

TAXATION

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During the survey period there were quite a number of statutory changes in the taxation laws of Georgia and a fair number of cases dealing with various types of taxes. For convenience and clarity the writer has sorted the legislation and cases and placed them under the heading of the particular type of tax involved.

SALES TAX

By enactment the Legislature has exempted certain transactions from the sales and use tax. These are, with qualification, as follows: Sales of school lunches, sales to state banks, sales to religious, non-profit newspapers, and charges made for transportation of tangible personal property, including various accessorial charges, such as refrigeration, switching, storage, etc.¹ All taxes accruing on sales of school lunches, sales to state banks and sales of religious newspapers since February 6, 1952, and taxes accruing on the charges made for transportation of tangible personal property since April 1, 1952, are annulled.²

A non-retroactive provision was enacted to provide for the coverage of the sales and use tax on "contributions" to coin-operated amusement devices and on "charges made for participation in games and amusement activities."³

The term "dealer" has been extended by the Legislature to include persons who solicit by representatives or by mail order, and who by reason thereof accept orders from consumers in Georgia. These persons are required to collect the tax from the purchaser, and before a suit for the purchase price of the goods may be instituted, it must affirmatively appear that the tax has been paid.⁴ Where the seller is an out-of-state concern and title passes outside of the state, a use tax is, no doubt, intended. The problem of taxing such out-of-state transactions with a sales or use tax has had a lengthy history, indeed. Problems have arisen under the Federal Commerce Clause and the Federal Due Process Clause. The Commerce clause obstacle seems to be overcome, in so far as a use tax on out-of-state sales is concerned, by the case of *McLeod v. Dilworth*.⁵

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1. Ga. Laws 1953, p. 182, amending GA. CODE ANN. § 92-3403a C(2) (Supp. 1951).
2. Ga. Laws 1953, p. 9.
3. Ga. Laws 1953, p. 192, amending GA. CODE ANN. § 92-340a C(1) (c) (Supp. 1951).
4. Ga. Laws 1953, p. 191, amending GA. CODE ANN. § 92-3404a (Supp. 1951)
5. 322 U.S. 327, 64 S.Ct. 1023 88 L.Ed. 1304 (1944). In connection with the sales tax, See, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S.Ct. 388 84 L.Ed 563 (1940).

The Due Process problem, raised by requiring the collection by the out-of-state seller of the use tax, was dealt with, and such a procedure upheld, in *General Trading Company v. State Tax Commission*.⁶ However, in this case there were agents of the seller within the state. In the mail order situation this may not be true. Some light may be shed on this problem by the United States Supreme Court at its next term.⁷ The problem will, by virtue of Code section 92-3412a be of importance only where the forwarding state has applied no sales tax, or a lesser one.

Several inherent difficulties in the sales and use tax field have been called to mind during the survey period. Although a sale of tangible personal property for resale is generally not a retail sale (not taxed at this stage), what allowance should be made for materials used, in one way or another, in the production of the item of tangible personal property to be resold? The sales and use tax law, providing for the exemption from the sales and use tax of the "sale, use, storage or consumption of industrial materials," has been amended to extend the application of this exemption to certain transactions and specifically to withdraw it from others. Now "industrial materials" need not become a component part of the product in order that sales of said materials be exempt. If the "industrial material" is "coated upon or impregnated into" the product to be resold, a sale of such material to a manufacturer-purchaser will be exempt.⁸ However, fuels are not considered "industrial materials," and sales of these to manufacturers are taxable. Sales of sizing, for example, are not taxable since they are not fuels, and they become "coated upon or impregnated into" the product. In this case the manufacturer would not pay a tax on the purchase and, when dealing with a wholesaler, would not have to withhold any tax on the sale of the final product. In the case of fuels, however, not only will there be a tax upon the sale to the manufacturer, but, to the extent that the use of the fuel is reflected in the price of the final sale, there will be, as in many other situations, a double tax. These close distinctions, without real differences, are inherent in any tax. As a practical matter, the most important effect of the tax on fuels is upon sales of products out of the state by Georgia manufacturers. These manufacturers are at a competitive disadvantage where the state of the purchase does not levy a sales tax on the sale of fuels to local manufacturers.

