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Trial Practice and Procedure

by T. Bart Gary*

This survey represents only some of the several hundred cases decided by the appellate courts in the area of trial practice and procedure. Those selected for comment were deemed significant because they either resolve new questions or illustrate the application of important principles of procedure. This follows the format established in the past for this survey. Personal jurisdiction, venue, and attachment and garnishment are discussed first, followed by cases arranged in numerical order under each section of the Civil Practice Act.

I. PERSONAL JURISDICTION

The trend of decisions from the United States Supreme Court in recent years has been to limit the states’ exercise of personal jurisdiction over nonresidents.1 The trend continues this year in World-Wide Volkswagen Corp. v. Woodson.2 The case began as a products liability case in an Oklahoma state court. The plaintiffs had purchased an Audi automobile in New York and while driving through Oklahoma on their way to Arizona, their car was struck in the rear by another automobile. The plaintiffs’ automobile caught fire and severely burned the plaintiffs. The defendants were the car’s manufacturer, importer, regional distributor, and retail dealer; however, only the regional distributor, World-Wide Volkswagen Corp. (World-Wide), and retail dealer, Seaway Volkswagen, Inc. (Seaway), challenged the state court’s jurisdiction. World-Wide was a New York corporation which distributed automobiles, parts, and accesso-

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ries in New York, New Jersey, and Connecticut. Seaway was a dealer located in New York. The Supreme Court of Oklahoma held that the state court had personal jurisdiction over the defendants essentially on the ground that it was foreseeable that the vehicle, being mobile by nature, would be used in Oklahoma. The Supreme Court reversed. The majority examined the nature of the defendants’ contracts with Oklahoma and found them insufficient under the standards of International Shoe Co. v. Washington. The defendants carried on no business in Oklahoma, they had no sales or services there, they did not solicit business in Oklahoma, nor did they regularly sell cars to Oklahoma residents or seek to service directly, or indirectly, Oklahoma customers. The majority viewed it as a wholly fortuitous event that an automobile purchased in New York by New York residents would have an accident while passing through Oklahoma. The Court conceded that it is foreseeable that an automobile, being mobile by design and purpose, would cause injury in Oklahoma; however, it cautioned that “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” The Court continued,

... the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

The majority did not, however, reject the stream of commerce theory that if a defendant places a product in the stream of interstate commerce destined for use in another state, it is not unreasonable to hold him answerable in that state for injuries resulting from the product. “The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” Therefore, it is not sufficient for jurisdictional purposes that a product might foreseeably or possibly come to rest and cause injury in a particular state. Indeed, in this day of mobility, a product might ultimately come to rest in any state. Rather, the defendant must expect that the product will be purchased in a partic-

5. 444 U.S. at 295.
6. Id. at 297.
8. 444 U.S. at 297-98 (emphasis added).
ular jurisdiction when he places it in commerce. The majority would distinguish mere foreseeability from expectation or anticipation. Although there is no difference in the definition of the terms, the majority apparently attributes a greater degree of awareness to its meaning of expectation than to foreseeability. The focus would appear to be on the defendant's awareness or knowledge at the time he places a product in the stream of commerce as to where the product will be purchased.

Justices Brennan, Marshall, and Blackmun dissented, all three emphasizing the mobile nature of the automobile and the foreseeability that it would come to rest in Oklahoma.

Justice Brennan, however, offered a more expansive theory of personal jurisdiction over nonresidents which weighs the forum's interest in the subject matter of the litigation against the burden to the defendant in defending in the forum. According to Justice Brennan, once the plaintiff shows that the forum state has a sufficient interest in the litigation or contacts with the defendant, the burden shifts to the defendant to show some real injury or hardship in being required to appear in the forum. Distance alone, in this day of rapid long-distance transportation, is not a sufficient excuse. Justice Brennan found that the forum did have a strong interest in the litigation which outweighed any hardship to the defendant. The accident occurred in Oklahoma, the plaintiffs were hospitalized there, and the witnesses and evidence were in Oklahoma.

Under Georgia's Long Arm Statute, a nonresident tortfeasor may be subject to the jurisdiction of Georgia courts if he

(b) Commits a tortious act or omission within this State . . . ; or (c) Commits a tortious injury in this State caused by an act or omission outside this State, if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State.

9. In another case, Rush v. Savchuk, 444 U.S. 320 (1980), the Court disapproved Seider v. Roth, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966), which held that the contractual obligation of an insurance company to its insured under a liability insurance policy is a debt subject to attachment in order to obtain personal jurisdiction over the insured if the insurance company does business in the forum state. The automobile accident which formed the predicate of the lawsuit occurred in Indiana between two Indiana residents, but the plaintiff thereafter moved to Minnesota and filed suit there. The defendant's insurer did business in Minnesota and the plaintiff attached the insurance company's obligation to defend and pay any judgment against the defendant in order to obtain personal jurisdiction over the defendant. The Court held that the insurer's decision to do business in Minnesota was a fortuitous event over which the defendant had no control. It could not be said that the defendant had engaged in any purposeful activity related to the forum which would make the exercise of jurisdiction fair, just, or reasonable.


11. Id.
As originally written the Long Arm Statute contained only subsection (b) respecting tortious conduct. In 1969 the Georgia Court of Appeals decided that subsection (b) applied only to tortious conduct within the state. Before the supreme court could address the question, the general assembly amended the statute by adding subsection (c) in order to expand the statute to include tortious conduct outside the state as well as within the state; however, in Coe & Payne Co. v. Wood-Mosaic Corp., the supreme court held that the court of appeals was wrong in its narrow interpretation of subsection (b). The court gave it an expansive reading to comprehend tortious conduct outside Georgia which causes injury within the state, as well as tortious conduct within the state. Since the expansive reading of subsection (b) in Coe & Payne, there has been much debate over the efficacy of subsection (c). Some commentators believed that Coe & Payne rendered subsection (c) nugatory. On the other hand, one commentator argued that the general assembly intended subsection (b) and (c) to cover two entirely different situations—one where the tortious conduct occurs within the state and the other where it occurs outside the state—and that Coe & Payne should be limited to its facts as an interim stopgap measure. During this survey period the supreme court resolved the dispute. In Clarkson Power Flow, Inc. v. Thompson, the court held "that there is no essential difference between subsections (b) and (c)." The court explained that subsection (c) was enacted simply to get around the court of appeals' restrictive interpretation of subsection (b) and that the limitations articulated in subsection (c) are constitutionally mandated under subsection (b) as well.

