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Domestic Relations

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DOMESTIC RELATIONS

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STATUTES

The General Assembly of Georgia, during the 1950 regular session, enacted three statutes modifying and repealing existing statutes dealing with divorce and domestic relations.

Probably the most important change in the divorce laws of Georgia was the amendment by the 1950 Legislature of Code Section 30-107 reducing the required period of a petitioner's residence within the state before filing an application for divorce from twelve months to six months.[1] The residence requirment of twelve months was enacted in 1893, and this amendment is the only change in the period of required residence since that time.

The significance of this amendment can easily be seen by comparing the period of residence now required in Georgia with the residence requirements of surrounding Southeastern states. Florida[2] is the only one of the surrounding states having a residence period less than that of Georgia. The period in Georgia is now equal to that of North Carolina[3] and is from six to eighteen months less than the period required in the states of Alabama,[4] Mississippi,[5] South Carolina,[6] and Tennessee.[7]

The immediate results of the reduction of this period of residence cannot be seen; however, it is the opinion of the writer that by reason of this amendment there will be a sharp increase in the number of divorces granted in the State of Georgia.

In connection with the amendment of Code Section 30-107 by the 1950 Legislature, it should be pointed out that no change has been made in the period required for a person who is a resident of an Army Post or Military Reservation to obtain a divorce, that period remaining one year next preceding the filing of a petition.

The second statute was the amendment of Code Section 30-112. This section, before it was amended, provided that after a suit for divorce is filed no transfer of property by the husband, except bona fide in payment of pre-existing debts, shall pass title so as to avoid the vesting of the property in accordance with the final verdict of the jury. The amendment provided that this section was operative only if lis pendens notice was

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1. Ga. Laws 1950, p. 429.
2. FLA. STAT. § 65.02 (1943) (ninety days prior to filing petition).
3. N.C. GEN. STAT. ANN. § 50-5(4) (Supp. 1949) (six months next preceding filing the petition).
4. ALA. CODE ANN. §§ 34-27, 34-29 and §§ 34-20, 34-22 (Supp. 1947) (one year where brought on ground of voluntary abandonment or where defendant is a non-resident; two years where brought on ground of non-support).
5. MISS. CODE ANN. § 2735 (1942) (one year prior to filing petition).
6. S. C. Acts of 1949, Nos. 95 and 137. (one year prior to filing petition).
7. TENN. CODE ANN. § 8428 (1932) (two years next preceding filing of petition).

duly filed. The amendment brought divorce suits in line with all other suits as to notice of lis pendens. Hereafter, if it is desired by a wife, as petitioner, to prevent her husband from disposing of his property in a divorce case, she must file the lis pendens notice.[8]

The third statute repealed Code Section 53-504, which section provided that a contract of sale by a wife of her separate estate to her husband or to a trustee was not valid unless approved by order of the superior court.[9] This is more evidence of the opinion that wives are able to look after themselves.

DECISIONS

In the amendment to the divorce law of 1946, there was included a provision for a thirty day period to elapse before the judgment and decree became final. In the opinion of the writer, this was an unfortunate provision in the way in which it was included.

During the past year, there have been several cases construing and attempting to clarify this amendment which was enacted in 1946 to Code Section 30-101, and which has caused so much confusion and uncertainty in appellate procedure in divorce cases.[10] This amendment provided for some person at interest to file a motion to set aside and vacate, within thirty days, a verdict or judgment granting a total divorce or granting a total divorce and alimony.

In the case of *Degouras v. Degouras*[11] the Supreme Court dismissed, on general demurrer, a petition filed by the plaintiff within thirty days from the date of the verdict and judgment to modify and set aside the said verdict and judgment, and held that where such a petition is filed, it must set forth "good and sufficient grounds" for the modification or setting aside of the verdict and judgment.