Another difficulty in the "resale" area is that situation where services are a strong factor at the retail level. Where and when should the tax be collected? This problem was discussed in *Craig-Tourial Leather Co. v. Reynolds*.⁹ Here, a wholesaler of leather goods sold various leather products to a shoe repair shop and sought to collect the sales tax from

6. 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944).

7. *Miller Brothers Co. v. Maryland*, Docket No. 160, S.Ct. 1953.

8. Ga. Laws 1953, p. 194, amending GA. CODE ANN. § 92-3403a C(2) (Supp. 1952).

9. 87 Ga. App. 360, 73 S.E.2d 749 (1952).

the repairer. The Court of Appeals held that the tax was collectible at this stage. Although the various leather goods were, in a sense, to be resold in the form of tangible personal property under Code section 92-3403(c)(1), still, the skilled service involved was the outstanding characteristic of the transaction. Since no separate charge was made by the repairman for the materials used, the sale did not qualify under Code section 92-3403a(c)(2), and was not a sale of tangible goods to be resold. However, under this section the shoe repairman is to be given the option of registering as a seller at retail and separating the items of materials and services. In the latter event, the tax would be collected by the repairer on the amount allocable to materials only.

Two cases involving alleged exemptions from the sales and use tax were decided. The first, *Cherokee Brick & Tile Co. v. Redwine*,¹⁰ involved a sale under a written contract entered into prior to the approval of the sales and use tax law (February 20, 1951). The delivery of the products sold under the contract was not made within 90 days of the effective date of the law, April 1, 1951.¹¹ It was held that the requirement of delivery within 90 days in Code section 92-3403a(c)(2)(e) applied not only to sales of building materials under plans drawn up prior to the act, but also the sales under written contracts entered into prior to the act. Where an alleged exemption is involved, ambiguous language is construed against the taxpayer. The second case, *City of Marietta Hospital v. Redwine*,¹² dealt with a contended exemption from the sales tax for sales to a city hospital. The hospital contended that it was an instrumentality of a municipal corporation, and hence sales to it were exempt under the Code.¹³ Tracing the failure of proposed amendments to exempt sales to hospitals, the Court of Appeals held the sales taxable.

A needed amendment was enacted exempting from the sales and use tax certain transfers of tangible personal property in connection with "reorganizations."¹⁴ However, the term "reorganization" is not defined in the amendment. It apparently intends to cover: (a) transfers by an individual or individuals, a partnership or corporation to a partnership; (b) transfers by an individual or individuals, or partnership to a corporation, and (c) corporate reorganizations, such as split-ups, split-offs or spin-offs. Prior to this amendment it would appear that the definitions of "sale at retail"¹⁵ and "business"¹⁶ were broad enough to cover the transactions

10. 209 Ga. 691, 75 S.E.2d 550 (1953).

11. See. CCH STATE TAX REPORTER, GEORGIA (3rd ed.).

12. 87 Ga. App. 629, 74 S.E.2d 670 (1953).

13. GA. CODE ANN., § 92-3403a C(2) Ad (Supp. 1951).

14. Ga. Laws 1953, p. 301, adding § 3 (c) 2 (h). "The taxes levied by this Act shall not apply to sales, transfers or exchanges of tangible personal property made as a result of a business reorganization provided the owner, owners, partners or stockholders of the business being reorganized maintain the same proportionate interest or share in the newly formed business reorganization."

15. GA. CODE ANN. § 92-3403a C(1) (Supp. 1951).

16. GA. CODE ANN. § 92-3403a J. (Supp. 1951).

above described, if enforcement were desired. The "proportionate interest" requirement inserted in the amendment is somewhat puzzling. A similar expression is found in Int. Rev. Code section 112(b)(5).¹⁷ However, there are two conflicting tests under the federal law in deciding whether this requirement has been met.¹⁸ The question of whether or not the State will require a "proportionate interest" in all parties in all classes of stock or securities after a corporate reorganization remains open.¹⁹ The writer does not believe that such will be required. If the Revenue Department should construe this section strictly, what would be the result if the "proportionate interest" test is not exactly met? Would the entire value of the tangible personal property be taxed, or merely the amount of the change in interest? Technically, the former would be the case.