19. Id. at 302, 260 S.E.2d at 11.
20. In 1977 the general assembly amended the definition of "nonresident" in the Long Arm Statute to include persons who were residents of Georgia at the time the claim arose but who were nonresidents at the time the suit was filed. 1977 Ga. Laws 587. The amendment provided that it would apply to all pending actions as of its effective date and to all actions subsequently filed. In Ballew v. Riggs, 244 Ga. 232, 259 S.E.2d 482 (1979), the court held that retroactive application of the amendment was constitutional. In Ballew the claim arose prior to the 1977 amendment but was filed after its effective date. The court distinguished Bauer International Corp. v. Cagles, Inc., 225 Ga. 684, 171 S.E.2d 314 (1969), which
Finally, a case decided by the court of appeals provides a new context and interpretation of the Long Arm Statute. In Hollingsworth v. Cunard Lines Ltd., two disgruntled passengers were suing a nonresident cruise ship line for breach of contract and fraud based upon certain misrepresentations that, among other things, organized poker games were available on the cruise ship. Cunard Lines, a foreign corporation not registered to do business in Georgia, hired the Thomas Cook Travel Agency to handle a nationwide promotion of the round-the-world cruise and had given Cook blank passenger ticket stock which Cook in turn distributed to local travel agencies. The cruise was advertised in the Atlanta Journal-Constitution which excited the Hollingworths' interest in the cruise. They applied for passage through the Osborne Travel Agency of Atlanta. Osborne promised that poker games and other activities were available on the cruise and completed the Hollingsworths' application. Cunard Lines confirmed the reservation in New York and forwarded the tickets to Georgia. Cunard Lines denied any principal-agent agreement between itself and any local travel agencies including Osborne and maintained that only it could book and confirm accommodations on its vessels.

The court of appeals addressed only the question of whether Cunard Lines had transacted any business in Georgia within the meaning of subsection (a) of the Long Arm Statute. The court pointed to the aggregate of circumstances—the nationwide advertisement campaign, the distribution of blank ticket stock to local travel agents, the frequent telephone calls to Georgia, and the mailing of tickets to Georgia—to find the necessary minimum contacts with Georgia. The court rejected Cunard Lines' argument that the travel agent was not its agent in terms of traditional notions of principal-agent. The court stated that with modern theories of personal jurisdiction "... the jurisdictional distinction between agents and independent contractors has begun to fade. Courts treat persons who derive commission revenue [travel agencies], not in terms of agents or independent contractors, but they view their activities and status, in a realistic commercial light." The court perceived that Cunard Lines, by use of operatives termed independent contractors rather than agents or employees, was attempting to insulate itself from local jurisdiction.

had held that an amendment to the Long Arm Statute amending the definition of "nonresident" to include corporations could not be constitutionally applied retrospectively. In Bauer the court concluded that the amendment affected substantive rights of the parties and could not have retrospective application. In Ballew, however, the court held that the 1977 "amendment [was] remedial in nature and [did] not affect the substantive rights of the defendant." 244 Ga. at 233-34, 259 S.E.2d at 483.


tion. Viewed realistically, Cunard Lines was creating consumer demand by national advertising and was supplying local travel agencies with blank ticket stock to fill that demand. Regardless of whether the travel agencies were termed agents or independent contractors, Cunard Lines was systematically and purposefully deriving economic benefit from the state through its own efforts.

The decision appears to be at odds with the general rule that "if the corporation's business in the state is conducted by independent contractors with only limited power to act on behalf of the corporation as Cunard Lines urged that local travel agents were then the corporation probably will not be held to be doing business in the state."24 "Probably", however, is the key word, and at least one other court rejected the independent contractor argument where it was "clearly defendant's business objective to sell its products on a regular and continuing basis" in the forum state.25 Cunard Lines is another case where general rules give way to practical considerations in the area of personal jurisdiction over nonresidents.

II. Venue

The Constitution of Georgia provides that "[s]uits against joint obligors, joint promissors, co-partners, or joint trespassers, residing in different counties, may be tried in either county."26 The provision applies only where all the defendants are residents of Georgia.27 In Bergen v. Martindale-Hubbell, Inc.,28 the plaintiff filed suit in Chatham County Superior Court against Martindale-Hubbell, a foreign corporation not authorized to transact business in Georgia, and its field representative Forbes, a resident of DeKalb County, Georgia. Venue was proper as to Martindale-Hubbell in Chatham County and the plaintiff sought to establish venue against Forbes through the special venue provision for joint tortfeasors. The supreme court held that venue was improper as to Forbes in Chatham County. It reasoned that although the Long Arm Statute made Martindale-Hubbell amenable to suit in Georgia and particularly in Chatham County, it specifically did not make it a resident of Georgia or of any county for purposes of venue.29 The court distinguished three cases30

28. 245 Ga. 742, 267 S.E.2d 10 (1980).
29. The Long Arm Statute defines a nonresident as "a corporation which is not organized or existing under the laws of this State and is not authorized to do or transact business in this State." GA. CODE ANN. § 24-117 (Supp. 1979). Under this definition the court concluded that Martindale-Hubbell could not be considered a resident of Georgia. But cf. GA.
wherein a resident defendant and a foreign corporation were sued jointly on the ground that "the suits were brought in counties where the foreign corporations had agents, if not also offices, and the court found them to be 'residents' of those counties." 83

In Nelson Associates v. Grubbs, 84 a limited partnership with its principal place of business in Pennsylvania was sued for breach of contract in Sumter County where it owned real property. Three of the partners were residents of Pennsylvania and New Jersey, but the general partner was a resident of Dade County, Georgia. Venue was proper as to the nonresident partners in Sumter County; 85 however, the defendant alleged that since one of the partners was a resident of Georgia, the partnership could only be sued in his county of residence—Dade County. The court of appeals held that a partnership may be sued in any county where jurisdiction and venue are proper as to any one of its partners. Since venue was proper as to the nonresident partners in Sumter County, the partnership could be sued there.

