APPELLATE PRACTICE AND PROCEDURE

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A number of cases were decided under the Appellate Practice Act during the recent survey period and some of the more significant rulings will be commented on here. In keeping with survey tradition in this area, the reader can expect very little editorializing about the yeas and nays of the appellate courts' action. The purpose is to provide the appellate practitioner with an overview of the past year in this field.

Practitioners continued to be held to a "letter of the law pecksniffery"[1] application of the Appellate Practice Act during this most recent survey period. This happenstance reflects little change from past surveys of this area.[2] The lesson, of course, is that since a liberal interpretation of the Appellate Practice Act has not come about, the occasional visitor to the appellate courts of this state should review in detail the Appellate Practice Act as well as the rules for the respective courts before embarking on an appeal.

The requirement of a certificate of immediate review in certain instances, the timeliness of the appeal, and the necessity of the proper handling of the transcript resulted in many appellants being sent away without an adjudication of their case on the merits. Therefore, these topics will be the focus of this article.

The year was not without its highlights and rather than commence the survey on the somber note sounded above, consider the case of *Winston Corp. v. Park Electric Co.*[3] Here, in an attempt to award a first and second place trophy, the court of appeals had unabashed praise for appellant and appellee alike: "[T]he well written briefs and fine oral arguments by both counsel confirmed their clients receiving dedicated representation."[4] This praise was appropriate in the court's opinion even though one party failed to cite a single authority in its "well written brief." Evans, J. refused to concur and herein lies the noteworthiness of the decision.

> The winning lawyer does not need to be thus propped up; and as to the losing lawyer, it is quite doubtful that such fulsome praise soothes his troubled spirit to any extent whatever. He is prone to ask himself: If my brief was so well written, and if I made such a fine oral argument, and if

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1. That is not to say the appellate courts do not acknowledge that this close scrutiny is a "judicial sin." *See* Judge Clark's comment in Lowe v. Payne, 130 Ga. App. 337, 203 S.E.2d 309 (1973).

2. *E.g.*, DeDeyn, *Annual Survey of Georgia Law: Appellate Practice and Procedure*, 24 MERCER L. REV. 253 (1973); Fleming, *Annual Survey of Georgia Law: Appellate Practice and Procedure*, 23 MERCER L. REV. 229 (1972).

3. 130 Ga. App. 508, 203 S.E.2d 753 (1973).

4. *Id.* at 508, 203 S.E.2d at 754.

my representation of my client was accounted as dedicated, how come I lost my case?[5]

I. CERTIFICATE OF IMMEDIATE REVIEW

The absence of a certificate of immediate review in compliance with Georgia law[6] resulted in the dismissal of a number of appeals this past year. Some of the decisions were routine in nature and can be dealt with in short order. In capsule form, appeals were dismissed by the courts in the following instances for lack of a certificate: where a motion for a new trial was sustained;[7] where a counter claim was dismissed prior to a final judgment;[8] where there was a ruling by the trial court directing a verdict against the plaintiff;[9] and, where the appeal was from an order denying a defendant's motion to require that a garnishment bond be strengthened.[10] In the main these cases merely reiterated past holdings and offered little beyond the headnotes. They do reflect the continuing view of the appellate courts that attention to procedural niceties is necessary to insure adjudication of an appealed case on its merits.

In a case of first impression, *Turner v. Harper,*[11] the appellants obtained a certificate of immediate review following the overruling of their motion to dismiss the complaint and for a judgment on the pleadings entered March 15, 1973. However, the appellants did not file the certificate with the clerk for entry on the docket until April 6, 1973, which was more than ten days after the appealed ruling. The certificate was dated March 23, 1973, which was within the ten-day period required by the statute. The court concluded: "[T]he certificate must be filed with the clerk of the trial court or 'entered' within the ten-day period . . . ."[12] The appeal was dismissed. Interestingly, there was a dissent by three justices who view the ten-day requirement as only necessitating the *obtainment* of the requisite certificate and not that it be filed within the ten-day period.[13] The ayes have it; the majority opinion contemplates a rationale that in the future will avoid any dispute regarding how long an appellant can delay before filing the certificate once it has been granted.