A blanket amendment regarding sales of tangible personal property for resale was enacted by the Legislature during the January-February session.²⁰ In general, it provides that where the final seller is unlikely to collect the tax (by reason of minority, lack of a place of business or lack of adequate records, etc.) the Commissioner may prescribe rules for classifying sales to such persons as "sales at retail." The effect would be to require the person selling to such individuals, chosen by the Commissioner, to withhold the tax. The provision, in all probability, is aimed at newspaper boys and others, but there have been no rulings to date.

Miscellaneous procedural amendments were added to the sales and use tax law. Dealers must keep records of their sales for three years instead of two.²¹ There is to be no Statute of Limitations where a dealer files a fraudulent return or fails to file a return.²² Where delay in filing a sales tax return is due to providential cause, the Commissioner may accept the payments made, without penalties or interest, where an affidavit showing providential cause is filed within ten days of the due date along with the remittance.²³ When a person raises the issue of taxability in a suit to collect sales taxes, that person must furnish the Attorney General with a copy of the initial pleadings raising such issue; if receipt of the said pleadings is not acknowledged, any judgment rendered will be null and void.²⁴ This amendment would change the result reached in *Craig-Tourial Leather Co., v. Reynolds*,²⁵ which held that,

17. Tax-free transfers by individuals, partners, or corporations to a corporation.

18. See, N.Y.U. 8th Annual Institute on Federal Taxation, p. 96 (1950).

19. Under a complicated corporate reorganization, a "proportionate interest" in all stocks and securities is not always retained. Under the federal case law of tax free corporate reorganizations, only a continuity of "proprietary" interest is required. See, *Pinellas Ice & Cold Storage Company v. Com.*, 287 U.S. 462; 53 S.Ct. 257, 77 L.Ed. 428 (1933); *Letulle v. Scofield*, 103 F.2d 20 (C.C.A. 5th 1939), aff'd, 308 U.S. 415, 60 S.Ct. 313, 84 L.Ed. 355 (1940).

20. Ga. Laws 1953, p. 199, amending GA. CODE ANN. § 92-3403aC(1) (Supp. 1951).

21. Ga. Laws 1953, p. 200.

22. Ga. Laws 1953, p. 184.

23. Ga. Laws 1953, p. 196.

24. Ga. Laws 1953, p. 197.

25. See n. 9, *supra*.

under the still existing law,²⁶ the person suing to collect the tax need not file a copy of the pleadings (with the Revenue Commissioner), though the language of the Code, taken literally, so required.

INCOME TAXATION

This branch of tax law had a considerable amount of alteration during the survey period, both in the form of patchwork and in basic change.

All estates now have an exemption of \$1,000, and trusts an exemption of \$100.²⁷ A person may now receive \$600 income from a trust and still be used as a dependent, if the other requirements are met.²⁸ The law of installment sales²⁹ and depletion of mineral and oil rights³⁰ was changed so that both are to be treated as under the federal law.

In the realm of corporate income taxation two specific changes were made. First, the long-term capital gains of corporations are to be treated the same as those of individuals, *i.e.*, one-half of the excess of the net long-term capital gains over the net short-term capital losses is deductible from gross income.³¹ Taxes accruing since February 15, 1952, because of failure to grant this deduction, were annulled.³² Amended returns should be filed by corporations affected by this adjustment. Secondly, the alternative tax of 2%, after disallowing compensation to officers and stockholders in excess of \$10,000, has been abolished.³³

Members of the armed forces were given attention and are allowed to deduct up to \$1,500 from their income from services in the armed forces since January 1, 1950, until the end of the Korean conflict.³⁴ The executive order of the Governor to this effect was approved,³⁵ and income tax returns are to be computed or recomputed to give effect to this deduction.³⁶

The problem of deductibility of federal income taxes on the state return was dealt with quite in detail. Code section 92-3109(c) was overhauled and eight new paragraphs were added.³⁷ Deductible taxes, other than federal income taxes, may be deducted when paid or accrued.³⁸ No deduction is allowed for Social Security taxes, O.A.B., F.I.C.A., Railroad Retirement or Carriers' taxes. Unemployment taxes may be deducted by an employer if incurred in a trade or business or in the production of

