DOMESTIC RELATIONS

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STATUTES

The General Assembly of Georgia during the 1962 regular session enacted eight laws dealing generally with the field of Domestic Relations which are briefly stated as follows:

1. *Divorce—Appearance Day.* Act number 734[1] provides that, by agreement of the parties, a court is authorized to grant a divorce any time after thirty (30) days from the date of filing and that where no issuable defense is filed on or before the appearance day of the case, a decree may be taken without agreement at any time thirty (30) days thereafter.

2. *Divorce—Ground of Incurable Insanity.* Act number 887[2] amends GA. CODE ANN. §30-102 (11) (1952 Rev.), so as to reduce from three years to two years the time which a defendant in a divorce action must be confined to an institution for the insane so as to authorize the granting of a divorce on the ground of incurable insanity.

3. *Divorce—Removal of Disabilities.* Act number 883[3] amends GA. CODE ANN. §30-123 (1952 Rev.), so as to extend to a thirty (30) day period the notice of application for removal of disabilities. It is to be published once a week for four consecutive weeks immediately preceding the first day of the term to which the application is returnable.

4. *Custody—Right of Minor to Select Parent.* Act number 1004[4] amends GA. CODE ANN. §30-127 (1952 Rev.), and §74-107 (1933), so as to provide that in all divorce cases and cases between parents regarding the custody of minor children, where the child is over fourteen years of age, that the child has the right to select the parent with whom he desires to live and that this selection by him is controlling unless the parent selected is determined not to be a fit and proper person to have said custody.

5. *Marriage—Age Requirement.* Act number 676[5] amends GA. CODE ANN. §53-102 (1961 Rev.), so as to raise the minimum requirements of age as to the capacity to contract a marriage from seventeen to

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1. Ga. Laws 1962, p. 462.
2. Ga. Laws 1962, p. 600.
3. Ga. Laws 1962, p. 597.
4. Ga. Laws 1962, p. 713.
5. Ga. Laws 1962, p. 138.

eighteen years of age for the male and from fourteen to sixteen years of age for the female.

6. *Adoption—Notice Required.* Act number 844[6] amends GA. CODE ANN. §74-4 (1933), so as to provide that no notice of final hearing on adoptions shall be necessary to persons who have been served by publication and who have not filed objections prior to the final hearing.

7. *Guardian and Ward—Natural Guardian Defined.* Act number 596[7] amends GA. CODE ANN. §49-102 (1933), so as to clarify who the natural guardian of a minor is in providing that the father, if alive, shall be the natural guardian of his children unless he is not domiciled with the mother, in which case the parent having custody of the child is the natural guardian.

8. *Guardian and Ward—Citation.* Act number 584[8] amends GA. CODE ANN. §49-204 (1933) to clarify the meaning of the language of said code section so as to require that only the citation is required to be published in order for a guardian to reinvest the estate of his ward. This act also provides that minors over fourteen years of age, who are in certain hospital and mental institutions, are not required to be served personally in these instances.

DECISIONS

Probably the most publicized divorce case in many a year, *Reynolds v. Reynolds,*[9] was decided by the Supreme Court during the survey period. In a very lengthy opinion, the court held that the Georgia discovery procedure does not give a party the absolute right to establish his case by his own written interrogatories, answered by himself with the opposite party and her counsel excluded, and that for the court to authorize such procedure was prejudicial error. The court held that it was also error for the trial court to enter an ex parte order on an application for pre-trial conference, holding in abeyance all matters pending in the hearing of the case including the notice to take the deposition of the plaintiff and the notice to produce certain records. The court further held that a pre-nuptial agreement, which was void because of provisions therein for payment of certain amounts of money to the wife in full settlement in event of divorce, was also inadmissible for any purpose whatsoever. Also the court held that an award of slightly more than one thousand ($1,000.00)

6. Ga. Laws 1962, p. 524.
7. Ga. Laws 1962, p. 97.
8. Ga. Laws 1962, p. 93.
9. 217 Ga. 234, 123 S.E.2d 115 (1961).

dollars per month to a wife whose husband's income was over one million dollars a year was wholly insufficient as a matter of law.

