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TRIAL PRACTICE AND PROCEDURE

By J. Ralph Beaird*

AND

C. Ronald Ellington**

During the survey period, a large number of Georgia appellate court decisions dealt with matters of trial practice and procedure. No effort has been made to summarize all these decisions. Instead, the most significant decisions—those that mark new departures by the courts—have been selected as the focal point of this article. Hopefully, the attempt to assess critically these cases and put them in perspective will be of assistance to the bench and bar of the state.

Generally, the areas of jurisdiction and venue will be discussed first in the article, followed by cases arranged in numerical order under each rule of the Civil Practice Act and concluding with a case discussing the mutuality doctrine of res judicata. Amendments during the 1975 legislative session are included in conjunction with the discussion of garnishment actions and venue, respectively.

I. PERSONAL JURISDICTION

The judicial development of a modern doctrine of in personam jurisdiction in this state dates from the Georgia Supreme Court's landmark decision of 1973 in Coe & Payne Co. v. Wood-Mosaic Corp.¹ and related cases.² Those decisions unmistakably signalled an intent to expand the reach of the Georgia Long-Arm Statute³ over non-resident parties. However, as noted at the time,⁴ those opinions spoke broadly and in general terms and, while indicating a new approach to personal jurisdiction, left many needed clarifications to later case-by-case development.

During this survey period, several cases were decided which tend to answer some of the questions left unanswered in the Coe & Payne trilogy. Two decisions, in particular, are noteworthy because they refine the concept embodied in the "transacts any business" section of the Long-Arm Statute.⁵

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In *O.N. Jonas Co. v. B&P Sales,* plaintiff was a Georgia manufacturer that had sold goods invoiced F.O.B. the shipping point in Georgia to a non-resident customer. In a subsequent dispute over payment for the goods, the local manufacturer filed suit in Georgia predicating jurisdiction and service of process on the Georgia Long-Arm Statute. The non-resident customer’s only contact with the state had been a visit by one of its employees to the plaintiff’s manufacturing plant for a preliminary inspection. No goods were purchased on that trip, however. All purchase orders placed by defendant were made later by mail or telephone, and all orders originated from outside the state. No contracts or negotiations with respect to the goods were entered into in the state.

In holding that the non-resident customer was not subject to jurisdiction for “transacting any business in the state,” the court distinguished its earlier decision in *Davis Metals, Inc. v. Allen* because the contract in *Davis Metals* had been entered into and partially performed in Georgia. In *O.N. Jonas,* on the other hand, the court found that the defendant-customer’s only contact with the state was the receipt of goods manufactured and shipped in Georgia. In the absence of any contract or negotiations undertaken in this state, there was not sufficient contact with the state to merit a local court’s assertion of in personam jurisdiction under the Long-Arm Statute where the goods were purchased by mail or telephone and shipped out-of-state.

By way of contrast, the court of appeals in *Delta Equities, Inc., v. Larwin Mortgage Investors,* found that two negotiation visits by an officer of the non-resident defendant to Georgia were sufficient contact to support personal jurisdiction for a suit to recover plaintiff’s earnest money. Although the final consummation of the contract was made by telephone and the earnest money sent by wire after the defendant’s loan officer had returned to California, the court of appeals relied on the two visits made to Georgia to negotiate the terms of the contract. Noting that the trend in recent opinions is to uphold jurisdiction where the nonresident “has purposefully done some act or consummated some transaction in the state” and “the cause of action arises from . . . such act . . . .,” the court of appeals held that the two visits to the state to negotiate the terms of the contract satisfied the “minimum contacts” required by due process and constituted “transacting business” within the meaning of the Long-Arm Statute.

Thus the “transacting business” portion of Georgia’s Long-Arm Statute appears to be satisfied if the important preliminary negotiation stage of the contract took place in Georgia, even if the contract is formally entered into later by mail or telephone. However, the statute does not reach contracts

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7. Id. at 257, 206 S.E.2d at 438.
and purchase orders originating outside the state for goods to be shipped out of the state merely because the purchaser has made an inspection visit to the Georgia plant before placing the orders.\footnote{11}

The other major statute allowing in personam jurisdiction over non-residents, Georgia's Nonresident Motorist Act,\footnote{12} was construed during the survey period also. In \textit{Hanft v. Allbright},\footnote{13} the court of appeals read the Nonresident Motorist Act literally and narrowly. Here the court held that a non-resident defendant who was the owner of an automobile involved in a collision in Georgia was not subject to personal jurisdiction. The owner denied that the driver of the car had received his permission to bring the car into the state and therefore the car was not operated "by him, for him, or under his control or direction. . . ." at the time of the accident as required by the statute.\footnote{14} Although this result follows from a literal reading of the statute, other jurisdictions have construed similar language to cover owners who denied that their agents were acting within the scope of their authority at the time of the accident.\footnote{15} While such a defense might well defeat the owner's liability, it should not defeat the court's exercise of personal jurisdiction. Moreover, it should be noted that the plaintiff might well have succeeded in establishing jurisdiction over the non-resident owner in this case had he invoked the Long-Arm Statute. That statute provides jurisdiction over a non-resident who "in person or through an agent . . . [c]ommits a tortious act or omission within this State."\footnote{16}

\footnote{11} One other case during the survey period involved the tortious act sections of Georgia's Long-Arm Statute, \textit{Ga. Code Ann. §24-113.1}(b) & (c) (Rev. 1971). In \textit{Davis v. Haupt Bros. Gas Co.}, 131 Ga. App. 628, 206 S.E.2d 598 (1974), the plaintiff, a Georgia resident, was injured in South Carolina by a vehicle owned by a South Carolina corporation. All of the corporation's officers and stockholders were Georgia residents but no agent for service was located in Georgia. Plaintiff sued the South Carolina corporation, a wholly-owned subsidiary of a Georgia corporation and the Georgia resident who was president for both corporations.

The court of appeals held that the South Carolina corporation was not subject to jurisdiction in Georgia where the sole basis of contact was the residence of its stockholders and officers in the state. Neither §24-113.1(b) nor (c) were applicable because both the tortious act and the injury occurred outside the state.


\footnote{14} \textit{Ga. Code Ann. §68-801} (Rev. 1967) provides for substituted service in any action or proceeding against any such nonresident, growing out of any accident or collision in which any such nonresident may be involved by reason of the operation \textit{by him, for him, or under his control or direction}, express or implied, of a motor vehicle anywhere within the territorial limits of the State of Georgia. . . . (emphasis added.)

\footnote{15} In a closely analogous case, \textit{Moorer v. Underwood}, 194 S.C. 73, 9 S.E.2d 29 (1940), the South Carolina Supreme Court held that an agent's lack of authority to operate the automobile within the state, while a defense against liability, did not defeat personal jurisdiction over the owner under the South Carolina Nonresident Motorist Act. \textit{See generally Annot., Service on Nonresident Motorists}, 155 A.L.R. 335 (1945); \textit{Annot., Process—Nonresident Motorists}, 53 A.L.R.2d 1164 (1957).

