DOMESTIC RELATIONS

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During the past year, there have been several significant developments by statute and by court decisions in the field of domestic relations.

STATUTES

The General Assembly of Georgia during the 1953 regular session enacted five statutes dealing with divorce and domestic relations:

Adoption Proceedings — Administrative Expenses.[1]—This Act provides that the State Department of Public Welfare reimburse each county or district Public Welfare Department for administrative expenses incurred in matters of adoption.

Vital Statistics Act.[2]—This Act is a comprehensive amendment of the Vital Statistics Law[3] providing for the filing, recording and obtaining certificates of birth, adoption and death.

Removal of Divorce Disabilities.[4]—This Act amends Code section 30-125 relating to removal of divorce disabilities and provides that an application for relief from disability shall be tried at the first term by the judge without a jury, unless a cross-action or formal objection is filed, in which event the application would be tried before a jury, as in other cases.

Guardians — Sale or Exchange of Property.[5]—This Act amends Code section 49-203 relating to the authority of guardians to manage the property of the ward by adding to this section a provision that the judge of the superior court, having jurisdiction, has the authority to authorize the guardian to exchange any property held by the guardian for other property, and to pay or receive any difference in the value, as the court may direct.

Registration of Marriage, Divorces and Annulments.[6]—This Act amends the Registration of Marriages, Divorces and Annulments Act approved February 12, 1952[7] by providing that the clerk of the superior court and not the plaintiff's attorney shall fill in the form to be filed with the

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1. Ga. Laws 1953, p. 33.
2. Ga. Laws 1953, p. 140.
3. Ga. Laws 1945, p. 236.
4. Ga. Laws 1953, p. 257.
5. Ga. Laws 1953, p. 389.
6. Ga. Laws 1953, p. 534.
7. Ga. Laws 1952, p. 103.

Georgia Department of Public Health using such information as is disclosed by the pleadings in the suit for divorce or annulment.

Executors, Guardians, Trustees — Lease of Real Property.[8]—This Act authorizes executors, administrators, guardians and trustees to apply to the superior court for an order authorizing the execution of a lease of real property, that may or will continue beyond the termination of the administration of the estate, or beyond the termination of the trust held by such executor, administrator, guardian or trustee.

Administrators, Executors, etc. — Sale of Stocks and Bonds.[9]—This Act provides that guardians, administrators, executors, trustees and other fiduciaries may sell stocks or bonds with approval of the court of ordinary, which are either listed or admitted to unlisted trading privileges upon a stock exchange or are quoted regularly in newspapers.

DECISIONS

A new precedent was established by the Supreme Court in the case of *Rowell v. Rowell,*[10] when the court allowed the husband, the defendant in a divorce suit, to assert as a defense and also as a cross-action for divorce, the misconduct and adultery committed by the wife *after* the separation and *after* the divorce suit had been filed.

The question of removal of disabilities after death, was raised for the first time in Georgia, in the case of *Ex Parte Durden,*[11] and it was held that a petition brought by the husband's administratrix for removal of his disability to marry, placed upon a decedent by a divorce decree, could not be maintained because the statutory action for removal of such disability was a personal action and could not be maintained by another in his behalf.

Shelton v. Shelton[12] was an action for divorce on the ground that the other spouse had been adjudged to be incurably insane under the laws of another state. The suit was dismissed on the ground that the adjudication of insanity did not strictly comply with the provisions of the Georgia Code[13] setting forth the grounds for divorce.

When a divorce is brought on the ground of cruel treatment, no definite period of separation is required.[14]

The denial of conjugal rights will not authorize a divorce on the ground of cruel treatment, but the denial of such rights for a period

8. Ga. Laws 1953, p. 44.
9. Ga. Laws 1953, p. 378.
10. 209 Ga. 572, 74 S.E.2d 833 (1953).
11. 209 Ga. 721, 75 S.E.2d 548 (1953).
12. 209 Ga. 454, 74 S.E.2d 5 (1953).
13. GA. CODE ANN. § 30-102 (Supp. 1951).
14. Brant v. Brant, 209 Ga. 151, 71 S.E.2d 209 (1952).

of one year may constitute desertion and afford grounds for divorce by reason of desertion.[15]

In *Cohen v. Cohen*,[16] it was held that the defendant wife could not be adjudged to be in default in failing to file defensive pleadings prior to the call of the appearance docket at the appearance term. This case apparently holds that the wife can file defensive pleadings, and an answer and cross-action for alimony at any time prior to rendition of the verdict in a suit for divorce filed by the husband. The husband would have the same right to file defensive pleadings in a suit for divorce filed by the wife.