Again, as in years past, the middle bench distinguished between judgments dismissing less than all the parties defendant where one action pursues co-conspirators and the other merely co-defendants. In the former

5. *Id.* at 510, 203 S.E.2d at 755.
6. GA. CODE ANN. §6-701(a)(2) (Supp. 1973).
7. Henderson v. Henderson, 231 Ga. 208, 200 S.E.2d 867 (1973); Whitehead v. Dillard, 129 Ga. App. 5, 198 S.E.2d 376 (1973).
8. Lowe v. Payne, 130 Ga. App. 337, 203 S.E.2d 309 (1973).
9. Amie v. Davis, 130 Ga. App. 177, 202 S.E.2d 581 (1973).
10. Wilson v. Wilson, 130 Ga. App. 175, 202 S.E.2d 681 (1973).
11. 231 Ga. 175, 200 S.E.2d 748 (1973).
12. *Id.* at 176, 200 S.E.2d at 749.
13. *Id.* at 177, 200 S.E.2d at 749.

case, *Robinson v. A. Construction Co.*,[14] the court maintained that the appeal is reviewable without a certificate of immediate review, but the latter, *Rodriquez v. Newby*,[15] required a certificate in the court's best judgment.[16] The distinction is based on the principle that the liability of co-conspirators is joint and several, and, therefore, a judgment dismissing less than all the co-conspirators has sufficient finality to warrant appeal absent a certificate of immediate review.

In *Sheet Metal Workers International Ass'n v. Carter*,[17] appellant appealed the denial of a motion to dismiss the appellee's claim in the trial court and an order granting a default judgment on the question of liability and providing for a jury trial as to damages. The appeal was dismissed for lack of a certificate. Appellant contended the matter was appealable under section 6-901[18] because the hearing was held in chambers. The court of appeals disagreed, reasoning that the statute relied on is of jurisdictional importance only. The warning is clear; if the matter is heard in chambers and a final judgment is not rendered as to all matters, best judgment would dictate securing a certificate of immediate review.

The juvenile court practitioner was reminded during the most recent appellate court session that a certificate is necessary where the appeal is from an adjudication order alone in the absence of a dispositional order.[19] An adjudication order is not a final appealable order.

II. Timeliness of Appeal

Premature appeals and appeals rendered moot will not be considered by the appellate courts, but these considerations alone do not always control the timeliness of the appeal as the following cases demonstrate.

On the criminal side of the practice, in *Scott v. State*,[20] the defendant filed a motion for a new trial following a conviction of murder and a death sentence. The trial court granted a new trial on the death sentence portion, but denied a new trial on the verdict of guilty. The defendant appealed. The attorney general sought to have the appeal dismissed noting that since the trial court granted the motion for new trial on the sentence portion the case was still pending below. The appellate court refused to follow this line of reasoning. Justice Gunther, however, disagreed with the majority, stating that this was not an appealable judgment under the finality mandate of section 6-701(a)(1).[21]

14. 130 Ga. App. 56, 202 S.E.2d 248 (1973).
15. 130 Ga. App. 139, 202 S.E.2d 565 (1973). The court cites as authority Ga. Code Ann. §6-701 (Supp. 1973) and Ga. Code Ann. §81A-154(b) (Rev. 1972).
16. *See* Robinson v. Bomar, 122 Ga. App. 564, 177 S.E.2d 815 (1970).
17. 131 Ga. 176, 205 S.E.2d 715 (1974).
18. Ga. Code Ann. §6-901 (Supp. 1973).
19. M.K.H. v. State, 132 Ga. App. 143, 207 S.E.2d 645 (1974).
20. 230 Ga. 413, 197 S.E.2d 338 (1973).
21. *Id.* at 416, 197 S.E.2d at 339 (dissenting opinion).

