PRACTICE AND PROCEDURE

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The subject of practice and procedure has, in the main, undergone no startling changes during the past year. There were, however, a few interesting developments in the trend of the law, and an occasional departure from precedent. Several statutes have been written into the books by the General Assembly of 1952, and these will be briefly commented upon.

Space will not permit a digestive survey of all the procedural cases decided by the appellate courts of Georgia during the period covered by this writing, but where a unique or interesting question arose, or where an old principle was affirmed in a more comprehensive manner, the writers have attempted to set these forth as concisely as possible.

This article should mainly serve as a refresher of basic principles and a reminder of those precepts more recently determined.

ACTIONS AND PARTIES

By Act 809 of the General Assembly,[1] Code section 3-505 which provides for the survival of tort actions after the death of either party, has been considerably broadened by permitting the survival of causes of action as well as pending actions. This is another step in the long process which legislative bodies have for many years been building up to supply a need left entirely lacking by the common law. It is to be hoped that this statute will be found sufficiently broad to satisfy the needs of an Act in derogation of the common law, and that it will provide a remedy more in keeping with the demands of justice than has formerly existed.

Code section 105-1307 was amended by the legislature[2] so as to delete the dependency provision in suits for the homicide of a child, and to provide that in suits by the mother, the illegitimacy of the child shall be no bar to the recovery.

The cases chosen by the writers as illustrative of points relating to parties and actions will be treated briefly as follows:

It was held in the case of *Lankford v. Dockery*[3] that since an action for rent can seek recovery only for rent up until the filing of the action,

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1. Ga. Laws 1952, p. 224.
2. Ga. Laws 1952, p. 54.
3. 85 Ga. App. 86, 67 S.E.2d 800 (1951).

an additional suit for rents accruing after the filing of the first action will not be abated by the pendency of the first action.

Where an action for libel has been filed against a newspaper corporation, and pending the action, such corporation formed a merger with another newspaper, resulting in a consolidated corporation, the action did not abate, but properly proceeded against the resulting corporation under the provisions of the Corporation Act of 1938[4] to the effect that ". . all debts due on whatever account, and all other things in action of or belonging to each of said corporations shall be vested in the resulting corporation," and "all debts, liabilities and duties of the respective former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred by it." Because of the statutory liability thus attaching to the resulting corporation, the general rule, which requires the issuance of a rule nisi where new parties are sought to be made was held not applicable.[5]

A municipal corporation can be sued only in the corporate name set forth in its charter. Where the charter gave the name as "Mayor and City Council of Statesboro," an action brought against the "Mayor and Councilmen of the City of Statesboro" was declared to be a nullity and not amendable.[6]

On the subject of joinder of actions it was decided that an action for wanton misconduct cannot be joined in the same count with one for simple negligence over the objection of an appropriate demurrer.[7]

One of the methods used to determine whether there was more than one cause of action set out in a count of a petition is to decide whether there is but one wrong or more than one wrong committed, and where the petition shows but one wrong, it would not be subject to the objection that there is more than one cause of action alleged.[8]

Pleadings, Process and Service

Code section 81-301 was amended by Act 742[9] by the addition of the following language:

> All demurrers, pleas, and cross-actions of the defendant and all demurrers of the plaintiff to the defendant's answer or other pleas shall, prior to the filing, be served upon the opposite party or his attorney. Service may be shown by written acknowledgment, or by the certificate of counsel, or by the affidavit of the person who delivered or mailed the pleadings, showing that service has been made as above described.

It has long been better practice among reputable attorneys to provide their opponents with copies of pleadings as required by this statute, but this practice was never mandatory until the present enactment. It is per-

4. Ga. Code Ann. § 22-1844 (Supp. 1951).
5. Atlanta Newspapers, Inc. v. Doyal, 84 Ga. App. 122, 65 S.E.2d 432 (1951).
6. Darby v. Mayor, etc. of Statesboro, 208 Ga. 705, 69 S.E.2d 248 (1952).
7. Flint Explosive Co. v. Edwards, 84 Ga. App. 376, 66 S.E.2d 368 (1951).
8. Gloss v. Jacobs, 86 Ga. App. 161, 71 S.E.2d 253 (1952).
9. Ga. Laws 1952, p. 162.

haps unfortunate that the statute did not go further and clearly state the result of the failure to comply with its terms.