II. IN REM JURISDICTION

Although Doran v. Home Mart Building Centers, Inc.,17 concerns a constitutional attack on the Georgia attachment statute, Ga. Code Ann. §§8-101 et seq. (Rev. 1973), it has important ramifications in the area of quasi-in-rem jurisdiction generally. An enormous amount of attention has been generated recently concerning the impact of the due process requirements of notice and an opportunity to be heard in such proceedings in the wake of Sniadach v. Family Finance Corp.,18 Fuentes v. Shevin19 and Mitchell v. W.T. Grant Co.20 Indeed, the United States Supreme Court earlier this year considered a challenge to the Georgia garnishment statute21 on such procedural due process grounds and held it unconstitutional in North Georgia Finishing, Inc. v. Di-Chem, Inc.22 In reversing the judgment of the Georgia Supreme Court23 that had rejected a challenge to the garnishment of a corporate bank account before the outcome of the main litigation to establish the debt, the Supreme Court in Di-Chem indicated that due process was denied by even the temporary seizure of a debtor’s property where process may be issued on the basis of conclusory allegations, without the participation of a judicial officer, and with no right to a prompt and meaningful post-seizure hearing guaranteed in the garnishment statute.24

A few weeks after the decision in Di-Chem was handed down, the Georgia Supreme Court found sufficient differences in the attachment statute to uphold it in Doran.25 There, the plaintiff made an affidavit before a superior court judge to secure the attachment of the real and personal property of the defendant, who it was alleged owed plaintiff a sizable sum of money. Plaintiff otherwise claimed no pre-existing interest in defendant’s property that it was seeking to attach. Certain personal property of the defendant was seized pursuant to the statute without notice and hearing, and the defendant moved to dismiss the attachment on the grounds that it denied him procedural due process.

Several features of the attachment statute closely resemble the garnishment statute invalidated in Di-Chem. First, for example, neither the garnishment statute nor the attachment statute required that the plaintiff’s affidavit be based on personal first-hand knowledge of the facts,26 al-

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thought the affidavit in *Doran* was so alleged to be. Moreover, the affidavits under either statute could contain only conclusory allegations. Finally, under either statute, the writ could be issued by a court clerk without the participation of a "neutral" judge, although the writ in *Doran* was in fact issued by a superior court judge. Hence, foresight by plaintiff's attorney or sheer fortuity made *Doran* a much stronger case for supporting a summary seizure than *Di-Chem*. Relying on these differences and the fact that the statutory grounds for an attachment, *i.e.*, that the defendant is concealing himself, absconding, or removing his property from the state, etc., may constitute one of those "extraordinary situations" that warrant postponing the hearing until after the summary seizure, the Georgia court in *Doran* upheld the attachment statute.

Despite this holding, the validity of the Georgia attachment statute is not free from doubt. First, as noted, the statute does not require that the writ be issued by a judge—one of the factors stressed by the United States Supreme Court in *Di-Chem*. Second, it allows conclusory allegations that may well not satisfy the "extraordinary situation" exception to the normal requirement of pre-seizure notice and hearing. In *Reeves v. Motor Contract Co. of Georgia*, a three-judge district court declared the Georgia garnishment in attachment provisions unconstitutional, ruling that those

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agent/attorney to "swear according to his personal knowledge of the facts. . . ." Ga. Laws, 1975, p. 1291, 1293.


29. Ga. Code Ann. §8-101 (Rev. 1973) provides as follows:

Attachments may issue in the following cases:

1. When the debtor resides out of the State.
2. When the debtor is actually removing, or about to remove, without the limits of the county.
3. When the debtor absconds.
4. When the debtor conceals himself.
5. When the debtor resists legal arrest.
6. When the debtor is causing his property to be removed beyond the limits of the State.

30. 233 Ga. at 707-08, 213 S.E.2d at 826-27.
32. Ga. Code Ann. §8-501 (Rev. 1973). A garnishment in attachment proceeding must assert one of the six bases for an attachment listed in Ga. Code Ann. §8-101 (Rev. 1973). In *Reeves*, the federal court observed that it seemed strange how a plaintiff could assert, for example, that a defendant was concealing himself while at the same time he was seeking to garnish the defendant's wages at his place of employment. 324 F.Supp. at 1015. The *Reeves* court did suggest that pre-judgment garnishment in attachment for property other than wages would be constitutionally permissible, but this decision was handed down at a time that many courts read *Sniadach* narrowly to apply only to wages—a specialized form of property. This distinction between wages and other types of property has been obviated by
grounds for attachment relied on in Doran did not constitute the type of "extraordinary situation" that would justify pre-judgment garnishment of wages. Moreover, the Supreme Court of Georgia in Hall v. Stone struck down the bail trover law on procedural due process grounds even though the use of bail trover was predicated on grounds quite similar to those cited to justify the exception in Doran.

The best argument to differentiate the attachment statute at issue in Doran from the garnishment procedure invalidated in Di-Chem was that advanced by Justice Gunter in a concurring opinion. Justice Gunter emphasized that the attachment statute does provide a mechanism for a prompt post-seizure hearing, one of the other factors stressed by the Di-Chem opinion. Whether this factor, while doubtless important, would save the attachment statute before the federal courts, in light of its other deficiencies, is open to debate. It seems clear, however, that the legislature should amend the attachment statute just as it recently revised the garnishment law to insure that writs are issuable only by judicial officers upon affidavits stating more than conclusory allegations.


The point is, of course, that such conclusory allegations may not correspond to the concrete facts of a particular case. In Doran, the principle case, the plaintiff alleged that the defendant was absconding and concealing himself; yet, the defendant appeared in response to the judge's order and filed pleadings to attack the attachment proceedings.

33. 229 Ga. 96, 189 S.E.2d 403 (1972).

34. GA. CODE ANN. §107-201 to -203 (Rev. 1968). To obtain bail trover the plaintiff must allege that he has reason to apprehend that the said personal property has been or will be concealed or moved away, or will not be forthcoming to answer the judgment, execution, or decree that shall be made in the case. GA. CODE ANN. §107-201 (Rev. 1968).


36. 233 Ga. at 708, 213 S.E.2d at 827, 828 (concurring in opinion and on denial of motion for rehearing).


38. Justice Powell, concurring in Di-Chem, stressed the opportunity for a prompt post-seizure hearing before a judicial officer as the key ingredient of due process. 419 U.S. at 611.

III. Venue

In 1971, in *Register v. Stone's Independent Oil Distributors, Inc.*, the Georgia Supreme Court held that venue must be independently established before third-party defendants could be impleaded under the Civil Practice Act. Since the *Register* decision, survey articles have noted the undesirable and unfortunate restrictions that Georgia's constitutional provisions governing venue have had on the availability of impleader and counterclaims under the C.P.A. During this survey period, there were two important cases dealing with venue. In one, the court of appeals extended the principle of *Register* showing no inclination to seize an opportunity to ameliorate its harsh rigors. In the second case, however, the court of appeals approved a slight-of-hand method of avoiding the pitfalls of *Register*. Finally, there was an important legislative change in the statute providing alternative places of venue in actions at law against corporations.