Although the two decisions appear to be in conflict, 86 the supreme court in Martindale-Hubbell did not overrule Nelson but stated only that "if the resident partner had been sued in Nelson . . ., a different result would have obtained." 87 The court's meaning is not clear; however, the reported decision in Nelson shows that the partnership was sued in its firm name alone; none of the partners were sued individually. Perhaps the court was saying that where Georgia residents are not directly sued,
their right to be sued in the county of their residence is not implicated and venue may be fixed where it is proper for the nonresidents.86

III. ATTACHMENT AND GARNISHMENT

In 1978 the Fifth Circuit Court of Appeals declared Georgia's prejudgment attachment law as unconstitutional as violative of the due process clause.87 Although the court held the scheme unconstitutional on the sole ground that it did not permit the officer to whom the application was made any discretion to deny the writ, other constitutional deficiencies were apparent. Among the most notable defects were that the scheme permitted the clerk of the court, as well as the judge, to issue the writ of attachment, the statute did not require affidavits of fact as opposed to conclusions in support of the application for attachment, and there was no procedure for a prompt post-seizure hearing.88 During the 1980 legislative session, the general assembly amended the statutory scheme for attachment in an effort to remedy its constitutional shortcomings.89 The amendment provides that only "a judge of any court of record, other than the probate court" may hear and rule upon an application for attachment.90 The application must "be made in writing, under oath, and shall set forth specific facts that show the existence of one or more of [the six statutory grounds for issuance of a writ of attachment], the basis and na-

36. This explanation is not entirely satisfactory for, in order to decide that venue was proper in Nelson, the court of appeals apparently considered the nonresident partners to be residents of Sumter County for purposes of venue.

Such an interpretation of Nelson is contrary to the supreme court's interpretation of the Long Arm Statute (Ga. Code Ann. § 24-177 (Supp. 1980)) that a nonresident is not declared to be a resident of the county where venue is fixed by the long arm statute. But see Reading Assoc. v. Reading Assoc. of Georgia, 236 Ga. 906, 225 S.E.2d 899 (1976), where the supreme court held that jurisdiction over the nonresident general partner of a limited partnership may be exercised under the long arm statute "as if he were resident." Perhaps only a superficial reconciliation of Martindale-Hubbell and Nelson will suffice: one involved a suit against a partnership where the resident partner was not sued, the other a suit against joint tortfeasors where a resident tortfeasor was sued.


ture of the claim and the amount of indebtedness claimed therein by the plaintiff. The judge must then "inquire into the facts alleged, going beyond mere conclusory allegations" to determine whether attachment is warranted. The amendments make it clear that the judge has discretion to deny the writ. The amendments also set forth several methods of giving written notice of the application for attachment and of the writ of attachment to the defendant. Most importantly, the amendments add a new section providing the defendant an opportunity to traverse the allegations of the affidavit and requiring a hearing on the traverse not more than ten (10) days from the filing of the traverse.

The general assembly also made several amendments to the garnishment law. Most notably, the legislature enacted a procedure for continuing garnishment against the employer of a judgment debtor. Until this enactment, each garnishment reached only debts accruing or property coming into the hands of the garnishee on or before the time for filing the answer—not later than forty-five days after service of summons upon the garnishee. Under the continuing garnishment provision, however, all debts accruing or money and property coming into the garnishee's possession from the date of service of the garnishment "to and including the one hundred seventy-ninth day thereafter shall be subject to process of

42. *Id.* The six statutory grounds are:
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.


44. 1980 Ga. Laws, 1065, 1068-67. The provision for written notice to the defendant is virtually identical to the provision for notice to the debtor of a post-judgment garnishment proceeding. *See Ga. Code Ann.* § 46-105 (1979). In Easterwood v. LeBlanc, 240 Ga. 61, 62, 239 S.E.2d 383, 384 (1977), the court stated that the notice of garnishment provision "is extensive, and provides adequate notice to the judgment defendant that a garnishment proceeding has been filed."

45. *Ga. Code Ann.* § 8-114.1 (Supp. 1980). The general assembly also repealed several chapters of the Attachment Title of the Georgia Code including: Chapter 3, Attachments for purchase money; Chapter 4, Attachments against fraudulent debtors; Chapter 5, Proceedings on garnishment in attachment; Chapter 6, Pleadings and defenses in attachment; and Chapter 9, Lien of attachments; judgment and execution. 1980 Ga. laws 1065, 1074-75.


continuing garnishment." The procedures for continuing garnishment are much the same as for any other garnishment except that the garnishee must be an employer of the defendant and the affidavit must state that fact.  

The garnishment law was also amended to specify that the process of garnishment was available to satisfy a judgment obtained in a federal court sitting in Georgia, as well as for one obtained in a state court. Furthermore, Georgia Code Ann. section 46-509, which allows the garnishee to move for relief from a default judgment by motion filed not later than sixty days after he receives notice of the entry of default judgment was amended. The amendment changes the way in which the reduction of judgment is calculated and changes the burden of proof.

