DOMESTIC RELATIONS

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A SURVEY OF RECENT STATUTES AND DECISIONS

STATUTES

The General Assembly of Georgia during the November-December, 1953 Session enacted six statutes dealing with divorce and domestic relations:

1. *Divorce - Costs*[1]

This Act provides that the applicant for divorce, before filing a suit for divorce in the Superior Court of County having a population of not less than 115,000 and not more than 135,000 inhabitants, shall pay to the Clerk of said Court the sum of $10.00 as costs.

2. *Female Witnesses in Civil Cases*[2]

This Act provides that female witnesses in civil cases shall be required to attend in person under the same conditions and requirements that apply to male witnesses.

3. *Milledgeville State Hospital — Examinations to Determine Eligibility for Discharge*[3]

This Act substantially provides that the inmates of Milledgeville State Hospital shall be periodically examined to determine whether or not they have recovered or have been restored to sanity so as to authorize their discharge. The Superintendent of Milledgeville State Hospital is authorized to discharge or release any inmate found to be recovered and restored to sanity. The Act also gives any inmate the right to decline to accept said discharge and remain in the care and custody of the officials of the hospital.

4. *Minors — Contribution to Delinquency*[4]

This Act provides that any person contributing to the delinquency of a minor shall be guilty of a misdemeanor.

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1. Ga. Laws Nov.-Dec. Sess. 1953, p. 61.
2. Ga. Laws Nov.-Dec. Sess. 1953, p. 212.
3. Ga. Laws Nov.-Dec. Sess. 1953, p. 308.
4. Ga. Laws Nov.-Dec. Sess. 1953, p. 321.

5. Milledgeville State Hospital—Trial as to Lunacy of Patients[5]

This Act amends Title 35, Sections 236 and 237 of the Georgia Code and provides that any inmate of the Milledgeville State Hospital may obtain a trial on the question of lunacy in the Superior Court or the Court of Ordinary of Baldwin County by making a demand on the Superintendent of the hospital. This Act also provides that a relative or friend of any patient may file a petition for trial on the question of lunacy of the patient.

6. Insane Persons — Restoration to Sanity[6]

This Act provides that any person having been adjudged a lunatic may petition the Ordinary of the County in Georgia where such person legally resides for a judgment of restoration to sanity. This Act further provides for a Commission to examine the petitioner and file its verdict and findings in the Court of Ordinary.

DECISIONS

A new precedent was established by the Court of Appeals in the case of *Brown v. Georgia-Tennessee Coaches, Inc.*[7] when the Court held in a full bench unanimous decision that a wife has a cause of action for loss of consortium of her husband, arising out of injuries to her husband from a tort-feasor. This same question was before the Court of Appeals in 1949 in the case of *McDade v. West,*[8] in which the Court of Appeals was evenly divided and certiorari was denied by the Supreme Court. The Court of Appeals pointed out in the *Brown* case, that a husband and wife have equal rights in the marriage relation which will receive equal protection of the law.

In the recent case of *Gary v. Johnson,*[9] it was held that a suit by a purported wife for the negligent homicide of her purported husband cannot be maintained by her, where the first spouse of the husband is still in life, and the disabilities of the husband were not removed at the time the first divorce was granted.

In *Krasner v. O'Dell*[10] a plea of res adjudicata to a suit brought

5. Ga. Laws Nov.-Dec. Sess. 1953, p. 321.
6. Ga. Laws Nov.-Dec. Sess. 1953, p. 353.
7. 88 Ga. App. 519, 77 S.E.2d 24 (1953).
8. 80 Ga. App. 481, 56 S.E.2d 299 (1949).
9. 210 Ga. 686, 82 S.E.2d 651 (1954).
10. 89 Ga. App. 718, 80 S.E.2d 852 (1954).

by the father for medical expenses and loss of services for his child was sustained, where it appeared that a prior judgment had been entered, adverse to the father, in his own suit for personal injuries. It was held, in this case, that medical expenses, incurred for the treatment of a minor child and for loss of a child's services, are elements of damage to the father's property rights, and must be presented for determination in a single suit for personal injuries of the father and his claim for medical expenses and loss of services of his child.

The Court of Appeals, in the case of *Kidd v. Holtezendorf*,[11] held that a cause of action for alienation of affections of a spouse was set out, and held that a suit for alienation of affections is an action for the loss of consortium, which includes every conjugal right, such as affection, fellowship, cooperation, and aid.

In the recent case of *Johnson v. Johnson*,[12] a petition for annulment of a marriage was dismissed for the reason that an annulment will not be granted where the same complaint constitutes grounds for divorce.

In the interesting case of *Hilburn v. Hilburn*,[13] it was held that an insane spouse cannot commit wilful acts which amount to cruel treatment as grounds for divorce.