In *McCartney v. McCartney*,[10] the Supreme Court reversed the granting of a divorce by the trial court, on the basis of *Moon v. Moon*,[11] where the court failed to charge, without request, that if the jury found both parties guilty of like conduct of cruel treatment, that the jury should refuse a divorce to either of them. The court also held that it was reversible error for the trial court to express an opinion during the trial as to what had or had not been proven as to the dependency of the wife for support, the needs of the wife and the ability of the husband to pay.

Brackett v. Brackett,[12] followed the *Moon* case.

In a case where a wife brought her suit for temporary and permanent alimony and custody after an agreement between the parties wherein the temporary custody of the minor child was awarded to the husband, the court held in *Grayson v. Grayson*,[13] that the wife could not thereafter enter a dismissal so as to dismiss the entire proceeding and bring a new suit so as to relitigate the matter of custody. In *Wright v. Wright*,[14] the Supreme Court reaffirmed that the trial court retained jurisdiction of both parties and the subject matter after the husband had served a process on the wife in a divorce action, and the wife had thereafter served the husband's attorney of record with her answer and cross-action, the husband subsequently dismissing his case and moving out of the state. The husband's argument was that he had not been personally served with the said answer and cross-action.

The Supreme Court held in *Blanton v. Blanton*,[15] that a wife having filed her answer, cross-action and plea to the jurisdiction, these proceedings having been litigated adversely to her, could not relitigate the matter of jurisdiction in a suit to set aside the divorce in that the prior adjudication was res judicata.

It was held in *Cramer v. Cramer*,[16] that a petition alleging nagging and fussing of a continuous nature is sufficient and that it is not necessary for the plaintiff to set forth with exactitude the dates of the cruelties complained of.

The Supreme Court in *Waldor v. Waldor*,[17] reiterated the rule

10. 217 Ga. 200, 121 S.E.2d 785 (1961).
11. 215 Ga. 110, 119 S.E.2d 39 (1961).
12. 217 Ga. 84, 121 S.E.2d 146 (1961).
13. 217 Ga. 133, 121 S.E.2d 34 (1961).
14. 217 Ga. 511, 123 S.E.2d 557 (1962).
15. 217 Ga. 542, 123 S.E.2d 758 (1962).
16. 217 Ga. 414, 122 S.E.2d 729 (1961).
17. 217 Ga. 496, 123 S.E.2d 660 (1962).

that although the time for excepting to a divorce decree directly by writ of error had expired, the trial judge had authority and power, during the same term of court, to set aside the divorce decree without notice to anyone.

In an action to set aside a divorce decree by a non-resident wife, the Supreme Court held in *Baker v. Baker,*[18] that counsel for the wife who had made no motions, submitted no pleadings and in no way participated in any overt act in the litigation instituted by the husband had not thereby waived defect in service or made a general appearance so as to authorize the divorce.

In *Collins v. Collins,*[19] it was held that though an insane person was represented by counsel, any divorce judgment rendered against such person who had had no legal guardian or who had no guardian ad litem appointed for the purpose of appearing for him was voidable.

In *Brown v. Brown,*[20] the court held that a divorce case is not ripe for trial until the next regular term of court after the term which began within one week of appearance day of the suit, and the absence of consent by the defendant to trial at an earlier date, a divorce decree entered at first or appearance term was properly set aside on motion made by the defendant within six months of the date of the decree.

In an action by a husband to nullify a divorce decree which approved a contract between husband and wife settling her claim for alimony, the court held in *Bridges v. Bridges,*[21] on the ground of fraud in its procurement, that the requirement of certain payments until the wife "dies, remarries or becomes self-supporting," the term "self-supporting" being defined as meaning "that she is capable of earning the sum of one hundred ($100.00) dollars per month or more" would not impute fraud merely because of the fact that the wife had recovered from an operation for which she was convalescing when the agreement was entered into, and had not at the time returned to work.

The Supreme Court reversed an award of alimony to a wife in *Brown v. Brown,*[22] upon her testimony that she left her husband for the reason that she called his attention to the fact that there was very little food in the house and that he did not give her any money to purchase food or tell her that he would purchase it. The court re-

18. 216 Ga. 800, 120 S.E.2d 308 (1961).
19. 217 Ga. 143, 121 S.E.2d 18 (1961).
20. 217 Ga. 231, 122 S.E.2d 90 (1961).
21. 216 Ga. 808, 120 S.E.2d 180 (1961).
22. 217 Ga. 674, 124 S.E.2d 399 (1962).

stated the rulings that one act of cruelty not of a violent or serious nature standing alone is not sufficient grounds for a divorce and that where a wife abandons her husband without just cause, she is not entitled to alimony.