In *Louisville & Nashville R.R. v. Bush*, one Hogan, the driver of an automobile, and Bush, a guest passenger, were injured in a car-train collision in DeKalb County. Hogan, then a resident of DeKalb County, filed suit there against the railroad for her injuries. At the same time, Bush, the passenger, also filed suit in DeKalb County against the defendant railroad for her injuries. Since both Hogan's suit and Bush's suit arose out of the same collision, the cases were ordered consolidated for trial. Thereafter, the trial court entered an order in Bush's law suit granting leave to the defendant railroad to file and have served a third-party complaint against Hogan in which the railroad sought contribution alleging that Hogan, as the driver of the automobile, was jointly liable because of her gross negligence in driving into the path of the oncoming train. Hogan moved successfully to dismiss the third-party complaint against her since she had moved to Gwinnett County between the time of filing her complaint in DeKalb County and the time the railroad's third-party complaint was served on her. The cases continued to trial, and the jury found for the railroad in Hogan's suit and for the passenger in Bush's suit. The railroad appealed and enumerated as one error the dismissal for lack of venue of its third-party claim against Hogan.

The court of appeals held, rather woodenly, that since Hogan was a resident of Gwinnett County at the time the third-party complaint was served against her, the rule in *Register* precluded the impleader against her in DeKalb County. There were two ways in which the court might have avoided this result, but it chose to adopt neither. First, it refused to find that Hogan had waived venue for the purpose of Bush's suit by filing her...
own complaint against the railroad in DeKalb County. Although it is well established that by filing suit a party does waive venue as to all matters arising out of the action brought by that party (such as counterclaims or separate actions to enjoin its prosecution), the court refused to hold that a party, by filing suit in a county, waives venue as to a separate law suit between different parties in that county even though both actions arise from the same events and have been consolidated for trial.

Moreover, the court might have held that since Hogan was a resident of DeKalb County at the time her action was commenced, her subsequent move to another county during the litigation did not change her residence for the purpose of the law suit. This is certainly the rule in federal practice where the citizenship of the parties for the purpose of determining diversity is fixed as of the time the action is commenced.

It is regrettable that the court of appeals took neither of these possible avenues to avoid dismissing the third-party complaint against Hogan on these facts. The railroad can presumably still proceed to Gwinnett County now and sue Hogan for contribution in the Bush case, but it would have been far more economical and expeditious to have determined the rights of all the parties in one consolidated trial before one judge and jury in DeKalb County, the scene of the accident.

In Ogden Equipment Co. v. Talmadge Farms, Inc., the court of appeals sanctioned one ingenious way to circumvent the Register problem. Here, General Electric Credit Corporation filed suit in Fulton County against Talmadge Farms, Inc., a resident of Henry County. Talmadge Farms filed its answer without asserting its venue objections and then filed a third-party complaint against Ogden Equipment Co., a resident of Fulton County. Ogden moved to dismiss the third-party complaint contending that Talmadge Farms could not waive venue so as to prejudice the right of third parties in accordance with Ga. Code Ann. §24-112 (Rev. 1971).

See Bragg v. Gavin, 234 Ga. 70, 214 S.E.2d 532 (1975). In Bragg, plaintiff, a resident of Jones County, filed suit in the DeKalb State Court alleging breach of warranty and fraud in the sale of three Irish Setter dogs. The defendant filed an answer and counterclaimed for general and punitive damages for defamation. The defendant also filed a petition in the Superior Court of DeKalb County to enjoin the state court proceedings and to transfer both claims to the Superior Court which had the appropriate subject-matter jurisdiction.

The Georgia Supreme Court held that Ga. Code Ann. §3-202 which allows an injunction in the county where the suit is pending "provided no relief is prayed as to matters not included in such litigation" is an exception to the general rule that the defendant must be sued in the county of his residence. Moreover, the court concluded that all claims did arise out of the state court litigation because the defendant's claim for defamation was closely connected to the plaintiff's claim for fraud.

Judge Eberhardt, joined by Judges Bell, Hall, and Clark, dissented and would allow the impleader since the suits had been consolidated. 131 Ga. App. at 410-11, 206 S.E.2d at 62.


Ga. Code Ann. §24-112 (Rev. 1971) provides that
The court held, however, that this statute only barred waivers that prejudiced the legal rights of third persons and was not violated by a party's mere inconvenience and expense in defending an impleader action expressly allowed by the C.P.A. Although General Electric and Talmadge Farms had orally agreed on Fulton County as the forum for the original action in order to allow Talmadge Farm's third-party complaint against Ogden, venue was proper as to the original defendant, Talmadge Farms, by consent and as to Ogden, the third-party defendant, because it was a resident of Fulton County. Thus, if the plaintiff is cooperative and will file suit by pre-arrangement in the county of the residence of the party sought to be impleaded as here, the economies of third-party practice can be had in Georgia courts even though the third-party plaintiff and the third-party defendant are residents of different counties.

The other significant development concerning venue was the legislative change in defining the alternative places of venue in actions at law against corporations. Ga. Code Ann. §22-5301 (Rev. 1970), which provided permissible places of venue for contract and tort actions against corporations in addition to the county where the registered office was located, was repealed by the legislature, effective July 1, 1975.19 Basically, the amendment restated and consolidated the existing venue rules for corporations under Ga. Code Ann. §22-404 (Rev. 1970). However, in connection with the rules for tort actions, one interesting change was made, the meaning of which is as yet unclear.

First, Ga. Code Ann. §22-404(b) (Rev. 1970) remains unchanged in providing that for venue purposes a corporation is deemed a resident of the county where its registered office is fixed by its corporate charter. New section 22-404(c) was added and it now specifies that a corporation shall also

be deemed to reside and may be sued on contracts in that county in which the contract sought to be enforced was made or is to be performed, if it has an office and transacts business in that county.50

This provision is identical to the one contained in former Ga. Code Ann. §22-5301 (Rev. 1970).

New section 22-404(d) reflects a change, however. It provides that a corporation, in addition to the county of its registered office,

shall be deemed to reside and may be sued for damages because of torts, wrong or injury done, in the county where the cause of action originated, if the corporation transacts business in that county.51

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The former rule in section 22-5301 did not contain this “transacts business” proviso but rather required that the corporation have an agent, agency or place of business there before it could be served in the county where the cause of action arose. The measure of this change is unclear, but the import is presumably to expand the availability of venue in tort actions against corporations. While the level of corporate activities necessary to satisfy the “transacts business” requirement of section 22-404(d) must await future case-by-case developments, it should be far easier to establish that a corporation was “transacting business” by, for example, operating a delivery truck in the county where the accident occurred, than to show that it had an agent, agency or place of business in the county at the time process was attempted to be served.53

Although the change in fixing the venue for tort actions against corporations is salutory, it is regrettable that the General Assembly did not go farther and remove the distinction pointed out in Etowah Milling Co. v. Crenshaw54 by also providing alternative places of venue against corporations where affirmative equitable relief, rather than damages, are sought for torts, wrongs, or injuries done. To continue the distinction between the venue of suits against corporations for money damages and for equitable relief can only lead to confusion especially since the union of law and equity for many other purposes in the Civil Practice Act.55

