DOMESTIC RELATIONS

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Some of the cases submitted for discussion herein have been deferred to other articles or excluded because they involved well-established rules.

CASES

JURISDICTION

TEMPORARY ALIMONY

Where an appeal is taken from a judgment overruling demurrers to a petition for divorce and alimony, the trial court nevertheless retains jurisdiction for the purpose of considering the question of temporary alimony. The court in *Swindle v. Swindle*,[1] applying this rule, stated that temporary alimony is for the purpose of enabling the wife to support herself during the litigation and to enable her to litigate the questions raised both on appeal and in the trial court. The trial court does not, however, have jurisdiction to enter any order adjudicating the property rights of the parties at a temporary hearing. Thus in *Walton v. Walton*[2] the court reversed a temporary order commanding the husband to pay the wife a sum of money representing the down payment in the name of the parties contributed by the wife from her own funds. Temporary support is only to provide temporary maintenance for the wife during the pendency of the action.

CHILD CUSTODY

Two cases involving the jurisdiction of the trial court to make an award of child custody arose during the survey period.

Henley v. Henley[3] was a separate action commenced by the ex-husband to have custody changed to himself on the ground that the ex-wife was neither physically nor financially able to care for the children. She was personally served and signed an agreement consenting to the custody change. The court thereupon granted the ex-husband's petition, changed custody, and ordered the ex-wife to re-convey the home to him. Subsequently, the ex-wife commenced this action to set aside that order, alleging that the court had no jurisdiction to grant same under the rule in *Danner v. Robertson*.[4] The appellate court affirmed, stating that the trial court

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1. 221 Ga. 760, 147 S.E.2d 307 (1966).
2. 223 Ga. 85, 153 S.E.2d 554 (1967).
3. 222 Ga. 349, 149 S.E.2d 783 (1966).
4. 221 Ga. 516(1), 145 S.E.2d 554 (1965). Discussed in Cetti, *Domestic Relations*, 18 MERCER L. REV. 76, 77 (1966).

had jurisdiction to entertain a separate action commenced by reason of changed conditions or circumstances materially affecting the welfare of the children, and that the evidence showed such change of conditions.[5] The court distinguished the *Danner* case on the ground that in that case there was a mere agreement between the parties and no showing of any change in conditions which could give the court jurisdiction to grant the relief sought.

A provision against removing the minor children from the state was declared void in the final decree entered in *Connell v. Connell.*[6] The decree provided that neither party could petition the court for permanent removal of the children from the jurisdiction for four years and ordered that neither party remove them from the jurisdiction for longer than two weeks during each parent's custody period. In violation of the decree, the ex-wife removed the children to South Carolina and the ex-husband brought this action for contempt. The court held the above portion of the decree to be void because: (1) the court lost jurisdiction over the subject matter because the former wife had taken the children to South Carolina before the petition for contempt was filed, and the children remained in South Carolina; and (2) upon the rendition of the final decree, the court had exhausted its jurisdiction, relying upon *Evans v. Allan.*[7]

While it might well be said that the decree was an abuse of the trial court's discretion, it can hardly be termed void. The court was empowered to and did in fact reserve jurisdiction to entertain questions concerning removal of the children from the state.[8] Under these circumstances, jurisdiction over the subject-matter, which vested at the time the original petition for divorce was filed, was not divested by the subsequent act of removing the children from the state.

DISMISSAL AND REINSTATEMENT OF CAUSES

A superior court has no jurisdiction to dismiss an appeal pending in the appellate courts on the ground that the appellant failed to comply with the Georgia Appellate Practice Act of 1965.[9] Dismissal of any appeal is within the exclusive jurisdiction of the appellate court in which the appeal is pending. Neither does the trial court have jurisdiction to reinstate a cause previously dismissed where both parties had dismissed their respective action and cross-action without prejudice and one party objects to the petition for reinstatement.[10]

5. *See,* Perry v. Perry, 212 Ga. 668 (2), 95 S.E.2d 2 (1956).
6. 222 Ga. 765, 152 S.E.2d 567 (1966).
7. 212 Ga. 193 (1), 91 S.E.2d 518 (1956).
8. *Compare,* Locke v. Locke, 221 Ga. 603, 146 S.E.2d 273 (1966).
9. Davis v. Davis, 222 Ga. 369, 149 S.E.2d 802 (1966).
10. Minchew v. Minchew, 222 Ga. 593, 151 S.E.2d 144 (1966). See also, Black v. Black, 165 Ga. 243, 140 S.E. 364 (1927); Simpson v. Brock, 114 Ga. 294, 40 S.E. 266 (1901); GA. CODE ANN. §30-127 (Supp. 1967); GA. CODE ANN. §30-206 (1952 Rev.).

RESIDENCY

One case in this area construed GA. CONST. art. VI section 14, para. 1 (1945). In *Johnson v. Johnson,* the plaintiff-wife filed suit for and obtained a divorce in Gwinnett County; her petition alleged that the defendant was not a resident of Georgia but that she, "has been a resident of said State for six months prior to filing her suit for divorce."[11] The court held that plaintiff's divorce was void ab initio in that neither her petition nor her proof showed that she was a resident of Gwinnett County as required by the Georgia Constitution when the defendant is a non-resident.