IV. SERVICE OF PROCESS AND FILING

A. Service

In Benton v. Modern Finance & Investment Co., the supreme court declared the method of service by tacking as provided in the Civil Practice Act, section 4(d)(6), unconstitutional. Section 4(d)(6) provided for service of process “[i]f the principal sum involved is less than $200, by leaving a copy [of the summons and complaint] at the [defendant’s] most notorious place of abode.” Due process requires that the method of service be “reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their

49. GA. CODE ANN. § 46-702(a) (Supp. 1980).
50. GA. CODE ANN. § 46-703(a) (Supp. 1980).
52. GA. CODE ANN. § 46-509 (Supp. 1980).
53. Under the law as formerly written (1977 Ga. Laws 783, 784) the default judgment could be reduced to 125 percent of the total amount which was subject to garnishment on or before the last day on which the answer could have been filed. The amendment provides that the judgment will be reduced to the greater of $50 or $50 plus 100 percent of the amount subject to garnishment. 1980 Ga. Laws 1769, 1774.
54. Before the amendment the burden of proving the timeliness of a motion for relief from a default judgment was on the garnishee. See Sambo’s, Inc. v. First Am. Nat’l Bank, 152 Ga. App. 899, 264 S.E.2d 330 (1980); 1977 Ga. Laws 783, 784. The amendment places the burden upon the plaintiff to prove that the motion was not filed within the time provided by law. 1980 Ga. Laws 1769, 1774.
The court explained:

The mere leaving of copy of suit at the residence of the defendant is not reasonably calculated to apprise him of the pendency of an action against him. He may be absent from such abode for an extended length of time. He may be in the process of moving from one residence to another. The copy may be destroyed by inclement weather, or be removed by other persons.\(^5\)

Justice Hill concurred in the judgment but suggested that section 4(d)(6) might be more tightly drawn to make it more certain that it would inform a defendant of the lawsuit. The complaint might be placed in a marked, waterproof packet high on the door of the defendant’s residence followed by duplicate service by mail. The general assembly quickly heeded Justice Hill’s advice and amended section 4(d)(6). Service may be made

\[(6)\] If the principal sum involved is less than $200.00, and if reasonable efforts have been made to obtain personal service by attempting to find some person residing at the most notorious place of abode of the defendant, then by securely attaching the service copy of the complaint in a conspicuously marked and waterproof packet to the upper part of the door of said abode and on the same day mailing by certified or registered mail an additional copy to the defendant at his last known address, if any, and making an entry of this action on the return of service.\(^6\)

Though the amendment purports to be a method of personal service, it might also be considered a substitute method of service where personal service is difficult or impossible. Before the plaintiff may avail himself of the tacking method of service, he must first make “reasonable efforts” to obtain personal service on someone residing at defendant’s most notorious place of abode.\(^7\) By phrasing “reasonable efforts” in the plural, the legislature implies that more than one unsuccessful visit to the defen-

\(^6\) 244 Ga. at 535, 261 S.E.2d at 360, quoting Womble v. Commercial Credit Corp., 231 Ga. 569, 571, 203 S.E.2d 204, 206 (1974). Womble held a similar service by tacking provision unconstitutional on grounds that the method of service was not reasonably calculated to inform the defendant of the pendency of the action.
\(^7\) 1980 Ga. Laws 1124, 1125.

The amended section 4(d)(6) appears to refer to the method of service provided in section 4(d)(7) (GA. CODE ANN. § 81A-104(d)(7) (Supp. 1980)) by leaving process at the defendant’s “usual place of abode with some person of suitable age and discretion then residing therein.” Although the amendment fails to include the requirement that the person be of “suitable age and discretion,” it is unlikely that the legislature intended service upon a very young child or an incompetent to suffice.

In Dep’t of Transp. v. Ridley, 244 Ga. 49, 257 S.E.2d 511 (1979), the supreme court held that section 4(d)(7) provides a method of personal service and may be used in a special statutory proceeding which calls for “personal service” upon a party.
dant’s residence is required. It may require repeated attempts to leave the summons and complaint with someone residing at the defendant’s home. In other instances where the plaintiff has been unable to locate and perfect personal service upon the defendant, the courts have allowed alternate methods of service by publication and certified mail. Furthermore, section 4(i) of the Civil Practice Act allows the court to fashion an appropriate method of service in exigent circumstances where the method of service is not clear or provided by law. Though the new section 4(d)(6) still suffers from some of the problems stated in Benton and Womble v. Commercial Credit Corp., it is at least as effective as publication in most cases. Therefore, a credible argument could be made for the constitutionality of new section 4(d)(6) by analogy to the cases approving substitute service where diligent efforts at personal service have failed.

As a general rule where personal service upon an individual is prescribed, service upon that person’s attorney will not suffice. In Browning v. Europa Hair, Inc., the supreme court carved out an exception to the rule holding that

where a foreign corporation files suit and obtains judgment in this state and institutes garnishment on that judgment in this state, process in a suit in equity to set aside that judgment under Code Ann. § 81A-160(e) may be served upon the attorney for the foreign corporation who filed the first suit and the garnishment. During the pendency of the garnishment such attorney is an agent of the foreign corporation subject to being served with the suit to set aside.

The court explained that it is reasonable to assume that the attorney


When the person on whom service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of the summons . . . [the] judge or clerk may grant an order that the service be made by the publication of summons.