An interesting decision regarding the timeliness of an appeal and the duty of the plaintiff appellant to diligently follow the progress of his case turned on whether an appellant is entitled, as a matter of right, to notice of the entry of judgment as a precedent to the running of the time for appeal. Unfortunately for the appellant in *Alexander v. Blackmon*,[22] the court of appeals responded negatively. On August 16, 1972, a letter from counsel for appellants in that case informed the trial court that they would strongly request an immediate ruling on a motion to dismiss filed by the opposite party. The trial court complied with this request but, apparently, the appellants did not receive notice of the entry of the judgment of dismissal. Thereafter, on October 11, 1972, they appealed the order of dismissal. The appeal was too late: "[I]n Georgia, notice is not required as a condition precedent to the 30-day period in which to file an appeal begins to run."[23]

In *Paulk v. Georgia Power Co.*[24] the supreme court was asked to consider the timeliness of the filing of a motion for a new trial in a condemnation case. Briefly, the court of appeals certified the following question to the supreme court: "Is the payment of the amount of a jury condemnation verdict which is in excess of the prior judgment based on the appraisal by assessors, or the award of a special master, a condition precedent to the filing of a motion for a new trial?"[25] The supreme court answered the question in the affirmative, adding that this ruling is applicable whether such redetermination by the condemnor is sought by a motion for a new trial or by notice of appeal. In the court's opinion, each situation seeks a de novo jury determination of value.

As noted in the foregoing, time periods for filing various motions and supporting materials are set out in the rules of the appellate courts as well as in the Appellate Practice Act. Precise compliance with these time limits is required or, as appellant and appellee alike have learned, the appellate courts will dismiss the appealed matter. In this connection, where the final day for filing falls on a Saturday, Sunday, or a legal holiday, the courts will grant an additional day or days.[26]

22. 129 Ga. App. 214, 199 S.E.2d 376 (1973).

23. *Id.* at 216, 199 S.E.2d at 378.

24. 231 Ga. 721, 204 S.E.2d 154 (1974).

25. *Id.*

26. A motion for an extension of time for filing a transcript of evidence on appeal from conviction, though made on the 31st day from filing of appeal, will be granted where application has been made before expiration of time for filing transcript because the law allows an additional day when the 30th day falls on a Sunday. Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974). Further, where the tenth day following rendition of a judgment of the court of appeals falls on a Saturday, Sunday, or a legal holiday, the period for filing a rehearing motion will be extended until the end of the next day which is not a Saturday, Sunday or a legal holiday. Hightower v. Berlin, 129 Ga. App. 246, 199 S.E.2d 335 (1973).

III. TRANSCRIPT ON APPEAL

The Appellate Practice Act clearly requires that a transcript or record of the proceedings below be forwarded to the requisite appellate court to insure consideration of the appeal.[27] Failure to comply with this provision will result in the appellate court dismissing the appeal. The appellant in *Drake v. Drake*,[28] a divorce action, sought to circumvent this requirement by attaching to an amendment to a motion for a new trial a resume of the testimony of certain witnesses. The supreme court considered this tantamount to no transcript and held that without a transcript the evidence below must have authorized the appealed judgment. The court did note the provision of section 6-805[29] which provides that where a proceeding is not recorded, the parties may agree on a preparation of a transcript of the evidence and that writing can be filed in lieu of the otherwise unobtainable record. Here, however, the resume of the testimony of the witnesses did not purport to be a transcript for review and the failure of the appellee to file objections to the resume did not cause it to rise to the status of an agreed statement of the evidence on appeal.