One other residency case arose from an attempt by the husband to defeat the jurisdiction of the superior court by moving from the state.[12] In that case the husband filed a divorce action in Georgia, but upon his wife's filing a cross-action for permanent alimony without a divorce, he dismissed his action and removed himself from the state. The court held that his action did not divest the trial court of jurisdiction of the cross-action, and the wife could subsequently amend her cross-petition to pray for a divorce.

MODIFICATION OF DECREE

One extremely important development in this area was the case of *Slowik v. Knorr,*[13] which held that an action for modification of a judgment for permanent alimony cannot be maintained in the court in Georgia which rendered the judgment where the opposing party, at the time modification is sought, is a non-resident and served only by publication. This decision overruled that in *Bethke v. Taylor,*[14] on the ground that a judgment for alimony is an in personam judgment and personal service is required before the Georgia courts can acquire jurisdiction of the petition to modify same. The decision is clearly correct under GA. CODE ANN. section 30-220 (Supp. 1967). However, it raises an interesting problem which, to this writer, makes the result extremely undesirable. If the petition could not be heard in Georgia because of lack of personal service of process, where could it be heard? If it were commenced in the state in which the opposing party was a resident and personal service were obtained in that state, could that party rely on GA. CODE ANN. section 30-220 (Supp. 1967) and obtain a dismissal on the ground that said section requires petitions for modification to be filed in the county of *Georgia* in which the parties were divorced? This statute implies that modification of a judgment for alimony is not, at least in Georgia, a transitory cause of action, but one confined to the court which rendered the judgment. If so, the court's de-

11. 222 Ga. 433, 150 S.E.2d 684, 685 (1966).
12. Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363 (1966).
13. 222 Ga. 669, 151 S.E.2d 726 (1966).
14. 214 Ga. 679 (1), 107 S.E.2d 217 (1959).

cision in the instant case could well leave a party with no forum in which to litigate the question of modification.

The most desirable solution to this problem would be to repeal GA. CODE ANN. section 30-220 (Supp. 1967) and adopt the Florida rule. Under this rule proceedings for modification are a continuation of the original divorce proceeding under the court's continuing jurisdiction, rather than a new or separate action.[15] It is, therefore, the rule in Florida that service of a motion for modification can be perfected by mail outside the state, since its only purpose is to give notice of the proceeding.

COLLATERAL ATTACK ON DECREE

Daniel v. Daniel[16] was the only case involving collateral attack of a foreign decree decided during the period under review. In that case the husband left Georgia and established domicile in Nevada, where he commenced a divorce action. He served the wife by publication and caused a copy of the process to be handed to her by a private individual in Atlanta. Thereafter, the wife commenced an action for divorce and alimony in Hall County, Georgia, to which the husband set up a plea of res judicata. The wife appealed from the trial court's sustaining of that plea. The supreme court held that the entire divorce proceeding in Nevada was "void" on the ground of fraud; the husband had falsely represented to the Nevada court that he and his wife were married, whereas shortly before he had obtained a Mexican divorce; he had also falsely represented that he and his wife entered into a pre-marital agreement setting his liability for alimony.

The court is clearly correct in holding that the Nevada decree could not operate as an adjudication of the wife's right to alimony because of lack of in personam jurisdiction; however, it is quite another matter to hold that the Nevada decree is void on the question of divorce *vel non*. The alleged fraud perpetrated upon the Nevada court in representing that the parties were still married is no fraud at all, but merely a recognition by the husband that the Mexican divorce was invalid. The supreme court in fact tacitly held that the Mexican decree was void since it ruled that the Georgia court could grant the wife a divorce. How can the court accuse the husband of fraud for recognizing the same thing that the court itself saw? As to the pre-marital settlement, there was no fraud which should vitiate the decree since it did not affect the jurisdiction of the Nevada court. It went merely to an area that the Nevada court could not adjudicate, namely, the wife's right to and amount of alimony. It had nothing to do with the issue of granting or not granting the divorce. It is further submitted that the court's authority for holding the Nevada decree to be void

15. Kosch v. Kosch, 113 So.2d 547 (Fla. 1959); Arrington v. Brown, 116 So.2d 461 (Fla. 1959); Grant v. Corbitt, 95 So.2d 25 (Fla. 1957).
16. 222 Ga. 861, 152 S.E.2d 873 (1966).

does not support its position. The court relied upon *Williams v. North Carolina.*[17] However, that case merely held that a divorce could be held void as against public policy where the party procuring it falsely represented to the Nevada court that he was a bona fide resident of Nevada. The obvious distinction between *Williams* and the instant case is that in *Williams* the misrepresentation was of an *essential jurisdictional fact,* going to the authority of the Nevada court to entertain any part of the proceeding. The misrepresentation in the instant case was merely as to the issue of alimony, and had nothing to do with the court's power to entertain the divorce action.

ALIMONY, CHILD SUPPORT AND ATTORNEYS' FEES

CONTEMPT

Once again the survey period is replete with cases involving contempt proceedings, usually by irate ex-wives.