In the case of *Carnegie v. Carnegie*[12] the Supreme Court affirmed the lower court, holding that where the defendant has actual knowledge of divorce proceedings, and has failed to appear and defend, but within the thirty days after the granting of the divorce, comes into court and files a petition to modify and set aside the divorce judgment, such petition must be based upon "good and sufficient grounds" meeting the requirements of a motion for a new trial in substance and form, including a brief of the evidence where the evidence is necessary to the consideration of the grounds alleged. In this case, the petition to modify and set aside the divorce judgment merely denied the allegations of plaintiff's petition for divorce and set up a counter-claim for divorce and alimony, and the court held that these allegations did not meet the requirements for "good and sufficient grounds" being alleged. The court also held in this case, that although Code Section 30-101 provides "if such a petition is filed, it will be decided by the judge, unless a jury trial of the issues raised thereby is

8. Ga. Laws 1950, p. 365.
9. Ga. Laws 1950, p. 174.
10. Ga. Laws 1946, pp. 90, 91, GA. CODE ANN. § 30-101 (Supp. 1947).
11. 205 Ga. 362, 53 S.E.2d 759 (1949).
12. 206 Ga. 77, 55 S.E.2d 583 (1949). *See also* Allison v. Allison, 204 Ga. 202, 48 S.E.2d 723 (1948); Huguley v. Huguley, 204 Ga. 692, 51 S.E.2d 445 (1949); Lucas v. Lucas, 179 Ga. 821, 177 S.E. 684 (1934); Wrenn v. Allen, 180 Ga. 613, 180 S.E. 104 (1935).

demanded by any party,"[13] and a jury trial is demanded by the party filing the petition, the legal question of whether the petition sets forth good and sufficient grounds for the relief sought is to be determined by the court, and the petitioner was not entitled to have the legal sufficiency of the grounds determined by a jury, although a jury trial of the issues raised was demanded by the petitioner. The term "issues raised," as provided in Code Section 30-101,[14] means issues of fact only, and not the legal sufficiency of the petition. The Supreme Court, in this case, re-emphasized that the language used in the cases of *Dugas v. Dugas*[15] and *Thompson v. Thompson*[16] could not be construed to mean that the filing of a petition to modify and set aside a divorce judgment within thirty days of the rendition of that judgment entitled the petitioner to a de novo trial as a matter of right, or to the automatic legislative grant of a new trial.

The case of *Davis v. Davis*[17] held that Code Section 30-101, providing for the filing of a motion to modify and set aside a judgment for divorce and alimony within thirty days from the date of such verdict and judgment, applies only in cases where a divorce is *granted*. The Supreme Court, in this case, held that where a jury refused to grant a divorce to either party, but granted the wife a specific sum of alimony for the support of the plaintiff and the minor child, that the judgment for alimony was unauthorized because the jury denied a divorce to both parties, the prayer for alimony being dependent upon and incidental to her prayer for divorce, and that a motion by the defendant to set aside the judgment filed after thirty days had expired from the date of the judgment, but within the same term of Court, was the proper procedure.

The case of *Armstrong v. Armstrong*[18] also involved the question of filing a motion to set aside a verdict and decree, and the Supreme Court held, in this case, that a judgment woud not be set aside on the ground that it was entered because of corrupt and willful perjury, unless it appeared that the person charged with perjury had been duly convicted thereof and that the judgment was based on such testimony alone. This case also held that a petition for divorce and alimony, containing allegations as to title and ownership of real and personal property being in the plaintiff, showed on its face the purpose to have title to such property decreed in the plaintiff, and absence of specific prayers to that effect was an amendable defect, and want of such prayer was cured by the judgment.[19]

In the case of *Adams v. Adams*[20] the Supreme Court held that in a suit for divorce, alimony and custody, where the defendant, by direct bill of exceptions, assigns error upon the sustaining of a demurrer filed by the plaintiff to the defendant's answer, the bill of exceptions must be dismissed on the ground that there is no assignment of error upon a final judgment of the trial court.

13. GA. CODE ANN. § 30-101 (Supp. 1947).
14. *Ibid.*
15. 201 Ga. 190, 39 S.E.2d 658 (1946).
16. 203 Ga. 128, 45 S.E.2d 632 (1947).
17. 206 Ga. 559, 57 S.E.2d 673 (1950).
18. 206 Ga. 540, 57 S.E.2d 668 (1950).
19. GA. CODE § 110-705 (1933).
20. 206 Ga. 857, 59 S.E.2d 375 (1950).

