DOMESTIC RELATIONS

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STATUTES

The General Assembly of Georgia in the 1963 Session passed only three laws dealing generally with the field of Domestic Relations. They are briefly summarized as follows:

1. *Authority of Guardian to Invest in Certain Real Estate.* Ga. Laws 1963, page 479, Act. No. 380: In addition to all other investments which executors, administrators, guardians, trustees, custodians and other like fiduciaries holding trust funds are authorized by statute to make, they may also invest trust funds held by them in real estate loans (a) which are not in default, (b) which are secured by mortgages or deeds to secure debt conveying a first security title to improved realty, (c) which are insured pursuant to the provisions of The National Housing Act, and (d) with respect to which real estate loans, on or after default, pursuant to such insurance, debentures in at least the full amount of unpaid principal are issuable and which debentures are fully and unconditionally guaranteed both as to principal and interest by the United States.

2. *Husband and Wife, Transfers Between.* Ga. Laws 1963, page 524 Act. No. 421: code section 60-512, relating to the transfer of registered real estate between husband and wife, is hereby repealed in its entirety.

3. *Incurable Insanity as a Ground for Divorce—Procedure.* Ga. Laws 1963, page 288, Act. No. 225: Incurable insanity, but no divorce shall be granted upon this ground unless the insane party shall have been adjudged insane by a court of competent jurisdiction, confined in an institution for the insane for a period of at least two (2) years immediately preceding the commencement of this action, and until the superintendent or other chief executive officer of the institution and one competent physician appointed by the court shall, after a thorough examination, make a certified statement under oath that it is their opinion that such person is hopelessly and incurably insane. Notice of said action shall and must be served upon the guardian of the person of such insane person and the superintendent or other chief executive officer of the institution in which such person is confined, or in the event there is no guardian of the person, then notice

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of such action shall be served upon a guardian ad litem appointed by the court in which such divorce action is filed and the superintendent or the chief executive officer of the institution in which such person is confined and such guardian and superintendent shall be entitled to appear and be heard upon the issues. The status of the parties as to the support and maintenance of the insane person shall not be altered in any way by the granting of the divorce.

DECISIONS

The case of *Kendrick v. Kendrick*[1] involves an application by the former wife for revision of the child support provisions of her divorce decree, and was instigated under code section 30-207 authorizing a revision and modification of a child support decree either upward or downward where there has been a substantial change in income or financial status of the husband or father. The Supreme Court held that the jury had no authority to find a verdict which revised and modified the original child support judgment by providing for the creation of a trust fund, but the jury was limited to finding a verdict only as to the amount required for support of the minor child of the parties based on substantial change in income and financial status of the father, if any.

The case of *Davis v. Davis*,[2] was likewise brought under code section 30-207 by the husband for a reduction of permanent alimony for child support. Petition was filed in the same case as the original divorce decree. The Supreme Court held that the petition was no more than a motion made in a divorce case and did not confer jurisdiction to alter or revise the divorce decree where the same was filed after the expiration of the term in which the original decree was entered.

In the case of *Chandler v. Chandler*,[3] the plaintiff sought the recovery of support payments made to his ex-wife on the grounds that she had practiced fraud and deceit through perjured testimony as to the marital status of the child at the time of the granting by final decree the support payments. The Court of Appeals held that when a judgment is obtained by perjury, it cannot be set aside unless the person charged with such perjury shall first have been tried and convicted of this crime. It further held that an affidavit of illegality cannot arrest a judgment without proof of the conviction of the perjurer.

In *Allen v. Allen*,[4] the Supreme Court held that a defendant in a divorce action, who was not personally served and who did not ac-

1. 218 Ga. 284, 127 S.E.2d 379 (1962).
2. 218 Ga. 250, 127 S.E.2d 296 (1962).
3. 107 Ga. App. 108, 129 S.E.2d 370 (1962).
4. 218 Ga. 364, 127 S.E.2d 902 (1962).

knowledge or waive service or appear or plead, could have filed at the term in which divorce was granted, a motion to vacate and set aside said decree on the ground that, at the time of purported service by leaving petition and process at her most notorious place of abode, she was actually domiciled in another county. A motion to set aside a judgment in a divorce action on the ground of lack of jurisdiction, a defect not appearing on the face of the record, when the motion is made at the term in which the divorce was granted was proper.