An Act of the General Assembly[10] amends Code section 81-1001 by requiring that after an order sustaining a demurrer and allowing time for amendment, such order shall not be subject to exception or review, but that the court must render a judgment as to the sufficiency of the pleadings after the expiration of the period granted. We construe this to mean that the court must render such a judgment whether or not an amendment is filed.

This statute should do much to clarify some of the confusion which has prevailed as to the proper time of taking exceptions in the situation dealt with.[11]

While there were many cases turning upon the sufficiency of petitions and concerned with the procedure relating to general and special demurrers, the following may be considered as typical.

In the case of *Atlantic Coast Line R. Co. v. Royal*[12] it was somewhat reluctantly held by the Court of Appeals that where a petition contains allegations which would be subject to a demurrer, evidence to prove such allegations is admissible so long as no demurrer is filed. Judge Felton, in rendering the opinion, states that he believes there are better cases adjudicated in Georgia holding to the contrary, but that he is bound by the majority ruling of the court.

It has again been held that while a petition which fails to pray for process might be subject to demurrer for such failure, pleading to the merits without objecting to the failure to so pray will constitute a waiver of the objection. The filing of a general demurrer going to the merits of the case is sufficient to constitute such a waiver.[13]

While the mere filing in the office of the clerk of the court of a paper called an amendment, but without any allowance by the judge or order permitting it to be filed, does not amount to an amendment of the petition, an order by the court as follows: "Read and considered: Let the same be filed subject to objections." is sufficient, the order directing the paper to be filed being construed as an allowance.[14]

On the matter of alternative pleading it was held that where a general demurrer is filed on this ground, the petition will be construed as alleging only the weaker of the two alternative allegations.[15]

"A general demurrer goes to the whole pleading to which it is addressed and should be overruled if any part thereof is good in substance. The bad part in pleading does not make the whole bad; the good part makes the whole good enough to withstand a general demurrer."[16]

10. Ga. Laws 1952, p. 243.
11. See cases cited under nn. 18 through 22 (post).
12. 84 Ga. App. 247, 65 S.E.2d 827 (1951).
13. Herring v. Herring, 208 Ga. 146, 65 S.E.2d 584 (1951).
14. Benion v. Life and Casualty Ins. Co. of Tennessee, 84 Ga. App. 509, 66 S.E.2d 75 (1951).
15. Gregory v. Taylor, 84 Ga. App. 717, 67 S.E.2d 192 (1951).
16. Bailey v. Bell, 208 Ga. 715, 69 S.E.2d 272 (1952).

The case of *McRee v. Atlanta Paper Co.*[17] indicates the proper procedure in those cases in which matter in a petition is so prejudicial that the mere sustaining of a special demurrer would not prevent its having a harmful effect on the jury. In this case, which was an action for damages, the petition had incorporated therein a notice to produce documentary evidence consisting of public-liability insurance policies covering the operations of the defendant, and alleged such policies to be in existence. The defendant demurred specially to the petition as containing irrelevant and prejudicial matter, and by a separate motion sought to purge such irrelevant and prejudicial matter. Acting on such motion, the trial judge ordered that the petition be withdrawn and rewritten within five days, otherwise to be dismissed. Upon the election of the plaintiff to stand upon the petition as written, the Court of Appeals sustained the dismissal of the petition by the trial court.

In the case of *Sheffield v. Ervin*[18] it was decided that where a special demurrer to a petition was sustained and the petitioner given twenty days within which to amend, an amendment proferred within the twenty-day period opened the proceedings to further amendment, and even if the first amendment offered failed to perfect the petition, a second amendment offered after the elapse of the twenty-day period, but before any adjudication as to the sufficiency of the first amendment, was timely and it was error to disallow it.

This case, decided before the enactment of the new statute,[19] illustrates the difficulty formerly presented in determining the date of dismissal of a petition upon the sustaining of a special demurrer. It was contended by the defendant in error that the order to the effect that the petition was to stand dismissed unless amended within twenty days should have the effect of dismissing the petition as of the date of the order. The Court of Appeals, however, ruled that, (even before the enactment of the statute) the final judgment would take the date of the final ruling after the amendment.