The recent case of *Shivers v. Shivers*[21] held that the superior court has plenary power over its orders and judgments during the term at which entered, and may amend, correct or revoke them, for the purpose of promoting justice at such term on the court's own motion, without notice to either party. In this case, the Superior Court of Cobb County revoked a custody decree during the same term, awarding a minor child to the plaintiff in a divorce suit in Cobb County, where it appeared that the minor child had previously been awarded to the defendant in a divorce suit in Florida.

The case of *Bell v. Bell*[22] explains the appellate procedure where a divorce is *denied*, holding that where a divorce is *granted,* a petition to modify or set aside a verdict or judgment must be filed within thirty days from the date of the verdict or judgment, but that when a divorce is *denied,* a review by a motion for new trial, without such petition to modify or set aside, is an available procedure. This case also held that where the defendant had been divorced by a former wife, and the jury in that action placed disabilities on his remarriage which were never removed, subsequent ceremonial marriage of the defendant with the plaintiff was invalid, and the defendant was *not estopped from attacking the validity of the marriage, although the plaintiff entered into marriage in good faith, so that the plaintiff could not prevail in her action for divorce and alimony,* and that the marital status of citizens is a matter of public interest and concern, and that rules of estoppel between parties cannot be invoked to determine the validity of a marriage.

It is the opinion of the writer, as well as the hope of the writer, that at the next session of the Legislature, this provision of the law will be changed, so that the final judgment and decree of the court in a divorce case will be final on the date rendered, and will have the same force and effect as any other judgment and decree of the court, and the requirements as to further procedure will be the same as are now applicable to final judgments and decrees.

The case of *Powell v. Powell*[23] is a very interesting decision dealing with the jurisdiction and venue of the court in a divorce suit. In this case, the Supreme Court held that where a wife files her suit for divorce in one county and the husband comes in and files a plea to the jurisdiction and a cross-action, and the wife dismisses her suit for divorce and files another suit for divorce in the county alleged to be the residence of the husband, the husband cannot, by dismissing his plea to the jurisdiction, unknown to the plaintiff, procure a divorce on his cross-action. It was pointed out in this case that when the wife dismissed her suit in the first county, that court was divested of jurisdiction of the case before the hearing on the cross-action. This case also held that such a petition could be amended as other petitions. The case of *Respess v. Lites*[24] is a case dealing with another jurisdictional question. Here, the court held that failure to mail a notice of the date of the final hearing of the adoption proceeding to the natural

21. 206 Ga. 552, 57 S.E.2d 660 (1950).
22. 206 Ga. 194, 56 S.E.2d 289 (1949).
23. 207 Ga. 1, 59 S.E.2d 718 (1950).
24. 81 Ga. App. 110, 57 S.E.2d 869 (1950).

father, who was required to be served in the first instance, was jurisdictional, and the trial judge did not have jurisdiction to finally hear and determine the case. It was also held in this case that notice to the attorney for the natural father was not a compliance with the statute providing for service.[25] In connection with this case, see the case of *Brewer v. Brewer*,[26] where the court held that a petition for contempt for non-payment of alimony may be served on the defendant's counsel of record. Also in this connection, see the case of *Chambers v. Chambers*,[27] where the court held that a person who is non compos mentis, though not legally adjudged to be insane, is incapable of being served with a petition for divorce, and a judgment in an uncontested divorce suit, which is predicated upon such service, may be set aside in a proceeding by a next friend.

In the case of *Levine v. Levine*[28] the Supreme Court reversed the lower court, holding that a charge by the court, that the jury would be authorized to find against a divorce on the ground of cruel treatment, if because of the same, the parties mutually agree to separate, was erroneous.

The Declaratory Judgment Act [29] has been applicable in the recent case of *Wright v. Wright*[30] where the husband filed a petition for a declaratory judgment and an accounting on permanent alimony where, subsequent to the rendition of the judgment against the husband for permanent alimony, the whole family was re-established in normal family relationship. In this case, Justices Wyatt and Candler concurred specially, but were of the opinion that the plaintiff had an adequate remedy at law without regard to the declaratory judgment law.