In a similar case, the Supreme Court held in *Hardin v. Hardin,*[5] that if a defendant to a suit for divorce acknowledged service of a petition, she thereby became a party to the case and the proper time to raise the question of jurisdiction, or the lack thereof, is in the proceeding in that case, unless she can show fraud or any incapability on her part to so acknowledge that service, and that a petition to set aside the decree on the ground of lack of jurisdiction for non-residency was properly subject to a general demurrer, it being res adjudicata.

In *Cureton v. Cureton,*[6] a divorced wife filed an application for disbursement of a fund deposited in the Registry of the Superior Court subsequent to a condemnation proceeding against the land of her ex-husband. The fund was awarded to her. The Supreme Court held that when an alimony judgment was obtained in rem against the real property of the non-resident husband, and service had been perfected upon him by publication, and the divorce petition specifically prayed for judgment against the property, such judgment is conclusive upon the husband.

Byrd v. Byrd,[7] was a trover action for the recovery of certain items of personalty, subsequent to the rendition of a divorce decree in favor of the defendant wife in which she was awarded all of the "household furniture." The Supreme Court held that where the parties to a divorce action fail to schedule or incompletely schedule their property, even though title to the personal property of each might have been adjudicated in the action, the final decree leaves the parties where it finds them, and the separate title of each to his own property is unaffected by the decree.

Another trover action was involved in *Reese v. Thompson,*[8] wherein the plaintiff wife sought to recover certain items of personal property from the defendant ex-husband. The Court of Appeals held that the ex-wife was not estopped from suing ex-husband to recover

5. 218 Ga. 39, 126 S.E.2d 216 (1962).
6. 218 Ga. 88, 126 S.E.2d 666 (1962).
7. 106 Ga. App. 89, 126 S.E.2d 270 (1962).
8. 105 Ga. App. 826, 125 S.E.2d 726 (1962).

enumerated items of personal property by divorce action judgment, which showed that the only matter adjudicated in the prior divorce action was dissolution of the marriage contract, and that no issue relative to wife's rights with respect to such personal property was raised therein, and that it was error to dismiss the entire answer where the same raises issue of fact which should be tried before a jury. The defendant's plea in this case generally denied the plaintiff's right to recover and, therefore, raised issues to be determined by a jury.

The defendant in *Bryant v. State*[9] was convicted by the lower court of possessing non-tax paid whiskey. The evidence which convicted him consisted, in part, of the finding of the whiskey in question in the possession of the defendant's wife in the abode wherein the defendant and his wife resided. The Court of Appeals held that the husband is recognized by law as the head of his family and where he and the wife reside together, the legal presumption, although rebuttable, is that the house and all the household effects, including any intoxicating liquors, belong to the husband as the head of the family.

There were two cases involving adoption during the survey period. Of particular interest is the case of *Sale v. Leachman*,[10] which dealt with an interpretation of GA. CODE Section 74-403 (2) which eliminates the necessity of obtaining the father's consent in an adoption where it can be proved that the father has abandoned his minor child, and that such abandonment has come by virtue of his wanton and wilful failure to comply with the final judgment of any court ordering him to make support payments, and where such failure has existed for a period of twelve months. The evidence showed that the father did, in fact, fail to make support payments for a period in excess of twelve months, but that he had made some payments within the twelve months immediately prior to the filing of the adoption petition. The Court of Appeals held that any twelve months period would suffice and thereby the consent of the father was not necessary. On certiorari, the Supreme Court, in 218 Ga. 834, reversed and interpreted the phrase "twelve month, or longer" to mean that said period must transpire immediately prior to the filing of the adoption petition. The court said that the alluding to twelve months or longer "can in the 'light of reason' be construed to mean twelve months immediately preceding the filing of the petition to adopt a minor child."