Where the court, in sustaining special demurrers, orders that the plaintiff amend his petition within ten days, and within such period amendments are offered subject to demurrer, and no additional demurrers are filed, an order of the court in effect adjudging that the amendments meet the criticism of the demurrers, unexcepted to, will, right or wrong, become the law of the case.[20]

Where the overruling of a general demurrer is appealed by a direct bill of exceptions, the case continues to pend in the trial court, and the judge thereof may allow amendments to the pleadings offered by either party before the judgment of the appellate court is made the judgment of the trial court. The entry of judgment by the trial court on the remittitur from the appellate court, thereafter, adjudicates only that the pleading demurred to was subject to demurrer at the time of hearing, and such

17. 84 Ga. App. 181, 65 S.E.2d 832 (1951).
18. 85 Ga. App. 17, 67 S.E.2d 593 (1951).
19. Ga. Laws 1952, p. 243.
20. Western and Atlantic Railroad v. Hughes, 84 Ga. App. 511, 66 S.E.2d 382 (1951).

entry after amendment curing the defect does not render the proceeding moot.[21]

On the other hand, however, an amendment having been filed in compliance with an order of court based upon a special demurrer, and a motion to strike the case from the docket having been made on the ground that the amendment fails to cure the defect in the petition, an adjudication by the Court of Appeals to be the effect that the overruling of the motion to strike was erroneous, will terminate the action, and further amendment cannot be allowed pending the remittitur. Such a case will be controlled by the rule that after a general demurrer to a petition has been sustained by a lower court, and that ruling affirmed by an appellate court without condition, the petition is no longer amendable.[22]

A special demurrer to a petition must be in writing and filed within thirty days after service of the petition, unless there is a subsequent amendment that materially changes the cause of action, in which event, the amendment will open the petition as amended to demurrer. However, in this case, the amendment made after thirty days did not open the petition to special demurrer, since, if the petition was defective as contended, the defect was apparent before, as well as after the amendment.[23]

Defense

In the case of *Thompson v. Nichols*,[24] a proceeding in quo warranto, it was held that the ruling of the trial court in sustaining a demurrer was erroneous in that the answer stated a good defense to the action, and that such ruling of the trial court could not be sustained on the ground either that: (1) the answer was not properly verified or (2) that the answer was not filed at the proper time. It was pointed out that the filing of the general demurrer was a waiver of any defect as to verification, and that the failure to file within the proper time could properly be attacked only by a motion to strike the answer from the file. The filing of the general demurrer also constituted a waiver of this latter ground of objection.

Estoppel to be relied upon must be pleaded; however, the word "estoppel" is not required to be used in the pleadings, where the facts pleaded indicate that estoppel is an applicable defense.[25]

It was determined that the doctrine of res judicata does not apply in an action for custody of minor children when the action is based upon a change of circumstances affecting the welfare of the children and does not seek merely a modification of a former judgment fixing such custody.[26]

21. Southeastern Wholesale Furniture Co. v. Atlanta Metallic Casket Co., 84 Ga. App. 271, 66 S.E.2d 68 (1951).
22. Simpson v. Hayes, 208 Ga. 754, 69 S.E.2d 567 (1952).
23. Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952).
24. 208 Ga. 147, 65 S.E.2d 603 (1951).
25. Harris v. Abney, 208 Ga. 518, 67 S.E.2d 724 (1951).
26. Herring v. Herring, 208 Ga. 146, 65 S.E.2d 584 (1951).

COURTS

The appellate jurisdiction of the superior court must be exercised, and can only be exercised, in those cases where the right of appeal is provided by law. There is no right of appeal to the superior court in a railroad company whose property has been assessed for ad valorem taxes by the State Revenue Commissioner.[27]

Since an appeal from the court of ordinary to the superior court is a *de novo* investigation, it is proper to allow therein any amendment, whether in the matter of form or substance, which would have been proper while the case was in the court of ordinary.[28]

The answer of the trial judge to a writ of certiorari, when not excepted to or traversed, will alone be considered in ascertaining what occurred upon the trial of the case.[29]

Where the court of ordinary is without jurisdiction over the subject matter of a case, consent of the parties cannot give such jurisdiction to the court.[30] This is of course, the general rule for all courts.