IV. Service of Process

A. Constructive Service

Although not decided under the Civil Practice Act, Pelletier v. North-
brook Garden Apartments,\textsuperscript{56} which deals with the method of service permitted in a landlord's dispossessory warrant proceeding, has potentially significant ramifications on the type of service allowable in in rem and quasi-in-rem actions generally. In Pelletier the landlord served the tenant with notice of dispossessory proceedings by tacking the notice on the tenant's door. The tenant, who claimed never in fact to have received the summons, moved to set aside the default judgment rendered in favor of the landlord by attacking the constitutionality of Ga. Code Ann. §61-302(a) (Supp. 1974) which authorized such tacking if personal service on the tenant or service by leaving the summons with some person sui juris residing on the premises could not first be had.\textsuperscript{57}

The court upheld the constructive service by tacking despite claims that it violated due process by not affording the tenant the best notice practicable under the circumstances. Stressing the special qualities of the landlord-tenant relationship,\textsuperscript{58} the court reasoned that where personal service upon the tenant could not be achieved during the sheriff's normal working hours and no one else could be located on the premises, tacking the notice on the very door of the disputed premises was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' "\textsuperscript{59} within the meaning of the constitutional requirements announced in Mullane v. Central Hanover Bank & Trust Co.\textsuperscript{60}

The real importance of the Pelletier decision lies in the majority's ruling that the lesser notice of constructive service is permitted in in rem and quasi-in-rem proceedings such as ejectment or dispossessory actions. The majority distinguished the instant case on this basis from Womble v. Commercial Credit Corp.,\textsuperscript{61} where a few months earlier the court had found unconstitutional as a denial of due process a method of service of leaving the summons and complaint as the defendant's most notorious place of abode in a case involving a suit upon a note.

Justices Ingram and Gunter dissented in Pelletier arguing that there was

\begin{itemize}
\item[56.] 233 Ga. 208, 210 S.E.2d 722 (1974).
\item[57.] GA. CODE ANN. §61-302(a) (Supp. 1974) provides as follows:
\begin{quote}
When the affidavit provided for in section 61-301 shall be made, the judge of the superior court or justice of the peace before whom it was made shall grant and issue a summons to the sheriff or his deputy, or any lawful constable of the county where the land lies, a copy of which, together with a copy of the affidavit, shall be personally served upon the defendant. If the sheriff is unable to serve the defendant personally, service may be given by delivering said summons and affidavit to any person sui juris residing on the premises or, if no such person is found residing on the premises, by tacking a copy of said summons and affidavit on the door of the premises.
\end{quote}
\item[58.] 233 Ga. at 212, 210 S.E.2d at 725.
\item[60.] 339 U.S. 306, 314 (1950).
\item[61.] 231 Ga. 569, 203 S.E.2d 204 (1974).
\end{itemize}
not a sufficient distinction between other civil actions and dispossessory warrant actions to justify a relaxation of due process safeguards of notice in dispossessory cases. The sharp distinction drawn by the majority between the notice requirements for in personam actions and those for in rem actions is not consistent with the approach taken by the United States Supreme Court. Ultimately Pelletier may be limited to the rather special circumstances surrounding the landlord-tenant relationship rather than stating a principle of constructive notice applicable to in rem actions generally. Nevertheless, the legislature should consider amending section 61-302(a) to provide for service by mailing notice to the tenant before tacking is allowed.

B. Immunity From Service Of Process

Georgia's statutory provision granting immunity from service of process is found in the evidence title of the Code rather than the Civil Practice Act. Ga. Code Ann. §38-1506 (Rev. 1974) allows immunity from process to witnesses while going to, returning from, or attending trial. Judicial interpretations of this section have extended its provisions to include parties to civil suits, but criminal defendants originally were not immune from civil process while awaiting or attending trial. In White v. Henry, the Georgia Supreme Court extended immunity from civil process to defendants in criminal proceedings who voluntarily appear. The court reasoned that the underlying purpose of granting immunity was to ensure a fair and uninterrupted trial, and thus a defendant in a criminal proceeding who voluntarily appears and enhances this goal by saving the time and expense of extradition should be afforded the same immunity as parties to civil suits.

Thus the privilege from civil service while attending court in Georgia now extends to witnesses in both civil and criminal trials, parties to civil trials, and criminal defendants who appear voluntarily.

62. 233 Ga. at 213, 210 S.E.2d at 726.
64. Ga. Code Ann. §81A-104(e)(1)(i) to -(iii) (Rev. 1972) which allows service by publication in certain cases, provides that a copy of the notice shall be mailed to the defendant if his address is known.
65. For a broad-based discussion of immunity from service, see F. James, Civil Procedure, §12.14 (1965).
66. Ga. Code Ann. §38-1506 (Rev. 1974) provides that "[a] witness shall not be arrested on any civil process while going to or returning from and attending on any court. . . ." 
70. 232 Ga. 64, 205 S.E.2d 206, 209 (1974).
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V. SCOPE OF THE ACT

Two cases during the survey period touched on the scope of the Civil Practice Act. In English v. Milby, the Georgia Supreme Court held that juvenile courts are not governed by the Civil Practice Act but come under special statutory proceedings within the meaning of sections 81A-101 and 81A-181.

Then in Sikes v. Sikes, the court held that complaints for the partition of land are controlled by the Civil Practice Act whether the claim is brought under the equity or statutory theory of partitioning.

VI. PLEADINGS AND MOTIONS

A. Pleading Fraud—Rule 9(b)

Section 9(b) of the Civil Practice Act provides that "[i]n all averments of fraud, or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . ." Georgia courts have, since 1967, refined this requirement in the direction of more and more particularity until certain core elements evolved without which a complaint was subject to a motion to dismiss. However, in Cochran v. McCollum, the Georgia Supreme Court in three paragraphs effectively eliminated the particularity requirements of section 9(b). In this case the court reviewed a trial court dismissal of a caveat on the ground that it was conclusory and without facts to show fraud. In reversing, the court stated that under the C.P.A. a pleading should not be dismissed for failure to state a claim unless it

72. The court based this finding on the fact that title 24A governing juvenile courts was enacted subsequent to title 81A and thus modifies the applicability of the C.P.A. The court also noted that Ga. Code Ann. §24A-101 (Supp. 1974) provides for liberal construction of the juvenile court code and that special provisions exist for commencement of proceedings, form of petition, and modification of orders. Id. at 9, 209 S.E.2d at 605 (1974).
78. Robinson v. A. Constr. Co., 130 Ga. App. 56, 202 S.E.2d 248 (1973), gave the requirements as follows:

This standard is parallel to the federal rule which requires (1) false representation of a material fact; (2) knowledge of or belief in its falsity by the person making it; (3) belief in its truth by the person to whom it is made; (4) intent that it should be acted upon; (5) detrimental reliance. 5 Wright and Miller, Federal Practice and Procedure §1297, at 401-02 (1969).
appears that the plaintiff can prove no set of facts which would entitle him to relief.