The second adoption case was *Lee v. Green*,[11] and involved an action against the step-father's estate seeking specific performance of a contract to adopt the step-children. The Supreme Court held that it

9. 106 Ga. App. 182, 126 S.E.2d 538 (1962).
10. 106 Ga. App. 879, 129 S.E.2d 88 (1962).
11. 217 Ga. 860, 126 S.E.2d 417 (1962).

is an essential of a contract for the adoption of a child, where no statutory adoption exists, that it be made between persons competent to contract for the disposition of the child, and be based upon a sufficient legal consideration. In the present case, the step-father, upon the bringing of the children in his home by his new wife, assumed the status of loco parentis to the children. Therefore, where he furnishes support and education to the children, no contract with the mother is necessary to entitle him to the love and affection of said children, and it follows that the consent by the mother that the step-father enjoyed these rights and benefits, will not constitute consideration for the promise of the step-father that he will adopt the children.

Weeks v. Fuller[12] was a proceeding by a formerly incompetent ward, who had been legally restored to sanity, challenging the legality of disbursement of her funds by the guardian, Weeks. The guardian issued to the ward a check for the final disbursement of funds held by him for her, upon which he marked the notation "account paid in full." The question here is whether or not the general rule, that any draft marked "account paid in full," constitutes a full relief of the demand for which it was given, is applicable to a guardian-ward relationship when taken in the light of the provisions of GA. CODE Section 49-312. That section holds that no final settlement made between the guardian and ward shall bar the ward at any time within four years thereafter, from calling the guardian to a settlement of his accounts, unless it shall be made to appear that the same was made after a full exhibit of all of the guardian's accounts, and with a full knowledge by the ward of his legal rights. The Supreme Court reversing 105 Ga. App. 790 in 128 S.E.2d 715, held that the provisions of code section 49-312 must be met and that whether settlement between guardian and ward was made after full exhibit of all guardian's accounts and with full knowledge by the ward of her legal rights was a jury question and motion for judgment notwithstanding verdict for guardian was properly overruled.

In *Saldivia v. Saldivia*,[13] the Supreme Court held that petition for divorce was insufficient where, though it averred that parties had entered into common law relationship, there was attached to it as an exhibit a contract between parties concerning custody, reciting that they had never been married.

In *Thome v. Thome*,[14] the Supreme Court had the question of whether or not a divorced wife may receive temporary alimony and attorney's fees pending her motion to set aside on the grounds of fraud

12. 218 Ga. 515, 128 S.E.2d 715 (1962).
13. 218 Ga. 98, 126 S.E.2d 615 (1962).
14. 218 Ga. 359, 127 S.E.2d 916 (1962).

and deceit a divorce decree rendered against her. The Court held that the divorce judgment complained of dissolved her marriage so that she ceased to be the wife of the plaintiff husband, and that she is, therefore, not married to him at the time of her motion, and a marital relationship is a necessary prerequisite to the awarding of temporary alimony or attorneys' fees.

In *Reynolds v. Reynolds*,[15] the Supreme Court held that an increase from $1,042.00 per month to $5,000.00 per month in temporary alimony was not an abuse of the trial judge's discretion, and that the adjustment to $5,000.00 should have been made effective as of the first awarding of temporary alimony, to-wit, August 19, 1959, rather than January 5, 1962, for the reason that if the court found that she was entitled to $5,000.00 per month as of that date, then she was, under the evidence, entitled to that amount as of the effective date of the original award.

Johnson v. Johnson[16] was an action brought by the husband for divorce, alleging adultery as the ground and a cross-action filed by the wife alleging cruelty. The Supreme Court held that where the evidence fails to show condonation of the cause of separation, which the uncontradicted evidence disclosed was the adultery of the wife, and even though there was conflicting testimony as to the cruelty of the husband alleged as a ground of divorce in the cross-action, it follows that the court abused its discretion in awarding temporary alimony to the wife.