Several cases dealt with making support payments in manners other than those directed in the final decree. In *Wills v. Glunts*[18] the father had been ordered to pay $400.00 each month for support of his children except during six weeks of each year when he had them live with him. He voluntarily paid the full $400.00 each month even during these six-week periods but then fell into arrears for five consecutive months thereafter. The court held that he was not entitled to credit for his voluntary overpayments and was in contempt of court for ignoring the terms of the final decree. The court likewise upheld a judgment of contempt in *Flesch v. Flesch,*[19] where the husband, although ordered to pay $100.00 to the wife twice yearly for the children's clothing, in addition to a specified monthly award of child support, ignored the court's order and used the $100.00 twice yearly to purchase clothing for the children himself, over the wife's objections. The court refused to hold the husband in contempt under somewhat similar circumstances, however, in *Biggers v. Biggers.*[20] In that case the wife was granted custody of the minor child of the parties and the husband ordered to pay $200.00 per month as child support. Shortly thereafter, the wife voluntarily relinquished custody to the husband, but no order changing same was sought until four years later. The wife then filed an action to hold the husband in contempt for failure to pay the child support during the past four years. The trial court found as a fact that the husband had supported the child in his custody during the four years in question, although he did not pay the $200.00 per month to the mother as ordered in the final decree, and that the husband was not in willful contempt of court, but merely in "technical" contempt. The supreme court, in reversing,

17. 317 U.S. 287 (1942).
18. 222 Ga. 647, 151 S.E.2d 760 (1966).
19. 222 Ga. 513, 150 S.E.2d 619 (1966).
20. 222 Ga. 139, 149 S.E.2d 98 (1966).

held that the husband was not in any sort of contempt since contempt is founded upon a willful disobedience of the court's orders. This case is distinguishable from the above two cases in that here the husband had no choice but to violate the court's order unless he could afford to support the child, plus pay the child support to the wife, which would have been unjust enrichment on her part. In the two previously-discussed cases, the husband could have easily complied with the final decree. In addition, the wife in *Biggers* waived any standing she might have had to seek back support since she was a party to the agreement which attempted to vary the terms of the final decree and could not come into equity with clean hands.

As pointed out above, contempt is founded upon a willful disobedience of the court's orders. Thus where a husband's failure to pay alimony was due to a decrease in his income from $150.00 per week to $25.00 per week because of poor health, and he had conveyed all of his property to the wife and gone into debt in an attempt to meet the alimony installments, there is no willful disobedience upon which to found a contempt citation.[21]

Neither can the husband be held in contempt where the wife did not pray for or seek support; that part of the final decree ordering payment of support is void.[22] Lisewise where the parties enter into a settlement agreement which is subsequently recited in the final decree but not approved, incorporated or ordered performed therein, the husband cannot be held in contempt.[23] The language pertaining to performance of the agreement must be in the form of a ruling, not merely a recitation without ordering performance thereof.

In the only case involving percentage settlements during the period, the court held that where the parties entered into a settlement agreement, which was ordered performed in the final decree, whereunder the husband was to pay 28.82 per cent of his monthly salary to the wife, the decree was not subject to attack on the ground that the amount to be paid was too indefinite and uncertain to be enforced by contempt proceedings.[24]

Even if the husband is in willful contempt, the trial court cannot sentence him to a fixed jail term and require a payment of advance alimony in addition to the arrearage as a condition precedent to his release.[25] The authority of the court to compel the contemnor to abide by a decree for alimony is limited to administering only conditional punishment allowing the contemnor to purge himself by paying such sums as he is able to pay as shown by the evidence.

21. Horton v. Horton, 222 Ga. 430, 150 S.E.2d 630 (1960).
22. Frady v. Frady, 222 Ga. 184, 149 S.E.2d 324 (1966).
23. Newton v. Newton, 222 Ga. 175, 149 S.E.2d 128 (1966).
24. Gray v. Gray, 222 Ga. 641, 151 S.E.2d 774 (1966).
25. Mathews v. Mathews, 222 Ga. 313, 149 S.E.2d 666 (1966).

TEMPORARY ALIMONY AND ATTORNEYS' FEES

In *Grantham v. Grantham*[26] the court sustained the deletion of an award of attorney's fees from a judgment in a divorce action where the wife had not prayed for attorney's fees until she amended her petition on the same day that the jury verdict was rendered, and the court had not, prior to judgment, fixed any attorney's fees or reserved jurisdiction to award them after judgment.

Where the wife timely prays for temporary attorney's fees, the court can award them even though the husband appeals from a judgment overruling demurrers to her petition.[27] Temporary alimony is for the purpose of enabling the wife to support herself during the litigation and to enable her to litigate the questions raised both on appeal and in the trial court.[28] The court's jurisdiction in awarding temporary alimony is limited, however, to the above purpose, and the court cannot enter an order adjudicating the property rights of the parties at a temporary hearing.[29]

In post-final decree proceedings, *Connell v. Connell*[30] held that attorney's fees are not allowable to the ex-wife where the husband petitions the court to hold the wife in contempt for violating its orders even though the husband be unsuccessful.