The court then stated that this standard was applicable to all pleadings, including fraud, mistake, and conditions precedent, and expressly disapproved Martin v. Approved Bancredit Corp. The court also indicated that the proper method for obtaining further particularity was a motion for a more definite statement. Thus, the literal wording of section 81A-109(b) and the host of cases interpreting that provision were overturned, with the result that Georgia's Civil Practice Act became further distinct from the Federal Rules of Civil Procedure.

The dissenting opinion of Justice Nichols points out that there was an obvious legislative intent for a different standard of pleading in fraud cases that was totally ignored by the majority opinion. The higher standard for fraud pleading in the federal rules was not inserted arbitrarily. Many reasons have been advanced for this requirement, i.e., fraud is not presumed, in fact the presumption is against fraud; fraud is easy to allege, yet serious and difficult to prove, therefore no one should be allowed to charge fraud unless he is able to substantiate the charge with facts and is willing to do so specifically; particularity in fraud pleading is necessary to present sufficient definiteness to the charge to advise the adversary of the claim his answer must meet; the higher standard is necessary to protect defendants from unfounded charges involving moral turpitude; and the list continues. Thus, there are sound practical and policy reasons to require more of a pleader charging fraud than a bare allegation. However, the decision in Cochran does not touch on these factors and relegates the pleading standard for fraud to the lower standard of rule 8. Thus in Georgia courts defendants are no longer afforded any of these protections.

Additionally, the court in Cochran indicated that the proper remedy for an insufficient fraud complaint was a motion for a more definite statement. Again, this is at variance with the majority federal practice of granting a rule 12(b)(6) motion to dismiss for failure to plead fraud in accordance with rule 9(b) requirements. Of course, the rationale of the federal practice was to insure compliance with the higher rule 9 pleading standard, which disappears with the Cochran decision's elimination of a dual standard. However, the rule 12(e) motion for a more definite statement is

82. 1 Kooman, Federal Civil Practice §9.02 (1969).
83. 1A Barron, Holtzoff and Wright, Federal Practice and Procedure §302, at 225 (1960).
84. Id. at 224.
87. Id. See also 5 Wright and Miller, Federal Practice and Procedure §1300, at 425 (1969).
not wholly adequate either. First it is well recognized that motions for a
more definite statement are disfavored and are denied in most cases. 88 Too
often rule 12(e) motions are a delay tactic and thus are closely scrutinized.

The real problem with the use of a rule 12(e) motion to obtain particular-
ity in fraud allegations revolves around the standard against which a rule
12(e) motion is tested. Section 12(e) of the C.P.A. provides:

If a pleading to which a responsive pleading is permitted is so vague or
ambiguous that a party cannot reasonably be required to frame a respon-
sive pleading, . . . he may move for a more definite statement. . . .

Thus the motion is properly presented only where the complaint is so
vague, or ambiguous, or contains such a broad generalization that a defen-
dant cannot frame an answer to it. 89

Under the Cochran decision an allegation of fraud without particulari-
ization of circumstances may meet the rule 8 standard of a short plain
statement of the claim entitling the pleader to relief. Thus, since a plead-
ing which satisfies rule 8 is not subject to a rule 12(e) motion, 90 there is no
remedy in Georgia for a bare allegation of fraud unless the courts distort
Ga. Code Ann. §81A-112(e) (Rev. 1972) and allow its use in instances other
than when the complaint is too ambiguous to permit responsive pleading.

A final problem emanating from the Cochran decision results from the
fact that the filing of a rule 12(e) motion does not toll the time in which
an answer must be filed. 91 While not unique to fraud charges, this problem
is accentuated by the court's decision that rule 12(e) motions are the
proper remedy for generalized fraud allegations. Thus, even where the
complaint is so vague and ambiguous to preclude the defendant from
framing a responsive pleading and thus properly subject to a motion for a
more definite statement, the defendant still has only 30 days to file his
answer. The result is that he must respond to a complaint that makes a
serious charge and yet is too vague to permit an accurate response. While
this dilemma was not wholly eliminated under the pre-Cochran practice,
the threat of potential dismissal for failure to comply with rule 9(b) at least
mitigated against the problem by stimulating complaints sufficiently par-
ticularized so as to permit the adversary to intelligently respond.

Thus the decision in Cochran may prove a boon to plaintiffs by relieving
the burden of strict compliance with prior decisions setting definite stan-
dards for fraud pleading on pain of dismissal for noncompliance, yet the

88. 1A Barron, Holtzoff and Wright, Federal Practice and Procedure §362, at 411, 431
(1960).
89. 2A Moore, Federal Practice §12.17[1], at 2363 (1974).
90. 1A Barron, Holtzoff and Wright, Federal Practice and Procedure, §362, at 413
(1960); 2A Moore, Federal Practice §12.17[1], at 2365 (1974).
91. While the Georgia rules allow 30 days to answer following service of the complaint, in
contrast to the federal rule of 20 days, the federal rules toll the time to answer upon filing of
a rule 12 motion. Georgia does not toll the time upon filing of a motion and thus an answer
is due 30 days after service whether or not any rule 12 motions are filed.
decision may well be a bane to defendants by stripping them of the very protections rule 9(b) was designed to provide and placing a heavy burden on their ability to respond.

B. Naming Parties—Rule 10(a)

Ga. Code Ann. §81A-110(a) (Rev. 1972) provides in part that

[i]n the complaint the title shall include the names of all the parties. . . . A party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly.

In Russell v. O'Donnell, the plaintiff had filed suit in a dispossessory action as Ansley Forest Apartments. Defendant moved to dismiss as Ansley Forest Apartments was not a proper legal entity. Plaintiff was allowed to amend the complaint to read O'Donnell d/b/a Ansley Forest. The trial court held for the plaintiff and defendant appealed. The court of appeals unanimously held that the judgment should be reversed. The court noted rule 10(a) but indicated that a dual standard exists. When a defendant's name is unknown, he may be named in the complaint by a fictitious name and if properly served, the plaintiff may amend the complaint to reflect defendant's proper name. However, a plaintiff named in a complaint must import a person, firm or corporation. When this is not satisfied, there is no plaintiff and therefore no action. The court noted that "Ansley Forest Apartments" did not import a natural person, a partnership, or corporation, and thus the suit was a nullity.

C. Waiver Of Defenses—Rule 12(h)


A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subsection (g), or (b) if it is neither made by motion under this section nor included in a responsive pleading as originally filed.

In Price v. Prophet, the court of appeals strictly construed this section. There the defendant was personally served in Muscogee County for a tort action. The defendant answered admitting residence in Muscogee County. Approximately one hour after the answer was filed, defendant's counsel discovered that defendant was a resident of Harris County and filed an

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93. Id. at 295, 208 S.E.2d at 108.
amended answer, denying residency and moving to dismiss. The court held that

[t]he defendants, having failed to take advantage of their personal privilege to require trial of a complaint in law in the county where they reside by asserting the privilege in an appropriate responsive pleading as originally filed, waived any defense of jurisdiction over their persons or improper venue. . . .

While this holding is correct in its interpretation of the literal wording of rule 12(h) and is consistent with prior decisions, it is particularly harsh and in striking contrast to the liberal amendment allowance under rule 15 for issues other than dilatory defenses.