The lack of a transcript cannot be cured by preparation of a well written brief containing detailed facts presented in deposition form in the lower court. The absence of the deposition as a part of the record on appeal will result in the appellate court refusing to consider the facts referred to in the brief.[30]

What is the result in a criminal action where the transcript is lost or destroyed through no fault of the defendant? The unique set of facts that gave rise to the foregoing inquiry were presented to the supreme court during this past session.[31] It was conceded on appeal that the transcript was not and could not be filed because the steno notes necessary for the preparation of the record had been destroyed during the removal of the court reporter's office from one location to another. Citing two pertinent Georgia statutes, the court reasoned that it is the duty of the state to file the transcript and where this cannot be done through no fault of the defendant, the convicted felon is effectively denied his right to appeal.[32] The adverse judgment below was reversed.

The burden of filing the transcript of the proceeding appealed is on the appellant in a civil action. This task cannot be shifted to the court re-

27. GA. CODE ANN. §6-804 (Supp. 1973).

28. 231 Ga. 193, 200 S.E.2d 719 (1973).

29. GA. CODE ANN. §6-805 (Supp. 1973).

30. The appellant in Stephens v. Big Apple Supermarket, 130 Ga. App. 841, 204 S.E.2d 805 (1974) met the same fate as appellant in Drake v. Drake, 231 Ga. 193, 200 S.E.2d 719 (1973) in that the court refused to consider facts referred to in briefs prepared by counsel where these facts were taken from depositions which were not a part of the record.

31. Wade v. State, 231 Ga. 131, 200 S.E.2d 271 (1973).

32. *Id.* at 133, 200 S.E.2d at 273. The court cites GA. CODE ANN. §6-805(a) (Supp. 1973) and GA. CODE ANN. §27-2401 (Rev. 1972).

porter. Even after a request for an extension of time for filing under section 6-804 the burden does not shift. Furthermore, the court reporter, upon the expiration of an extension, is under no duty to request another extension. These likely conclusions can be found in *Dunbar v. Green*[33] where appellant's cause was dismissed because no transcript was filed nor was there any showing that the trial court had granted an extension of time. The court had granted two extensions but the most recent had lapsed and appellant failed to request another order.

It is incumbent upon the appellant in his notice of appeal to inform the clerk of that portion of the record he deems necessary for a full consideration of his appeal. In turn, the appellee can either accept this determination by the appellant or provide for the inclusion of additional material presented at the trial level. The parties to an appeal must not, however, by private instruction to the clerk, have documents omitted from the record on appeal which are not clearly marked for omission in the notice of appeal. This irregular practice was strongly objected to by the court of appeals in *Ayers Enterprise, Ltd. v. Adams*[34] and the court forewarns that such practice may well result in the bench imposing the ultimate sanction of disregarding the presented enumerations of error. This is strong medicine, but such a measure would have to receive support from the majority of the practicing bar.

IV. MISCELLANY

Perhaps one of the most enlightened opinions during the recent term was *Ramsey v. Ramsey.*[35] In this divorce action the trial court issued a contempt order and the defendant appealed without seeking a discharge or obtaining a certificate of immediate review. Appellee sought dismissal, contending this was not an appealable order absent an application for discharge. Support for this position was found in several earlier cases decided by the Supreme Court of Georgia.[36] On appeal these decisions were expressly overruled and the court in so doing gave section 6-701(a)(3)[37] its most liberal interpretation to date. Moreover, while this was an appeal from a contempt order following a final divorce decree, the court made it clear that such an appeal may be taken whether the order violated is an interlocutory order or a final judgment. The application for a discharge in these circumstances is no longer a *sine quo non* for appeal.

In a case decided the same day as *Ramsey,* however, the supreme court reminded the practitioner that an *ex parte* temporary restaining order is

33. 232 Ga. 188, 205 S.E.2d 854 (1974).

34. 131 Ga. App. 12, 205 S.E.2d 16 (1974).

35. 231 Ga. 334, 201 S.E.2d 429 (1973).

36. Hickman v. Brooker, 229 Ga. 568, 192 S.E.2d 897 (1972); General Teamsters Local 588 v. Allied Foods, 227 Ga. 830, 183 S.E.2d 374 (1971); Eastland v. Candler, 225 Ga. 585, 170 S.E.2d 422 (1969).