It has further been held that where a trial court, in a case over which it has, as to subject matter, no jurisdiction, renders any judgment, other than one of dismissal, the Supreme Court will, of its own motion, reverse the judgment, whether exception to the want of jurisdiction in such trial court be taken in the bill of exceptions or not.[31]

In testing jurisdiction the case must be appraised in the character it bore at the time the issues resulting in the judgment complained of were submitted. This has been universally held by Georgia's appellate courts.[32]

The case of *Yates v. Owens*[33] discusses the jurisdiction of the Court of Appeals to hear direct appeals from city and municipal courts. The case holds that under the Georgia Constitution[34] the General Assembly may, in its discretion, establish such courts in certain counties, giving them the right of direct appeal to the appellate courts of the state. However, the General Assembly must, in each instance, specifically give the court as created the right of direct appeal, and where, as in the case of the Municipal Court of Columbus, a judgment of which was in question, this power has never been written into the statute, the right of appeal does not exist.

An order adjudging a defendant to be in contempt of court for failing to obey a decree founded upon a verdict of a jury which decree had been set aside by the Supreme Court was improper and would be ordered vacated by the Supreme Court.[35]

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27. Georgia R. R. and Banking Co. v. Redwine, 208 Ga. 261, 66 S.E.2d 234 (1951).
28. Smith v. Goodwin, 84 Ga. App. 319, 66 S.E.2d 169 (1951).
29. Mons v. State, 84 Ga. App. 340, 66 S.E.2d 159 (1951).
30. Mathis v. Rowland, 208 Ga. 571, 67 S.E.2d 760 (1951).
31. Georgia R. R. & Banking Co. v. Redwine, 208 Ga. 261, 66 S.E.2d 234 (1951).
32. McCowen v. Aldred, 208 Ga. 483, 67 S.E.2d 478 (1951).
33. 84 Ga. App. 607, 66 S.E.2d 760 (1951).
34. GA. CODE § 2-4201 (1948 Rev.).
35. Harris v. Abney, 208 Ga. 588, 68 S.E.2d 577 (1952).

As usual there were several decisions in the past year involving the question of venue of actions and the jurisdictions of our two appellate courts depending upon whether or not title to land was involved.

An application by a widow to the court of ordinary for approval of the sale of her property set aside as a year's support for herself and her minor children is a statutory proceeding and does not involve the question of title to land. Therefore, the Court of Appeals and not the Supreme Court has jurisdiction of such a proceeding.[36]

An equitable petition seeking a decree of court declaring that, as against the defendant, a certain road and a described tract of land had been impliedly dedicated to the public, is not a case respecting title to land, which under the State Constitution must be brought in the county where the land lies. Where no substantial relief is prayed against a resident defendant dismissal of such petition will be proper on general demurrer of the resident and nonresident defendants.[37]

Statutory and Extraordinary Remedies

On the subject contemplated under this heading there were two legislative enactments worthy of note. We will first briefly mention these prior to discussing the cases selected for this survey.

Act 868 amended Code section 67-2002,[38] which section involves materialmen's and laborers' liens, and provides that in the event of the death of the contractor, a lien may be enforced directly against the property improved. This statute somewhat broadens the procedure under which the action may be brought against the property holder without a prior or concurrent judgment against the contractor.

Code section 37-1503, providing the grounds for the grant of interpleader was amended so as to allow the person bringing such action to have the expenses of so doing, including attorney's fees taxed in the bill of costs under the approval of the court.[39]

A case bearing somewhat on the subject matter of the first above-mentioned statute under this heading was that of *Athens Lumber Co., Inc. v. Burton*.[40] This case held that where a contractor died before fully completing his contract to improve realty, a claim of lien recorded by a materialman within three months from the death of the contractor was in time, and the real estate was subject to a lien for the full amount of sums due the materialman for material furnished in the improvement of the property. The court further held that while lien statutes, being in derogation of the common law, must be strictly construed, this strictness relates only to the classes of persons who may claim a lien and the improvements and kind of property on which a lien may be claimed. The death of the

36. Harnesberger v. Davis, 208 Ga. 629, 68 S.E.2d 585 (1952).
37. Screven County v. Reddy, 208 Ga. 730, 69 S.E.2d 186 (1952).
38. Ga. Laws 1952, p. 291.
39. Ga. Laws 1952, p. 90.
40. 84 Ga. App. 249, 66 S.E.2d 124 (1951).

contractor was held to be a technical completion of his contract, both on the basis of cases holding an abandonment of a contract to be a constructive completion[41] and on the basis of Code section 113-1525, which in effect declares that an executory contract of a deceased shall be considered as completed at his death where the personal skill of the deceased enters into the consideration of the contract.