D. Third Party Practice—Rule 14

While most litigating involving Ga. Code Ann. §81A-114 (Rev. 1972) has centered around venue problems, at least one case has been decided this survey year which focuses on the substantive content of the rule. In McMichael v. Georgia Power Co., the plaintiff was a passenger in an auto driven by McMichael which collided with a Georgia Power Co. vehicle. In an ensuing suit, Georgia Power filed a third party complaint against McMichael stating that

third party defendants are or may be liable to the defendant [third party plaintiff] for all or any portion of any sum which might be adjudged against the defendant . . . either by way of contribution or implied indemnification.

The court of appeals in reviewing the denial of the third party defendant’s motion to dismiss held the third party complaint valid.

The court reasoned that the 1966 amendment to Ga. Code Ann. §105-2012 (Rev. 1968) eliminated the need for joint suit against joint tortfeasors to make contribution available and that rule 14 allows a third party complaint against one who may be liable to the third party plaintiff. Thus, though a party may not obtain contribution until a judgment is entered, the third party defendant may be liable for contribution and thus the rule 14 standard for a third party action is met.

Thus contribution seems well established as a ground for a third party

96. Id. at 24, 205 S.E.2d at 31 (emphasis in the original).
99. Id. at 593, 211 S.E.2d at 633 (emphasis in the original).
100. Ga. Laws, 1966, p. 433 inserted subsection (1) which provides:
Where the tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if they had been jointly sued.
action although it may be that liability cannot be shown with certainty and may not in fact result. The result does, however, serve the underlying rationale of the C.P.A. of avoiding multiplicity of actions and a just, speedy and inexpensive determination of every action.¹⁰²

E. Amendments—Rule 15(c)

Ga. Code Ann. §81A-115(c) (Rev. 1972) provides for the relation back to the date of the original filing of certain amendments made to original pleadings. Amendments changing the party (or name of a party) against whom a claim is asserted relate back to the date of original filing if that person (1) had received such notice of the action as not to be prejudiced, and (2) knew or should have known that, but for a mistake, the action would have been brought against him. While this provision was originally designed to allow amendments to reflect proper parties when improper parties had been named by mistake, the section has recently been found to apply to amendments of John Doe complaints as authorized by rule 10(a). Thus in Sims v. American Casualty Co.,¹⁰³ the court of appeals held that rule 15(c) would allow an amendment to reflect the proper name of a defendant against whom a complaint was filed under a fictitious name if the proper defendant had been served within the period of the statute of limitations. Thus an amendment filed after the statute of limitations had run would relate back to the original date of filing if the proper defendants had sufficient notice within the rule 15(c) requirements. The court of appeals declined to rule on the amount of notice required [i.e., service of process or mere notice] since the plaintiff in Sims did not allege any notice at all.¹⁰⁴

Therefore it appears that the statute of limitations is not tolled by the mere filing of a “John Doe” complaint, but the proper defendant must in fact have notice of the action to toll the statute. A plaintiff is still protected, however, in instances where the proper party was served and merely the name given in the complaint is sought to be amended following the running of the statute.

F. Pre-trial Orders—Rule 16


[t]he court shall make an order . . . which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial. . . .

In Cooper v. Rosser, the plaintiff appealed from an adverse judgment in a suit to enjoin encroachment in which the trial court had given rulings in the alternative. The trial court stated that the evidence was insufficient to show any encroachment by the defendant and if any encroachment existed, defendant had acquired adverse title. Plaintiff based his appeal on an objection to the adverse title ruling since the pre-trial order had stated that title was not in issue. The Georgia Supreme Court held:

A pre-trial order should be liberally construed to allow the consideration of all questions fairly within the ambit of the contested issues. Where the question of precluding issues is raised, the matter is within the discretion of the trial judge. Where, as here, there can be no viable claim of surprise or unfairness in the court’s consideration of the issue involved in the ruling, we will not conclude that the court abused its discretion. . . .

This construction of the Georgia rule 16 is consistent with the federal rule 16 construction which allows introduction of issues apparently precluded by the pre-trial order if there is no objection at the time and there is no showing of prejudicial surprise.

VII. Parties

A. Class Actions—Rule 23

Georgia’s rule 23 is patterned after the pre-1966 version of the Federal Rules of Civil Procedure with the notable exception that section 23(a)(3) of the federal rules was not included in the C.P.A. That portion of the federal rule allowed the so-called “spurious class action” where the plaintiff’s rights are several but there is a common question of law or fact and common relief is sought. This type of class action was permitted, however, by the Georgia Supreme Court’s decision in Georgia Investment Co. v. Norman despite the obvious legislative intent in deleting the provision. Subsequently it has been held that a taxpayer action for declaratory judgment or injunctive relief against a county tax digest was a proper vehicle for a class action suit.

The question left open by the rule 23 decisions prior to this year was the effect of the judgment in a spurious class action in Georgia. Under the pre-1966 federal rule, a spurious class action judgment bound only those

106. Id. at 598, 207 S.E.2d at 515. The court remanded, however, for a finding without alternatives on sufficiency of the evidence to show encroachments.
members of the class before the court, not the entire class.\textsuperscript{112} Thus the spurious class action was merely a permissive joinder device and those with common questions qualifying them as members of the class could either ignore the suit or intervene and become parties.\textsuperscript{113} Conversely, under pre-1966 true class actions,\textsuperscript{114} from which the court in \textit{Georgia Investment Co.} found a right to a spurious class action in Georgia’s C.P.A. counterpart,\textsuperscript{115} the judgment was binding as to \textit{all} members of the class, whether or not parties to the action.\textsuperscript{116} Thus, with the decision in \textit{Georgia Investment Co.}, there arose questions as to the effect of a spurious class judgment in Georgia. Was the right to be treated as permissive joinder and bind only parties, or was the federal rule, from which the provision was taken, to control and bind all class members, whether or not active in the suit?

This question received at least a tentative answer in the past year. In \textit{Herring v. Ferrell},\textsuperscript{117} the Georgia Supreme Court had occasion to review a denial of a class action initiated by taxpayers of Grady County. Plaintiffs, five taxpayers, brought an action on behalf of all taxpayers in the county to have the ad valorem tax digest declared void. The trial court entered an order declaring the action not to be a class action and further issued a protective order indicating that any payments of tax subsequently made would not be considered voluntary and would not affect the rights of \textit{those parties named} in the suit. The court of appeals affirmed the class action portion of the trial court’s order.\textsuperscript{118} The supreme court, with two justices dissenting, reversed. The court first stated that the suit was a proper class action meeting the \textit{Georgia Investment Co.} spurious class action standard and available in taxpayer suits as established by \textit{Anderson v. Blackmon}.\textsuperscript{119} Then in an effort to determine which taxpayers were to be properly bound by a judgment in the action, the court turned to the protective order. The court held, on the basis of a previous decision,\textsuperscript{120} that those taxpayers who had made payment of the taxes prior to issuance of the protective order did so voluntarily and could not benefit from a judgment declaring the tax digest void. However, with respect to those taxpayers who had not paid the tax prior to the issuance of the order, \textit{all} would be members of the class and would be bound by the subsequent judgment, be it beneficial by declaring the tax digest void, or detrimental by upholding the tax digest. Thus, as Justice Hall’s dissent points out, the res judicata effect of a spurious class action in taxpayer suits is made to hinge on the timing of a protective order issuance rather than the \textit{type} of class action.\textsuperscript{121}