37. GA. CODE ANN. §6-701(a)(3) (Supp. 1973).

not an appealable judgment even where it refers to an unappealed prior judgment.[38]

In another decision[39] arising from an action seeking injunctive relief, the supreme court maintained its rather harsh requirement regarding supersedeas bonds. The injunctive relief sought at the trial court level was an effort to enjoin foreclosure under a pleaded security deed. The matter was later dismissed and a proposed sale of the tract of land in question was consummated. Appeal was taken absent a supersedeas bond in compliance with section 62 of the Georgia Civil Practice Act.[40] The appeal was dismissed as moot with the court citing some rather recent holdings as controlling authority.[41]

This result is not limited to questions involving real property interests. The appellants in *Strickland v. Adams*[42] brought an action to enjoin the appellees from conducting a corporate stockholders meeting. The trial court granted an *ex parte* temporary restraining order that was subsequently dissolved following a hearing on the matter. An appeal was taken following the dismissal, and appellees petitioned the supreme court to dismiss the appeal as moot under section 6-809(b).[43] The request for dimissal was granted. The appellate court took the position that the appellants should have applied for a supersedeas before proceeding.

The supreme court has for some time maintained that constitutional questions must be raised and resolved in the lower court if the party appellant expects consideration of the point on appeal.[44] The court reiterated this policy in *Pitts v. General Motors Acceptance Corp.*[45] where it denied jurisdiction in the case, concluding that the action had been improperly certified to the court by the court of appeals. Likewise, where no question regarding the constitutionality of a statute is presented but only a question concerning the constitutional application of the statute, the case will be transferred to the court of appeals for lack of jurisdiction if jurisdiction is pleaded on this ground alone.[46]

The introduction to this article notwithstanding, the court of appeals strengthened its liberal viewpoint of rule 14(e) of the court's rules.[47] In

38. George v. George, 231 Ga. 296, 201 S.E.2d 418 (1973).

39. Lott v. Foskey, 230 Ga. 134, 196 S.E.2d 141 (1973).

40. GA. CODE ANN. §81A-162 (Rev. 1972).

41. Board of Comm'rs of Walton County v. Department of Public Health, 229 Ga. 173, 190 S.E.2d 39 (1972); Dennis v. City of Palmetto, 226 Ga. 853, 178 S.E.2d 161 (1970); Howard v. Smith, 226 Ga. 850, 178 S.E.2d 159 (1970).

42. 231 Ga. 729, 204 S.E.2d 294 (1974).

43. GA. CODE ANN. §6-809(b) (Supp. 1973).

44. Bentley v. Anderson-McGriff Hardware Co., 181 Ga. 813, 184 S.E. 297 (1936); Georgia & Fla. Ry. v. Newton, 140 Ga. 463, 79 S.E. 142 (1913); Brown v. State, 114 Ga. 60, 39 S.E. 873 (1901).

45. 231 Ga. 54, 199 S.E.2d 902 (1973).

46. Montaquila v. Cranford, 230 Ga. 443, 197 S.E.2d 358 (1973).

47. "The enumeration of errors shall be deemed to include and present for review all judgments necessary for determination of errors specified." GA. CODE ANN. §24-3614(e) (Supp. 1973).

Buffington v. McClelland[48] the court reasoned: "In order to raise questions on appeal, it is unnecessary first to include them as grounds for a new trial."[49] The practice of requiring issues to be raised as grounds for a new trial has been a procedural nightmare for many an appellant in the past under the rule of *Hill v. Willis*.[50]

Where a motion for summary judgment is overruled by the lower court and the judgment is later reversed by the appellate court, the original complaint may be amended before remittitur is made the judgment of the trial court. This is true even though the original complaint failed to state a cause of action and the purpose of the amendment is to cure this defect.[51] No amendment is allowed, however, where the motion for summary judgment is granted by the trial court and affirmed on appeal because, in this situation, the case terminated in the lower court.[52] The foregoing rules have found support in Georgia for some time and the Appellate Practice Act has not changed these results. The rationale used to buttress these conclusions was restated in *Giordano v. Stubbs*.[53] Here, the appellate court decided that after a case has been appealed, and even after adverse judgment has been rendered in an appellate court, the plaintiff may amend and set out a cause of action although the original complaint failed to do so.