In *Libman v. Libman*,[23] the court held that in view of the evidence the trial court was authorized to find that the husband was able to pay the amount of the alimony award and, therefore, did not abuse its discretion.

In *Stewart v. Stewart*,[24] the court held that where alimony is awarded for the support of minor children, the mother acquires no interest in the funds and is merely a trustee charged with the duty of seeing that these funds are applied for the benefit of the children. She cannot consent to a reduction or remission of the alimony. This case further held that the husband is properly held in contempt upon his statement that he refused to pay the alimony because the mother of the children refused to permit him to exercise his visitation rights as this sets up no valid excuse for the failure to obey the order of the court.

In the similar case of *Combs v. Combs*,[25] the court held that the husband is not relieved of making payments under an order merely because the mother moved the residence of herself and the children to the state of Florida in order to teach school, thereby preventing him from exercising his visitation rights, as she was under no restraint prohibiting her from so moving.

In *Taylor v. Taylor*,[26] it was held that the court rendering the final decree awarding permanent alimony and custody had jurisdiction of the contempt proceeding against the husband for violation thereof although he had become a resident of another county, and that the court had the power, upon finding the husband in violation of its order, to require the husband, in order to purge himself of contempt, to return the children to the custody of their mother although the children were physically out of the jurisdiction of the court.

In *Tilly v. Canedy*,[27] the court held that the husband was not guilty of contempt, under an agreement that he would pay for keeping certain life insurance policies in force during the child's minority, and upon his failure to do so, he would pay an equal sum as the premiums to support the minor daughter, upon showing that the child had attained majority.

23. 217 Ga. 475, 123 S.E.2d 114 (1961).
24. 217 Ga. 509, 123 S.E.2d 547 (1962).
25. 216 Ga. 715, 119 S.E.2d 341 (1961).
26. 216 Ga. 767, 119 S.E.2d 571 (1961).
27. 217 Ga. 63, 121 S.E.2d 144 (1961).

In *Roberts v. Mandeville*,[28] it was held to be error for the trial court to permit a defendant to purge himself of contempt by paying an amount less than he was obligated to pay under the previous decree in satisfaction of an arrearage, in that a court has no power to modify the obligations imposed by the decree without the right having been reserved by consent of the parties in the final decree itself.

Probably the most far-reaching case to be decided by the Supreme Court in regard to contempt was *Gore v. Gore*.[29] This case held that an order or judgment merely declaring the rights of the parties without an express command of prohibition is not one which may be the basis of a contempt proceeding for failure to comply therewith. The case appears to hold that when an agreement is made a part of a final judgment and decree and incorporated therein, unless the same goes further and expressly orders and directs the parties to comply with each and every provision thereof, such violation of the agreement would not subject the offender to punishment by contempt. The court also held that there is no requirement of law that a petition for contempt be verified.

In an annulment case, the court held in *Bryant v. Bryant*,[30] that a married woman, marrying another man, knowing that her husband is still living, and that her marriage has not been dissolved by divorce, perpetrates a fraud upon the man that she so marries. Where the man gives her a deed in consideration of love and affection, the deed given under such circumstances is null and void.

In a habeas corpus case, the court held in *Coleman v. Way*,[31] that the mother of a child cannot, by an agreement to which a father is not a party, give the child to a third person without the father's consent unless the father has forfeited his right to custody in a manner provided by law. It was further stated that the mere failure of the father to provide support for the child, not in his possession, when no payments of support are requested or needed, is not such an abandonment as to amount to a relinquishment of his rights as a parent.

In *Levens v. Edge*,[32] the Supreme Court held that where custody of a minor child, in a habeas corpus proceeding by the father to obtain custody from the child's maternal grandmother, was vested in the child's mother pursuant to a prior judgment, and where the mother was not named a party defendant in the habeas corpus proceeding,

28. 217 Ga. 90, 121 S.E.2d 150 (1961).
29. 217 Ga. 478, 123 S.E.2d 254 (1961).
30. 216 Ga. 762, 119 S.E.2d 573 (1961).
31. 217 Ga. 366, 122 S.E.2d 104 (1961).
32. 217 Ga. 418, 122 S.E.2d 728 (1961).

the award of the child to the father was erroneous even though the mother did appear and testify.