Price v. Price[31] involves the question of whether, where a husband buys land with his own money and has the land conveyed to his wife, there is a gift to the wife or a resulting trust in favor of the husband. In this case the Supreme Court held that there is a rebuttable presumption that the property is a gift to the wife, and that in order to rebut such presumption, the proof must be clear and convincing. It was further held that a suit by the husband against his former wife to have an implied resulting trust decreed in favor of the husband was not barred under the doctrines of res judicata or estoppel by judgment, where such matters were not within the scope of the pleadings and were not actually litigated in the divorce and alimony case.

In connection with the question of res judicata, see the case of *Mize v. Mize*,[32] where the court held that a money demand between husband and wife may be joined in a divorce action, and where the issues presented by the pleadings in the divorce suit could have been inquired into and adjudicated, and adjudication of the divorce suit on its merits, either by demurrer or otherwise, is res judicata of all issues presented in the pending suit.

The question of custody of minor children is usually the most contested

25. GA. CODE ANN. § 74-414 (Supp. 1947).
26. 206 Ga. 93, 55 S.E.2d 593 (1949).
27. 206 Ga. 796, 58 S.E.2d 814 (1950).
28. 206 Ga. 234, 56 S.E.2d 266 (1949).
29. Ga. Laws 1945, p. 137, GA. CODE ANN. §§ 110-1101 *et seq.* (Supp. 1947).
30. 205 Ga. 524, 54 S.E.2d 596 (1949).
31. 205 Ga. 623, 54 S.E.2d 578 (1949).
32. 80 Ga. App. 441, 56 S.E.2d 121 (1949).

issue between the parties in a domestic relations case, and the determination of custody of minor children must be decided on the basis of what is in the best interest of the children, and what will best promote their welfare and happiness. In the case of *Adams v. Adams*[33] the Supreme Court refused to interfere with the judgment of the trial judge in awarding the custody of minor children where the evidence failed clearly to show an abuse of the discretion vested in the trial judge. During the past year there have been many decisions holding that a decree awarding the custody of a minor child or children, without any reservation of jurisdiction, is final and conclusive, and that the principle of res judicata is applicable unless a material change of circumstances, subsequent to the date of the decree awarding the custody and substantially affecting the welfare of the child or children, is made to appear.[34]

During recent months there have been numerous court decisions establishing new judicial precedents concerning citations for contempt for violations of orders of the court. In the recent case of *Ozborn v. State*[35] the Court of Appeals of Georgia held that a divorce judgment awarding custody of minor children to the mother and providing for alimony did not preclude the conviction of the father, who failed to comply with the judgment, for abandonment of the minor children. The court emphasized in this case that a judgment for alimony is not necessarily a bar to a prosecution for abandonment.

In the case of *Sells v. Sells*[36] the court held that a contract between a husband and wife, made with the intention of promoting a dissolution of the marriage relation, is contrary to public policy and is void, and held in this case that the agreement, entered into after the separation had taken place, providing for alimony and attorney's fees should the wife enter a suit for divorce, was valid and enforceable.

On the question of an alimony decree being excessive, see the case of *Jeffrey v. Jeffrey*,[37] where the court held that the verdict of the jury, awarding the wife $150 per month alimony, was not excessive, as a matter of law, under the evidence as presented of the parties' earnings.

The case of *Adams v. Pafford*[38] is an interesting case on the question of what property is owned by the wife during coverture. The court held that property acquired or purchased by the wife during coverture, with her own money, becomes her separate property, and that all property acquired prior to her marriage, and that given to her individually during marriage, becomes part of her separate estate. It was also held in this case that there was a presumption that property bought partly by the husband and partly by the wife is a gift to the wife, but that this presumption may be rebutted.