63. See note 58, supra, and accompanying text.
64. The analogy cannot be carried too far because, in the cases where substitute methods of service were upheld, the plaintiff had first obtained a court order allowing the alternate method of service. The judge could assure himself that the plaintiff had made a diligent effort at personal service. Under section 4(d)(6), however, the plaintiff alone decides whether he has made reasonable efforts at personal service. The decision will no doubt be colored by the fact that the claim is relatively small in the first instance.
65. See e.g., Souter v. Carnes, 229 Ga. 220, 190 S.E.2d 69 (1972).
67. Id. at 224-25, 259 S.E.2d at 475.
would notify the defendant's corporate officers of any subsequent related actions. The decision may be justifiable because, but for the peculiarities of Georgia law, an attack on a judgment would normally be in the form of a motion in the court which rendered the judgment and could be served upon the opposing attorney under Civil Practice Act section 5(b).

Browning has not been limited to attacks on judgments. In Austin v. Austin, a former husband instituted an action in the DeKalb Superior Court against his former wife to modify the divorce decree. The wife in turn filed a separate contempt proceeding against the husband in the same court, but since the husband resided outside Georgia, she served the attorney for the husband in the modification action. When the application for contempt was called for hearing, the husband was not present and his attorney stated that he represented the husband only for the modification and not in the divorce or contempt. Nevertheless, the trial court cited the husband for contempt. The husband moved to set aside the contempt for failure of the wife to perfect service of process upon him. The supreme court stated that Georgia's venue rules required that the modification and contempt actions be treated differently; however, the court emphasized that both actions related to the same subject matter, the divorce and alimony decree. "It would be unconscionable for a nonresident to be able to seek modification of an alimony judgment in the courts of this state but be immune at the same time to enforcement of that very same judgment." The court explained that it was reasonable to expect the attorney to inform his client of the pendency of the contempt proceeding. The court also noted that no provision clearly prescribed the method of service of a contempt on a nonresident. In this instance, service upon the attorney was proper.

The limited exception to the rule that appears to emerge from Browning and Austin is that where an attorney represents a nonresident party in one action, the attorney will be deemed an agent for that party to accept service of process in a subsequent action which is related to the first action and which is served while the first action is pending and while the attorney represents the client in that action. The essential inquiry is whether under the circumstances it is reasonable to expect the attorney to inform his client of the action. Obviously the exception to the rule is

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70. 245 Ga. 487, 265 S.E.2d 788 (1980).
71. Id. at 490, 265 S.E.2d at 790.
72. The analogy of the holdings in Browning and Austin to C.P.A. section 5(b) is obvious. Section 5(b) provides for service of all papers and pleading subsequent to the complaint upon the party's attorney. Even where amended pleadings set forth new or additional claims related to those set out in the original complaint, it is assumed that the attorney will inform
complicated and fragile; the safe course would be personal service upon a party. As a last resort, however, Browning and Austin may provide an alternative or substitute method of service in an exigent case.

B. Filing

Section 5(e) of the Civil Practice Act states that filing of pleadings and other papers is “made by filing them with the clerk of the court.” But what if the clerk fails to file them? In Gibbs v. Spencer Industries, the supreme court held that delivery of the papers into the hands of the clerk for filing within the prescribed time period is sufficient. The fact that the clerk fails to mark them filed is immaterial.

V. Pleading

Two cases decided during this survey period serve to illustrate how the Civil Practice Act has changed rules of pleading. In Bradley v. Godwin, the court was faced with the question of the sufficiency of a prayer for damages contained in a counterclaim. The trial court directed a verdict against the defendant on the counterclaim on the general ground that she had failed to prove her actual damages. The court of appeals agreed that the proof of actual damages was insufficient but believed that the defendant might have been entitled to nominal damages. The court noted that prior to the Civil Practice Act an allegation of general damages was sufficient to allow recovery of nominal damages; however, where only special damages were alleged but not recoverable, the pleader would recover nothing even though general or nominal damages would have been recoverable had they been alleged. The result was a confusion of the issue of liability and of the issue of damages. A pleader might suffer a directed verdict against him if he failed to prove damages but nevertheless made out a jury question on the issue of liability. Although several cases decided after the Act brought forward the old rule, the court viewed them

Nonetheless, the court should dispense with the presumption that service on the attorney gives adequate notice to the litigant and should direct personal service on the party pursuant to Rule 4(1) if service on the attorney is not likely to insure that the party against whom the pleading is asserted will receive notice of any new or additional claims contained in the amended pleading or (2) if the new claims are radically different from those set out in the original pleading.

as suspect under the Act's relaxed rules of pleading, particularly section 54(c)(1) providing that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings." The court concluded "that under the Civil Practice Act it is not necessary to pray specifically for general or nominal damages in order to present a question for the jury as to nominal damages." The holding also reflects an awareness of the distinction between the elements of a claim and the question of damages so that the fact finder may render a true verdict on the question of liability even though the damages have not been proved.

Prior to the passage of the Civil Practice Act, it was necessary for one contesting the jurisdiction or venue of the court to allege another court which had jurisdiction and venue of the matter; however, this requirement was abolished by the Act. In Buchan v. Duke, the court of appeals held that even though this pleading requirement was abolished, the party opposing a motion to dismiss for a lack of jurisdiction or venue was entitled to the opportunity to discover from the movant the location of his residence before the court rules on the motion to dismiss.

VI. Parties

Section 21 of the Civil Practice Act provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Is a court order also required when a party merely seeks to change his capacity rather than add a new party? The question arose in C&S Land, Transportation & Development Corp. v. Yarbrough, which began as a shareholders' derivative action against the corporation and its agents and officers. Sometime later the plaintiffs amended their complaint to add a personal claim against certain corporate officers and agents. The plaintiffs did not obtain an order permitting the amendment. The trial court dismissed the amendment on the ground that it in effect added new parties without the permission of the court as required by section 21. The court of appeals reversed. It distinguished the case of Robinson v. Boman, which held that a change in status of a party from a third party defen-

78. 152 Ga. App. at 788, 264 S.E.2d at 260.
dant to a defendant required leave of the court. The court pointed out
that there had been no attempt to change the status of any party, only a
change in capacity. "Whether derivatively or directly involved as plain-
tiffs, stockholders hold beneficial interest in both the original counts and
the amended count. It follows that a 'new' party has not been added nor
has a party plaintiff changed 'status' to a party defendant." In sum-
mary, when a party changes his position in an action, e.g., from a plaintiff
to a defendant or vice versa, there is a change of status requiring leave of
the court. Where a party merely changes from a representative capacity
to his individual capacity or vice versa, no order is required.