One of the most unfortunate decisions of the survey period is *White v. Bowen*,[31] in which the court held that an attorney cannot enforce the provisions of an alimony decree for attorney's fees by attachment for contempt or by writ of fieri facias as against the husband of the attorney's deceased client. The reason given for this decision is that the purpose of GA. CODE ANN. section 30-202 (Supp. 1967) is for the benefit of the wife to enable her to contest the issues between herself and her husband and, therefore, she is the only one who can enforce the award of attorney's fees. The court's premise is undoubtably correct, but it does not follow that because of it the wife is the only person who can enforce the award of attorney's fees. The purpose of the statute being to enable the wife to employ an attorney without having to advance the entire amount of attorney's fees, that statute should receive a construction promoting the extension of credit to the wife. The court's decision in the instant case has exactly the opposite effect, and serves to discourage attorneys from representing wives, especially those of advanced years or in poor health, without the full payment of attorney's fees in advance. In addition, while an attorney certainly could not seek an award of attorney's fees on his own behalf

26. 222 Ga. 577, 151 S.E.2d 129 (1966).
27. Swindle v. Swindle, 221 Ga. 760, 147 S.E.2d 307 (1966).
28. See also, Hewlett v. Hewlett, 220 Ga. 656, 140 S.E.2d 898 (1965), discussed in Cetti, *Domestic Relations*, 18 MERCER L. REV. 76, 81 (1966).
29. Walton v. Walton, 223 Ga. 85, 153 S.E.2d 554 (1966), discussed *supra* under JURISDICTION.
30. 222 Ga. 765, 152 S.E.2d 567 (1966).
31. 223 Ga. 94, 153 S.E.2d 706 (1967).

after death of his client, once an award is made it has the full force and effect of a judgment. Why should an attorney's rights under a judgment awarding him attorney's fees be less than any other money judgment?

AMOUNT OF ALIMONY AS BEING EXCESSIVE

Two cases were decided in which the husband sought a reduction in alimony or child support on the ground of same being excessive.

The court reversed an award of alimony where the income of the husband was about $21,000.00 per year before taxes, his liabilities exceeded his assets by several thousand dollars, and the trial court had ordered him to pay (1) $100.00 per month into a trust fund for the education of his minor child; (2) $750.00 per month to the ex-wife as alimony; (3) $1,638.59 in annual life insurance and hospitalization premiums with the ex-wife as the beneficiary. The total award was slightly less than one-half of the husband's probable income during the current year and more than one-half of his average yearly income for the preceding three years. In reversing, the court stated that there was no evidence of any, "special circumstances of the wife requiring this disproportionate part of the husband's income."[32]

The husband was not as fortunate in *Holmes v. Holmes*.[33] In that case the husband made a gross pay of $562.08 per month and had living expenses of $150.00 per month; the wife proved needs totalling $609.69 per month for herself and minor children. In addition, the wife had an income of $306.66 per month but expected her job to terminate on the day of the final hearing. On these facts the court held that an award of $100.00 per month alimony and $75.00 per month for each of the two minor children was not excessive.

VERDICTS

Two interesting cases were decided in the period under review involving challenges to the propriety of particular verdicts.

In *Wade v. Wade*[34] the plaintiff-husband filed an action for divorce on grounds of desertion and cruel treatment. The jury returned a verdict granting him a divorce but failed to specify the ground upon which it was granted; in addition, the verdict awarded the wife alimony of $200.00 per month, child support of $66.00 per month, and $15,000.00, representing the wife's one-half interest in the home of the parties. The husband appealed, contending that the verdict was invalid for failure to specify the grounds of divorce, and if the divorce were granted because of desertion, the wife was not entitled to alimony. The husband also contended that the award of alimony conveying the property of the wife to the husband upon his paying

32. Brown v. Brown, 222 Ga. 446, 450, 150 S.E.2d 615, 617 (1966).
33. 222 Ga. 115, 149 S.E.2d 84 (1966).
34. 222 Ga. 389, 149 S.E.2d 816 (1966).

a sum fixed by the jury at $15,000.00 was unauthorized by the pleadings and the evidence. The court affirmed the husband's first point, stating that it will be presumed, absent a contrary showing, that the verdict was based upon a finding that the wife had been guilty of cruel treatment rather than desertion, since the presumption is in favor of that construction which will sustain the final decree. That part of the decree ordering the husband to pay $15,000.00 for the wife's interest in the property was set aside on the ground that the issue had not been framed by the pleadings.

Moon v. Moon[35] involved a decree awarding the wife certain property as alimony and reciting that she assume the indebtedness thereon. The parties owned a forty-one acre tract of land, divided into two sections; the first was approximately nine acres with a residence thereon, and the second was thirty-two acres of unimproved land. There was $7,500.00 debt owed on the entire tract. The jury awarded the house and nine acres to the wife and the thirty-two acres to the husband but made no mention of the debt. Thereafter the trial court, pursuant to an appraisal showing each half to be worth approximately $16,000.00, entered a judgment on the verdict, part of which recited that the wife should pay one-half of the debt and the husband the other one-half. The wife appealed. Stating that the controlling issue was whether the foregoing order of the trial court was a substantial addition to the jury's verdict, the court affirmed by construing the jury verdict as implying that the wife should pay off the debt owed on the property awarded her. The court reasoned that since the jury was aware of the debt, its omission from the verdict must have been intended by the jury to impose the obligations pro rata upon the parties receiving the property. The order was, therefore, an amendment as to a matter of form and not a substantial addition to the jury's verdict. It is suggested that this decision reads too much into the jury's verdict. Perhaps the jury simply forgot about the debt. Equally likely is the assumption that the jury intended for the party or parties liable on the $7,500.00 note and mortgage to pay the debt. The court has no way of ascertaining that fact and has little business indulging in questionable assumptions about the intention of the jury. Where the verdict fails to dispose of all the issues, or to at least afford a fair basis for construction, the case should be reversed and remanded to dispose of those issues.