\textsuperscript{112} 3B Moore, \textit{Federal Practice} ¶23.11[3], at 2851 (1974).
\textsuperscript{113} Id.
\textsuperscript{114} Fed. R. Civ. P. 23(a)(1).
\textsuperscript{117} 233 Ga. 1, 209 S.E.2d 599 (1974).
\textsuperscript{119} 232 Ga. 4, 205 S.E.2d 250 (1974).
\textsuperscript{120} Blackmon v. Ewing, 231 Ga. 239, 201 S.E.2d 138 (1973).
\textsuperscript{121} 233 Ga. at 7, 209 S.E.2d at 602 (dissenting opinion).
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It appears that rather than clearing up the problem of judgment affect in Georgia spurious class actions, the decision in *Herring* may create as many problems as it solves. With respect to taxpayer suits at least, it seems that potential class members pay their tax at their peril if they do so prior to the issuance of a protective order in litigation challenging the tax base. Conversely, failure to pay in hope that litigation will determine the tax digest void may subject a taxpayer to penalty for late payment if the digest is upheld. Also the *Herring* rationale for which members are bound and which are not bound by the judgment runs afoul of the traditional federal rules for judgment effect in class actions. The result of the *Herring* decision is to put pre-protective order payers in the position of nonparties to a spurious class action if a tax digest is declared void, and yet it puts nonpayers, prior to a protective order, in the position of true class members, as being bound by a judgment whether favorable or detrimental.

This confusing state of affairs could be easily remedied by the legislature adopting the new federal rule 23. As amended, federal rule 23 provides that judgments in class actions, which would have been spurious under old federal rule 23(a)(3), will be binding on all members of the class when certain circumstances are met. In view of the present status of Georgia's class action provision, the amended version of the federal rule would be a welcome relief and eliminate any confusion and difficulty with res judicata impact in class actions.

B. Substitution Of Parties—Rule 25

An important interpretation of C.P.A. rule 25(a)(1) appeared during

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122. "In any class action maintained under subdivision (b)(3) . . . the judgment, whether favorable or not, will include all members who do not request exclusion. . . ." *Fed. R. Civ. P.* 23(c)(2)(b).

123. **Prerequisites To A Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P.* 23(a).

Federal rule 23(b)(3) further requires that the questions of fact or law common to the class must predominate over questions affecting individuals and that the class action must be superior to alternative methods of adjudication.


If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representative of the deceased party and, together with the notice of the hearing, shall be served on the parties as provided in section 81A-105, and upon persons not parties in the manner provided in section 81A-104 for the service of a summons. Unless the motion for substitution is made not later than 180 days after the death is suggested upon the record by service of a statement of
the survey period. In *Jernigan v. Collier*, the defendant in a tort action died following the filing of an answer to the complaint. Defendant's attorney then noted the death for the record. No substitution of parties was made within the 180 day period, however, no order of dismissal was made by the court. Fifteen months after the death of the defendant, plaintiff refiled the suit naming former defendant's executor as defendant. The defendant answered and moved for judgment on the pleadings which was granted. On appeal, the court of appeals held that dismissal for failure to meet rule 25 substitution requirements is not automatic and is effective only after entry of an order; however, dismissal for failure to comply is on the merits.\(^{127}\)

Thus, noncompliance with rule 25 for substitution does not result in automatic dismissal, but entry of an order of dismissal on defendant's motion operates as an adjudication on the merits as penalty for noncompliance.

VIII. Discovery

The only case worthy of mentioning involving discovery is *Swindell v. Swindell*\(^{128}\) which explains when the extreme sanction of default under rule 37 will be allowed for the late filing of interrogatories. Here, the plaintiff served interrogatories upon defendant's attorney on August 7, 1974. When no answers were served within the thirty days prescribed by rule 33(a), the plaintiff granted a seven day extension of time to respond. On September 17, 1974, plaintiff filed a motion to compel answers, and after a hearing on September 25, the trial court ordered the defendant to answer within ten days. On October 8 plaintiff filed a motion for sanctions for the defendant's failure to comply with the court's order compelling answers. Finally, on October 11, the defendant served answers. After the trial court struck his defenses and entered a default judgment, the defendant appealed contending that his refusal to serve answers was not wilful and therefore the harsh sanction of default imposed by the trial court was accordingly not authorized.

The supreme court noted that the 1972 amendments to the discovery rules had substituted the word "failure" for the word "refusal" in rule 37(b)(2), so that now a party could be subjected to sanctions if he "fails to obey an order to provide or permit discovery."\(^{129}\) After comparing the identical change in 1970 to federal rule 37(b)(2), the court concluded that the substitution of the word "failure" for the word "refusal" was not in-

\(\text{\footnotesize \cite{125:121 Ga. App. 162, 205 S.E.2d 450 (1974).}}\)
\(\text{\footnotesize 126. See 7A WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURES \S1955 (1972) indicating the federal rule is in accord.}}\)
\(\text{\footnotesize \cite{127:Again, the federal rule is the same. See 3B MOORE, FEDERAL PRACTICE } \text{\footnotesize \S25.06[3] (1974).}}\)
\(\text{\footnotesize \cite{128:233 Ga. 854, 213 S.E.2d 697 (1975).}}\)
\(\text{\footnotesize \cite{129:GA. CODE ANN. \S81A-137(b)(2) (Rev. 1972) (emphasis added).}}\)
tended to change the rule requiring a showing of wilfulness as a predicate to the imposition of the harsher sanctions of dismissal or default.\textsuperscript{130} Thus, the court decided that the rule announced in \textit{Maxey v. Covington}\textsuperscript{131} cautioning against the imposition of the harsher sanctions allowable under rule 37 was not overturned by the 1972 amendment to that rule.

Nevertheless, the court affirmed the sanction of default in this case. Although the defendant showed that he was in Florida and had difficulty collecting the papers necessary to answer the interrogatories after the court order to serve answers because his accountant was on vacation, the court noted that answers were not served until 65 days after service of the interrogatories. The relevant time for determining wilfulness, ruled the court, was not limited to the period after the court order but consisted of

the entire period beginning with service of interrogatories and ending with service of answers. Events transpiring during this entire time period are probative of whether appellant acted with "conscious indifference to the consequences of failure to comply" with the order compelling answers.\textsuperscript{132}

Because the appellant had been on vacation and had failed to communicate with his trial counsel until the order compelling answers was entered, his diligent effort later did not prevent the trial court from determining that overall his failure was wilful and warranted extreme sanctions.