The case of *Odom v. Odom*[17] held that a formal affidavit must be presented to the court upon the hearing of a motion for continuance on the ground of illness of the defendant.

During the past year three cases have been decided concerning the appellate procedure in divorce cases.[18]

The case of *Meeks v. Meeks*[19] is an interesting decision, dealing with the full faith and credit clause of the Constitution of the United States.[20] In this case, the husband, as plaintiff, filed a suit in the State of Georgia for divorce and the wife filed an answer and cross-bill for alimony. Thereafter, the husband dismissed his divorce suit in Georgia without prejudice to the prosecution of the suit for alimony by the wife. Thereafter, the husband instituted a suit for divorce in the State of Texas and a final judgment was entered thereon in Texas granting the husband a complete divorce. Subsequently, the wife obtained a judgment for alimony in the Georgia proceeding and brought a contempt rule against the husband for non-payment. The Supreme Court of Georgia held that the Texas divorce decree dissolved the marriage and was a complete bar to enforcement of the alimony decree by the wife and must be given validity under the full faith and credit clause.

In a recent case,[21] it was held that a wife does not have authority to trade an automobile owned by her husband on a new automobile and obligate her husband for the payments on the new automobile. However, it was held in this particular case that the husband ratified the unauthorized contract made by his wife when he retained and used the new automobile for a considerable period of time.

As a general rule, a married woman cannot bind her separate estate

15. Hinkle v. Hinkle, 209 Ga. 554, 74 S.E.2d 657 (1953).
16. 209 Ga. 459, 74 S.E.2d 95 (1953).
17. 209 Ga. 451, 74 S.E.2d 1 (1953).
18. Hammock v. Hammock, 209 Ga. 647, 74 S.E.2d 859 (1953) (brief of evidence is necessary); Goldberg v. Goldberg, 209 Ga. 372, 72 S.E.2d 709 (1952) (motion to modify proper procedure where divorce granted); Wellbeloved v. Wellbeloved, 209 Ga. 709, 75 S.E.2d 424 (1953) (new trial granted).
19. 209 Ga. 752, 74 S.E.2d 861 (1953).
20. U. S. CONST. Art. IV, § 1.
21. Southern Motors of Savannah, Inc. v. Krieger, 86 Ga. App. 574, 71 S.E.2d 884 (1952).

for debts of her husband. In the case of *Mathews v. Simmons*,[22] it was held that a note signed by a married woman was enforceable against the property of the married woman, where it was shown that she was engaged in the restaurant business with her husband, and the money was used in this business.

In the case of *Henry v. Hemstreet*,[23] it was held that nursing services rendered by one member of a family for another member are presumed to have been gratuitously rendered. However, this presumption can be rebutted by proof of an express promise to pay for such services, or by an implied promise to pay for the said service.

In the case of *Veazy v. Blair*,[24] an action for slander was brought against the husband by a third party, not a party to the original divorce suit, for testimony given by the husband in the trial of the divorce suit, and also for statements made by the husband outside of court testimony. The court held that any testimony given in court in response to questions by counsel, having some relation to the proceedings, is absolutely privileged although knowingly false and malicious, and held further that a cause of action was set out against the husband for defamatory statements made by the husband outside of court proceedings.

During the past year, the appellate courts of this state decided several cases dealing with the granting or refusing of alimony.

In the case of *Massengale v. Massengale*,[25] the Supreme Court distinguished the case of *Fried v. Fried*,[26] wherein the jury rendered a verdict of the standard form granting the plaintiff wife a divorce, and gave the defendant the right to remarry. The court stated that such a verdict will be construed to be for the plaintiff. In the *Massengale* case, the court said that such a verdict will be construed to grant both parties a divorce, and that such a verdict does not make it mandatory for the jury to award permanent alimony to the wife. It was pointed out that the jury can consider various other facts and circumstances and deny permanent alimony to the wife, although granting her a divorce from the husband.

In the case of *Milligan v. Milligan*,[27] the court decreed a cancellation of a deed by a husband to a third party on the ground of fraud in attempting to defeat the wife's claim for alimony.