MODIFICATION

Two cases established the rule that where the husband petitions for modification of an alimony award on the ground of reduced income, he must allege facts showing a reduction in his net income, not merely in his

35. 222 Ga. 650, 151 S.E.2d 714 (1966).

gross income. The husband's failure to do this was fatal in *Holland v. Holland*.[36] Allegations showing the husband's net income at the time of the final decree and net income at the time of the petition for modification were upheld as against a general demurrer in *Wynn v. Wynn*.[37]

Wayman v. Wayman[38] dealt with the awarding of litigation expenses to the wife where the husband petitions for modification. Construing GA. CODE ANN. sections 30-220, 30-223 (Supp. 1967), the court held that the husband is not required to pay these expenses in advance as a condition precedent to maintaining the petition for modification since the statutes give the court discretion to award or fail to award such expenses, and there is no way by which such expenses can be determined prior to a hearing of the petition.

UNIFORM RECIPROCAL SUPPORT ACT

In *Strange v. Strange*[39] the court held that the GEORGIA UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT is not unconstitutional on the ground that no provision for jury trial is made. The right to trial by jury exists only in those cases where such right existed prior to the first Georgia constitution, and since there was no common-law remedy to compel the divorced father even to contribute to the future support of his children, much less a provision for jury trial, there is no right to trial by jury under the Georgia constitution in such cases.

SETTLEMENT AGREEMENTS

The only case decided under this topic, *Newton v. Newton*,[40] has been deferred to CONTEMPT, *infra*.

CHILD CUSTODY AND VISITATION

CHANGE IN CONDITIONS

Rogers v. Smith[41] was an action by foster parents to obtain custody of a child taken from them by the court and committed to the Family and Children Services Department of the State. The petition alleged that since the date of custody change, the petitioners' health had greatly improved and they were able to care for the child. To this petition was interposed a plea of res judicata, which the trial court held to be good. In affirming, the appellate court stated that GA. CODE ANN. sections 30-127 and 74-107 (Supp. 1967) as amended by Ga. Laws 1957, pages 412-414, providing that

36. 222 Ga. 467, 150 S.E.2d 684 (1966).
37. 222 Ga. 687, 152 S.E.2d 371 (1966).
38. 222 Ga. 535, 150 S.E.2d 840 (1966).
39. 222 Ga. 44, 148 S.E.2d 494 (1966).
40. 222 Ga. 175, 149 S.E.2d 128 (1966).
41. 222 Ga. 841, 152 S.E.2d 859 (1967).

the court might consider all the circumstances including the improvements of the health of a party seeking the custody change, did not apply to foster parents; and, even if it did, would not be sufficient to show a change of circumstances material to the welfare of the child in any case where custody was sought by one not a parent of the child.

JURISDICTION

Where the grandmother filed a habeas corpus petition in the superior court seeking custody of her grandchildren from her daughter, the mother of the children, and the juvenile court had previously assumed jurisdiction of the subject matter by virtue of a petition filed therein by the Doughtery County Department of Family and Children Services, to which the grandmother was not a party, the court held that it was error for the trial court to dismiss the petition; it should have been transferred to juvenile court to give the grandmother an opportunity to establish her allegations.[42]

In *Henley v. Henley*,[43] the parties were divorced, and a final decree awarded the wife the minor children and the home of the parties. Thereafter the husband commenced a separate action seeking to have custody changed to himself and to recover the home on the ground that the wife was neither physically nor financially able to care for the children. The wife was personally served and signed an agreement consenting to the prayed-for relief. The court granted the husband's petition, changed custody, and ordered the wife to re-convey the home to the husband. Thereafter the wife commenced an action to set aside that order, alleging that the court had no jurisdiction to entertain same. The court affirmed, stating that the trial court had jurisdiction to entertain a separate action commenced by reason of changed conditions materially affecting the welfare of the children, and that the evidence in the instant case showed such a change.[44]

AWARD OF CUSTODY

Several cases illustrate the well-established rule that the controlling factor in an award of custody is the welfare of the child. In *Peck v. Shierling*[45] this rule was applied where the trial court awarded custody of the minor to a third party where the father, who had been awarded custody previously, was deceased. The court held that it was error to make such an award when the legal right to the child was in the mother and there had been no show-

42. Carstarphen v. Dayton, 222 Ga. 138, 149 S.E.2d 103 (1966).
43. 222 Ga. 349, 149 S.E.2d 783 (1966).
44. *See*, Perry v. Perry, 212 Ga. 668 (2), 95 S.E.2d 2 (1956). The court distinguished Danner v. Robertson, 221 Ga. 516 (1), 145 S.E.2d 554 (1965), on the ground that in that case there was a mere agreement between the parties and no showing of any change in conditions or circumstances which could give the court jurisdiction to grant the relief. See discussion in Cetti, *Domestic Relations*, 18 MERCER L. REV. 76, 77 n. 14 (1966).
45. 222 Ga. 60, 148 S.E.2d 494 (1966).