Among the requirements for intervention as of right under section
24(a)(2), is that the interests of the person seeking intervention are not
adequately represented by existing parties. The case of DeKalb County v.
Post Properties, Inc., involved an action by a landowner against the
county to have the current zoning classification declared unconstitutional
and to enjoin the defendants from preventing certain uses of the land. A
group of adjacent landowners who opposed any change in the zoning
sought to intervene as of right in the proceeding claiming an interest in
the subject matter of the litigation, potential impairment of that interest,
and inadequate representation by existing parties. The supreme court
held that even assuming that the would-be intervenors had an interest
and that there was potential impairment of that interest, they had failed
to demonstrate inadequate representation:

[W]e hold that where the interest of the intervenor is identical to that of
a governmental body or officer who is a named party, it will be assumed
that the intervenor’s interests are adequately represented, absent a “con-
crete showing of circumstances in the particular case that make the rep-
resentation inadequate.”

The would-be intervenors failed to make a showing of inadequate

85. 153 Ga. App. at 649, 266 S.E.2d at 512.
86. Where a claim is asserted against a defendant in a new capacity, it is advisable to
perfect personal service of process upon the defendant. See note 72, supra. An amended
complaint that changes the capacity of a plaintiff will relate back to the time of filing the
original complaint under C.P.A. § 15(c) (Ga. Code Ann. § 81A-115(c) (1977)) if the defen-
dant was given notice of the claim and the claim arose out of the same conduct, transaction
or occurrence set forth in the original pleading. See Downs v. Jones, 140 Ga. App. 752, 231
S.E.2d 816 (1976); Atlanta Newspapers, Inc. v. Shaw, 123 Ga. App. 848, 182 S.E.2d 683
(1971). The same rule would apply to an amendment changing the capacity of a defendant.
89. Id. at 219, 263 S.E.2d at 909, quoting 7A C. Wright & A. Miller, Federal Practice
representation.

VII. Discovery

A. Scope Of Discovery

The discoverability of income tax returns presents a particularly thorny problem for litigants and the courts. On the one hand they are not privileged and may be extremely relevant. On the other hand they are a ready source of harassment and embarrassment which one party may misuse to extract concessions from the other. In Borenstein v. Blumfeld, the court of appeals articulated some standards for determining when discovery of federal income tax returns should be permitted:

Unless clearly required in the interest of justice, litigants ought not to be required to submit [income tax] returns as the price for bringing or defending a lawsuit. . . . The interests of justice do not require production of tax returns in the face of a motion for protective order where other discovery methods are available to obtain the same information. 92

Under such a standard it is difficult to envision a case where the information could not be discovered through other means.

B. Interrogatories

Following the trend of the Federal Rules of Civil Procedure, the general assembly amended section 33(a) of the Civil Practice Act to limit the number of interrogatories that may be served without leave of the court. The amendment provides “that no party may serve interrogatories on any other party containing more than 50 interrogatories, including sub-parts, upon any other party [sic] without leave of court upon a showing of complex litigation or undue hardship incurred if such additional interrogatories are not permitted.” 93

C. Request to Admit

Under section 36(a) matters contained in a request for admission are deemed admitted unless the opposing party serves a written denial of or objection to the requests within thirty days of receipt. As originally en-

93. GA. CODE ANN. § 81A-133(a) (Supp. 1980).
acted, any matter admitted as a result of a failure to make a timely response was conclusive unless the party who failed to respond could demonstrate that his failure was due to "providential cause." In 1972 subsection 36(b) was amended to permit any matter admitted to be withdrawn or amended by order of the court "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Notwithstanding the amendment, in 1975 the court of appeals in Osceola Inns v. State Highway Department, held that a party could not be permitted to withdraw an admission because he had failed to show providential cause or excusable neglect. In Cielock v. Munn, the supreme court disapproved Osceola Inns and held that whether a party should be allowed to withdraw an admission should be determined by the two-pronged test (1) whether the presentation of the merits would be subserved by the withdrawal and (2) whether the withdrawal will prejudice the opposing party.

In another case which corrected an erroneous interpretation of section 36, the court of appeals in Hilton Hotels Corp. v. Withrow Travel Services, Inc., held that a response to a request for admission need only be "signed by the party or by his attorney." Prior to 1972, responses were required to be made under oath. The 1972 amendments deleted any requirement of an oath; however, as late as 1978 the court of appeals continued to hold that an oath was required. It is now settled that the response need not be made under oath, but need only be signed by a party or his attorney.

99. See GA. CODE ANN. § 81A-106(b) (1977) which permits the trial court to relieve a party from his failure to take some action within a prescribed time period "where the failure to act was the result of excusable neglect."
100. 244 Ga. 810, 262 S.E.2d 114 (1979).
101. The party opposing the motion to withdraw or amend has the burden of proving that he will be prejudiced by the withdrawal or amendment. The fact that he may be deprived of a judgment by default is not the kind of prejudice contemplated by section 36(b). See Moore Ventures Ltd. Partnership v. Stack, 153 Ga. App. 215, 264 S.E.2d 725 (1980).
103. Id.
In *Mosley v. Lankford*, a tort action on behalf of a minor by his father as next friend, the trial court dismissed the suit for want of prosecution after no one appeared on the minor's behalf at the call of the case. The supreme court held that the trial court had abused its discretion in dismissing the case. The court explained that every step of its proceedings by or against a minor occurs under the aegis of the court. Just as a next friend or guardian *ad litem* has no authority to settle a claim or suit except by leave of the court, the "next friend has no authority to forfeit the minor's claim by lack of prosecution except by leave of court." The court stated that the trial court should have appointed a guardian *ad litem* or should have taken some other action for the minor's protection such as dismissal without prejudice rather than with prejudice.