In two cases the Supreme Court held that the petition set out a cause of action for divorce,[14] and in another case held that the evidence supported the verdict for divorce.[15]

In the case of *Merritt v. Merritt*[16] the wife was presumed to know the law and the effect of resuming cohabitation with her husband before the divorce had been granted.

A procedural question was presented in the case of *Jones v. Jones*,[17] whether or not the defendant may waive service of process of a suit before the petition is filed. It was held in this case that the wife was duly served with the divorce suit when she acknowledged service and waived process, even though the petition had not been filed and a copy of process was not attached to the petition.

Another procedural question was decided in the case of *Burgess v. Burgess*,[18] where the Supreme Court held that a petition for declaratory judgment seeking to set aside a final judgment and

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11. 88 Ga. App. 360, 76 S.E.2d 656 (1953).
12. 210 Ga. 359, 80 S.E.2d 153 (1954).
13. 210 Ga. 497, 81 S.E.2d 1 (1954).
14. Anglin v. Anglin, 209 Ga. 823, 76 S.E.2d 498 (1953), Stone v. Stone 210 Ga. 127, 78 S.E.2d 22 (1953).
15. Day v. Day, 210 Ga. 454, 81 S.E.2d 6 (1954).
16. 210 Ga. 39, 77 S.E.2d 438 (1953).
17. 209 Ga. 861, 76 S.E.2d 801 (1953).
18. 210 Ga. 380, 80 S.E.2d 280 (1954).

decree granting a divorce did not present a proper case for relief under the Declaratory Judgment Act.[19]

A most unusual result was reached in the case of *Davenport v. Davenport*,[20] where it was held that a verdict of a jury finding against the wife in her petition for divorce was not res adjudicata and did not preclude her from filing a subsequent suit for permanent alimony. The court pointed out that although the jury could not have awarded her any amount as alimony in the divorce case, she would, nevertheless, be entitled to maintain a subsequent action for permanent alimony based upon the allegation that the parties are living in a state of voluntary separation.

In *Brown v. Brown*,[21] the defendant, a Colonel in the United States Air Force, filed a plea of stay under the Soldiers and Sailors Civil Relief Act.[22] The Court of Appeals affirmed the order of the lower court, overruling this plea, where the defendant failed to show that his defense of the case was materially affected by military service.

The Supreme Court dealt with charges of the court to the jury in two cases. In the case of *Fried v. Fried*,[23] it was held to be error for the court to charge the jury that it was the duty of the husband to support the wife when living separate, unless the wife has forfeited her claim on the husband for support by misconduct, where there is no evidence that the wife was guilty of misconduct.

In the case of *Atha v. Atha*,[24] it was held that it was erroneous for the court to fail to charge the jury any legal definition of cruel treatment where the suit was brought for divorce on the ground of cruel treatment.

The divorced husband filed a suit against his former wife and her second husband for cancellation of certain conveyances and transfers made by him pursuant to an agreement by which he obtained a divorce by collusion in the case of *Fender v. Crosby*.[25] The court applied the cardinal maxim of equity and denied the petition and prayers of the divorced husband on the ground that he did not come into equity with clean hands and was estopped to attack the validity of the self-induced divorce decree.

Lewis v. Lewis,[26] also dealt with cancellation of deeds. The court held that a cause of action was set out by the wife

19. Ga. Laws 1945, p. 137, GA. CODE ANN. § 110-1101 (Supp. 1951).
20. 210 Ga. 687, 82 S.E.2d 654 (1954).
21. 89 Ga. App. 428, 80 S.E.2d 2 (1953).
22. 54 STAT. 1181 (1941), 50 U.S.C. App. 521 (1946).
23. 209 Ga. 854, 76 S.E.2d 395 (1953).
24. 210 Ga. 540, 81 S.E.2d 454 (1954).
25. 209 Ga. 896, 76 S.E.2d 769 (1953).
26. 210 Ga. 330, 80 S.E.2d 312 (1954).

against her husband and his attorney to cancel a deed from her husband to his attorney on the ground that the deed was made with the intention to defeat, hinder and delay her collection of alimony.