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33. 206 Ga. 881, 59 S.E.2d 366 (1950).
34. In this connection, see: Bowers v. Bowers, 205 Ga. 761, 55 S.E.2d 152 (1949); Leftwich v. Cook, 79 Ga. App. 585, 54 S.E.2d 455 (1949); Madison v. Montgomery, 206 Ga. 199, 56 S.E.2d 292 (1949); Elders v. Elders, 206 Ga. 297, 57 S.E.2d 83 (1950); and Crawford v. Jones, 205 Ga. 764, 55 S.E.2d 215 (1949).
35. 79 Ga. App. 823, 54 S.E.2d 376 (1949).
36. 206 Ga. 650, 58 S.E.2d 186 (1950).
37. 206 Ga. 41, 55 S.E.2d 566 (1949).
38. 79 Ga. App. 477, 54 S.E.2d 329 (1949).

The case of *Williams v. Williams*[39] is an unusual case involving modification of a temporary alimony order. In this case an agreement between the parties providing that the husband should pay the wife the sum of $272.00 per month as temporary alimony was made the judgment of the court. Nine months later the husband filed a petition to modify and reduce the amount of alimony on the ground of a change of circumstances. The court reduced the amount to $250.00 per month, to which order the husband excepted. On appeal, it was held that the award by the lower court of $250.00 per month where the income of the husband was $350.00 per month was excessive, and was an abuse of discretion by the lower court.

Gardner v. Gardner[40] is another interesting case involving divorce and alimony. In this case the Supreme Court held that where the wife files a suit for divorce and alimony, and the husband files a cross-action, and the jury returns a verdict in the statutory form, the verdict should be construed to be that a divorce was granted on the wife's petition rather than on the husband's cross-bill. And in such a case, where the jury denies alimony to the wife, such denial of alimony is contrary to law and evidence where it appeared that the wife had no separate estate or means of support, and that the husband was able to support her. This case also held that a jury was without authority, after refusing to grant the wife permanent alimony, to decide how property owned by the parties as tenants in common could be used and sold.

There are several recent decisions involving the granting of alimony at and before the appearance term of the court. *Fowler v. Fowler*[41] held that judgment for alimony based on written agreement between the parties was not void on the ground that alimony was not prayed for, or on the ground that alimony was awarded at the appearance term of the court, and that the defendant's waiver of service of process in advance of filing of the petition was good as between the parties in absence of fraud. However, in the case of *Gaither v. Gaither*[42] the court held that a judgment awarding the wife permanent alimony *before* the appearance term, although based on an agreement between the parties, was invalid and that the husband was entitled to cancellation of the judgment on the ground that the judgment was void for want of jurisdiction of the husband's person, and for want of jurisdiction of the subject matter, but held that the agreement was valid between the parties. On further appeal to the Supreme Court. that court held that where the non-resident husband files a petition in equity to cancel the consent alimony judgment, he submits himself, for all purposes of that suit, to the jurisdiction of the courts of the county in which that suit is pending; that the wife has a right to amend her cross-action and to set up against the husband the prior alimony agreement entered into between the parties upon which the judgment was based; and that as the husband moved from the State immediately after judgment was entered, the agreement made in 1929 was not barred by the Statute of

39. 206 Ga. 341, 57 S.E.2d 190 (1950).
40. 206 Ga. 669, 58 S.E.2d 416 (1950).
41. 206 Ga. 542, 57 S.E.2d 593 (1950).
42. 205 Ga. 572, 54 S.E.2d 600 (1949).

Limitations and was germane to the suit brought by the husband to set aside such judgment.[43]

In the case of *Murray v. Murray*[44] the Supreme Court held that where a suit for divorce is still pending when a hearing on an ancillary petition for temporary support of a child is held, although more than three years after filing of the suit for divorce, it is proper for the court to award a a sum of money for the support of the child retroactive to the date of filing the original petition for divorce, covering the period from the time the divorce suit was filed until the hearing on the ancillary petition.