The renewal statute permits a plaintiff to dismiss without prejudice and to refile an action within six months even where the statute of limitations has run on the claim. Nevertheless, does the filing of an action toll the statute of limitations so that if the plaintiff voluntarily dismisses the action he may avail himself of the remaining time to refile even if it is more than six months? In *Rakestraw v. Berenson*, the plaintiff made just this argument. The claim for medical malpractice, which has a two year statute of limitations, was first filed within eight months of accrual of the claim. It remained pending for two years before the plaintiff dismissed. Eleven months later, the plaintiff refiled the action but the trial court dismissed the second suit as barred by the statute of limitations. The plaintiff argued that while the first suit was pending the statute of limitations was suspended and that after he dismissed it he had sixteen months (two years in which the suit was pending minus eight months which elapsed before the first filing) remaining in which to refile the action. The court of appeals found the argument "ingenious but incorrect." One does not subtract the duration of the first suit from the total elapsed time in determining whether a subsequent suit is filed within the statute of limitations. The suit may be refiled within the original period
of limitations if it has not already elapsed or it may be refiled within six months after dismissal without prejudice if the statute of limitations expired before the dismissal.

IX. JUDGMENTS

A. Default Judgments

During this survey period, the general assembly amended Georgia Code Ann. section 110-401 (1973) to delete the requirement that the question of damages be tried before a jury in tort cases where a default judgment has been entered. The amendment will become effective if a necessary amendment to the constitution is ratified. Section 110-401 was repealed by the Civil Practice Act but continues to govern practice in courts not covered by the Act. Furthermore, the legislature left untouched section 55(a) of the Act, which requires a jury trial on the issues of damages in tort cases where a default judgment has been entered. Therefore a jury trial is still required in tort default cases in courts covered by the Civil Practice Act.

B. Summary Judgments

Several important cases were decided interpreting the summary judgment section of the Civil Practice Act. In the first case the supreme court addressed the question of the trial court’s responsibility to review the record before ruling on a motion for summary judgment. In General Motors Corp. v. Walker, the trial judge’s order granting a motion for summary judgment recited that he had reviewed the record but it was obvious from depositions in their original seal that he had not considered the depositions. The court of appeals reversed the summary judgment and remanded the matter to the trial court to consider the sealed depositions. The court of appeals relied on language in Thompson v. Abbott to the effect that a trial judge should consider the entire record before granting a motion for summary judgment. The supreme court reversed and stated that the “entire record” language from Thompson v.
Abbott was dicta. It then went on to establish the following rule:

If a trial court indicates in his order granting a motion for summary judgment that the motion is being granted after a review of the record, this court will not hold that he failed to review the relevant portions of a deposition simply because the original of the deposition on file in the case remained sealed and was not opened until after the order granting the motion was entered.1

The implication of the holding is not altogether clear. Does the case simply stand for the proposition that an appellate court will not disturb an order granting a motion for summary judgment which is otherwise proper merely because it is obvious that the trial court did not personally read every paper on file? Or does it mean that there is no obligation upon the trial judge to consider the entire record but only those portions of the record brought to his attention by counsel? The court's disavowal of the "entire record" language from Thompson v. Abbott, and its seemingly approving reference to a concurring opinion by Judge Banke of the court of appeals, would seem to point to the latter interpretation. In his concurring opinion in Realty Contractors, Inc. v. Citizens & Southern National Bank,2 Judge Banke expressed the opinion that a busy trial judge should not be put to the task of reviewing the entire record. Rather the responsibility to bring forward pertinent portions of the record should be placed upon counsel. Given this interpretation of section 56, it is not sufficient for a party simply to put his evidence on file. In order to obtain or defeat a motion for summary judgment the parties must digest the record and "tender into evidence those documents they are relying on to support their positions, pointing out specifically the portion of the documents believed to be relevant."3 It should be emphasized that Walker did not specifically state that this practice is part of the parties' burden under section 56(e) of showing the absence or existence of genuine questions of fact, but it is one possible interpretation of the decision.4

122. 244 Ga. at 193, 259 S.E.2d at 451.
124. Id. at 71, 245 S.E.2d at 344 (Banke, J., concurring specially).

Such a reading of section 56 is inconsistent with the interpretation of Fed. R. Civ. P. 56. Under the federal rule, "the court is obliged to take account of the entire setting of the case on a Rule 56 motion. In addition to the pleadings, it will consider all papers of record, as well as any other material prepared for the motion that meets the standard prescribed in Rule 56(e)." 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 272 (1973) (footnotes omitted) (emphasis added).

125. The decision in Walker leaves many questions unanswered. For example, what happens in a case where the trial court grants a summary judgment but it appears that there is evidence in the record which raises questions of fact but which the party opposing the motion failed to bring to the trial court's attention? What is the scope of appellate review?
In *Cruce v. Randall*, the supreme court addressed the issue "whether it was proper to enter summary judgment in favor of the nonmoving party plaintiff as well as for the movant party plaintiff, absent written notice or waiver thereof." The court noted that under Fed. R. Civ. P. 56 a summary judgment could be granted to a nonmoving party provided that the opposing party had notice and an opportunity to respond. *Cruce v. Randall* was unlike the federal cases because the party against whom summary judgment was rendered did not receive notice of the court’s intention to render summary judgment for the nonmovant. Nevertheless, the court held it was not error to render the summary judgment. Since both the moving and nonmoving plaintiffs were joint obligees on a note, the issues were the same as to both of them. Therefore, the defendant had received notice from the moving party and had responded to the merits. Finally the nonmovant consented to entry of judgment.