On the question of habeas corpus it was decided in the case of *McBurnett v. Warren*[42] that a petition for the writ of habeas corpus by one who is being illegally deprived of his liberty must be filed in the county where the illegal detention exists and against the individual having the actual physical custody and control of the person detained.

A true owner alone can maintain an action to remove a cloud on his title to land, and, in a petition for such purpose, facts must be alleged to show that the title is in the petitioner.[43]

The universal theory that on the grant or refusal of an interlocutory injunction the discretion of the trial judge will not be controlled by the appellate court unless manifestly abused was held not to apply where the question to be decided was one of law.[44]

A justice court has jurisdiction to abate a private nuisance resulting from erection of a fence and piled lumber in an alley abutting plaintiff's property. Such a proceeding was not changed into an action to try title to land by the defendant claiming title to the land upon which the fence had been erected and the lumber piled.[45] The reader's attention is directed to Chapter 72-2 of the Georgia Code, which provides the manner of abatement of nuisances by justices of the peace.

A comprehensive case on the law of specific performance was the case of *Almand v. Williams*[46] where a petition for specific performance was filed and the Supreme Court held that such a petition must allege the value of the property involved or facts from which the value can be ascertained so as to enable the court to determine whether or not the contract is fair, or just, or one which in good conscience should be performed.

Domestic Relations

According to Act 732[47] Georgia now has an annulment statute. The Act provides that parties who have entered into purported marriages should have the right to file a petition for annulment where such marriages now or hereafter are declared void by law. The statute does not indicate whether the remedy contemplated is to be construed as one in equity or at law, but it may be argued that it is intended as a legal remedy since the Act provides that the parties shall have the right to file a petition either for annulment or for divorce, if the grounds for divorce exist.

41. Citing 36 AM. JUR. 99, § 144.
42. 208 Ga. 225, 66 S.E.2d 49 (1951).
43. Thomas v. Stedham, 208 Ga. 603, 68 S.E.2d 560 (1952).
44. Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597 (1951).
45. Barnes v. Cheek, 84 Ga. App. 653, 67 S.E.2d 145 (1951).
46. 208 Ga. 703, 69 S.E.2d 271 (1952).
47. Ga. Laws 1952, p. 149, GA. CODE ANN. § 53-601, *et seq.* (Supp. 1952).

This constitutes some departure from the pre-existing procedure in annulment cases wherein it had been held that no action for annulment would lie where the divorce statute supplied an adequate remedy at law.[48] All matters of procedure, jurisdiction, residence and service are to be the same as those already provided for obtaining a divorce, with the exception that a decree of annulment may be ordered at any time, in open court or in chambers, when personal service is had at least thirty days beforehand and no contest or answer is filed. One rather remarkable feature of this statute would appear to be that instead of specifically declaring a marriage void *ab initio,* a decree of annulment rendered under it "Shall have the effect of total divorce between the parties of such void marriages, and shall return the parties thereto to their original status before marriage, but a decree of annulment shall not operate to relieve any party thereto of criminal charges or responsibilities occasioned by such marriage." The annulment statute is not applicable in cases where children are born or to be born as a result of the marriage.

Act 688 of the General Assembly[49] relieves the invalidity of verdicts and judgments rendered in divorce cases prior to the statute in those cases tried at the first or appearance term by consent where the petition had been filed less than twenty days before the first term, unless such verdicts and judgments had been set aside and declared void by proper adjudication at the time of the passage of the Act.