26. Ga. Code § 92-8410 (1933).

27. Ga. Laws 1953, p. 297, amending GA. CODE ANN. § 92-3106(h) (Supp. 1952).

28. Ga. Laws 1953, p. 272, amending GA. CODE ANN. § 92-3106(j) (Supp. 1952).

29. Ga. Laws 1953, p. 287, amending GA. CODE ANN. § 92-3107(a) (Supp. 1951).

30. Ga. Laws 1953, pp. 274, 278, amending GA. CODE ANN. § 92-3109(f) (Supp. 1952).

31. Ga. Laws 1953, p. 267, amending GA. CODE ANN. § 92-3119(d) (2) (Supp. 1952).

32. Ga. Laws 1953, p. 7.

33. Ga. Laws 1953, p. 625, amending GA. CODE ANN. § 92-3102 (Supp. 1951).

34. Ga. Laws 1953, p. 268.

35. Ga. Laws 1953, p. 6.

36. Ga. Laws 1953, pp. 187, 286.

37. Ga. Laws 1953, p. 274.

38. Ga. Laws 1953, p. 272, amending GA. CODE ANN. § 92-3106(j) (Supp. 1952).

taxable income.³⁹ As a general rule, federal income taxes must be deducted when paid, regardless of the method of accounting, and whether original or subsequent assessments are involved; in the case of a subsequent refund of federal income taxes, such refund, to the extent of tax benefit, is to be included in the income of the year in which recovered; before deducting subsequent assessments for federal income taxes the taxpayer must waive the Statute of Limitations in Code section 92-3303 against assessments for state income taxes.⁴⁰ Where the entire net income is not taxable in Georgia, a proportionate amount of the federal income tax is allowed (as before) as a deduction. For clarification, the year to which the federal income tax applies is to be the year used in computing the proportionate amount deductible.⁴¹

Certain exceptions are made to the rule that federal income taxes are deductible only when paid. Members of the armed forces upon returning to the United States or upon discharge may elect to allocate federal income taxes paid to the year in which the federal income tax applies, if payment thereof is made on time. Furthermore, they are given three years after the last payment of federal taxes in which to file a claim for refund of state taxes assessed without the benefit of this section.⁴² A person filing under the Federal Current Tax Payment Act, at his election, may deduct the federal income tax on his state income tax return in the year the federal tax is due, if paid before the federal due date, or officially extended due date. However, deficiencies are to be deducted in the year paid.⁴³

It was also provided that, for the first taxable year ending after February 15, 1952, the taxpayer on the accrual basis is to be allowed to deduct the federal income taxes when paid.⁴⁴ This prevents a loss of a year's federal income taxes as a deduction, which would have been caused by the 1952 amendment to the Code. Taxpayers affected should file amended returns before February 27, 1955.

A very harsh provision was added by the Legislature providing that federal income taxes may not be used in computing the net operating loss carry-over or carry-back.⁴⁵ This will amount to quite a sizeable disallowance in many cases, and, in whole or in part, deny federal taxes, a legitimate operating business expense, as a deduction. Further changes made in the law of the carry-over and carry-back of losses are as follows:

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39. GA. CODE ANN. § 92-3109 (c) (2) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 275.
 40. GA. CODE ANN. § 92-3109 (c) (3) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 275.
 41. GA. CODE ANN. § 92-3109 (c) (4) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 276.
 42. GA. CODE ANN. § 92-3109 (c) (5) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 276.
 43. GA. CODE ANN. § 92-3109 (c) (8) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 277.
 44. GA. CODE ANN. § 92-3109 (c) (6) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 276, amending Ga. Laws 1952, pp. 405, 427.
 45. GA. CODE ANN. § 92-3109 (c) (7) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 277.