In two cases during the past year, the Supreme Court held that temporary alimony awards in these cases did not constitute an abuse of discretion by the trial judge.[27] That the rights of a minor child under a decree for alimony are not affected by subsequent voluntary cohabitation of the husband and wife was decided in the case of *Brown v. Brown*.[28] In this case a verdict and decree for permanent alimony for the wife and for the minor child was rendered, and thereafter the husband and wife resumed cohabitation. The court held that the voluntary cohabitation subsequent to rendition of the decree for permanent alimony annulled the provision made for permanent alimony for the wife, but did not affect the provision made for the support of the minor child. This case also held that the wife may institute a subsequent suit for divorce, temporary alimony, and attorneys' fees for herself. In a companion case between the same parties, it was held that the husband could be adjudged in contempt of court for failing to pay the permanent alimony awarded for the support of the minor child, although the husband and wife had resumed voluntary cohabitation.[29]

During the past year the appellate courts decided several cases dealing with the modification of temporary alimony awards and with the modification of permanent alimony awards, reaffirming the principle that temporary alimony awards may be modified by the court at any time, but that permanent alimony awards can be neither modified by the court nor the parties, unless there is a reservation of jurisdiction in the court to modify these awards.[30]

During the past year the Supreme Court decided four cases concerning contempt citations for non-payment of alimony and in these cases stated that generally the matter is for the discretion of the trial judge and will not be reversed unless an abuse of discretion is shown.[31]

27. Golden v. Golden, 209 Ga. 915, 76 S.E.2d 697 (1953). Harbuck v. Harbuck, 210 Ga. 220, 78 S.E.2d 508 (1953).
28. 210 Ga. 233, 78 S.E.2d 516 (1953).
29. Brown v. Brown, 210 Ga. 238, 78 S.E.2d 519 (1953).
30. Fried v. Fried, 210 Ga. 457, 80 S.E.2d 796 (1954), Swinson v. Swinson, 210 Ga. 110, 78 S.E.2d 10 (1953). Maddox v. Maddox, 210 Ga. 590, 82 S.E.2d 21 (1954). Martin v. Martin, 209 Ga. 850, 76 S.E.2d 390 (1953). Roberson v. Roberson, 210 Ga. 346, 80 S.E.2d 283 (1954). Christian v McLeod, 210 Ga. 492, 80 S.E.2d 777 (1954).
31. Yancey v. Mills, 210 Ga. 684, 82 S.E.2d 505 (1954). Fennell v. Fennell, 210 Ga. 153, 78 S.E.2d 524 (1953). Nichols v. Nichols, 209 Ga. 811, 76 S.E.2d 400 (1953). Swain v. Wells, 210 Ga. 394, 80 S.E.2d 321 (1954).

The case of *Smith v. Smith*[32] concerned appellate procedure, and held that there is no final order to appeal from where the defendant's motion to vacate the sheriff's return of service was sustained, but no judgment dismissing the case was actually entered by the court.

Three recent cases have been decided by the appellate courts dealing with adoption of minor children. In the case of *Johnson v. Strickland,*[33] it was held that the father's consent to adoption is necessary, unless the evidence shows that he has abandoned the child.

In the case of *Collier v. Johnson,*[34] the court granted an application for adoption, although the natural parents interposed objections to the adoption upon the final hearing where it appeared that the parents of the child had surrendered all parental rights over the child to the Juvenile Court for the purpose of having the child adopted.

In *Jones v. Harrison,*[35] a contract for adoption of a child entered into by a married woman without praticipation of her husband was held to be valid.

In numerous cases the appellate courts held that a decree awarding custody of a child is conclusive as between the parties to such decree unless a change of circumstances subsequent to the rendition of said decree affecting the welfare of the child is shown.[36] The remarriage of the parent having custody of the child is generally insufficient to authorize modification of an award of custody of a minor child.[37] Upon the death of the parent to whom custody of the minor child has been awarded by a court decree, the prima facie right of custody of the child automatically inures to the other parent.[38] In the case of *Green v. Dawson,*[39] the court held that an award of custody which permitted a minor child, thirteen years of age, to determine or select the place of her residence would be set aside on the ground the trial judge is not authorized to allow the minor to select the place of her residence.

The case of *Hampton v. Stevenson*[40] was an interesting case

32. 210 Ga. 355, 80 S.E.2d 160 (1954).
33. 88 Ga. App. 281, 76 S.E.2d 533 (1953).
34. 89 Ga. App. 39, 78 S.E.2d 539 (1953).
35. 210 Ga. 373, 80 S.E.2d 155 (1954).
36. Dodson v. Perkins, 210 Ga. 302, 79 S.E.2d 807 (1954). Harrell v. Cronin, 209 Ga. 877, 76 S.E.2d 624 (1953). Mercer v. Foster, 210 Ga. 546, 81 S.E.2d 458 (1954). Horton v. Freeman, 210 Ga. 298, 79 S.E.2d 537 (1954). Young v. Young, 210 Ga. 164, 78 S.E.2d 424 (1953).
37. North v. North, 209 Ga. 883, 76 S.E.2d 617 (1953). Fennell v. Fennell, 209 Ga. 815, 76 S.E.2d 387 (1953).
38. Radwin v. Conner, 210 Ga. 508, 81 S.E.2d 461 (1954). Hale v. Henderson, 210 Ga. 273, 79 S.E.2d 804 (1954).
39. 210 Ga. 128, 78 S.E.2d 17 (1953).
40. 210 Ga. 87, 78 S.E.2d 32 (1953).