A divorce decree prohibiting the guilty party from remarrying is without effect outside the territorial limits of the state, and where a woman is under such disability, but has no actual knowledge of it, and, in good faith, contracts a second marriage outside the state, such second marriage is not void. Under such circumstances, the woman could bring a workmen's compensation death claim based upon the death of her second husband.[50]

Where a divorce decree was rendered and a motion was made by the wife, who commenced the original action to set aside the decree, and subsequently both parties so moved, a judgment setting aside the decree was invalid, since no petition was filed, as provided by law, setting forth good and sufficient grounds for the modification of the decree.[51]

DECLARATORY JUDGMENTS

In the very important case of *Calvary Independent Baptist Church v. City of Rome*[52] the Georgia Supreme Court has apparently greatly extended the scope which will in the future be allowed the remedy of declaratory judgments in this state. The extreme strictness with which the court has construed the Declaratory Judgment Act has caused some comment in the past, but the *Calvary* case would seem to give some basis for

48. See discussion in Johnson v. Johnson, 172 Ga. 273, 157 S.E. 689 (1931); Baxter v. Rogers, 195 Ga. 274, 24 S.E.2d 52 (1943).
49. Ga. Laws 1952, p. 115, GA. CODE ANN. § 30-134 (Supp. 1952).
50. Bituminous Casualty Corp. v. Wacht, 84 Ga. App. 602, 66 S.E.2d 757 (1951).
51. Lloyd v. Lloyd, 208 Ga. 694, 69 S.E.2d 251 (1952).
52. 208 Ga. 312, 66 S.E.2d 726 (1951).

the belief that a somewhat more liberal interpretation can now be anticipated.

Briefly stated, the issue of fact in this case was whether the church or the city had title to certain land. No acts of interference with possession were alleged, but there was a prayer for temporary restraint of and permanent injunction against any future interference. The church further prayed that the court determine and settle by declaratory judgment what right, title, and interest each of the parties had in the land. From dismissal on general demurrer, the church appealed.

In reversing the lower court, the Supreme Court held that the petition stated a cause for declaratory relief under the language of section 1(b) of the Declaratory Judgment Act.[53] The pertinent provision being: " . . . the superior courts . . . shall have power . . . to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that such declaration be made." The court pointed out that this provision gives to Georgia an Act much broader in scope than the Uniform Declaratory Judgment Act.

It was further stated by the court that certain earlier cases[54] had been decided purely on the "actual controversy" basis laid down in section 1(a) of the Act[55] and that in these cases the court had overlooked section 1(b). The cases mentioned were overruled insofar as they deal with the question presented. The court, speaking through Justice Candler, reiterated that "The legislative intent and purpose of our Declaratory Judgment Act is to relieve against uncertainty and insecurity; to declare rights, status, and legal relations, but not to execute remedies or grant coercive relief."

TRIALS AND HEARINGS

Continuances for the absence of party or counsel was the subject of an amendatory statute enacted by the General Assembly.[56] Code section 81-1402 was amended to provide that where there are several attorneys engaged by a party, a continuance shall be granted upon a showing by the party or his other counsel that such absent counsel is necessary or desirable for the proper handling of the case.

A very good discussion of the law of nonsuit will be found in the case of *Kirby v. Atlanta Gas Light Co.*[57] holding that defective pleadings are not grounds for nonsuit; the only question involved in a motion for nonsuit is whether the allegations and the proof correspond.

Further on the subject of nonsuit the Supreme Court adjudicated that

53. Ga. Laws 1945, p. 137, GA. CODE ANN. § 110-1101 (b) (Supp. 1951).
54. City of Nashville v. Snow, 204 Ga. 371, 49 S.E.2d 808 (1948); Brown v. Lawrence, 204 Ga. 788, 51 S.E.2d 651 (1949); Wright v. Heffernan, 205 Ga. 75, 52 S.E.2d 289 (1949); Darnell v. Tate, 206 Ga. 576, 58 S.E.2d 160 (1950); Sanders v. Harlem Baptist Church, 207 Ga. 7, 59 S.E.2d 720 (1950).
55. GA. CODE ANN. § 110-1101 (Supp. 1951).
56. Ga. Laws 1952, p. 26.
57. 84 Ga. App. 786, 67 S.E.2d 413 (1951).

if, at the conclusion of evidence offered by the plaintiff, a prima facie case has not been made out, it is error to direct a verdict for the defendant, on which final judgment can be entered. A nonsuit should be awarded, thus reserving to the plaintiff the right to institute a subsequent action for the same cause.[58]

In an equity case, if the judge, in his discretion submits questions to the jury for the rendition of a special verdict under Code section 37-1104, any objection as to an improperly submitted or omitted question must be made at the time of submission, and cannot be made for the first time in a motion for a new trial.[59]

VERDICT AND JUDGMENT

The law with reference to default judgments was amended by the General Assemby[60] by adding to Code section 110-401 a provision to the effect that for the purposes of this section, suits on account shall not be considered suits for unliquidated damages. The effect of this provision is to dispense with the necessity for jury verdicts where suits on account are in default.

