. Shick, 260 S.W. 2d 944 (Ky., 1953) (physical cruelty); Puckett v. Puckett, 258 S.W. 2d 519 (Ky., 1953); Lampkin v. Lampkin, 258 S.W. 2d 720 (Ky., 1952) (mental cruelty, settled aversion); Childers v. Childers, 243 S.W. 2d 929 (Ky., 1951 (wife's leaving home was cruelty); Crawford v. Crawford, 233 S.W. 2d 505 (Ky., 1950) (physical cruelty); Patterson v. Patterson, 266 S.W. 2d 91 (Ky., 1954) (Baseless counterclaim charging adultery was itself cruelty).

[30] Cadden v. Cadden, 272 S.W. 2d 474 (Ky., 1954) (without prejudice to seek a divorce after five year period of separation on that ground); Fenner v. Fenner, 273 S.W. 2d 803 (Ky., 1953) (applied recrimination); Dean v. Dean, 238 S.W. 2d 672 (Ky., 1951) (mere "shortcomings", no divorce).

[31] KY. REV. STAT., sec. 403.020.

[32] Brumley v. Brumley, 247 S.W. 2d 987 (Ky., 1952).

short of justifying a divorce for adultery, but the association of one of the spouses with a person of the opposite sex may be so serious in character or so notorious as to constitute a ground for divorce on the ground of cruelty.[33] Also cruel enough for a divorce may be unfounded charges of adultery.[34]

There are two statutory provisions in Kentucky providing for absolute divorce because of abandonment and separation. One provision, which is strictly speaking referred to as the desertion statute, gives a right of divorce to the party not in fault for abandonment for one year. The other provision, the "living apart" statute, gives a right of divorce to either party without regard to fault when the spouses have lived apart "without any cohabitation for five consecutive years next preceding the application."[35] The latter statute, though not in the category of a desertion statute, nevertheless requires the intention by at least one of the parties to continue to live apart from his spouse coupled with the uninterrupted separation. This five year provision has had some court construction. In one fairly recent case the Court of Appeals, in reversing the alimony award, considered that the husband should not have been granted an absolute divorce where the husband and wife had lived together in the same house, even though they did not eat or sleep together and there was no sociability whatever.[36] This decision was contrasted with the position of a recent District of Columbia case and other authorities discussed in a note in the *Journal*.[37]

Abandonment to satisfy the one year statute was held established where the wife admitted having ordered the husband out of the family home, saying on the stand "I should have kicked him out".[38] One court held that a divorce on the ground of either abandonment or cruelty, unlike adultery, may be granted on the uncorroborated evidence of one of the parties if persuasive enough.[39] Although the court cannot reverse that portion of the

[33] Crawford v. Crawford, 233 S.W. 2d 505 (Ky., 1952) (Wife publicly kissing another man).
[34] Rupard v. Rupard, 301 Ky. 554, 192 S.W. 2d 477 (1945).
[35] KY. REV. STAT. sec. 403.020.
[36] Ratliff v. Ratliff, 312 Ky. 450, 227 S.W. 2d 989 (1950); cf. Evans v. Evans, 247 Ky. 1, 56 S.W. 2d 547 (1933).
[37] Hoge, *Divorce: "Living Apart" Under the Same Roof?*, 41 KY. L.J. 110 (1952).
[38] Hannan v. Hannan, 256 S.W. 2d 485 (Ky., 1953).
[39] Jones v. Jones, 246 S.W. 2d 583 (Ky., 1952).

judgment which grants a divorce, it can hold, incident to review of the alimony award, that a divorce should have been granted to the wife on the ground of abandonment instead of to the husband for cruelty.[40]