The court held in *Kennison v. Lee*,[33] that the juvenile court was without jurisdiction to award custody and order the husband to contribute to the support of the children and to pay the wife's hospital and doctor bills during pregnancy without a showing under GA. CODE ANN. §24-248 (4) (1959 Rev.), that the child was in a state of neglect, dependency or other insufficient guardianship.

In *Blood v. Earnest*,[34] it was held that when a petition by the grandparents to the juvenile court, showing on its face that none of the jurisdictional facts required by the statute existed, is acted upon, the court is without authority to take custody of the children from their mother and award the same to the grandparents, however beneficent the exercise of control over minors by the juvenile court may be. In this case there was no showing of a change of condition affecting the interest and welfare of the children.

In a petition of habeas corpus by a mother to obtain custody of the children from their father, the court held in *Singleton v. Singleton*,[35] that although the Texas decree awarding custody to the father was not a final one, and hence not entitled to full faith and credit, the paramount question is the welfare of the children and that the court may make its decision regardless of the fact that the petition was brought upon the wrong theory. This case also held that, the writ of habeas corpus being a speedy writ, it is not error to refuse to allow a continuance until interrogatories and depositions may be taken from witnesses and residents of another state beyond the jurisdiction of the court.

In another habeas corpus case, the court held in *Yancey v. Watson*,[36] that voluntary relinquishment of parental rights must be clear and unambiguous and that the infant's father, on parole after being convicted of voluntary manslaughter of the infant's mother, was unfit to care for the infant and that until he had finished serving his parole, no reformation may be shown to have taken place so as to authorize a change in custody.

In a case where a deceased husband appointed a testamentary guardian for a child over whom he had been awarded custody, the court held in *Forrester v. Livingston*,[37] that the wife is entitled to the custody

33. 217 Ga. 155, 121 S.E.2d 821 (1961).
34. 217 Ga. 642, 123 S.E.2d 913 (1962).
35. 216 Ga. 790, 119 S.E.2d 558 (1961).
36. 217 Ga. 215, 121 S.E.2d 772 (1961).
37. 216 Ga. 798, 120 S.E.2d 174 (1961).

of the child where she has shown a change in her character since the award of custody as against the testamentary guardian.

The Supreme Court held in the case of *Porter v. Watkins,*[38] that no right of trial by jury exists in habeas corpus cases and the same does not offend the constitutional guarantee of right to trial by jury.

The case of *Samples v. Alewine,*[39] restated the principle that the court has no power to modify a child custody provision in a decree after the expiration of the term at which the decree was entered.

The case of *Bonds v. Tant,*[40] held that a divorced wife's action to regain custody of children awarded to their father is not such that would allow her, in addition, to obtain alimony for support of the children where the divorce decree did not expressly reserve to the court the authority to amend as to alimony to be awarded them.

Blakemore v. Blakemore,[41] held that the father has no right to custody of an illegitimate child and that under the facts it was the court's legal duty to award custody and control of such child to the mother.

In a case where the mother of a child born out of wedlock relinquished in writing all rights and claims to her minor child, the court held in *Carson v. Marette,*[42] where the person to whom temporary custody and control of the child was given with the consent to adopt the child, but no adoption proceedings were ever commenced, that the juvenile court had the right to remove the child from the custody temporarily given and grant the child unto the care of the State Department of Public Welfare.

The Supreme Court decided a number of cases all of which involved questions of fact holding generally that where evidence was in conflict and no abuse of discretion is shown, the award by the court of custody of minor children will not be disturbed. Among these cases are *Everitt v. Everitt,*[43] *Strickland v. Long,*[44] *Helan v. Wright,*[45] *Speer v. Speer,*[46] and *Adams v. Heffernan.*[47]

In the case involving modification of permanent alimony on behalf of minor children, the court held in *Nelson v. Roberts,*[48] that under GA. CODE ANN. §30-220 (1952 Rev.), *et. seq.*, the former husband is