A notice of appeal may only be amended in order to correct an error in the original notice. In *Tapley Finance Corp. v. Citizens & Southern Bank of Dublin*,[54] the appellant amended a notice of appeal and requested that certain pleadings and an additional order of the trial court be sent to the appellate court. The subject matter referred to in the amendment had been filed or entered subsequent to the judgment from which the appeal was taken. The court of appeals refused to consider the additional record because the amendment did not purport to correct an error. The original decision appealed was not a final judgment and therefore the appellant could not seek review of the subsequent order under section 6-701(b)[55] without a certificate of immediate review.

Since the most recent survey, the Supreme Court of Georgia has amended a number of the rules governing practice in that forum. The following rules have been amended or completely rewritten since March 19, 1973: Rule 4(a); rule 8(a); rule 16(e); and rule 23.

48. 130 Ga. App. 460, 203 S.E.2d 575 (1973).

49. *Id.* at 466, 203 S.E.2d at 581.

50. 224 Ga. 263, 161 S.E.2d 281 (1968). For an excellent discussion of *Hill* and the "Law of the Case" doctrine see DeDeyn, *supra* note 1.

51. Welsch v. Wilson, 218 Ga. 843, 131 S.E.2d 194 (1963); Ware v. Martin, 208 Ga. 330, 66 S.E.2d 737 (1951); Cotton States Mut. Ins. Co. v. Tiller, 116 Ga. App. 275, 157 S.E.2d 57 (1967).

52. City of Rome v. Sudduth, 121 Ga. 420, 49 S.E. 300 (1904).

53. 129 Ga. App. 283, 199 S.E.2d 322 (1973).

54. 129 Ga. App. 781, 201 S.E.2d 482 (1973).

55. GA. CODE ANN. §6-701(b) (Supp. 1973).

Rule 16(e) is a new addition to the rules and is reproduced here in its entirety:

> In all capital felony cases, copies of the enumerations of error, briefs and request for oral argument of the appellant must, before they are offered for filing, be served upon both the Attorney General and the district attorney for the circuit in which the case was tried. Likewise, copies of the briefs and requests for oral argument of these officers shall be served on counsel for the appellant.[56]

Rule 23 was completely rewritten and specifies that requests for oral argument before the court must be filed within twenty days after the case is docketed. Failure to do so, except in cases where the death sentence has been imposed, will result in the party forfeiting his right to present oral argument. Appellant and appellee alike must file a timely written request and counsel has been requested by the clerk of the supreme court to include an estimate of the time needed for argument in the notification of election to present an oral argument.[57]

Legislative alteration to the Appellate Practice Act was limited during the survey period, but one addition deserves comment. After much debate, the prosecution has been granted the right to appeal in criminal cases.[58] The newly granted right to seek relief in the appellate court is limited to the following instances:

> (a) From an order, decision or judgment setting aside or dismissing any indictment or information, or any count thereof.
> (b) From an order, decision or judgment arresting judgment of conviction upon legal grounds.
> (c) From an order, decision or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy.
> (d) In the case of motions made and ruled upon prior to the empanelling of a jury, from an order, decision or judgment sustaining a motion to suppress evidence illegally seized.[59]

It remains for experience to determine how often the state will resort to the new provision, but it is doubtful the legislation will have a great impact on criminal practice in Georgia.

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56. GA. SUP. CT. (CIV.) R. 16(e).
57. GA. SUP. CT. (CIV.) R. 23.
58. GA. CODE ANN. §§6-1001-05 (Supp. 1973).
59. GA. CODE ANN. §6-1001a (Supp. 1973).