The order of the carry-over was clarified to correct a possible ambiguity;⁴⁶ provision for denying interest on refund claims for carry-backs was inserted;⁴⁷ and a new set-up, allowing a tentative carry-back adjustment similar to the federal law, established.⁴⁸

Several other "clarification" amendments were added to the income tax law. The provision of our Code allowing non-recognition of gain on property involuntarily converted shall apply only where both the property converted and the property received are located within Georgia, or is property the gain or loss from which is includable by this State in gross income, or deductible from gross income.⁴⁹ Similarly, the provision allowing non-recognition of gain on the sale or exchange of an old residence for a new residence shall apply only to property within Georgia.⁵⁰ However, the last sentence of the new section states that the section shall not apply where Georgia has no jurisdiction to tax the income from or gain or loss from the disposition of said property. The purpose of this additional qualification is not clear. As of February 15, 1952, the interest rate of 6% shall apply also to assessments made or *fi. fa.* issued, thus plugging a possible loophole in the prior act.⁵¹ However, no interest rate in excess of 6% is to be charged for unpaid taxes after February 15, 1952.⁵² For the purpose of deciding whether or not the six-year Statute of Limitations applies (where there are accidental omissions of items of gross income), the expression "twenty-five per centum of gross income" now means "twenty-five per centum of gross income less business expenses."⁵³

LICENSE TAXES

Certain professional occupations may not be taxed with a municipal license tax except at their principal place of business, and where such principal place of business is within a municipality, the county may not levy such a tax.⁵⁴ Sewing machine companies were removed from the exemption from the state license tax on foreign corporations.⁵⁵ Certain changes regarding due dates, penalties and balance sheet requirements were made

46. GA. CODE ANN. § 92-3109(m) (1) (Supp. 1952) amended by Ga. Laws 1953, pp. 274, 280.

47. GA. CODE ANN. § 92-3109(m) (4) (Supp. 1952) amended by Ga. Laws 1953, pp. 274, 281.

48. GA. CODE ANN. § 92-3109(m) (5) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 282.

49. GA. CODE ANN. § 92-3119(e) (4) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 282.

50. GA. CODE ANN. § 92-3119(f) (8) (Supp. 1953) added by Ga. Laws 1953, pp. 274, 282.

51. Ga. Laws 1953, p. 294, amending GA. CODE ANN. § 92-3305(b) (Supp. 1952).

52. Ga. Laws 1953, pp. 274, 284, adding GA. CODE ANN. § 92-3305(c) (Supp. 1953).

53. Ga. Laws 1953, pp. 274, 284, amending GA. CODE ANN. § 92-3303(b) (2) (Supp. 1952).

54. Law, medicine, osteopathy, chiropractic, chiropody, dentistry, masseur, public accounting, embalming, funeral directors, civil mechanical, hydraulic or electric engineering, or architecture. Ga. Laws 1953, p. 207.

55. Ga. Laws 1953, p. 285.

in the license tax on domestic corporations.⁵⁶ The license tax rates on foreign corporations are now the same as those on domestic corporations.⁵⁷

In the realm of litigation one case was decided. *West Lumber Co. v. City of Atlanta*⁵⁸ held that a municipal license tax on each place of business was not due where it appeared that the alleged second place of business was merely a tradename, the entire business being located on one tract of land.

UNEMPLOYMENT TAXES

In *Benton Rapid Express v. Redwine*,⁵⁹ the Court of Appeals ruled on the definition of "employment" in Code section 54-657(h). It held, for the purposes of the unemployment tax, that services of a commission agent of a common carrier constituted "employment" where the common carrier could turn away the agent "any day it wanted to." Also, ninety per cent of the commission agent's floor space was devoted to storage of the common carrier's freight.⁶⁰ Therefore, concluded the court, the express company, carrier, was obligated to pay the unemployment tax.

PROPERTY TAX

The County Boards of Tax Assessors are now authorized to hire individuals or firms to assist them in mapping, cataloging or appraising property, or searching out unreturned property and are authorized to purchase such information.⁶¹ In this connection, the Supreme Court of Georgia in *Hutchins v. Candler*,⁶² upheld the validity of the Acts of 1941 and 1951,⁶³ providing for cadastral surveys in certain counties, against the objections that such laws were special legislation and that the judgment of the third parties was substituted for that of the board. Likewise, the court upheld the right of the board of assessors to charge a recording fee to defray expenses incurred in hiring third parties to make the surveys. The recording fee charged was merely incidental to the board's power to make the surveys.