The case of *Kenimer v. State*[45] established a new judicial precedent in prosecutions for criminal contempt in violating orders of the court. In this case, criminal contempt proceedings were brought by the State of Georgia against Kenimer for violation of an order of court by removing a minor child, previously awarded to the wife, from the jurisdictional limits of the state for a period of 238 days. The trial judge found the defendant husband guilty of 238 separate acts of contempt, and imposed a fine of $50.00 and imprisonment of five days on each of the 238 contempt charges against the husband, or a total of $11,900.00 fine and confinement in jail for over three years. On appeal to the Court of Appeals, it was held that it was proper to find the husband guilty of 238 separate contempt offenses and that the court had the right to impose punishment for each offense, although the total exceeded the legal limits for one offense, but held, on the other hand, that the sentence in the case seemed to include multiple and cumulative punishment for a single design, and that the cumulative result and effect of the judgment was excessive, cruel and unusual, and contrary to the spirit of the law of the state, and against the policy of the law of the state. A minority dissented, on the ground that where the punishment did not exceed that prescribed by law, the Court of Appeals could not legally reverse or set aside the judgment of the trial judge on the ground that the sum total of the punishment was excessive, cruel and unusual. The contention of the defendant, that the violation of the order of the court should be treated as one offense because his conduct was one continuous action, was disregarded in this case, on the theory that each day the defendant was outside of the jurisdiction of the court he interfered with the administration of the court, and each day prevented the court from considering and determining the case, and, therefore, each day was a separate and distinct contempt of the order of the court.

In an action brought for contempt, based on non-payment of alimony by the husband, it was held that the divorced husband, by non-payment of alimony, waived any right to insist upon the wife's resuming her maiden name in accordance with an agreement between the parties.[46] In the case of *Borders v. Borders*[47] the Supreme Court affirmed the lower court in holding the defendant in contempt of court for failure to comply with an order of the court providing for payment of temporary alimony and attorneys' fees.

43. 206 Ga. 808, 58 S.E.2d 834 (1950).
44. 206 Ga. 702, 58 S.E.2d 420 (1950).
45. 81 Ga. App. 437, 59 S.E.2d 296 (1950).
46. Burks v. Mullins, 206 Ga. 603, 57 S.E.2d 926 (1950).
47. 206 Ga. 191, 56 S.E.2d 517 (1949).

In the case of *Pharr v. Pharr*[48] the Supreme Court held that a husband's voluntary conveyance to his second wife was not a fradulent conveyance, and could not be cancelled in a petition by his first wife, who had previously obtained a judgment for permanent alimony. It was also held in this case that a judgment for permanent alimony does not create a lien on the divorced husband's realty for future installments where no such lien is expressly created in the judgment.

There are several recent decisions by the appellate courts which, although not falling within any particular category, are nevertheless related to the field of domestic relations. *Brewer v. Brewer*[49] holds that condonation and cohabitation, after filing a suit for divorce, if conditioned upon the promise of the defendant not to again be guilty of the act charged in the petition, will not prevent the plaintiff from proceeding with the original petition for divorce in the event of a breach of the condition and agreement on the part of the defendant. The court also held that the fact that the parties may have moved out of the State of Georgia after the suit was filed and served would not cause the court to lose jurisdiction of the case then pending in that court. The suit had not died nor abated and was not dismissed in effect by the mere act of condonation.

McDade v. West[50] raises, for the first time in Georgia, the question of whether or not a wife has a cause of action against a third party for the loss of consortium of her husband for injuries suffered by him. In this case, the Court of Appeals was equally divided on this question and did not decide the point, affirming the lower court which dismissed the suit on demurrer on another ground.

Roberts v. Employers Insurance Company of Alabama[51] involved the meaning of the word "dependent" as used in an insurance policy. It was held in this case that the word "dependent," as used in an insurance policy, which policy provided for payment to the wife after proof of death of any "dependent" member of the immediate family of the wife, meant dependent to a partial extent or degree, and not legally dependent in the sense that there was any legal obligation imposed at common law or by statute, and held that whether the husband of the wife was a dependent in the particular case was a question for the jury.

In the case of *Skelton v. Gambrell*[52] the Court of Appeals held that the parent of a 14 year-old child could not be held liable for an independent act of that child, in negligently shooting another with a pistol, merely by reason of the relationship. Such liability must rest upon the same grounds that would make that parent responsible for the negligence of any other person.