38. 217 Ga. 73, 121 S.E.2d 120 (1961).
39. 217 Ga. 675, 124 S.E.2d 394 (1962).
40. 217 Ga. 67, 121 S.E.2d 125 (1961).
41. 217 Ga. 170, 121 S.E.2d 642 (1961).
42. 217 Ga. 614, 124 S.E.2d 74 (1962).
43. 217 Ga. 438, 122 S.E.2d 920 (1961).
44. 216 Ga. 717, 119 S.E.2d 561 (1961).
45. 217 Ga. 720, 124 S.E.2d 640 (1962).
46. 217 Ga. 288, 122 S.E.2d 84 (1961).
47. 217 Ga. 404, 122 S.E.2d 735 (1961).
48. 217 Ga. 613, 124 S.E.2d 85 (1962).

not required to pay attorneys' fees of his former wife in connection with her application for modification of a judgment for permanent alimony on behalf of the children of the parties. The attorneys' fees provision of this section only applies where a former wife is forced to defend an action brought by her former husband.

In another case involving the same parties (*Nelson v. Roberts,*[49]), the court held that the modification act of 1955[50] [GA. CODE ANN. §30-220 (1961 Supp.), *et. seq.*] does not offend those sections of the Constitution of this State or the United States, which provide that no law impairing the obligation of contract shall be enacted,[51] where the amount of alimony or support so awarded by the judgment as well as the time during which it was to be paid was contained in an agreement entered into by the parties and made a part of the final decree.

In a petition for reduction of alimony by the husband, the court held in *McClinton v. McClinton,*[52] that a petition is subject to demurrer when it shows on its face that the net worth of the husband at the time of the filing of the petition was greater than at the time of the alimony judgment although the husband's income is shown to have dropped, but that the wife's cross-action alleging his net worth to be higher stated a cause of action for an increase in alimony.

The case of *Wright v. Lester,*[53] was an action for damages for alienation of affections wherein the Court of Appeals held that the gist of the action is the loss of consortium and that it is not essential to allege harboring, abducting or enticing the wife from the husband, or adultery in order for the offended spouse to maintain the action. The court concluded that a petition alleging the alienation " . . . by artful means and deceitful practices consisting of secret embraces, giving of gifts, secret meetings and persuasion, all done wilfully and maliciously and in utter disregard of the plaintiff's marital relationship . . . " states a cause of action.

The Supreme Court, in construing the adoption statutes contained in GA. CODE ANN. §74-404 (1933), held in *Dye v. Ghann,*[54] that an adopted child does not become an heir-at-law of the brother of the adoptive father so as to be entitled to share as an heir-at-law in the estate of the brother who died intestate.

In *Lanthripp v. Lang,*[55] the Court of Appeals held that it was re-

49. 216 Ga. 741, 119 S.E.2d 545 (1961).
50. Ga. Laws 1955, p. 630.
51. U. S. CONST. art I, §10; GA. CONST. art. 1, par. 2 (1945).
52. 217 Ga. 346, 122 S.E.2d 112 (1961).
53. 105 Ga. App. 107, 123 S.E.2d 672 (1961).
54. 216 Ga. 743, 119 S.E.2d 700 (1961).
55. 103 Ga. App. 602, 120 S.E.2d 59 (1961).

versible error for the trial judge, in an adversary proceeding to determine the custody of illegitimate minor children, to admit in evidence ex parte affidavits showing the unfitness of the mother to regain custody.

The Court of Appeals in *Carpenter v. Forshee,*[56] held that the existence of facts rendering unnecessary a parent's consent to his child's adoption, although they are alleged in the petition, must be judicially determined and notice to the parent is therefore an essential prerequisite to a decree of adoption cutting off his rights. However, when such parent files objections and moves to revoke an ex parte interlocutory order and thereupon the court reopens the proceedings and affords this parent a full hearing, the parent is not harmed by the erroneous ex parte order. The court in this case went on to define "wantonly and wilfully" as contained in GA. CODE ANN. §74-404 (1933), in regard to twelve-month abandonment, as without reasonable excuse, with a conscious disregard to duty, willingly, voluntarily, and intentionally.

The Court of Appeals held in *Holbrook v. Rodgers,*[57] that the leaving of a child by its mother in a Methodist Childrens' Home for two and one-half years is not sufficient in itself to constitute an abandonment within the meaning of GA. CODE ANN. §74-404 (1933).

In the case of *Taylor v. Taylor,*[58] the Supreme Court held that where a party alleges he is entitled to share in the decedent's estate because the latter breached a contract of adoption, he is not an heir nor creditor of the deceased and cannot file a caveat in the court of ordinary objecting to a year's support being set apart out of the decedent's estate.