Two cases have been decided by the appellate courts of the State of Georgia, dealing with validity and rescission of alimony agreements.

22. 87 Ga. App. 735, 75 S.E.2d 272 (1953).
23. 86 Ga. App. 863, 72 S.E.2d 801 (1952).
24. 86 Ga. App. 721, 72 S.E.2d 481 (1952).
25. 209 Ga. 154, 71 S.E.2d 211 (1952).
26. 208 Ga. 861, 69 S.E.2d 862 (1951).
27. 209 Ga. 743, 76 S.E.2d 18 (1953).
28. 209 Ga. 468, 74 S.E.2d 89 (1953).

In the case of *Beverly v. Beverly*,[29] the Supreme Court held that an alimony settlement agreement between husband and wife, which is made to promote a dissolution of marriage, or to facilitate the granting of a divorce, is contrary to public policy and void. In the other case, *Ulmer v. Ulmer*,[30] the wife sought to cancel a settlement agreement on the ground of fraud, and the court held that the wife could not maintain the action for a cancellation until she had restored or offered to restore to the husband whatever she had received under the contract.

The Supreme Court held in the interesting case of *Ramsay v. Sims*[30] that an alimony agreement entered into between the husband and wife, providing for support of the wife and minor children, would not terminate upon the death of the husband, but that the payments would continue under the terms of the contract, and would be binding on the estate of the husband for future payments accruing after his death.

Several cases have been decided concerning enforcement of alimony and property settlement decrees.[31]

In the case of *Henderson v. Henderson*,[32] the trial court held the husband in contempt for failure to comply with an alimony judgment rendered by a Florida court. On appeal, the Supreme Court held that such a citation for contempt is not an alimony case and transferred the case to the Court of Appeals. The Court of Appeals reversed the trial court, and held that the trial court erred in holding the defendant husband in contempt of court on the foreign alimony decree, pointing out that a foreign alimony decree occupies the same status as an ordinary foreign money judgment, and such decree must be reduced to judgment in the State of Georgia before it can be enforced, and such judgment cannot be enforced by citation for contempt, but only be enforced by execution in the same manner as other money judgments.[33]

The question of custody of minor children is usually the most contested issue between the parties in a domestic relations case, and the determination of custody of minor children must be decided on the basis of what is in the best interest of the children and what will best promote their welfare and happiness.

Numerous decisions of the appellate courts were handed down holding that modification of a custody award will not be made unless there is such

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29. 86 Ga. App. 319, 71 S.E.2d 558 (1952).
30. 209 Ga. 228, 71 S.E.2d 639 (1952).
31. Vogt v. Harris, 209 Ga. 749, 75 S.E.2d 808 (1953) (evidence authorized judgment of contempt); Kirkland v. Kirkland, 209 Ga. 526, 74 S.E.2d 453 (1953) (construed "net earnings"); Hagan v. Hagan, 209 Ga. 313, 72 S.E.2d 295 (1952); (contempt action dismissed where court did not have jurisdiction to enter alimony order).
32. 209 Ga. 148, 71 S.E.2d 210 (1952).
33. 86 Ga. App. 812, 72 S.E.2d 731 (1952).

a change of circumstances occurring subsequent to the date of the decree awarding custody as would affect the welfare of the children.[34]

The case of *Baynes v. Cowart*,[35] involves the right of the father to have custody of the minor child upon the death of the mother, who had custody under an award of court. The court held that the father had the prima facie right of custody of the minor child, and that the court erred in awarding the child to the maternal grandparents in the absence of evidence that the father had lost parental control of the said child.

In this connection, see also the case of *Henderson v. Hale*,[36] where the court held, in a similar situation, that the court of ordinary was without authority to appoint another as guardian of the person of the said child. It was also held in this case, that the superior court had authority to set aside the judgment of the court of ordinary appointing the guardian on the ground that the judgment was obtained by fraud upon the court.

Cornett v. Justice[37] involves an appeal from a judgment awarding custody of a minor child. The court held that it was mandatory that a brief of the evidence be filed with the court in determining such issues, and the court affirmed the trial judge in his award.