In *Monroe v. Monroe*,[17] the Supreme Court affirmed the amount of alimony awarded to the defendant wife on her cross-action, and that the plaintiff was not harmed by the verdict.

The lower court in *Perlotte v. Perlotte*[18] instructed the jury that if they granted one party a divorce as a matter of law, the opposite party should be granted a divorce. The wife sued on the grounds of cruel treatment and the husband answered denying the cruel treatment and prayed for a divorce, although he did not set out the ground therefor. The Supreme Court reversed the granting of divorce to the wife and held that although the defendant did not allege cruel treatment, his evidence of such, unexcepted to, amounted to an amendment setting out cruel treatment as his ground, and it was erroneous for the court to instruct the jury that the defendant was not asking for a divorce. Further, it was held to be reversible error to charge a jury that where one party seeks a divorce that the other party, as a matter

15. 218 Ga. 92, 126 S.E.2d 671 (1962).
16. 218 Ga. 28, 126 S.E.2d 229 (1962).
17. 218 Ga. 353, 127 S.E.2d 899 (1962).
18. 218 Ga. 27, 126 S.E.2d 220 (1962).

of law, should be granted a divorce, where the contentions of the parties diametrically opposed each other.

An interpretation of GA. CODE Section 81-1003, which grants to the superior court the power to render final judgment in chambers in any county in the judicial circuit, where a jury verdict is not required upon reasonable notice being given to a party, was involved in *Hinson v. Hinson*.[19] The divorce action was instituted by the husband in Charlton County against his non-resident wife with proper service of publication and issuance of process and the mailing of the marked copy to the wife. Thereafter, and while the Superior Court of Charlton County was in session the trial court in chambers in Coffee County heard evidence and granted a divorce to the husband. On motion of wife, the divorce decree was vacated. The Supreme Court held that the power of the superior court to determine issues by final judgment at chambers in any county in the judicial circuit when a jury verdict is not required may be exercised only after reasonable notice is given to the parties. The requirement of this notice was not dispensed with for any reason advanced. It was not obviated by the defendant's failure to file defensive pleadings within the time prescribed or by her failure to show due diligence. Service of the divorce suit upon the defendant is not the notice contemplated by the foregoing provisions.

Owens v. Owens[20] was an action for divorce in which the lower court entered judgment unsatisfactory to the defendant husband. The Supreme Court held that the allowance of illegal hearsay testimony, over objection of counsel, required reversal and the case was remanded to the lower court on the alimony issue alone, the evidence being sufficient otherwise to support the granting of the divorce.

Edge v. Edge[21] is a contempt action against a former husband for non-payment of support. The divorce decree provided that the husband should pay a lump sum each month for child support, and that the wife would not have the right to take the children out of the State of Georgia. Subsequent to the divorce, the parties entered into an agreement, whereby in consideration of the defendant no longer having to pay child support, the wife would have the right to take the children with her new husband out of the State. The wife left the State but subsequently came back and sought in this action to enforce the child support provisions from the date of her re-entry into the State. The lower court did not hold him in contempt. The Su-

19. 218 Ga. 447, 128 S.E.2d 487 (1962).
20. 218 Ga. 336, 127 S.E.2d 897 (1962).
21. 218 Ga. 463, 128 S.E.2d 493 (1962).

preme Court affirmed, holding that, although the supplemental agreement was null and void as being in violation of a court decree, the lower court did not abuse its discretion by failing to hold the defendant in contempt for failure to pay child support because of his reliance on a void supplemental agreement. It noted that the defendant had at all times expressed a willingness to pay when ordered or commanded to do so by a court of competent jurisdiction. The court held, however, that the trial court's failure to find him in contempt did not relieve him of his liability for the child support that was in arrears. The court held that the plaintiff had several available remedies to collect or enforce payment of the past due alimony.