concerning the commitment of a minor child by judgment of Juvenile Court to the State Training School. The court held that under the Juvenile Court Act,[41] such an action was a civil action rather than a criminal action and did not violate the provisions of the Constitution giving the Superior Court exclusive jurisdiction in criminal cases where the offender is subjected to loss of life or confinement in penitentiary and given the right to trial by jury.

The question of legitimation of a child was litigated in the case of *Murphy v. Thomas*,[42] where the court dismissed a petition by the putative father to legitimate his child, on the ground that the petition was not filed in good faith and the objections of the mother of the child were sustained.

During the past year the Court of Appeals decided two criminal cases dealing with bastardy, holding that the evidence was sufficient to convict the defendant of the crime of bastardy.[43]

The State of Georgia brought a criminal charge of abandonment in the case of *Learmont v. State*.[44] It was held in this case that in order to convict the father of the crime of abandonment, the accusation must be filed within two years from the time the abandonment occurred. In a like proceeding, in the case of *Roberts v. State*,[45] it was held that it is necessary to show that the minor children were abandoned in the county where the prosecution is brought against the husband for abandonment. The court reached a similar decision in the case of *Weltzbarker v. State*.[46]

Three cases were decided reaffirming the principle that a married woman cannot be surety for her husband, or any other person. In *Callaway v. Dubose*,[47] and the companion case, *Callaway v. J. Austin Dillon Company*,[47] it was held that the surviving wife, immediately upon the death of her husband becomes a widow and may enter into a valid contract for the burial expenses of her husband and may legally assume his debts. In *Dye v. Richards*[49] and in *Ezzard v. Fowler*,[50] the court held that where money is delivered to the husband and wife for their use jointly without division and a note is signed by the husband and wife, that a plea of suretyship is not sustainable, and in such cases the burden of

41. Ga. Laws 1951, p. 291, GA. CODE ANN. § 24-2401 *et seq.* (Supp. 1951).
42. 89 Ga. App. 687, 81 S.E.2d 26 (1954).
43. Wheless v. State, 90 Ga. App. 39, 81 S.E.2d 891 (1954). Jones v. State, 88 Ga. App. 790, 78 S.E.2d 88 (1953).
44. 89 Ga. App. 648, 80 S.E.2d 716 (1954).
45. 88 Ga. App. 767, 77 S.E.2d 825 (1953).
46. 89 Ga. App. 765, 81 S.E.2d 301 (1954).
47. 89 Ga. App. 513, 80 S.E.2d 62 (1954).
48. 89 Ga. App. 513, 80 S.E.2d 62 (1954).
49. 210 Ga. 601, 81 S.E.2d 820 (1954).
50. 89 Ga. App. 136, 78 S.E.2d 868 (1953).

proof is upon the wife to show that she signed as surety only, and that the lender or payee of the note, with knowledge of the facts which would constitute her a surety, contracted with her as a surety.

In the interesting case of *Herring v. Holden*,[51] it was held that although a husband is liable for necessary medical attention and professional services rendered to his wife, even in the absence of his consent, the husband would not be liable therefor when it appeared from the evidence that the physician performed an operation on his wife upon her credit alone, and upon her express promise to pay for the operation.

During the past year four cases were decided by the appellate courts dealing with presumption of validity of marriage, holding that where there is more than one marriage, the law presumes the last marriage to be valid, and the burden is on the one attacking the last marriage to overcome such presumption by proving its invalidity.[52] In *Stewart v. Price*,[53] this presumption was overcome by showing that a valid and undissolved marriage existed at the time the alleged ceremonial marriage was performed. In *Cooper v. Cooper*,[54] the court pointed out that the presumption as to marriage, arising from common law marriage from cohabitation and repute yields to proof of a subsequent ceremonial marriage by one of the parties. Apparently the presumption of validity of the last marriage is founded on public policy, and it is necessary to rebut this presumption by clear and convincing proof to the contrary.

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51. 88 Ga. App. 212, 76 S.E.2d 515 (1953).
52. Griffin v. Welch, 210 Ga. 300, 79 S.E.2d 527 (1954). Johnson v. Gunder 210 Ga. 419, 80 S.E.2d 327 (1954).
53. 89 Ga. App. 662, 81 S.E.2d 28 (1954).
54. 88 Ga. App. 335, 76 S.E.2d 726 (1953).