# PRACTICE AND PROCEDURE

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An active legislature in its most recent session somewhat overturned certain old statutory standbys in our state adjective law. In some instances the legislative changes were radical departures from well-known precepts, and should be thoroughly digested by the practitioner and student prior to any procedural decision. In view of the further fact, that after careful analysis, it was determined that there was very little change, if any, from recognized principles in the decisions of the appellate courts involving practice and procedure, it was decided by the writers, in the main, to devote this article to practical use as a compendium of the recent statutory changes. Only when comment is necessary for a clear consideration of the new laws shall such be appended. During the course of this short summary certain appellate court decisions will be noted and briefly discussed, not because of their revolutionary nature, but because, in the opinion of the writers, they might be of general interest to the Bar.

The appellate practice came in for a large share of the change. It will be remembered that by Georgia Laws 1946, pages 726 *et seq.*, there was enacted what was designated as the "Rules of Practice and Procedure for Appeal and Review." The general effect of the adoption of these rules was to amend certain existing Code sections, and one of the most salient changes in the 1946 legislation was the elimination of the old "fast bill of exceptions," which was at one time provided for by Code Section 6-903. The general intent of this legislation was to make the time for tender of the bill of exceptions twenty days in all cases other than those relating to motions for change of venue in criminal cases. Georgia Laws 1953, Nov.-Dec. Sess., pages 279, 280,[1] again changed the time of tender to thirty days with the above noted exception. This change also necessitated amendment of Code Sections 6-903, Bills of Exceptions in particular cases; 87-304, which relates to validation of bonds by political subdivisions and 87-405, which relates to validation of bonds by holders. It is suggested that if

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1. The general policy of the state and the constitutional significance of the adoption of rules of practice and procedure was very succinctly

this matter is again legislated upon it would be beneficial merely to repeal Code Section 6-903, since there is no longer any distinction between the cases dealt with in that section and cases which fall under the general rule. It is also suggested that in Sections 87-304 and 87-405 there should be no stipulated number of days given for the tender of bills of exceptions, but that the sections should merely provide for tender as in other cases. This would eliminate the necessity for the complete revision of these Code sections whenever the law is changed.

A significant change in the appellate procedure was the abolition of exceptions pendente lite. This was brought about by Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 453, which provided that exceptions pendente lite need no longer be certified within a stipulated period after the ruling complained of, "but all exceptions to any antecedent ruling, judgment, sentence or decree may be made in the final bill of exceptions complaining of a final judgment, irrespective of the time elapsing between the date of the ruling complained of and the presentation of the final bill of exceptions." This provision will be found in Georgia Code Annotated Section 6-905 (Supp. 1954). It is further provided that the section shall apply to all cases pending at the time of its approval and to all subsequently filed cases.[2] The same Act of the legislature in abolishing exceptions pendent lite repealed in its entirety Code Section 6-1305, "Exceptions pendente lite; sufficiency of assignment of error."

The matter of the service of the bill of exceptions was considerably clarified by Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 456, amending Georgia Code Section 6-911. The new statute provides that, "Where there is no acknowledgment or waiver of service, the return of such service may be either in the form of an affidavit or by an unverified certification of one of counsel for plaintiff in error showing service, indorsed upon or annexed to the bill of exceptions or cross-bill." Prior to this amendment

stated in the case of Godry v. Dunwody, 210 Ga. 810, 83 S.E.2d 7 (1954). The statement, contained in the first headnote is as follows:

> "The rules of procedure and practice recommended by the Supreme Court pursuant to Georgia law (Ga. L. 1945, p. 145), and enacted by the legislature (Ga. L. 1946, p. 726), are matters over which the legislature had always theretofore, with the complete acquiescence of the judiciary, exercised jurisdiction. The Constitution of 1945, art. VI, sec. II, par. VII (Code, Ann., § 2-3707), does not change the jurisdiction, but refers only to rules for the operation of the Supreme Court which this court alone can adopt. The 1953 act (Ga. L. 1953, Nov.-Dec. Sess., p. 279) is a valid amendment, and under it the bill of exceptions was presented in time, and the motion to dismiss is denied."

the procedure was obvious enough under the former Code section where an acknowledgment of service was made; however, where counsel for the defendant in error failed or refused to make such acknowledgment the Code section was not explicit as to the mode of procedure, and it was necessary for the plaintiff in error to fall back upon the rule stated in the case of *Stanley v. Richardson & Son,* 32 Ga. App. 373, 124 S.E. 71 (1924), to the effect that service of a bill of exceptions may be made by the sheriff of the county in which the case was tried, and the official entry of such officer will be sufficient evidence of service; but service by any other must be verified by affidavit made in due time. The ruling in this case has, of course, been considerably modified by the new law. It should be noted that the above change as to service of the bill of exceptions in no way changes or modifies Georgia Code Annotated Section 6-908.1 (Supp. 1951) providing for notice to party or attorney before certification of the bill of exceptions.

Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 452 made specific provision for the use of joint bills of exception. This law has been codified in the 1954 Supplement of the Georgia Code Annotated as Section 6-919 and reads as follows:

> "**6-919. Joint bills of exceptions.**—Whenever two or more persons are defendants in an action and there is a judgment or decree against each of them which may be carried to the Supreme Court or Court of Appeals upon a bill of exceptions, they may jointly present, have certified, and file, as joint plaintiffs in error, a bill of exceptions specifying in said joint bill of exceptions the errors complained of by each separately or by both or all jointly. This rule shall also apply where two or more persons shall have sued jointly, and there has been a judgment or decree adverse to them. (Acts 1953, Nov. Sess., pp. 440, 452.)"

The former rigid requirement that the brief of evidence whether as part of the bill of exceptions or sent up as part of the record had to be reduced to narrative form was superseded by Georgia Laws, Nov.-Dec. Sess. 1953, pages 440, 450 codified as Section 6-813 and reading:

> "**6-813. Use of stenographic report with immaterial questions and answers deleted and summary of documentary evidence in lieu of brief of evidence.**—In all cases or situations in which a brief of evidence is now permitted or required under the laws of this State, it shall be deemed a compliance with such permission or requirement that a stenographic report of the trial of the case, with immaterial questions and answers and parts thereof stricken, and copies or a summary of documentary evidence introduced at the trial be supplied or used. (Acts 1953, Nov. Sess., pp. 440, 450.)"

The general terms of this statute make it also applicable to those cases in which a brief of evidence is necessary as an incident to a motion for a new trial.

This change relative to the brief of evidence is also reflected in the following sections of the Georgia Code Annotated (Supp. 1954) : 6-801, 6-802, 6-803, 24-3364, 70-301, 70-305 and 70-312.

An enactment similar to that covering joint bills of exceptions mentioned above provides for a joint application for a new trial where two or more persons are jointly either plaintiffs or defendants. Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 453. See Georgia Code Annotated Section 70-313 (Supp. 1954).

The legislature, finally taking cognizance of the fact that a lawyer's time is his stock in trade, added the following sentence to Code Section 81-103, ". . . When a petition contains separate counts it is permissible for paragraphs of one count to be adopted in and made a part of another count merely by reference to the same." Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 444. This new addition is a complete departure from the rule laid down in the case of *Cooper v. Portner Brewing* Co., 112 Ga. 294, 38 S. E. 91 (1901), which held that each count of a petition must contain a complete cause of action in distinct and orderly paragraphs numbered consecutively; and it is not permissible to make paragraphs of one count a part of another count by mere reference to the same. This change is a boon to the Bar, particularly in actions which require two or more counts, but in which allegations as to negligence or as to other long factual situations are the same and necessarily quite repetitious.

The rule of law as laid down in the case of *Payne v. Moore Finance Co., Inc.,* 87 Ga. App. 627, 74 S.E.2d 746 (1953), to the effect that a verdict and judgment rendered in a case where the officer serving a copy of the petition and process failed to show on the copy the date of the service on the defendant by dating and signing the copy, in the absence of waiver, is void, and the judgment should be set aside; which rule, admittedly, is rather harsh as to the plaintiff, was rectified by the General Assembly in its latest session. Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 451 added the following proviso to Code Section 81-202: "Provided, however, that the failure of the copy served on the defendant to show thereon a date of service signed by the officer serving shall not invalidate any service otherwise legally made."

By Georgia Laws Nov.-Dec. Sess. 1953, pages 82, amending Code Section 81-1001, the General Assembly eliminated an existing evil in the law, but in the opinion of the writers, may have gone too far in the opposite direction. Under the former law it was held that where a court sustained a demurrer to a petition,

and ordered the plaintiff to amend, and he did so, such ruling became the law of the case, and there was no error in dismissing the petition as amended where the terms of the original demurrer were not met, regardless of whether or not such original demurrer was well taken. *Truitt v. Southern Ry. Co.,* 80 Ga. App. 790, 57 S.E.2d 496 (1950). In other words, where special demurrers were sustained to a petition, and the plaintiff submitted to such ruling by the trial judge by amending to meet the special demurrers, the plaintiff could not then subsequently except to the sustaining of the special demurrers. See *Hobbs v. Starr,* 82 Ga. App. 441, 61 S.E.2d 435 (1950).