ing that she had lost her parental rights under GA. CODE ANN. section 74-108 (1964 Rev.), or was an unfit person to have custody. The third party then sought to have custody changed on the ground of the mother's immorality. The court held, however, that where the mother's immorality took place two years before the proceeding seeking a change of custody, the trial court could not use this as a ground therefor.[46]

Likewise in *Brown v. Brown*[47] the court affirmed an award of custody to the father, even though the wife had been granted the divorce, where the evidence showed that the mother had been under psychiatric care and had been unable to enforce the child's attendance at school.

In *Rigdon v. Rigdon*[48] a similar question was involved. There, the court held that the husband, who had won his divorce action and was not in default, was not entitled to custody of his minor children as a matter of law. GA. CODE ANN. section 30-127 (Supp. 1967), which seems to confer such a right on the party not in default, must be read *in pari materia* with the judicial pronouncement that the right to custody depends upon what will promote the welfare of the children.[49] Where there is evidence from which it could be found that the wife was not unfit, the trial court's discretion in awarding custody to her will not be termed arbitrary.

HABEAS CORPUS

Hall v. Hall[50] was a habeas corpus action instituted by the father of an illegitimate child to obtain custody from the child's maternal grandmother, the father not having legitimatized the child. The court held that the father had no standing to bring the suit; the rule that no interest arising from humanity is sufficient to entitle a person to bring a writ of habeas corpus in behalf of one imprisoned does not apply where the petitioner claims custody of the person against another holding custody.

DIVORCE

PLEADINGS

A divorce petition is not demurrable on the ground of misjoinder of causes of action where the petition prayed for a divorce, specific performance of an oral contract to convey realty, and partition of jointly-owned property.[51] Divorce is an equitable proceeding designed to settle all questions relating to the property rights of the parties as well as their respective marital rights and duties.

46. Peck v. Shierling, 223 Ga. 1, 152 S.E.2d 868 (1967).
47. 222 Ga. 446, 150 S.E.2d 615 (1966).
48. 222 Ga. 679, 151 S.E.2d (1966).
49. *E.g.*, Madison v. Montgomery, 206 Ga. 199, 56 S.E.2d 292 (1949).
50. 222 Ga. 820, 152 S.E.2d 737 (1966).
51. Goodwill v. Goodwill, 221 Ga. 757, 147 S.E.2d 313 (1966).

In *Frady v. Frady*[52] that part of the final decree of divorce ordering payment of child support was void where the wife had not prayed for or sought child support. The ex-husband could therefore not be held in contempt of court for his failure to make such child support payments as ordered in the final decree.

Musgrove v. Musgrove[53] was a somewhat complicated case involving allegations of fraud against the ex-wife in the procurement of a divorce and certain procedural questions. The plaintiff-wife and her husband were divorced in DeKalb County in an uncontested proceeding wherein the husband had filed a general waiver and signed an agreement providing that he was to make certain payments. After the entry of the final decree, with the agreement made a part thereof and ordered performed therein, the ex-husband filed a motion for new trial and a motion to vacate and set aside the final decree, alleging that it had been procured by fraud, but failing to specify the particular fraud relied upon. The trial court overruled both motions and the husband's appeal therefrom was dismissed on procedural grounds. Thereafter the wife commenced a garnishment suit arising from the husband's failure to make the payments as ordered in the final decree. The husband responded that the decree was void for vagueness and because it was procured by fraud since he was not a resident of DeKalb County when suit was filed. The trial court overruled a general demurrer to this traverse, but upon trial found for the wife and entered a judgment against the husband for the arrearage. The husband then instituted this appeal contending that the trial court's overruling of the general demurrer had set the "law of the case" and amounted to a holding that the final decree was void for vagueness and because he was not a resident of DeKalb County when suit was filed. In affirming, the court stated that the overruling of the general demurrer did not amount to a holding that the decree was void. Such a holding was not necessary to sustain the traverse since the traverse contained defenses which, if they had been proven, would have been good as against the garnishment suit. In answer to appellant's second contention, the court responded that appellant had no standing to raise the question of residency since he had not specifically raised it in his motions for new trial and to vacate the final decree, and for the further reason that the fraud was self-induced; he had entered a waiver and signed an agreement in the action, well knowing that he was not a resident of the county in which it had been filed. The court also pointed out that the judgment of the court of appeals against him on these questions stood unreversed and was binding upon him.

52. 222 Ga. 184, 149 S.E.2d 324 (1966).
53. 113 Ga. App. 245, 147 S.E.2d 862 (1966).

JURY INSTRUCTIONS

It was reversible error to instruct the jury in *Schwartz v. Schwartz*[54] that they were required to grant the plaintiff a divorce if they were satisfied that the defendant was guilty of misconduct alleged as the grounds for divorce. The jury may in their discretion grant a divorce but are not required to do so.