Defenses—The common law defense of recrimination continues to be applied in Kentucky. Several recent cases have denied a divorce to a plaintiff himself guilty of serious misconduct.[41] It is true that one case[42] affirmed an anomalous type of lower court decree awarding a divorce to both parties because of cruelty by both of them without mentioning the possibility of recrimination as a bar. This holding can be partially explained by the fact that the Court of Appeals cannot reverse that portion of a judgment granting a divorce although it can reconsider the correctness of the judgment in reviewing the determination as to alimony. A note on this case discusses other possible bases upon which the holding might well have been predicated, and concludes that the case has not lessened the hold of recrimination in Kentucky in the light of other decisions.[43] A criticism of the doctrine and discussion of the means whereby other states have allowed a trend toward its rejection appears in an earlier note.[44] Very recently a case in California attracted national attention by practically abolishing by judicial interpretation the defense in that state.[45]

Another recent case now being noted in the *Journal* clarifies the law as to the inapplicability of the defense of condonation from the sole fact of living with the offending spouse during and following the continuing offense of cruelty.[46]

The bed and board divorce—The Kentucky statute authorizes a "divorce from bed and board" type of separation for any cause that would justify an absolute divorce or for any other cause that

[40] Ahrens v. Ahrens, 230 S.W. 2d 73 (Ky., 1950) (Court also stated that filing of complaint with personal attack against husband and his family was insufficient recrimination).

[41] Fenner v. Fenner, 273 S.W. 2d 803 (Ky., 1954) (Affirmed denial of divorce on evidence of husband's similar cruelty, despite argument that statute does not mention absence of like fault in giving husband ground of divorce for cruelty.

[42] Shofner v. Shofner, 310 Ky. 868, 222 S.W. 2d 933 (1949).

[43] Lewis, *Divorce—Does Recrimination Remain in Kentucky?*, 40 KY. L.J. 330 (1952).

[44] Spears, *Domestic Relations—The Modern Trend Toward Rejection of Recrimination*, 36 KY. L.J. (1948).

[45] De Burgh v. DeBurgh, 39 Cal. 2d 858, 264 P. 2d 598 (1952). See also the 1953 and 1954 Annual Survey of American Law, 29 N.Y.U.L. REV. 722 (1954), 30 N.Y.U.L. REV. 680 (1955).

[46] York v. York, 280 S.W. 2d 553 (Ky., 1955).

the court in its discretion deems sufficient.[47] The effect of such judicial separation is unlike an absolute divorce in that neither party may remarry during the life of the other and the property rights of the surviving spouse are not terminated. One interesting case arose as to the effect of such a decree upon the property settlement incorporated therein where the parties within a short time resume living together.[48] The court held that the property settlement part of the decree was terminated by the resumption of the marital relations insofar as it purported to bar full dower and distributive share rights in the surviving spouse. It seems, however, that a bed and board separation is not automatically terminated by the resumption of relations by the spouses, since the statute provides for the setting aside of the decree "by the court rendering it".[49] This point is discussed in a recent note by Robert C. Moffit.[50] In one other significant recent case the court reversed the granting of a bed and board divorce and ordered that an absolute divorce be granted.[51] This result was praised in a recent note by L. M. Tipton Reed, pointing out objections to a bed and board divorce where it has proven impossible for the parties to live together.[52] When the evidence falls short of sufficient grounds for an absolute divorce it is debatable whether the solution should be (1) a judicial separation[53] or (2) denial of any decree at all, without prejudice to the right of the parties to seek an absolute divorce later when the statutory five years' separation has elapsed.[54] The court has wide discretion whether or not to award a bed and board divorce and the court will be guided by the circumstances of the individual case.

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[47] KY. REV. STAT. sec. 403.050.

[48] Cecil v. Farmers National Bank, 245 S.W. 2d 430 (Ky., 1952).

[49] 403.050. And since the decision, the statute was amended expressly to provide for annulment of a bed and board divorce by either party showing just cause. KY. REV. STAT. sec. 403.042, Laws 1952, c. 84, sec. 1.

[50] 41 KY. L.J. 322 (1955).

[51] Coleman v. Coleman, 269 S.W. 2d 730 (Ky., 1954).