The 1953 amendment under discussion added the following language to the first paragraph of Code Section 81-1001:

"Either party who amends or attempts to amend his petition or other pleadings in response to order or other ruling of court shall not be held to have waived his objection to such order or ruling but may thereafter take exception thereto as in other cases." This language clearly relieves the injustice formerly done to a plaintiff who had filed a good petition in the first instance only to have it thrown out under the "Law of the case" rule after attempting to make an unnecessary amendment. It would perhaps have been better had the right to except to a ruling on special demurrer been cut off after the case has actually proceeded to trial. Of course, a great deal depends upon the construction given this language by our appellate courts, but it is at present conceivable that a plaintiff may now amend to meet a special demurrer, proceed through a complete trial of the case on its facts, and then, being dissatisfied with the final result, take exception to the ruling on demurrer, and if successful, have all proceedings subsequent to the ruling on demurrer declared nugatory.

It has long been recognized that the courts of the state have been cluttered by a great number of cases which, to all intents and purposes have been abandoned by both parties, and in many instances have been settled without clearing the docket. The recent session of the General Assembly took action to relieve this situation somewhat by the passage of Georgia Laws Nov.-Dec. Sess. 1953, pages 342, 343, which appears in the Georgia Code Annotated (Supp. 1954) in the following language:

> **"3-512. Dismisal of action where no order taken for five years.—** From and after the passage and approval of this section, any suit filed in any of the courts of this State in which no written order is taken for a period of five years the same shall automatically stand dismissed with costs to be taxed against the party plaintiff. For the purposes of this section an order of continuance will be deemed an order. All suits which are pending upon the effective

date of this section shall automatically stand dismissed five years from the date of the approval of this section unless an order shall be taken therein as provided above. (Acts 1953, Nov. Sess., pp. 342, 343.)"

By virtue of Georgia Laws 1953, Nov.-Dec. Sess., pages 440, 444, this state now recognizes the right of a party to move for a judgment notwithstanding the verdict. Codified as Georgia Code Annotated Section 110-113 (Supp. 1954), this statute provides:

"**110-113. Judgment notwithstanding the verdict; motion; procedure for review.**—Whenever a motion for a directed verdict, made at the close of all the evidence, is denied, or for any reason is not granted, a party who has moved for a directed verdict, within 30 days after the reception of verdict, may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for directed verdict; or, if a verdict was not returned, such party, within 30 days after the jury before which the case was tried has been discharged, may move for judgment in accordance with his motion for a directed verdict. To the overruling of this motion, the party making the same may take specific exception in the final bill of exceptions, and if the exception is sustained by the appellate court, direction shall be given that verdict be entered in accordance with the motion. A motion for a new trial may be joined with this motion, or may be filed separately. If a motion for judgment notwithstanding verdict is filed, and no motion for new trial is filed, the trial judge, before entering final order, shall give the moving party reasonable time in which to present for approval such a transcript or brief of the evidence as is required in motions for new trial. (Acts 1953, Nov. Sess., pp. 440, 444.)"

In commenting upon this statute, perhaps the most interesting feature is the fact that a motion for directed verdict is a condition precedent to the motion for judgment notwithstanding the verdict. Thus it will be seen, that while this is not actually a modification of the well-established rule that a motion to direct a verdict, when refused, does not constitute a basis for review, something of the same effect may now be accomplished. Under the present statute, a party feeling that the evidence demands a verdict in his favor may first move for directed verdict. If this motion is overruled, his remedy is not to except to the ruling on such motion, but to go a step further and move for judgment notwithstanding the verdict. An unfavorable ruling on this latter motion will then furnish him with a ground for exception. The nature of the remittitur from the appellate court also is worthy of con-

2. It would be well to note, however, that while this Act applies to cases pending at the time of its becoming effective (January 1, 1954), it does not apply to those ruling rendered in such cases prior to the effective date of the Act. In other words, the statute "did not have the effect of reviving the right of review which was waived prior to the effective date of the statute, and this is so notwithstanding the same act provides that 'this act shall apply to causes pending in the trial court at the time of its approval, and all causes subsequently filed.'" Carter v. The State, 90 Ga. 61, 81 S.E.2d 868 (1954).

sideration. Note that the appellate court does not necessarily order a new trial, but ". . . if the exception is sustained by the appellate court, direction shall be given that verdict be entered in accordance with his motion for a directed verdict."