\section*{IX. Judgments}

\subsection*{A. Opening Default Judgments—Rule 55(b)}

Rule 55(b) allows opening of a default judgment any time prior to its becoming a final judgment.\textsuperscript{133} However, two cases during the survey period have indicated that Georgia courts will strictly construe the provisions of rule 55(b) and disallow opening the default for failure to meet any of the stated criteria.\textsuperscript{134}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{130} 233 Ga. at 856, 213 S.E.2d at 699.
\item \textsuperscript{131} 126 Ga. App. 197, 190 S.E.2d 448 (1972).
\item \textsuperscript{132} 233 Ga. at 857, 213 S.E.2d at 700.
\item \textsuperscript{133} GA. CODE ANN. §81A-155(b) (Rev. 1972) provides:
\begin{quote}
At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of a plea or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and announce ready to proceed with the trial.
\end{quote}
\item \textsuperscript{134} In West Court Square v. Assayag, 131 Ga. App. 690, 206 S.E.2d 579 (1974), the court held that while the defendant established a meritorious defense, no showing of legal excuse for previous nonappearance was made and thus it was improper to open the default.
\item In Early Co., Inc. v. Britsol Steel & Iron Works, Inc., 131 Ga. App. 775, 206 S.E.2d 612 (1974), the court stated that an erroneous conclusion as to the effect of a summons and subsequent ignoring of process is gross negligence and inexcusable, thus opening the default was improper.
\end{itemize}
\end{footnotesize}
B. Summary Judgments—Rule 56

In the past year the supreme court ruled on the propriety of summary judgments, or motions to dismiss under rule 12(b) treated as summary judgments, on matters in abatement. In *Ogden Equipment Co. v. Talmadge Farms, Inc.*, on a certified question, the court held that motions for summary judgment were improper on matters in abatement. The court reasoned that summary judgments are designed to test the merits of a suit and thus abatement matters were not proper subjects for such a motion as they result only in a dismissal without prejudice. The court indicated that the proper method of raising a matter in abatement is a rule 12(b) motion.

C. Relief From Judgments—Clerical Errors—Rule 60(g)

Ga. Code Ann. §81A-160(g) (Rev. 1972) provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

In *Park v. Park*, the supreme court clarified this provision by limiting its application to instances where there is no factual dispute as to the error or omission. The court indicated, however, that where factual disputes exist, the only method of correcting the judgment or order is a complaint in equity to set aside the judgment under rule 60(e).

X. Res Judicata—Estoppel By Judgment

In *Gilmer v. Porterfield*, the supreme court recognized one basic exception to the mutuality doctrine but refused to go very far in allowing a stranger to a lawsuit to assert its preclusive effects defensively. *Gilmer* actually represents a classic case for collateral estoppel. In the first lawsuit in federal court, plaintiff Porterfield and his wife sought damages from Philco Distributors, Inc., based on the alleged negligence of Philco's employee, Gilmer, in causing a rear-end collision between Philco's automobile and the Porterfield vehicle driven by Mr. Porterfield in which Mrs. Porter-

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136. The federal rule is in accord. See 6 Moore, Federal Practice §56.03 (1974).
137. Thus the defenses of Ga. Code Ann. §81A-112(b)(1) thru (5) (Rev. 1972) and Ga. Code Ann. §81A-112(b)(7) (Rev. 1972) are not appropriate subjects for a motion for summary judgment and may be raised only by rule 12 motion or a responsive pleading. This is in harmony with the federal procedure. See 6 Moore, Federal Practice §56.03 (1974).
139. 233 Ga. 671, 212 S.E.2d 842 (1975).
field was a passenger. Gilmer was not a party to that action because apparently his addition as a defendant would have destroyed diversity of citizenship. The jury in that lawsuit returned a verdict in favor of Mrs. Porterfield against Philco but, apparently as a result of the comparative negligence charge, in favor of Philco on Mr. Porterfield's claim.

Mr. Porterfield then instituted a second lawsuit, this time against Gilmer in a state court based on the same alleged acts of negligence on Gilmer's part that were involved in the earlier federal court actions against Gilmer's employer, Philco. Gilmer asserted the affirmative defense of "'res judicata and/or estoppel by judgment and/or the law of the case and/or the fact that all of these matters were either previously litigated or could have been litigated previously.'"140 This shotgun defense marked the beginning of the confusion in this case. The trial court granted Gilmer's motion for summary judgment based on res judicata or, more accurately, estoppel by judgment because Porterfield's cause of action against Gilmer was not the same as his cause of action against Philco. In a five to three decision, the court of appeals reversed, thinking itself bound by the supreme court's adherence to the mutuality doctrine.141

The mutuality doctrine, as explained by the court of appeals, is as follows:

The general rule is "'that the operation of the doctrine of res judicata [or estoppel by judgment] must be mutual, and that one of the essential elements of the doctrine is that both the litigants must be alike concluded by the judgment, or it binds neither. Under this rule, if a judgment cannot be effective as res judicata against a person, he may not avail himself of the adjudication and contend that it is available to him as res judicata against others.'"142

Thus, since Gilmer was not a party or in privity with a party in the first suit in federal court against Philco, he could not be bound by that judgment because of his due process right to a day in court. Therefore, the mutuality doctrine prevented his obtaining the benefit of that judgment in the second action, or so the court of appeals reasoned.

The supreme court, however, found that an exception to that traditional mutuality rule did exist in Georgia.143 Thus, if a plaintiff sued a servant for his alleged negligence and the judgment on the merits was in favor of the servant, the master whose liability, if any, was derivative, based on the doctrine of respondent superior, would be allowed to assert that first judgment defensively in plaintiff's action against him even though he was not a party and would not be bound by that judgment. This well-recognized exception to mutuality is allowed lest the second suit against the master

140. 233 Ga. at 672, 212 S.E.2d at 842.
142. 132 Ga. App. at 466, 208 S.E.2d at 297 (emphasis in the original) quoting from 46 AM. JUR. 2D Judgements §521 at 673 (1969).
143. 233 Ga. at 674, 212 S.E.2d at 844.
result in a verdict in favor of the plaintiff, and the master, in turn, successfully recover by right of indemnification from his servant whose judgment in the first action is thereby effectively destroyed.144 Hence, the court concluded that exceptions to mutuality are recognized in Georgia and that the lack of mutuality should not bar Gilmer from asserting the first judgment in favor of Philco. Nevertheless, the court proceeded to hold that Gilmer could not assert the first judgment because he was not in privity with Philco:

Although a master has privity with his servant and can claim the benefit of an adjudication in favor of the servant . . . , a servant is not in privity with the master so as to be able to claim the benefit of an adjudication in favor of the master.145

This privity requirement is nonsense and should have no place in this context since by definition the question is whether a stranger to the first litigation (a person not a party or in privity with a party) can assert its preclusive effect. Accordingly, many courts today allow a person in Gilmer's shoes to assert the first judgment in favor of Philco defensively.146 The reason for allowing the servant sued subsequently to assert the prior judgment in favor of his master is of course not the fear of possible indemnification. Rather, the justification goes to the reason underlying res judicata generally. Once the plaintiff has had his day in court on the issue in a forum of his choosing, litigation should come to an end even though the plaintiff has not had his day in court on the issue against this particular litigant.

145. 233 Ga. at 674, 212 S.E.2d at 844.