[52] 43 KY. L.J. 322 (1955). *Cf.* a concurring and dissenting opinion by Justice McFaddin of the Arkansas Supreme Court to the decision in McClain v. McClain, 263 S.W. 2d 911 (Ark., 1954), dissent in 264 S.W. 2d 595 (Ark., 1954), lauding the advantages of limited divorces as encouraging reconciliation, though admitting that they have almost "passed out of style" in the recent Arkansas cases. The dissenting opinion also disapproves of the recent trend in Arkansas to limit the defense of recrimination by the comparative fault qualification.

[53] Baldwin v. Baldwin, 314 Ky. 399, 235 S.W. 2d 1008 (1951).

[54] Cadden v. Cadden, 272 S.W. 2d 474 (Ky., 1954).

ALIMONY AND SUPPORT

During the past few years several articles were published in the *Journal* on alimony and support obligations. One by John W. Murphy discusses comprehensively the remedies available in Kentucky for enforcement of alimony decrees and suggests that the availability of execution and other remedies to compel payment of alimony should make use of the contempt process unnecessary in most cases.[55] A step forward in enforcement of the obligation of support of dependents where the person obligated crosses state lines was taken by the 1954 General Assembly in passage of uniform support legislation, discussed in another article by Mr. Murphy in the Fall, 1954 issue of the *Journal*.[56]

Some of the most perplexing problems in connection with support and alimony, as well as divorce, litigation have really been in the conflict of laws field, yet the domestic relations lawyer must be aware of these developments. There has been increasing recognition nationally of the comparatively new concept sometimes termed "divisible divorce", which generally speaking refers to the right of one state to determine matters relating to alimony and property rights under limited circumstances although another awards a divorce.[57] One interesting case arose in which the husband, with the wife appearing, procured a divorce in Florida with no adjudication thereon upon alimony or property rights.[58] The wife then sued in Kentucky to adjudicate rights with regard to Kentucky real estate and for alimony. The court said that alimony, though usually incident to a divorce suit, may be recovered in an action independently of divorce. Further, the court concluded that the Florida divorce decree itself was not conclusive of the wife's right subsequently to seek alimony there, and therefore not conclusive of the right in the Kentucky courts either. It was a case of the husband seeking a determination of divorce without alimony in Florida and of the wife seeking adjudication of only the alimony and property questions in Kentucky. The

[55] Murphy, *Enforcement of Alimony Decrees in Kentucky*, 41 KY. L.J. 335 (1953), see also note 35 KY. L.J. 74 (1946).

[56] Murphy, *Uniform Support Legislation*, 43 KY. L.J. 98 (1954).

[57] See articles: Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287 (1951); Paulsen, *Support Rights and an Out-of-State Divorce*, 38 MINN. L.R. 709 (1954); 1954 Annual Survey of American Law, Lacy, *Family Law*, 30 N.Y.U.L. REV. 675, 682 (1955).

[58] Cooper v. Cooper, 234 S.W. 2d 658 (Ky., 1950).

court pointed out that it was not required to go as far as the U.S. Supreme Court did in recognizing "divisible divorce", that is that divorce based upon domicile of one of the parties may be a subject of jurisdiction of one state, while the question of alimony may nevertheless be litigated[59] in the home state.

In a later case, discussed above,[60] the Court of Appeals in addition to holding a Nevada divorce invalid for lack of bona fide domicile to confer jurisdiction, went on to hold that even if the Nevada divorce were valid the question of alimony and maintenance had not been adjudicated there and was therefore properly subject to a separate later action in Kentucky. Kentucky thus seems to recognize the so called "divisible divorce" doctrine under which the alimony and support question may be left open despite previous divorce based on domicile if one of the parties is not served personally and does not appear in the granting state.[61]

Similar principles apply in regard to support of children. A Texas decree based upon jurisdiction from residence of both parties and providing also for payments for maintenance of the child of the marriage was given force in Kentucky in *Williams* v. *West,*[62] yet the Kentucky court recognized its own right to modify the maintenance payments on change of conditions where the former wife and child were in Kentucky.

The decisions reviewing awards of alimony and support provisions in divorce decrees continue to be very numerous, but in the main reiterate familiar principles and will not be discussed here.