A matter which has frequently occupied the attention of the legislature in recent years is that of default judgment, their opening, and the formalities necessary to arrive at final judgment in default cases. This is covered by Georgia Code Section 110-401, which has been amended by the General Assembly in 1946, 1952, and most recently by Georgia Laws Nov.-Dec. Sess. 1953, pages 440, 451. Briefly stated, the tendency is to get away from jury trials in default cases, and to use a jury only where absolutely necessary. The most recent legislation affecting this Code section is set forth in the Georgia Code Annotated (Supp. 1954) in these words:

> **"110-401. (5653, 5661) Default; automatic on failure to file answer in time; opening as matter of right, issues in default cases.** —If any case is not answered on or before its appearance day, such case shall automatically become in default unless the time has been extended as provided by law. The default may be opened as a matter of right by the filing of such defenses within 15 days after the appearance day, upon the payment of costs. If the case is still in default after the expiration of such period of 15 days, the plaintiff, at any time thereafter shall be entitled to verdict and judgment by default as if every item and paragraph of the petition were supported by proper evidence, and his claim, allegation or demand may at any time thereafter be tried without the intervention of a jury unless the suit is one for unliquidated damages, whether ex contractu or ex delicto, in either of which events the plaintiff shall be required to introduce evidence and establish the amount of damages before a jury, with the right to move for a new trial in respect of such damages, and also to except as in other cases. (Acts 1799, Cobb 486. Acts 1895, p. 45; 1946, pp. 761, 777; 1952, p. 195; 1953, Nov. Sess., pp. 440, 451.)"

In reenacting Code Section 110-401 at the 1953 November-December Session, the legislature did not reiterate the language of Georgia Laws, 1952, page 195, to the effect that suits on open account shall not be considered, for the purpose of this section, suits for unliquidated damages. However, it would appear that the language of the present section is sufficiently broad to eliminate the necessity for a jury trial in an action for open account, even without a specific provision to this effect.

Georgia Laws Nov.-Dec. Sess. 1953, pages 440-452, also amended Code Section 110-406 to read:

> **"110-406. (5660) Judgment without a jury, when.**—The court, either in open court or at chambers, shall render judgment without the verdict of a jury in all civil cases founded on unconditional contracts in writing where an issuable defense is not filed under

> oath or affirmation on or before the appearance day as to such case and where the period allowed by law for opening defaults as a matter of right has expired, and where the case is still in default. (Acts 1946, pp. 761, 779; 1953, Nov. Sess., pp. 440, 452.)"

The principal effect here was to liberalize the rule as to when such judgments may be rendered. The opening phrase of this Code section formerly read: "The court, at the term at which the case is returnable, shall render . . . etc."

Plaintiffs having claim against municipal corporations must now be somewhat more prompt in their enforcement. Georgia Laws Nov.-Dec. 1953 Sess., page 338, amending Code Section 69-308, requires that any person claiming damages against a municipality must present his claim within six months of the happening of the event upon which the claim is predicated. Of course, it has long been the rule that the claim was a condition precedent to suit, but there was formerly no stipulated general rule as to any specific date upon which a claim had to be made, and because of the wording of the last proviso in the Code section, this sometimes resulted in an actual extension of the statute of limitations.[3]

By Georgia Laws Nov.-Dec. Sess. 1953, page 275, amending 67-2003 of the Code, the General Assembly raised from ten days to thirty days after the work is done the period allowed a mechanic for the filing of his lien on personalty for work done or material furnished.

Two Acts of the 1953 November-December session of the General Assembly recognizing the place of women in our present society will probably have considerable subtle effect upon future proceedings in our courts. Ga. Laws Nov.-Dec. Sess. 1953, p. 284, made females eligible to serve as grand and petit jurors by striking the word "men" wherever it appeared in Code Section 59-106 and substituting therefor the word "citizens." Also, in the same Act, Code Section 59-201, relating to the qualification of grand jurors was amended by striking therefrom the word "male" as such word appeared before the word "citizens." Seldom in the history of Georgia legislation has so sweeping an effect been wrought by the change of so few words.

The other Act of primary interest to the ladies will be found in Ga. Laws Nov.-Dec. Sess. 1953, p. 212, and is codified as Ga. Code Annotated Section 38-1509 (Supp. 1954). It provides simply: "Hereafter female witnesses in civil cases pending in the courts of this State shall be required to attend in person under the same conditions and requirements that apply to male witnesses."

3. See Mayor & Council of Unadilla v. Felder, 145 Ga. 440, 89 S.E. 423 (1916).