NEW TRIAL

On the motion of both the plaintiff wife and the defendant husband, the trial court in *Napier v. Napier*[55] ordered a new trial. Thereafter the defendant moved to dismiss plaintiff's petition on the ground that all of the evidence in the first trial showed that she had cohabited with him after the action was filed, thereby condoning his conduct. The trial court sustained this motion and the plaintiff appealed. The court correctly reversed, stating that when a motion for new trial is granted, the case is thereafter a de novo proceeding. *Quaere:* would a motion for summary judgment have been proper?

SELF INCRIMINATION

One of the most interesting cases decided during the period is *Bass v. Bass.*[56] In that case several witnesses refused to answer questions propounded to them by counsel for the husband on the ground that to answer the questions might tend to incriminate them and hold them and their families up to disgrace and public contempt. The question objected to asked each of the witnesses whether, "they had seen the plaintiff in the company of other men. The witnesses testified they were married men."[57] The court surprisingly upheld their refusal to answer on the basis of the fifth amendment of the United States Constitution and GA. CODE ANN. section 38-1205 (1954 Rev.).

It is difficult to follow the court's reasoning on the above facts. Whether the witnesses had answered "yes" or "no" to the question clearly could not have tended to incriminate them for the question did not seek the identity of any of the men the plaintiff might have been seen with nor the place at which they were seen with the plaintiff. While it is true that the witnesses could not be required to admit that they had been intimate with the plaintiff, that question was not asked. Further, it is no crime for a married man to "be seen" in the company of a married woman other than his wife. Any use of the self-incrimination privilege at this point would clearly seem premature.

54. 222 Ga. 460, 150 S.E.2d 809 (1966).
55. 221 Ga. 813, 147 S.E.2d 422 (1966).
56. 222 Ga. 378, 149 S.E.2d 818 (1966).
57. *Id.* at 384, 149 S.E.2d at 824.

CONTEMPT

WILLFULNESS AS ESSENTIAL ELEMENT

The several cases decided under this topic are discussed above in ALIMONY, CHILD SUPPORT AND ATTORNEYS' FEES.

IMPRISONMENT FOR DEBT

Where a contempt citation sentenced the ex-husband to fifteen days in jail, a fine, and a requirement that he pay twenty dollars in advance alimony in addition to the arrearage before being released from jail, the court in *Mathews v. Mathews*[58] held that such citation was void as being in violation of the constitutional provision against imprisonment for debt. The authority of the court in compelling the contemnor to abide by a decree for alimony is limited to administering only conditional punishment allowing the contemnor to purge himself by paying such sums as he is able to pay as shown by the evidence.

VAGUENESS IN DECREE

Gray v. Gray,[59] which upheld a percentage settlement against an attack on the ground of vagueness and uncertainty where the same was sought to be enforced by contempt, is discussed above in ALIMONY, CHILD SUPPORT AND ATTORNEYS' FEES.

MISCELLANEOUS

ADOPTION

In *Wheeler v. Little*[60] the natural father's actions in leaving his child in the custody of another for a number of years was not sufficient to show abandonment under GA. CODE ANN. section 74-403 (Supp. 1967), where the father's reason for leaving the child was his inability to care for an infant at that time and there was some arrangement, though indefinite, regarding eventual return of the child to him.

SURETYSHIP

Rankin v. Smith[61] involved a suit on an agreement signed by husband and wife, and to which the wife filed a plea of coverture, alleging that she had signed the agreement as surety for her husband.

Rankin and his wife along with Smith and his wife, owned all the stock in a close corporation. The Rankins sold their stock to the Smiths under a written agreement which provided, *inter alia*, that the Smiths would,

58. 222 Ga. 313, 149 S.E.2d 666 (1966).
59. 222 Ga. 641, 151 S.E.2d 774 (1966).
60. 113 Ga. App. 106, 147 S.E.2d 352 (1966).
61. 113 Ga. App. 204, 147 S.E.2d 649 (1966).

"assume and pay all outstanding debts and obligations of the corporation from this date forward [and would] hold harmless and release Robert W. Rankin and Jane M. Rankin from any and all liability and obligations resulting from their association as stockholders and/or officers of said Rankin-Smith, Inc."[62]

Subsequently Rankin was forced to pay off a note of the corporation which he had endorsed. He then brought suit against the Smiths on the above-quoted agreement. Mrs. Smith filed a plea of coverture, contending that her obligation was that of a surety for her husband and she therefore could not be held.[63]

In reversing the trial court, which had upheld Mrs. Smith's position, the court of appeals distinguished this situation from suretyship and guaranty. In this instance the Smiths did not join in the Rankins' principal obligation, as in suretyship. The Smiths entered into an original undertaking running only to the Rankins whereby they assumed and agreed to pay the corporation's debts and to relieve the Rankins from any liability thereon. The agreement was part of the consideration for the sale of their stock. That portion of the agreement in which the Smiths promised to hold the Rankins harmless of corporate debts was therefore an indemnity contract and not a contract of suretyship.