Over the years many rules of thumb for deciding motions for summary judgment have been formulated. One of those rules, first enunciated in *Rubel Baking Co. v. Levitt*, states that where the defendant asserts a legally sufficient counterclaim for damages in excess of the amount demanded in the complaint, it is ordinarily not error to deny the plaintiff's motion for summary judgment on his claim. The reason for the rule was that where there was a chance that the plaintiff's recovery might be reduced or offset by the counterclaims, the interest of judicial economy may be served by denying the motion for summary judgment. Through the years the rule evolved into virtually a *per se* rule that it was error to grant a motion for summary judgment in the face of a legally sufficient counterclaim in excess of the complaint. In *Mock v. Canterbury Realty Co.*, the court of appeals reviewed the decisions since *Rubel Baking* and rejected any hard and fast rules for dealing with cases with counterclaims.

There seems to be no sound reason to conclude that where there is a pending valid counterclaim, the trial court must deny a persuasive and valid motion for summary judgment, or alternative, that it is error per se to grant a motion for summary judgment where there is a pending, valid

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126. 245 Ga. 669, 266 S.E.2d 486 (1980).
127. Id. at 669, 266 S.E.2d at 487.
128. See 6 Moore’s Federal Practice ¶ 56.12. See also 10 C. Wright & A. Miller, Federal Practice and Procedure § 2720 (1973). In Golston v. Garigan, 245 Ga. 450, 451, 265 S.E.2d 590, 591 (1980), the court held that “summary judgment can be granted to a non-moving party provided that the grant is proper in all other respects.”
counterclaim.\textsuperscript{132} The majority, however, did not overrule Rubel Baking, but reiterated its holding that ordinarily it was not error to deny a motion for summary judgment in the face of a counterclaim that might reduce or offset the plaintiff's recovery. It is not error, however, to grant the motion in such a case if it is otherwise proper to do so.\textsuperscript{133}

Finally, it is well-settled that a summary judgment is an improper vehicle to dispose of a dilatory plea or plea in abatement.\textsuperscript{134} But what happens in the frequent case where a matter in abatement is disposed of by summary judgment? Must a plaintiff appeal such a ruling in order that it not become \textit{res judicata}? The supreme court addressed this question in \textit{National Heritage Corp. v. Mount Olive Memorial Gardens, Inc.},\textsuperscript{135} where the trial court granted a summary judgment against the plaintiff on the ground that the plaintiff, a foreign corporation, had not obtained a certificate of authority prior to filing suit as required by law.\textsuperscript{136} The plaintiff did not appeal. In a second suit involving the same subject matter, the defendant raised the defense of \textit{res judicata} based on the summary judgment in the first suit and the trial court dismissed the second suit on that ground. The supreme court noted that the failure to obtain a certificate of authority was a matter in abatement or dilatory plea and that summary judgment was inapposite. The court held that the plaintiff did not need to appeal that order to preserve its rights. Rather the court formulated a test for determining whether the disposition was an adjudication on the merits and was therefore \textit{res judicata}.

We hold that where an order granting summary judgment in a prior suit is relied upon in final support of a plea of \textit{res judicata} in a subsequent suit, the court considering the plea of \textit{res judicata} should examine the underlying basis of the summary judgment. If that summary judgment

\textsuperscript{132} \textit{Id.} at 878, 264 S.E.2d at 494.

\textsuperscript{133} In \textit{Howard v. Walker}, 242 Ga. 406, 249 S.E.2d 45 (1978), the supreme court enunciated the rule that where a plaintiff must produce expert testimony to prevail at trial and the defendant moves for summary judgment supported by expert opinion, the plaintiff must adduce expert opinion in opposition to the defendant's evidence or suffer a summary judgment against him. In a medical malpractice case, \textit{Parker v. Knight}, 245 Ga. 782, 267 S.E.2d 222 (1980), the court held that the rule in \textit{Howard v. Walker} applied even though the sole expert opinion offered by the defendant was his own. The court of appeals had held that the opinion of a party alone was insufficient to pierce the pleadings. \textit{Knight v. Parker}, 152 Ga. App. 467, 263 S.E.2d 248 (1979). The supreme court, however, explained that a party to an action is as competent to testify as any other witness and that no rule of law states that defendants in medical malpractice cases are incompetent to testify unless their testimony is corroborated.


\textsuperscript{135} 244 Ga. 240, 260 S.E.2d 1 (1979).

\textsuperscript{136} See \textit{GA. CODE ANN.} § 22-1421(c) (1977).
actually was an adjudication of the merits (a plea in bar, or otherwise on
the merits), the plea of res judicata should be sustained. However, if ex-
amination shows that the summary judgment actually was not an adjudi-
cation of the merits (a dilatory plea, etc.), the res judicata plea should be
denied. Code Ann. § 110-503. (If it is unclear why summary judgment
was granted, the order itself should be appealed.)\textsuperscript{137}

C. Merger of Judgments

In Jacoby v. Jacoby,\textsuperscript{138} the plaintiff sought to domesticate and enforce
an unsatisfied 1976 California judgment for alimony. The defendant
maintained that the California judgment had been merged into a later
Florida judgment which was based upon the California judgment. The
court of appeals determined that the question of merger in this context
was one of first impression in Georgia. It, therefore, adopted the majority
rule that "a judgment recovered in one state is not merged in a judgment
recovered in another state where the judgments are based on the same
claim and are of equal dignity."\textsuperscript{139} The court reasoned that the rule would
permit successive suits in different states until the original judgment was
satisfied.

\textsuperscript{137} 244 Ga. at 243, 260 S.E.2d at 3 (citation omitted).
\textsuperscript{139} Id. at 727, 258 S.E.2d at 536.