In a suit in equity by a wife against her mother-in-law and her mother-in-law's grantee to have a deed from her husband to his mother and from the mother to the grantee set aside on the ground of the husband's mental incompetence, the Supreme Court restated in *Oliver v. Oliver,*[59] the well-settled rule that a grantor is an indispensible party to a suit to set aside a deed and the failure to make the husband a party made the petition subject to general demurrer.

In an action by a wife to restrain the foreclosure of a deed to secure debt executed by herself and her husband, the Supreme Court held in *Cordele Banking Company v. Mattie Powers,*[60] that where both husband and wife were referred to as "party of the first part," the in-

56. 103 Ga. App. 758, 120 S.E.2d 786 (1961).
57. 105 Ga. App. 219, 124 S.E.2d 443 (1962).
58. 217 Ga. 20, 120 S.E.2d 874 (1961).
59. 216 Ga. 757, 119 S.E.2d 348 (1961).
60. 217 Ga. 616, 124 S.E.2d 275 (1962).

dividual debt owed by the husband alone was not a debt of the party of the first part which the bank, within the deed's "dragnet" clause was authorized to collect through exercise of power of sale contained in the deed. Where the wife sought the surrender of the deed, upon payment of the original debt to which she was a party, and interest, the action was not for cancellation of the deed but was based rather upon a statutory right so that it was not essential that the husband be made a party to the suit.

In a workmen's compensation case, the Court of Appeals held in *Missouri Insurance Company v. Kraft*,[61] that a ceremonial marriage entered into by the deceased and the claimant while he had a living wife was a nullity, but that when the prior wife divorced the deceased, who, thereafter, continued to live with the claimant, holding herself out as a wife, a valid marriage came into existence. The court held further that when the claimant proved a ceremonial marriage to the deceased and there was no evidence that her prior husband was still living, the presumption arose that her marriage to the deceased was valid. The burden of proof shifted to the employer to prove that the claimant was not the lawful widow of the deceased.

In the case of *Kicklighter v. Kicklighter*,[62] the Supreme Court reiterated the law that a common law marriage cannot be established where one of the parties has an undissolved marriage and that the plaintiff, not a party to the divorce proceeding attacked by her nor in privity with either party thereto, cannot collaterally attack the divorce decree valid on its face.

In an action for injuries by a wife, the Court of Appeals held in *McBowman v. Merry*,[63] that an award of $350.00 damages was not grossly inadequate though medical expenses alone amounted to $553.00 when the testimony also showed the wife's complaints were at least partially related to her physical condition prior to the accident in question. The court reiterated the rule that the wife could not recover expenses which she may have incurred to repair her husband's automobile as this is his cause of action and not hers.

In another action to recover damages for loss of consortium of her husband, it was held in *Walden v. Coleman*,[64] that this right exists only during the joint lives of the husband and wife and that if the injured spouse lives for any length of time whatever after the infliction of the injury, a cause of action arises. In this instance, the plaintiff's

61. 103 Ga. App. 889, 120 S.E.2d 922 (1961).
62. 217 Ga. 54, 121 S.E.2d 122 (1961).
63. 104 Ga. App. 454, 122 S.E.2d 136 (1961).
64. 105 Ga. App. 242, 124 S.E.2d 313 (1962).

husband died two and one-quarter hours after receiving the tortious injury.

The case of *Walden v. Coleman*[65] was again before the court. This case reversed the Court of Appeals and held that the widow and children had separate causes of action for the death of the husband and father and even if the daughter's negligence in driving the automobile owned by her husband resulted in the death of her father, recovery would only be defeated to the extent of her interest and that the husband was not entitled to have his plea in bar sustained.

The Court of Appeals held in *Owens v. White*,[66] that the wife, driver of the family purpose automobile, could bind her husband who owned it by making a contract whereby part of the expenses of an automobile trip would be born by the passengers. Proof of agency between wife and husband was not necessary where the husband ratified the contract. The court further held that the trial court erred in instructing the jury as to gross negligence, rather than ordinary negligence.

65. 217 Ga. 599, 124 S.E.2d 265 (1962).
66. 103 Ga. App. 459, 119 S.E.2d 581 (1961).