Where an action is one for liquidated damages and no answer was filed by the defendant within the statutory time and the time was not extended nor the default opened within fifteen days thereafter, the case was automatically in default and judgment should be entered for the plaintiff.[61]

In a case where a default judgment is properly opened within the proper time by paying the costs and filing an answer, it is not necessary to allege in such answer that the costs have been paid, and a demurrer raising this point will be properly overruled.[62]

While the superior court may, in a proper case, mould a verdict so as to do full justice, and while a verdict may be amended in a mere matter of form after the jury have dispersed, where a verdict has been received and recorded and the jury dispersed, the court can no longer amend it in a matter of substance. "If the verdict and decree do not harmonize, the decree must be set aside and a new trial ordered, because the judge has found facts which the jury did not, and thus usurped their peculiar province."[63]

When a valid judgment overruling demurrers to a petition is made and entered upon the minutes of the court, the court is without power at a subsequent term to enter a contrary order revoking, altering or modifying such judgment, and where at such a subsequent term the trial court rules again upon the identical demurrers, such latter judgment is void and should be set aside. A *nunc pro tunc* entry is for the purpose of recording some action that was taken or judgment rendered previous to the making of the entry, which is to take effect as of the former date. Such

58. Lewis v. Bowen, 208 Ga. 671, 68 S.E.2d 900 (1952).
59. Everett v. Mahaffey, 208 Ga. 775, 69 S.E.2d 769 (1952).
60. Ga. Laws 1952, p. 195.
61. Chapman v. Commercial Bank of Cedartown, 208 Ga. 593, 68 S.E.2d 603 (1952).
62. Laughlin v. Bon Air Hotel, Inc., 85 Ga. App. 43, 68 S.E.2d 186 (1951).
63. Fried v. Fried, 208 Ga. 861, 69 S.E.2d 862 (1952).

an entry cannot be made to serve the office of correcting a decision, however erroneous, or supplying non-action on the part of the court.[64]

It is a well recognized principle of law that the petition in an ejectment suit must describe the land sued for with such certainty that a writ of possession describing the premises as laid in the petition can issue, and will so identify the premises as to enable the sheriff to deliver the premises in accordance with the mandate. While the sufficiency of the petition with respect to such description can be tested by general demurrer, the defendant is not bound to demur, and if the description was fatally defective, he may, after verdict and judgment against him, move to set the judgment aside.[65]

APPEALS AND REVIEW

During the period covered by this survey there was one amendment to a Supreme Court Rule, and we deem it best to set the same out verbatim:

> 24-4533. *Rule 29A. Closing of Dockets.*—The dockets of this court for the January, April, and September terms shall close at noon on the 27th day before the second Monday in March, July and November, respectively. When the said 27th day shall fall on a Sunday or a holiday, the docket shall close at noon of the preceding day.[66]

In the case of *Campbell v. Allen*[67] it was held that where the respondent in a motion for a new trial, by agreeing to the truth and correctness of the brief of evidence, receives the full benefit of Rule 19 of the Rules of Practice and Procedure for Appeal or Review[68] he cannot complain that this rule, as to the giving of a written notice of the time and place the brief of evidence was to be submitted for approval by the court, has not been complied with.

Where no motion for a new trial is filed, the evidence may follow the judge's certificate as an exhibit, referring to it as such in the bill of exceptions, and having the judge place his signature to or upon the exhibit to identify it as the same to which the bill of exceptions refers.[69]

The law requiring notice to the opposite party of the presentation of a bill of exceptions came in for its share of attention, and there are several cases which will be herein set out as typical of the interpretations of the question.