The question of exemption from real property taxes for cemeteries was discussed in *Suttles, Tax Collector v. Hillcrest Cemetery, Inc.*,⁶⁴ the court

56. Due date for payment of the license tax is now January 1st of each year; balance sheets are required of all corporations, regardless of the type of stock issued; a penalty provision of 10% penalty is imposed for failure to pay the tax due within 90 days of due date; the tax for the first year is due on the date of incorporation; where a corporation is chartered after July 1st of any year, only one-half of the tax payable is imposed. GA. CODE ANN. § 92-2402 (Supp. 1952) as amended by Ga. Laws 1953, p. 290.

57. GA. CODE ANN. § 92-2402 (Supp. 1952) as amended by Ga. Laws 1953, p. 295.

58. 209 Ga. 739, 76 S.E.2d 10 (1953).

59. 87 Ga. App. 584, 74 S.E.2d 504 (1953).

60. GA. CODE ANN. § 54-647(h) (7) (0) (3) (Supp. 1951).

61. Ga. Laws 1953, p. 189, amending GA. CODE ANN. § 92-6910 (Supp. 1951.)

62. 209 Ga. 415, 73 S.E.2d 191 (1952).

63. Ga. Laws 1941, p. 382; Ga. Laws 1951, p. 85.

64. 87 Ga. App. 343, 73 S.E.2d 760 (1952).

holding that even though the property in question was not actually used for cemetery purposes, it still was exempt where it was restricted to use as such.

INTANGIBLE TAX

The due date for intangible tax returns is now April 15th of each year instead of March 15th.⁶⁵

CONCENTRATED FEED TAX

An amendment was added to the feed tax law to allow payment of this tax on a reporting basis and to make minor changes.⁶⁶

MISCELLANEOUS MATTERS AND GENERAL PROCEDURE

Provision has been made by the Legislature for settlements and compromises of any tax assessments, and a five-man board for that purpose was set up to operate under the majority rule.⁶⁷ Commission rates for county tax receivers and collectors in non-salary counties were revised.⁶⁸

A federal and state procedural problem was raised in *United States of America v. Bullard*.⁶⁹ This case involved a suit on a promissory note not then due. A request was made for a receiver to be appointed over defendant's property since there were federal tax liens thereon. Other parties holding mortgages intervened and asked judgment. The court held that the United States could be made a party in the suit under the provisions of 46 Stat. 1528 (1932), 28 U.S.C.A. 2410(a) (Supp. 1952), since it had been served with a bar order under Code section 37-410. It is to be noted under the federal law the Attorney General is given sixty days from the service of the complaint in which to answer, whereas Georgia Law provides a minimum notice of sixty days from the date of the order. The federal law, of course, should be followed. On rehearing, it was held that no objection could be made to the insufficiency of the petition, since such insufficiency was not argued before the trial court.⁷⁰

In *Carnes v. Pittman*,⁷¹ a sale under a tax deed, where all taxes had in fact been paid, was void. Such a sale was not a "valid and legal sale" as within the meaning of our Code provisions.⁷² Defendant-in-error had not made out a case for a prescriptive title under the case law of our State.⁷³

65. Ga. Laws 1953, p. 453, amending GA. CODE ANN. § 92-123 (Supp. 1951).

66. Ga. Laws 1953, p. 418, amending GA. CODE §§ 42-205, 42-209 (1933).

67. Ga. Laws 1953, p. 185. The broad criteria for settlement or compromise are "insolvency of the taxpayer or the questionable legal position of the State . . . and said settlement or compromise is in the best interest of the State."

68. Ga. Laws 1953, p. 234.

69. 209 Ga. 426, 73 S.E.2d 179 (1952).

70. See n. 69 *supra*.

71. 209 Ga. 639, 74 S.E.2d 852 (1953).

72. GA. CODE ANN. §§ 92-8315, 92-8316 (Supp. 1951).

73. *Smith v. Jefferson County*, 201 Ga. 674, 40 S.E.2d 773 (1946).