The case of *Adams v Adams*[22] was a contempt proceeding against the defendant ex-husband to enforce payment of an alimony award. The Supreme Court held that the evidence clearly established that the husband was financially capable of paying the award fixed as alimony and that he was in contempt for failing to make the payments. Attorneys' fees were also allowable.

Joiner v. Joiner,[23] held that there was no abuse of discretion in finding the defendant ex-husband in contempt of court for failure to pay alimony for the support of the minor children of the parties.

There were six cases during the survey period dealing primarily with the question of whether or not the original custody provision in the final judgments and decrees should be altered or changed.

Adams v. Kirkland,[24] was a case brought to obtain the custody and control of the two minor children of the defendant, alleging that the plaintiff had had custody of the two children for from twelve to twenty months previous to the hearing, that the defendant abandoned the two children in care of the plaintiff and the plaintiff had provided all the necessaries for the children, and that the defendant failed and refused to provide any type of home life for the children. The Supreme Court held that it would not substitute its judgment for that of the trial judge, in absence of abuse of legal discretion where evidence was in conflict. A similar ruling was made in *Murphy v. Dixon*.[25]

In *Palmer v. Bunn*,[26] the Supreme Court dealt with the question of what in a divorce decree was a direct order of the court so as to constitute grounds for contempt where violated, and what was merely

22. 218 Ga. 286, 127 S.E.2d 365 (1962).
23. 218 Ga. 110, 126 S.E.2d 614 (1962).
24. 218 Ga. 512, 128 S.E.2d 730 (1962).
25. 218 Ga. 111, 126 S.E.2d 616 (1962).
26. 218 Ga. 244, 127 S.E.2d 372 (1962)

a violation of another person's rights, but not in violation of a court order necessary for bringing a contempt citation. The court held that the only portion of a divorce and alimony decree which may be enforced by punishment for contempt is that which commands the parties to obey, and this was construed only to extend to the payment of alimony, and not to the violation of visitation rights, unless the said order especially commands the party to give full recognition to the rights of the other.

In *Hunnicutt v. Smith*,[27] it was held that for change of custody of child, the criterion is not changes in conditions and circumstances relating primarily to the parents, such as remarriage and establishment of a home by one of them, but the adverse effect of changed conditions upon the child.

In *Doughtry v. Doughtry*,[28] the Supreme Court held that where divorce decree did not determine custody of unborn child, the issue could be passed upon in appropriate proceeding instituted for the purpose after the child was born.

Floyd v. Floyd[29] involves a petition by the wife praying for custody of children previously awarded the husband, pending further proceeding in wife's divorce suit. The plaintiff based her contentions in part upon the fact that there had been an improvement in her health. The Supreme Court held that marked improvement in wife's health did not make her prima facie entitled to custody pending divorce, but such was just one of many factors germane, but not of itself controlling, to be taken into consideration by the trial judge in determining to whom custody should be awarded.

In *Ottinger v. Pelt*,[30] a Tennessee court awarded custody of the minor child to the father with visitation rights in the mother. The plaintiff father subsequently agreed for the defendant mother to have the child during the school months provided he would have custody during the summer months and all holidays. When the mother refused to surrender the child, the father instigated proceedings and pleaded the Tennessee decree awarding him custody. The lower court, in effect, incorporated the oral agreement allowing the mother the child during the school year and thereby materially changed the decree rendered by the Tennessee court. The Supreme Court affirmed holding that a custody decree of a foreign court stands on the same

27. 218 Ga. 282, 127 S.E.2d 375 (1962).
28. 218 Ga. 557, 129 S.E.2d 788 (1963).
29. 218 Ga. 606, 129 S.E.2d 786 (1963).
30. 217 Ga. 758, 125 S.E.2d 52 (1962).

footing as one handed down in a court of this state. Further, the court decreed that there was evidence, although contradictory, which showed the father was addicted to strong drink and was a turbulent and violent person, especially when drinking, that it was in the trial judge's discretion whether or not this was a material change of circumstance so as to deny him possession of the child. Consequently, the court refused to overrule the judge's discretion.