In the case of *Perthus v. Paul*[53] the Court of Appeals held that an action for fraud and deceit, rather than an action for breach of promise, was stated wherein the plaintiff prayed for punitive damages and alleged that he was induced to give up employment in Massachusetts and come to

48. 206 Ga. 354, 57 S.E.2d 177 (1950).
49. 205 Ga. 759, 55 S.E.2d 147 (1949).
50. 80 Ga. App. 481, 56 S.E.2d 299 (1949).
51. 79 Ga. App. 611, 54 S.E.2d 465 (1949).
52. 80 Ga. App. 880, 57 S.E.2d 694 (1950).
53. 81 Ga. App. 133, 58 S.E.2d 190 (1950).

Georgia by the false representation of the defendant that she had obtained a divorce from her former husband and was free to marry.

The order of descent and distribution of property is governed by the validity or invalidity of a marriage. There are several recent decisions dealing with the question whether or not a marriage will be presumed to be valid under certain situations and circumstances. *Carroll v. Hill*[54] was an action by the widow of the deceased to have a year's support set aside to her; and the executrix and a creditor of the deceased filed a caveat to the return of the appraisers setting aside the year's support to the widow on the ground that she was not the legal widow of the deceased by reason of a previous, undissolved marriage. In this case there was a conflict between presumptions of validity of first and second marriages. There is a presumption of validity of a second marriage, even though a previous marriage of one of the parties be shown; however, there is also the presumption of the continuance of the previous marriage and a presumption of invalidity of the second marriage. In this case, the court resolved the presumption in favor of the validity of the second marriage, and held that since the caveators were asserting the invalidity of the second marriage, they were required to carry the burden of proof on that issue, notwithstanding the fact that that burden required proving the negative fact that the prior marriage had never been dissolved. The court held in this case that the caveators had failed to carry that burden of proof, and held that the second marriage was valid.

Azar v. Thomas[55] is a recent case also dealing with the presumption in favor of a second marriage. In this case the administrator brought a suit in equity to cancel an alleged void marriage and to recover assets belonging to the estate of the plaintiff's deceased, alleging that the second marriage of the defendant to the plantiff's deceased was void on the ground that a prior divorce decree obtained in another state by the defendant from his former wife was void. It was held in this case that when a marriage has been regularly solemnized and the parties have lived together as man and wife, that there is a presumption that the marriage is valid, and such presumption can be negatived only by disproving every reasonable possibility against the validity of the marriage. However, it was held sufficient to overcome the presumption of the validity of the second marriage that a general search of the court records of the state in which the spouse effecting the second marriage had established residence showed that no divorce had been granted. It was held also that it was error for the trial court to refuse to allow the plaintiff to introduce evidence attacking the divorce decree obtained by the defendant from his former wife, and the decision of the lower court was reversed.

A similar result was reached in the case of *Carter v. Graves*.[56] In this case Graves filed a caveat to the proceeding by the executrix to probate the will of the deceased on the ground that Graves married the deceased subsequent to the execution of a will by the deceased, which will was not made in contemplation of a future marriage and was therefore void. It was proved by

54. 80 Ga. App. 576, 56 S.E.2d 821 (1949).
55. 206 Ga. 588, 57 S.E.2d 821 (1950).
56. 206 Ga. 234, 56 S.E.2d 917 (1949).

the propounder of the will that the caveator had not obtained a valid divorce from his former wife prior to his marriage to the deceased, and that even though the divorce decree might be valid, the caveator, subsequent to the date of the divorce decree and prior to the alleged marriage to the deceased, had entered into a common law marriage with another woman. It was held in this case, that assuming that no final decree had been granted in the divorce suit, granting a divorce based upon a ceremonial marriage, when considered in connection with the fact that both the parties were in life and neither had obtained any other divorce, that these facts would be sufficient to overcome the presumption of the validity of the ceremonial marriage to the deceased, and that a proved ceremonial marriage will prevail over a presumption of marriage founded on cohabitation and repute, yet such a ceremonial marriage will not prevail over a properly proved previous common law marriage.