The Act of 1946,[70] requiring notice to the opposite party of the presentation of a bill of exceptions had for its primary purpose notice to the defendant in error. It does not require the presence of the plaintiff in error or his attorneys at the time the judge passes on the sufficiency of the bill. Consequently, an attorney is not in contempt of court for failing to appear upon oral direction of the judge.[71]

64. General Tire Service Co. v. Carlisle, 84 Ga. App. 288, 66 S.E.2d 161 (1951).
65. Callaway v. Armour, 208 Ga. 136, 65 S.E.2d 585 (1951).
66. Adopted by order dated May 13, 1952.
67. 208 Ga. 274, 66 S.E.2d 226 (1951).
68. GA. CODE ANN. § 24-3364 (Supp. 1951).
69. Blackwell v. Farrar, 208 Ga. 757, 69 S.E.2d 574 (1952).
70. Ga. Laws 1946, pp. 726, 739; GA. CODE ANN. §§ 6-908.1, 6-909 (Supp. 1951).
71. Sellers v. Whaley, 84 Ga. App. 715, 67 S.E.2d 241 (1951).

Since the action or non-action of the trial judge as to requiring notice to the defendant in a bill of exceptions or his counsel to afford opportunity to determine its correctness is not reviewable,[72] failure of a judge to require such notice cannot properly be made the basis for a motion to dismiss the bill of exceptions.[73]

Where, prior to the presentation of a bill of exceptions, counsel for the defendant in error waived notice under Rule 7 of the Rules for Practice and Procedure for Appeal or Review[74] and acknowledged: "Due, timely and legal service of the within bill of exceptions, have received copy, and waive all other and further notice or service in the premises . . .," the service of the bill of exceptions is sufficient, and a motion to dismiss the writ of error for insufficient service must fail.[75]

In the case of *Amick v. Poteet*[76] a bill of exceptions was presented to the trial judge on September 20, 1951, and was certified by him on November 21, 1951. No reason appeared, nor was there any shown on the record for the delay in signing the bill of exceptions. Therefore, a motion to dismiss the bill was properly sustained.

Still on the subject of bills of exceptions, it was held that a judgment granting or refusing to grant a motion to open a default is not a final judgment; therefore, where it appears from the record that the case was still pending in the lower court, the bill of exceptions was prematurely brought to the Court of Appeals.[77]

A judgment committing a party to jail for refusal to comply with an order requiring the payment of alimony and attorney's fees, must be brought to the Supreme Court by direct bill of exceptions. Where, as in this case, this was not done, but a motion for new trial was filed, an order dismissing the motion for new trial was proper.[78]

A case determining jurisdiction of the two appellate courts of Georgia was that of *Crute v. Crute*,[79] which decided that in a divorce action where a husband was held in contempt of court for failing to produce certain documents, the Court of Appeals had jurisdiction on review, as neither a constitutional nor an equitable question was involved, nor was the divorce itself under review.

There were two interesting cases respecting proper parties in appellate courts. In the case of *McFall v. Griffin*[80] it was held that where an entry of service was traversed, not only is the sheriff who made the entry a necessary party to the proceedings in the trial court, but in the event of an appeal on the issue, he must be made a party to the bill of exceptions.

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72. GA. CODE ANN. § 6-909 (Supp. 1951).
73. Georgia, Southern & Florida Ry. Co. v. Williamson, 84 Ga. App. 167, 65 S.E.2d 444 (1951).
74. GA. CODE ANN. § 6-908.1 (Supp. 1951).
75. McGreggor v. W. L. Florence Const. Co., 208 Ga. 176, 65 S.E.2d 809 (1951).
76. 208 Ga. 674, 68 S.E.2d 903 (1952).
77. American Stove Co. v. Belcher, 86 Ga. App. 203, 71 S.E.2d 108 (1952).
78. Crute v. Crute, 209 Ga. 59, 70 S.E.2d 729 (1952).
79. 208 Ga. 723, 69 S.E.2d 257 (1952).
80. 84 Ga. App. 606, 66 S.E.2d 646 (1951).

Where, in such a case, it nowhere appears that the writ of error was served on the sheriff, or that service had been waived or acknowledged by the sheriff or his attorney, the writ of error will be dismissed.

Where the writ of error is sued out by one party who is entitled to except, an amendment may be made in the Supreme Court adding as plaintiffs in error the names of all other persons who were coparties with the plaintiff in error in the court below, and who may appear from the record to be proper or necessary parties plaintiff in error.[81]

81. Dooley v. Scoggins, 208 Ga. 200, 66 S.E.2d 62 (1951).