CHILDREN

Custody of Children—The recent Kentucky decisions concerning the custody of children will not be discussed since a recent article by Charles N. Carnes makes a comprehensive survey of the Kentucky custody decisions in divorce cases from 1940 to 1952 and analyzes the chief factors influencing the courts.[63] However,

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[59] Estin v. Estin, 334 U.S. 541, 68 S. Ct. 1213 (1948).
[60] Taylor v. Taylor, 242 S.W. 2d 747 (Ky., 1951).
[61] Goodrich, CONFLICT OF LAWS 413 (Third ed., 1949).
[62] 258 S.W. 2d 468 (Ky., 1953). See also Lockard v. Lockard, 237 S.W. 2d 63 (Ky., 1951) and Waters v. Waters, 251 S.W. 2d 580 (Ky., 1952), holding that a divorce decree does not preclude her from later action to require father to support children. The action for support may be had independently of divorce.
[63] Carnes, *Child Custody in Kentucky Divorce Cases: 1940-1952,* 41 KY. L. J. 324 (1953).

there are increasingly frequent jurisdictional problems of custody where the parties cross state lines, as was the case in the divorce and alimony tangles discussed above. The cardinal principle, that jurisdiction over custody is based upon domicile of the child within the state, is continually reaffirmed.[64] Even the court which has originally acquired jurisdiction and entered an order adjudging custody loses its continuing jurisdiction to modify when the child is removed from the state,[65] unless the child's removal is in violation of the court's decree or for the purpose of escaping its jurisdiction.[66] This principle the Kentucky court applied to hold void a modification by a Tennessee court of its original custody decree after the parties had left Tennessee for Kentucky.[67] Two Kentucky decisions declined jurisdiction because of domicile in other states. The Court of Appeals granted writs of prohibition to prevent the lower court from adjudging custody in *Chamblee* v. *Rose*,[68] where the child was held to retain its father's domicile in Alabama despite wrongful removal to Kentucky by the mother, and in *Rodney* v. *Adams*,[69] holding that the use of the Kentucky court by the divorced wife to enforce a previous Nevada support decree did not give Kentucky power to decide upon the custody of the child who was domiciled in Florida.

Child welfare—Recent important legislation on child welfare and the control of juvenile delinquency has already been discussed in articles by Dr. Gladys Kammerer of the Political Science Department and Professor James W. Hughes of the Sociology Department, University of Kentucky.[70] There were amendments to these laws by the 1954 General Assembly.[71]

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[64] Rodney v. Adams, 268 S.W. 2d 940 (Ky., 1954); Chamblee v. Rose, 249 S.W. 2d 775 (Ky., 1952); Marlar v. Howard, 226 S.W. 2d 755 (Ky., 1949).

[65] *Ibid.*

[66] Beutel v. Beutel, 305 Ky. 683, 205 S.W. 2d 489 (1947), and cases cited *supra* note 64.

[67] Marlar v. Howard, cited *supra* note 64. Contrast the situation of removal to another county within the state, in which case the court originally awarding custody would be the only court with continuing jurisdiction to modify. Weightman v. Hamilton 261 S.W. 2d 680 (Ky., 1953).

[68] Cited *supra* note 64.

[69] Cited *supra* note 64.

[70] Hughes, *The Youth Authority Act*, 41 KY. L.J. 7 (1952); Kammerer, *Child Welfare Legislation*, 41 KY. L.J. 41 (1952).

[71] Kentucky Acts of 1954, c. 193, p. 521, amending KY. REV. STAT. secs. 199.320 and 208.150 *et seq.*; Kentucky Acts of 1954, c. 185, p. 194, amending KY. REV. STAT. secs. 208.570-.580.