Walker v. Walker[38] is an unusual case dealing with custody of a minor child. In this case, the minor wife entered into an agreement with her husband, wherein the wife waived parental control of the child. This agreement was not embodied in any decree of the court, and thereafter the wife brought a suit for alimony and custody of the minor child. The court held that, although an infant under the age of twenty-one, but of lawful age to marry, can make binding marriage contracts and settlements, the wife in this case, who was a minor, could not enter into a binding contract with her husband concerning the custody of the minor child, and the wife was not precluded from applying to the court for custody of the child on the ground that the agreement was not made a part of the decree of the court, and was not binding on the wife as a minor. This case apparently holds that the agreement would have been binding on the minor wife, if embodied in a decree of the court. In this connection, see also the case of *Garden City Cab Company, Inc. v. Ransom*,[39] where the wife, ap-

34. Modification was denied in the following cases: Stout v. Pate, 209 Ga. 786, 75 S.E.2d 748 (1953); Jewell v. Jewell, 209 Ga. 678, 75 S.E.2d 3 (1953); Thornton v. Outen, 209 Ga. 649, 74 S.E.2d 867 (1953); Harrison v. Kelly, 209 Ga. 537, 74 S.E.2d 546 (1953); Gibson v. Wood, 209 Ga. 535, 74 S.E.2d 456 (1953); Pope v. Pope, 209 Ga. 326, 72 S.E.2d 308 (1952). Modification was granted in the following cases: Treadwell v. Treadwell, 209 Ga. 436, 73 S.E.2d 94 (1952); Young v. Young, 209 Ga. 711, 75 S.E.2d 433 (1953); Hicks v. Buffington, 209 Ga. 719, 75 S.E.2d 560 (1953); Jones v. White, 209 Ga. 412, 73 S.E.2d 187 (1952).
35. 209 Ga. 376, 72 S.E.2d 716 (1952).
36. 209 Ga. 307, 71 S.E.2d 622 (1952).
37. 209 Ga. 375, 72 S.E.2d 724 (1952).
38. 209 Ga. 490, 74 S.E.2d 66 (1953).
39. 86 Ga. App. 247, 71 S.E.2d 443 (1952).

parently over twenty-one years of age, had the right to surrender control of her child to her brother and sister-in-law in the absence of evidence of the whereabouts of the father where it was shown that the wife had custody and control of the child since the child was six months old. It was also held in this case that the mother had a right to sue for the negligent homicide of her minor child, even though she had surrendered custody and control to another, without giving up her status as parent of the child.

The question of violation of a custody award was litigated in the case of *Hammock v. Hammock*,[40] where the court held that the father did not violate the judgment of the court in taking possession of the children without the mother's consent, and over her protest, where no injunction of any kind had been granted, even though the judgment awarded custody of the minor children to the mother.

An action was brought by the State of Georgia on a criminal charge of abandonment in the case of *Barrow v. State*.[41] In this case it was held that the father could be convicted of abandonment of minor children, even though he had entered into an agreement with his wife, and had turned over property to his wife in lieu of alimony and support of the wife and children. The court pointed out that the right of a minor child to support cannot be contracted away by a parent in such a manner as to leave the child in a dependent and destitute condition, as was shown in this case. Apparently, it is a defense to an action for abandonment, if the father turned over to the mother a sufficient amount for the support of the children, but would not constitute a defense where the father turns over property, not for support, but as a consideration for freeing himself from any obligation of support, and thereafter the children are not in fact provided for.

In the case of *Gray v. Plummer*,[42] the court enforced an oral agreement for the support of the illegitimate child until the child reached the age of fourteen years.

The appellate courts of this state have held, that in petitions for adoption, the court will base its decision on the promotion of the welfare of the child sought to be adopted, and that it is necessary to have the consent of the father of the child to the adoption, unless it is made to appear that the father had abandoned the said child.[43]

40. 209 Ga. 751, 76 S.E.2d 15 (1953).
41. 87 Ga. App. 572, 74 S.E.2d 467 (1953). See also Dyer v. State, 87 Ga. App. 440, 74 S.E.2d 129 (1953) (evidence sustained conviction of father for abandonment).
42. 87 Ga. App. 331, 73 S.E.2d 569 (1952).
43. Herrin v. Graham, 87 Ga. App. 291, 73 S.E.2d 572 (1952); Murray v. Woodford, 86 Ga. App. 273, 71 S.E.2d 275 (1952); Ware v. Martin, 209 Ga. 506, 74 S.E.2d 361 (1953) (evidence supported adoption contract).