Another case in which the wife was sought to be held was *Jenkins v. Tastee-Freez of Ga., Inc.*[64] The husband and wife had executed a lease of certain franchise rights from Tastee-Freez, both having signed the lease as "lessees." Thereafter the husband and wife executed certain contracts with the owner of the premises in which the business was to be operated, and in those contracts designated themselves as partners. However, Tastee-Freez had no knowledge of these contracts until it had extended all of the credit sued upon to the lessees. Thereafter Tastee-Freez sued the husband and wife, alleging a partnership, but was able to serve only the wife. The wife answered and alleged that she had not signed the lease as a partner, but only as a surety, and her contract of suretyship was void under the statutory prohibition against such contracts by married women. At the close of the evidence, the trial court directed a verdict for the plaintiff and the wife appealed. The court of appeals reversed, holding that (1) the contracts with the third parties designating the husband and wife as partners did not create an estoppel against the wife since Tastee-Freez had no knowledge of them until the credit sued upon was extended, and (2) the testimony of the wife that she signed merely as a surety created an issue of fact to be submitted to the jury since the wife can explain the capacity in which she signed an instrument.

62. *Id.* at 205, 147 S.E.2d at 651.
63. See, GA. CODE ANN. §§53-502, 53-503 (1961 Rev.).
64. 114 Ga. App. 849, 152 S.E.2d 909 (1966).

SOLDIERS AND SAILORS CIVIL RELIEF ACT

In *Smith v. Smith*[65] the husband filed a divorce action and the wife answered and counterclaimed. At the time of the temporary hearing, the husband's counsel moved for a stay of the proceedings under the above act on the ground that the husband was in military service preparing to embark for Viet Nam and was not authorized to absent himself from his base to attend the temporary hearing. The court overruled this motion and proceeded to take testimony and enter a temporary order. In reversing, the court stated that the trial court was not authorized to find from the evidence that the appellant was willfully attempting to evade determination of the issues in the cause, or that the ability of the husband to defend against the cross action was not materially affected by reason of his military service. The evidence showed, on the contrary, that the husband could not attend the hearing because of his military service and it was not made to appear that such inability to attend would not prejudice his case, which burden was on the wife. The case should therefore have been stayed until such time as appellant could attend such a hearing.

HEAD OF HOUSEHOLD

There is a rebuttable presumption that narcotics found in a house were possessed by the husband even though the wife held legal title to the house. Where the husband and wife reside together he is always the head of the household, regardless of who owns the premises.[66]

GIFTS

Ashbaugh v. Ashbaugh[67] involved the statutory presumption of a gift to the wife where the husband is the donor. Where the husband in that case testified that he had no intention to give his wife property which had been purchased with his funds and had been placed in her name, and his testimony was corroborated with evidence showing that he had controlled and managed the property thereafter, the jury was authorized to find that the statutory presumption of gift to the wife was rebutted and a resulting trust was raised in the husband's name.

STATUTES

ADOPTION

During the 1967 session of the legislature, the adoption laws were amended or changed in three major aspects: (1) the adoption law was amended to provide for the service of the petition and order for adoption upon non-residents and on those parties whose addresses are unknown;[68] (2) the

65. 222 Ga. 246, 149 S.E.2d 469 (1966).
66. Landers v. State, 114 Ga. App. 601, 152 S.E.2d 431 (1966).
67. 222 Ga. 811, 152 S.E.2d 888 (1966).
68. Ga. Laws 1967, p. 6.

circumstances were changed under which the consent of certain parents need not be obtained before adoption of the parent's child;[69] and (3) a provision was added under which the adopting parents may inherit from an adopted adult that which is acquired or vested in such adult subsequent to the adoption, except that which such adult has acquired or inherited from blood relatives. The adopted adult shall be deemed a natural child of his adopting parents and entitled to inherit under the laws of descent and distribution intestate and under any testamentary instrument unless expressly excluded therefrom.[70]

ABANDONMENT OF CHILD

Under Ga. Laws 1967, p. 453, any person who willfully and voluntarily abandons his child, leaving it in a dependent condition, after leaving Georgia shall be guilty of a felony.

MARRIAGE OF MINORS

The laws relating to marriage of minors were changed by inserting new requirements for persons who may give their consent to the marriage of underage applicants for marriage licenses. The changes also clarify the requirement that parental consent is required for marriage of applicants under nineteen years of age.[71]

ATTORNEYS

A new law passed during the period provides that the provisions relating to unlicensed placement of children for care or adoption of The Child Youth Act shall not be construed to prohibit a properly licensed attorney from providing necessary legal services to parties enaged in adoption proceedings.[72]

A much-needed addition in the area of attorney's fees was provided by Ga. Laws 1967, p. 591, wherein a grant of attorney's fees at anytime during the pendency of a divorce or alimony action shall be a final judgment as to the amount granted, whether the grant be in full or on account, to the extent that the judgment may be enforced by attachment for contempt or writ of fieri facias, whether the parties subsequently reconcile or not. Unfortunately, the statute does not go far enough to remedy the problem arising in cases such as *White v. Bowen,* discussed under ALIMONY, CHILD SUPPORT AND ATTORNEYS' FEES, above even though the principal under which relief should be granted is the same as that upon which the instant statute is based.

69. Ga. Laws 1967, p. 107.
70. Ga. Laws 1967, p. 803.
71. Ga. Laws 1967, p. 31.
72. Ga. Laws 1967, p. 772.