Legitimacy—The court has continued to be watchful of the rights of infant children, avoiding when possible the harsh effects of illegitimacy. Numerous cases have applied the presumption in favor of legitimacy. Several cases have stated that evidence of illegitmacy must go beyond a reasonable doubt, in fact must be of a higher degree even than that required to convict a person of a minor criminal offense.[72] The presumption holds for the benefit of any child born during marriage, whether conceived before or after the marriage.[73] And evidence of the husband's sterility is not competent to make illegitimate the child of a married mother.[74]

An interesting application of the rule against admitting testimony by married spouses of non-access during coverture, when the result of allowing the testimony would be bastardization of the child, arose in *Dudley's Adm'r* v. *Fidelity & Deposit Co.*[75] The testimony by the mother and her earlier husband of non-parentage was held properly admitted (and given probative force), because under the peculiar facts of the case the child would be legitimate anyhow since the mother had subsequently married another man who had acknowledged the child as his own. Apparently such subsequent marriage plus recognition of parenthood by the father would legitimatize the child, even though the subsequent marriage itself logically falls in the void category, bigamous because of the impediment of the prior marriage. This is consistent with a previous interpretation by the court of the recognition statute in a related situation when it held legitimation accomplished by recognition even though one of the parties was married to another at the time of conception. The whole problem will be examined in a student note currently being written for the *Journal.*

Occasion arose requiring construction of the language of the so called "legitimacy saving" statute providing that the "issue of all other [i.e. other than incestuous or miscegenous] illegal or void marriages is legitimate".[76] A child of a purported Ohio common

[72] Ousley v. Ousley, 261 S.W. 2d 817 (Ky., 1953); Williams v. Williams, 311 Ky. 45, 223 S.W. 2d 360 (1949).
[73] Gross v. Gross, 260 S.W. 2d 655 (Ky., 1953).
[74] Shepherd v. Shepherd, 236 S.W. 2d 477 (Ky., 1951).
[75] 240 S.W. 2d 76 (Ky., 1949).
[76] KY. REV. STAT. sec. 390.100(2).

law marriage claimed as "issue". Since the mother was at the time already married to another man, however, the Ohio relationship had no consequence whatever as a marriage either in Ohio or Kentucky. In holding that the statute saved the child's legitimacy, the court pointed to a previous decision that the statute made legitimate even a child of a bigamous ceremonial marriage and refused any distinction between a void ceremonial marriage and a void common law marriage in this regard.[77] The court's interpretation can be reinforced by the statutory listing of "prohibited and void" marriages, which specifically includes the case ". . . where there is a husband or wife living, from whom there has not been a divorce".[78] The same should be true by analogy in the case of children of outlawed "common law" marriages taking place in Kentucky, since common law marriages, though completely void for most purposes, are likewise listed in the same statute among the "prohibited and void marriages".

The "recognition" statute according legitimacy to the child of an unwed mother if the father subsequently marries her and at any time acknowledges the child as his own was applied in *Dudley's Adm'r* v. *Fidelity & Deposit Co.*,[79] Furthermore, for inheritance purposes, it appears from one interesting case that the effect of legitimacy can sometimes be achieved quite independently of the statute and of subsequent marriage to the unwed mother. In *Caudill* v. *Caudill*,[80] the illegitimate child was held entitled to inherit from the estate of the father by virtue of an oral agreement between the unwed mother and the alleged father whereby the latter agreed to such inheritance in consideration of the mother's forbearing from bringing bastardy proceedings against the father.

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Even in a most summary sketch of recent developments in the law of domestic relations, special mention must be made of a Resolution of the 1954 General Assembly because of the potentialities it offers for future improvement in the law. House Resolution 41 directs the Judicial Council to make a thorough

[77] Copenhaver v. Hemphill, 235 S.W. 2d 778 (Ky., 1951).
[78] KY. REV. STAT., sec. 402.020.
[79] Cited *supra* note 75, applying KY. REV. STAT., sec. 391.090(3).
[80] 257 S.W. 2d 557 (Ky., 1952).

investigation of existing Kentucky divorce law and of "Family Courts" as used in other states and report its findings and proposed legislation to the 1956 General Assembly.[81] This study is to be coordinated with a comprehensive study of the entire court structure by the Legislative Research Commission[82] and any real developments may well have to await the recommendations under the more general study.

[81] H.R. 41 approved March 28, 1954, Kentucky Acts, 1954, c. 281, page 702.
[82] S.R. 52, approved March 28, 1954, Kentucky Acts, 1954, c. 268, page 689.

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